UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

VILLAGE OF HOBART, WISCONSIN,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,

DEB HAALAND, in her official capacity as United States Secretary of the Interior,

BUREAU OF INDIAN AFFAIRS,

TAMMIE POITRA, in her official capacity as the Midwest Regional Director, Bureau of Indian Affairs,

ACTING MIDWEST REGIONAL DIRECTOR, BUREAU OF INDIAN AFFIARS, and

INTERIOR BOARD OF INDIAN APPEALS,

Defendants.

Case No.

COMPLAINT

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1. This action seeks declaratory and injunctive relief that arises under the Administrative Procedure Act (the "APA"), 5 U.S.C. § 701, *et seq.*, the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, the Indian Reorganization Act of 1934, 25 U.S.C. § 5101, *et seq.*, (the "IRA"), 25 C.F.R. § 1.4, and the United States Constitution, for judicial review of a September 21, 2023 decision, *Village of Hobart, Wisconsin v. Acting Midwest Regional Director, Bureau of Indian Affairs*, 69 IBIA 84 (2023) ("*Hobart II*" or the "Decision"), issued by

the Interior Board of Indian Appeals ("IBIA"), which arose from the appeal of a decision made by the Acting Midwest Regional Director (the "Regional Director")[1], Bureau of Indian Affairs ("BIA") on January 19, 2017, to accept lands into trust by the United States for the Oneida Nation (the "Tribe") that are located within the Village of Hobart, Wisconsin (the "Village"). A copy of the IBIA's Decision in *Hobart II* is attached as **Exhibit A**.

2. The action seeks to declare as illegal, null, and void and to enjoin permanently the implementation of Defendants'[2] actions to have real property located within the Village, which consists of eight properties totaling 21 parcels and approximately 499 acres (the "Parcels")[3], acquired into trust by the United States for the benefit of the Tribe.

3. The action stems from the biased and unconstitutional actions of Defendants, in which the BIA processed and approved fee-to-trust applications submitted by the Tribe that led to the Decision – all while the Tribe paid the salaries of the very BIA employees entrusted to process the applications that are the subject of the Decision.

4. The action further stems from the Regional Director's abuse of her discretion and the IBIA's erroneous Decision as it relates to several topics that are the basis of the Decision, including the failure to consider the cumulative effects of all tax revenue losses within the Village as a result of removal of the Parcels from the Village's tax rolls, the failure to consider

[1] As noted in the Decision and the Regional Director's January 19, 2017 decision, the underlying decisions to accept lands into trust were made by both the Regional Director and Acting Regional Director acting under the Regional Director's authority. Both the Acting Regional Director and Regional Director are referred herein to as the "Regional Director."

[2] Together the United States Department of Interior, Deb Haaland, in her capacity as the United States Secretary of Interior, the Bureau of Indian Affairs, Tammie Poitra, in her capacity as the Midwest Regional Director of the Bureau of Indian Affairs, the Acting Midwest Regional Director of the Bureau of Indian Affairs, and the Interior Board of Indian Appeals are the referred herein as the "Defendants".

[3] The Parcels are known as the Boyea, Buck, Calaway, Catlin, Cornish, DeRuyter, Gerbers, and Lahay parcels and further legally described in the administrative record and decisions.

and respond to jurisdictional issues, and the failure to properly analyze environmental concerns underlying the Decision.

5. The action also challenges the constitutionality of the Indian Reorganization Act of 1934, 25 U.S.C. § 5101, *et seq.* and the constitutionality of 25 C.F.R. § 1.4, which the IBIA lacked authority to adjudicate.

6. For the separate and independent reasons stated in this Complaint, the Defendants' actions are also unconstitutional, illegal, arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with the law.

JURISDICTION AND VENUE

7. The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because this is a civil action arising under the Constitution and laws of the United States, namely, the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.*, the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, the Indian Reorganization Act of 1934, 25 U.S.C. § 5101, *et seq*.

8. The IBIA's Decision constitutes final agency action and no further agency appeal is available.

9. The sovereign immunity of the United States has been waived with respect to the subject matter of this action and the relief requested herein by 5 U.S.C. § 702.

10. Venue is proper in this Court under 28 U.S.C. § 1391(b) and (e) in that this is a civil action against the United States, an agency of the United States, and officials and employees thereof, and a substantial part of the events or omissions giving rise to this action occurred within the Eastern District of Wisconsin, Green Bay Division. Moreover, all the

property that is the subject of this action is situated within the Eastern District of Wisconsin, Green Bay Division.

PARTIES

11. The Village is a political subdivision of the State of Wisconsin with jurisdiction and regulatory authority, including taxing authority, over the Parcels at issue in the Decision, which lie within the Village's borders and which, due to the Decision, are to be removed from the Village's jurisdiction. The Village is one of the local governments that must be given notice, pursuant to 25 C.F.R. § 151.10, to provide written comments regarding the impacts on political subdivisions resulting from the removal of the land from the tax rolls and the jurisdictional and potential conflicts of land use which may arise as a result of the land being acquired into trust. As a result of the Decision and the Defendants' actions to accept the Parcels into trust and create a checkerboard pattern of jurisdiction within, the Village has lost and been stripped of its tax revenue, regulatory authority, and jurisdiction over the Parcels.

12. Defendant United States Department of the Interior is an executive agency of the United States government, established pursuant to 43 U.S.C. § 1451, *et. seq.* It intends to take the Parcels into trust.

13. Defendant Deb Haaland is the United States Secretary of the Interior, an office established by 43 U.S.C. § 1451. She intends to take the Parcels into trust.

14. Defendant Bureau of Indian Affairs is a United States federal agency within the Department of the Interior. It authorized the acceptance of the Parcels to be taken into trust.

15. Defendant Tammie Poitra is the Midwest Regional Director of the Bureau of Indian Affairs. She authorized the acceptance of the Parcels to be taken into trust.

16. Defendant Acting Midwest Regional Director, Bureau of Indian Affairs, is a vacant office within the BIA, but is responsible for adverse decisions issued that are part of the Decision. It authorized the acceptance of the Parcels to be taken into trust.

17. Defendant Interior Board of Indian Appeals is an appellate review body within the United States Department of the Interior that exercises delegated authority of the Secretary of the Interior to issue final decisions for the Department of the Interior in appeals involving Indian matters. Thomas A. Blaser is the Chief Administrative Judge of the IBIA, and Kenneth A. Dalton and James A. Maysonett are both Administrative Judges of the IBIA. It authorized the acceptance of the Parcels to be taken into trust.

GENERAL ALLEGATIONS

Fee-to-Trust Application

18. On April 12, 2006, the Tribe's Business Committee enacted several resolutions requesting the BIA to accept into trust several parcels of fee land – located within the Village – that are owned by the Tribe.

19. The following year, in 2007 the Tribe submitted 56 fee-to-trust applications to the BIA totaling 133 parcels with a combined acreage of 2,673 acres in the Village to be transferred into trust, which included applications for the Parcels.

20. Following the Tribe's application to have the Parcels placed into trust, in 2010 the Regional Director issued six notices of decision to accept the Parcels into trust for the Tribe.

Hobart I

21. The Village timely appealed the six notices of decision issued by the Regional Director in 2010 to the IBIA, and the IBIA, for various reasons, affirmed in part, vacated in part, and remanded the matter to the Regional Director for further consideration. *See Village of*

Hobart, Wisconsin v. Midwest Regional Director, 57 IBIA 4 (2013) ("*Hobart I*"). A copy of the IBIA's decision in *Hobart I* is attached as **Exhibit B**.

22. On May 9, 2013, in *Hobart I*, the IBIA issued a decision determining that the Regional Director had authority to take the land into trust for the Tribe pursuant to the IRA, but declined to consider the constitutionality of the IRA.

23. The IBIA remanded the matter for further proceedings and vacated the notices of decision, concluding that the Regional Director failed to adequately address the Village's comments concerning tax loss, potential land use conflicts, and jurisdictional problems.

24. The IBIA further concluded that the Regional Director should address the Village's bias argument in the first instance on remand in which the Village claimed that the BIA and its employees were unconstitutionally biased against the Village as it related to the processing and acceptances of fee-to-trust applications under a "Memorandum of Understanding" entered into between the BIA and the Tribe regarding a Midwest Region Division of Fee-to-Trust (the "Midwest MOU"). Copies of the Memorandum of Understanding for the Midwest MOU from 2005 through 2017 are attached as **Exhibit C**.

25. On January 19, 2017, the Regional Director issued decision on remand adverse to the Village. A copy of the Regional Director's January 19, 2017 notice of decision is attached as **Exhibit D**.

26. The Village timely appealed the Regional Director's decision to the IBIA on February 22, 2017.

Midwest Division of Fee-to-Trust –
Memorandum of Understanding
between Midwest Regional Office Bureau of Indian Affairs and Consortium Tribes

27. On appeal from the Regional Director's notice of decision from January 19, 2017, the Village informed the IBIA that the Regional Director's decision should be vacated and/or remanded for several reasons, including that the Regional Director's decision was the product of bias due to the Midwest MOU.

28. The Village informed the IBIA that since 2005 the Midwest MOU's stated purpose is "facilitating the expeditious processing of Fee-to-Trust applications" for participating tribes due to a "need for increased land base" and "widening gap" between tribal applications and land being "accepted into trust" for tribes.

29. Under the Midwest MOU the BIA employs individuals for the specific and sole purpose of processing solely the Tribe's and other participating tribes' fee-to-trust applications.

30. The salaries of the Midwest MOU's Division's employees, whose sole duties and responsibilities benefit the Tribe, are paid by the Tribe and other participating tribes. Under this pay-to-play structure, the Midwest MOU division staff employees rely on the Tribe for the very existence of their jobs, as the Tribe may cut funding at any time for the arrangement, should it feel it is not getting its desired results.

31. The Division's activities under the Midwest MOU include "[p]reparing the Notice of Decision on a requested parcel" for the Tribe. Under the Midwest MOU it is the Division staff employees who are responsible for preparing Notices of Decision for accepting properties into trust.

32. The Regional Director along with a representative from each tribe form an Advisory Council for the Division to assure the Midwest MOU's purposes are being fulfilled by

BIA employees that make up the Division's staff. The Division's BIA staff and any consultants are required to report directly to the Regional Director.

33. In 2006, the Interior Office of Inspector General ("IG") completed an investigation and report, which stemmed from a Government Accountability Office report that identified "two separate agreements between groups of tribes and two BIA regional offices, designed to expedite the processing of certain applications" which raised serious concerns about the tribes' funding of those agreements and whether the BIA was favoring trust applications from those tribes. *United States Govt. Accountability Office, Report to Congressional Committees, Indian Issues: BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications*, GAO-06-781, p. 15-16 (July 2006). One of those agreements included the Midwest MOU, under which the Tribe was and still is a participating member. A more complete copy of the IG Report than the Regional Director considered in its decision, which the Village was able to obtain, is attached as **Exhibit E**.

34. The IG Report investigated a similar consortium and noted that such consortiums created "tenuous funding structures" and led to certain employees to seek different jobs due to the stress associated with the potential to have an entire group of staff lose their jobs if MOU funding was not renewed. In fact, the IG Report states, in the midst of its stated concerns, that "BIA-MRO [Midwest Division] has a similar MOU." Additionally, in a section of the IG Report separately entitled "BIA Midwest Region's MOU," the Inspector General noted that "similar to the BIA-PRO's MOU, under the BIA-MRO's MOU, the salaries of the consortium staff are dependent upon TPA funding" from the participating tribes.

35. The IG Report documented that certain employees paid more attention to applications from "higher donating tribes" because a successful processing would "result in more

gifts and award recommendations." It also documented that consortium staff felt they worked directly for the tribes because the tribes paid their salaries and expected certain results.

36. Among other issues, the Village informed the IBIA that as part of the Regional Director's decision, which the IBIA required the Regional Director to address the IG Report's investigation and relevance to the Village's bias concerns as it related to the Midwest MOU, that the Regional Director simply referenced and cited to a redacted, incomplete version of the IG Report that did not contain any of the 19 attachments upon which the IG Report was based.

37. In the Decision and the underlying decisions in which the Decision was based, the Defendants failed to consider:

a. The 2006 IG Investigation report concluded that: "On July 7, 2006, SOL issued its legal opinion regarding the legality of the consortiums being utilized in BIA-PRO [Pacific] and BIA-MRO [Midwest]. . . . In the opinion, SOL determined that they 'do not believe that the consortiums violate the government-wide ethics rules or appropriations laws.' However, the opinion recognized the *patent appearance of a conflict of interest* created by the consortiums by pointing out that the consortium's structure and use by the tribes and BIA 'reflects an insufficient separation of organizational functions, *the possibility of the appearance of unfairness of the fee-to-trust application process*, and a concentration of resources within regional BIA offices in a way that *favors consortium tribes over other tribes served by the regional offices*.'"

b. The IG Report described the Solicitor's legal opinion and three different ways the MOU consortium structure gives the "*appearance of unfairness [that] also extends to the approval process itself*," ; that employees hired directly as a result

of tribes' funding to work exclusively on those tribes' applications "*raises serious questions about the independence of judgment*[,]" and that there is no evidence to suggest the BIA employees' contractible functions are "sufficiently separated from the final review and approval of the applications. . . ." As a result, the Solicitor concluded that it "*did not believe BIA can assure that the final decisions on the consortium fee-to-trust applications are fair and unbiased*, and also are perceived as such."

38. The Village also noted that several communications by Midwest MOU Division employees substantiated the Village's bias concerns and the prejudgment of the decisions to accept the Parcels into trust. Examples of these communications, including communications between the Midwest MOU staff and the Tribe concerning the bias issue and drafting notices of decision are attached as **Exhibit F.**

39. The Midwest MOU Division employees and the Tribe further boast their accomplishments of accepting land into trust for the Tribe by identifying in semi-annual and annual meetings the number of notices of decision, acceptances of conveyances, and completions and associated acres brought into trust.

25 C.F.R. § 151.10 Factors,
Including Tax Impacts and Jurisdictional Conflicts

40. The Village also informed the IBIA that, pursuant to 25 C.F.R. § 151.10(e), the Regional Director should consider the cumulative effect of all tax revenue losses on all lands within the Village's jurisdictional boundaries.

41. The Village informed the IBIA that according to a 2009 study issued by the Beacon Hill Institute, which evaluated the Tribe's then currently pending 133 fee-to-trust applications totaling 2,673 acres within the Village, a determination was made that "within 50

years all of the land in [the Village's] tax base would be transferred into [the Tribe's] federal trust, completely eliminating property tax revenue." The study concluded: "[U]nless the Village secures legal relief or finds an alternative revenue resource, if the [Tribe] continue its trends of transferring land from fee to trust, the Village will face fiscal and geographical extinction."

42. At the time of the Beacon Hill Institute study, the acceptance of the land into trust would have increased the trust land owned by the United States for the benefit of the Tribe to approximately 4,254 acres or 17% of the Village's tax base.

43. At the time the Tribe submitted its applications, which include the Parcels at issue in this matter, the Tribe announced that its goal was to own two thirds of the former reservation by 2030. The Tribe's stated goal is to place ultimately 100% of the Village's land in trust.

44. Upon information and belief, since 2008, the Regional Director has not rejected one application from the Tribe to have land placed into trust.

45. The Village does not receive any payment in lieu of taxes from the Tribe to offset the loss of tax revenue it suffers from land already placed into trust. The Tribe has no legal obligation to make payments in lieu of taxes.

46. Since 2008 the Tribe has paid over $2,740,000 in taxes that are the subject of the Tribe's fee-to-trust applications pending within the Village, which includes the Parcels.

47. The Village's budget to conduct all operations including payment of salaries, road repair, infrastructure costs, policing, fire protection, and administrative services will be diminished due to tax loss revenue as a result of trust acquisition of the Parcels; accordingly, forcing a reduction in the numerous services provided by the Village.

48. The Village informed the IBIA that the Regional Director failed to address and appropriately respond under 25 C.F.R. § 151.10(e) to the Village's comments. The Regional

Director provided nothing but conclusory statements concerning the tax impacts to the Village and that the Village must go uncompensated for services it must still provide to its residents.

49. The Village also informed the IBIA that, pursuant to 25 C.F.R. § 151.10(f), the Regional Director should consider numerous jurisdictional concerns, all of which contribute to a jurisdictional checkerboard pattern of fee and trust land within the Village.

50. The Village's concerns included jurisdictional conflicts involving storm water management programs, zoning and comprehensive planning conflicts, and the delivery of emergency services.

51. The Village also raised the issue that, under 25 C.F.R. § 151.10(h), the Regional Director failed to adequately consider certain environmental matters. These matters included the failure to address previously raised arguments, reliance on outdated phase one environmental site assessments, and non-compliance with various federal environmental laws.

Hobart II

52. On September 21, 2023, over six years after the Village's initial appeal, the IBIA issued the Decision affirming the Regional Director's decision following remand.

53. Addressing the Village's argument that the fee-to-trust process was tainted by bias and violated the Village's right to due process, the IBIA concluded the Midwest MOU did not create an unlawful structural bias and the Village had failed to identify any evidence that demonstrated that the Regional Director prejudged the fee-to-trust applications.

54. The IBIA rejected the Village's contentions that the Midwest MOU fostered improper *ex parte* communications and that it created an impermissible conflict of interest whereby the Consortium of tribes under the Midwest MOU, including the Tribe, paid the salaries of BIA employees.

55. The IBIA rejected the Village's assertion that the Midwest MOU is, in and of itself, contrary to the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5301, *et seq.*, and the Tribal Self-Governance Act, 25 U.S.C. § 5361, *et seq.*

56. The IBIA rejected the Village's argument that the Regional Director failed to complete the IBIA's order on remand in *Hobart I*, due to the Regional Director's failure to address the Inspector General Report findings and its cursory review of a redacted and incomplete version of the report.

57. The IBIA also rejected the Village's contention that the Regional Director failed to properly consider the criteria set forth in 25 C.F.R. §§ 151.10(e), (f), and (h) relating to the impact on tax rolls, jurisdictional problems and land use conflicts, and compliance with environmental laws.

58. Accordingly, the IBIA affirmed – in its entirety – the Regional Director's decision, dated January 19, 2017, to accept the Parcels into trust.

COUNT I
CONSTITUTIONALITY OF 25 U.S.C. § 5108

59. The Village realleges and incorporates by reference each and every one of the foregoing paragraphs as if fully set forth herein.

60. 25 U.S.C. § 5108 (formerly 25 U.S.C. § 465), pursuant to which the United States Department of Interior, through the actions of the Midwest Acting Regional Director and Regional Director, the BIA, and the IBIA, approved the applications for the Parcels, is unconstitutional as an unlawful delegation of legislative power from Congress to the executive branch under the United States Constitution.

61. The Village requests a ruling that 25 U.S.C. § 5108 is unconstitutional and violates its rights under the Constitution.

62. The Village has been harmed as a result of the Defendants' actions under 25 U.S.C. § 5108, which is in violation of the Constitution.

COUNT II
CONSTITUTIONALITY OF 25 U.S.C. § 5108

63. The Village realleges and incorporates by reference each and every one of the foregoing paragraphs as if fully set forth herein.

64. Congress lacks constitutional authority under the Commerce Clause, Article 1, Section 8, Clause 3 of the United States Constitution, to accept fee land, such as the Parcels, within the jurisdiction of State and local governments, such as the Village, into trust for an Indian tribe, such as the Tribe.

65. Neither the Commerce Clause, nor any amendment to the United States Constitution, empowers Congress or any official of the United States Government to acquire land in any State so as to remove it from State and local jurisdiction and sovereignty over that land.

66. The Village requests a ruling that 25 U.S.C. § 5108 is unconstitutional and violates its rights under the Constitution.

67. The Village has been harmed as a result of the Defendants' actions under 25 U.S.C. § 5108, which is in violation of the Constitution.

COUNT III
CONSTITUTIONALITY OF 25 U.S.C. § 5108

68. The Village realleges and incorporates by reference each and every one of the foregoing paragraphs as if fully set forth herein.

69. Congress lacks constitutional authority under the Enclave Clause, Article 1, Section 8, Clause 17 of the United States Constitution to accept fee land, such as the Parcels,

within the jurisdiction of State and local governments, such as the Village, into trust for an Indian tribe, such as the Tribe.

70. The Village requests a ruling that 25 U.S.C. § 5108 is unconstitutional and violates its rights under the Constitution.

71. The Village has been harmed as a result of the Defendants' actions under 25 U.S.C. § 5108, which is in violation of the Constitution.

COUNT IV
CONSTITUTIONALITY OF 25 U.S.C. § 5108

72. The Village realleges and incorporates by reference each and every one of the foregoing paragraphs as if fully set forth herein.

73. The United States Constitution does not delegate to Congress the authority to accept land intro trust for the benefit of an Indian Tribe, and as such, the authority over such lands was reserved to the individual states by the Tenth Amendment.

74. The Village requests a ruling that 25 U.S.C. § 5108 is unconstitutional and violates its rights under the Constitution.

75. The Village has been harmed as a result of the Defendants' actions under 25 U.S.C. § 5108, which is in violation of the Constitution.

COUNT V
CONSTITUTIONALITY OF 25 U.S.C. § 5108

76. The Village realleges and incorporates by reference each and every one of the foregoing paragraphs as if fully set forth herein.

77. By accepting land into trust pursuant to 25 U.S.C. § 5108, Defendants abridge the privileges and immunities of non-Indians who live on, or pass through, the land accepted into trust, and deny such non-Indians equal protection due to their inability to participate in

government of the area; as such, 25 U.S.C. § 5108 is unconstitutional under the Fifth and Fourteenth Amendments.

78. The Village requests a ruling that 25 U.S.C. § 5108 is unconstitutional and violates its rights under the Constitution.

79. The Village has been harmed as a result of the Defendants' actions under 25 U.S.C. § 5108, which is in violation of the Constitution.

COUNT VI
CONSTITUTIONALITY OF 25 U.S.C. § 5108

80. The Village realleges and incorporates by reference each and every one of the foregoing paragraphs as if fully set forth herein.

81. Article 3, Section 4 of the United States Constitution guarantees to every State a republican form of government.

82. It is integral to a republican form of government that the residents of the Village be able to fully participate in its governance.

83. The acceptance of the Parcels into trust deprives the Village of its authority to tax and its authority to regulate the Parcels and its uses for its residents.

84. Accordingly, the Village's loss of its jurisdiction and authority over the Parcels deprives it of its right to a republican form of government.

85. The Village requests a ruling that 25 U.S.C. § 5108 is unconstitutional and violates its rights under the Constitution.

86. The Village has been harmed as a result of the Defendants' actions under 25 U.S.C. § 5108, which is in violation of the Constitution.

COUNT VII
CONSTITUTIONALITY OF 25 C.F.R. § 1.4

87. The Village realleges and incorporates by reference each and every one of the foregoing paragraphs as if fully set forth herein.

88. 25 C.F.R. § 1.4(a) provides that ". . . none of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States."

89. If the Parcels are accepted into trust, the Village will, as a result of the Defendants' interpretation of 25 C.F.R. § 1.4, lose jurisdictional controls over the land negatively impacting the Village's ability to cohesively manage the Village's zoning affairs, stormwater management, and the enactment of all and other ordinances affecting the Parcels that relates to zoning and development.

90. The harm sustained by the placement of the Parcels into trust and application of 25 C.F.R. § 1.4 is evidenced by the fact the applicable Code of Federal Regulations mandates that the BIA notify the Village of the fee to trust application and provide the Village with an opportunity to object to the application.

91. Even if the IRA is constitutional, 25 C.F.R. § 1.4 is unconstitutional as it exceeds the scope and authority of the IRA because the IRA does not permit the removal and loss to the Village of jurisdictional and zoning authority as provided in 25 C.F.R. § 1.4.

92. Alternatively, even if 25 C.F.R. § 1.4 is constitutional, there is no evidence of any lease or agreement between the United States and the Tribe regarding the Parcels, which is a requirement for the application of 25 C.F.R. § 1.4.

93. The Village requests a ruling that 25 C.F.R. § 1.4 is unconstitutional and violates its rights under the Constitution, and alternatively, if 25 C.F.R. § 1.4 is constitutional, that the Defendants have not satisfied the requirements of 25 C.F.R. § 1.4.

94. The Village has been harmed as a result of the Defendants' actions that implicate 25 C.F.R. § 1.4, which is in violation of the Constitution.

COUNT VIII
DUE PROCESS VIOLATIONS

95. The Village realleges and incorporates by reference each and every one of the foregoing paragraphs as if fully set forth herein.

96. The Due Process Clauses of the Fifth and Fourteenth Amendments guarantee the Village of the right to a neutral, unbiased and independent decision maker who is not predisposed and prejudged against it.

97. The United States Department of Interior and the BIA's, including the Regional Director and Acting Regional Director, involvement in the fee-to-trust application process under the Midwest MOU was predisposed against the Village and blatantly biased in favor of the Tribe.

98. The Midwest MOU causes the United States Department of Interior and the BIA, including the Regional Director and Acting Regional Director, to act in a biased manner against the Village.

99. Upon information and belief, the Regional Director does nothing more than rubber stamp the notices of decision prepared by the BIA employees funded by the Tribes under

the Midwest MOU, thereby causing the United States Department of Interior to unlawfully accept land into trust for the Tribe.

100. The Midwest MOU creates a structural bias against the Village.

101. Accordingly, the Village was denied the Due Process Clause guarantee to a neutral, unbiased and independent decision maker.

102. The Village has been harmed a result of the Defendants' Due Process Clause violations.

COUNT IX
ADMINISTRATIVE PROCEDURE ACT VIOLATIONS

103. The Village realleges and incorporates by reference each and every one of the foregoing paragraphs as if fully set forth herein.

104. The IBIA's Decision is final agency action of the department and is reviewable pursuant to 5 U.S.C. §§ 704 and 706.

105. The IBIA's Decision and the underlying decisions by the Defendants to accept the Parcels into trust are arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, because among other reasons that are stated in the administrative record and the Village's briefing before the IBIA:

a. The Regional Director is not an unbiased, independent decisionmaker given the terms of the Midwest MOU and the underlying administrative record;

b. The communications and other evidence from the administrative record show that the Regional Director oversees and is directly involved with the Midwest MOU, which is funded by the Tribe, and delegates to the Division's staff's the drafting of decisions to accept the Parcels into trust for the Tribe;

c. There is no evidence in the administrative record that the Regional Director independently reviewed the decisions drafted by the Midwest MOU Division employees;

d. The Defendants erroneously considered and omitted critical investigative findings from the IG Report, including the Office of Solicitor's review and legal opinion relative to the Midwest MOU, as it relates to the processing and acceptance of the Parcels into trust under consortium type agreements, such as the Midwest MOU;

e. The Midwest MOU and its funding structure violates Congressional policy under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5301, *et seq.*, and the Tribal Self-Governance Act, 25 U.S.C. § 5361, *et seq.*;

f. The Defendants failed to consider and meaningfully respond to the Village's comments and concerns pursuant to 25 C.F.R. § 151.10(a)-(h).

g. The Defendants did not address or failed to require be addressed the Village's comments and concerns raised before the IBIA and in the administrative record concerning tax loss, jurisdictional and land use conflicts, and 25 C.F.R. § 151.10(e), (f), and (h);

h. The IBIA failed to require the United States Department of Interior and the BIA follow its own regulations and guidance regarding environmental matters prior to accepting the Parcels into trust;

i. The Defendants failed to require the Tribe submit new fee-to-trust applications for each parcel on the issues and decisions that the IBIA previously vacated;

j. The Defendants did not allow the Village notice or opportunity to review, comment, or otherwise respond to the Tribe's supplemental submissions after the Tribe's notices of application;

k. The Tribe was not under Federal jurisdiction in 1934 at the time the IRA was enacted in 1934, as required by *Carcieri v. Salazar*, 555 U.S. 379 (2009).

106. The IBIA's Decision is contrary to constitutional right, power, privilege or immunity.

107. For the reason stated in this Complaint, the IBIA's Decision is in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.

108. For the reasons stated in this Complaint, the IBIA's Decision is without observance of procedure required by law.

109. The Village has been harmed as a result of the IBIA's violations of the APA.

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REQUESTED RELIEF

WHEREFORE, Plaintiff, the Village of Hobart, Wisconsin, respectfully requests that this Court enter orders and judgment:

A. Declaring 25 U.S.C. § 5108 unconstitutional;

B. Declaring 25 C.F.R. § 1.4 unconstitutional;

C. Declaring, alternatively if 25 U.S.C. § 5108 and 25 C.F.R. § 1.4 are constitutional, the Village does not lose its jurisdictional and zoning authority under 25 C.F.R. § 1.4 because the Defendants have not complied with the requirements of 25 C.F.R. § 1.4;

D. Declaring the Village was denied due process by the Defendants;

E. Declaring that the Defendants' decisions, including the September 21, 2023 decision of the IBIA, to accept land into trust were arbitrary, capricious, an abuse of discretion, or otherwise not supported by the record or law, and therefore, violates the Administrative Procedure Act, 5 U.S.C. §§ 704, 706 and the Constitution;

F. Vacating, or alternatively, remanding for further consideration the Defendants' decisions, including the September 21, 2023 decision of the IBIA, to accept land into trust;

G. Staying the Defendants' decisions, including the September 21, 2023 decision of the IBIA, to accept land into trust pending the resolution of this dispute and further remand, if required; or alternatively, ordering the Defendants to remove the land from purported trust status and enjoin the Defendants from refusing to do so;

H. Declaring that the Midwest MOU is unconstitutional and violates Congressional policy under the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 5301, *et seq.*, and the Tribal Self-Governance Act, 25 U.S.C. § 5361, *et seq.*, and therefore, should be discontinued and any decisions accepting land into trust under the Midwest MOU are void;

I. Awarding the Village its attorney's fees and costs; and

J. Ordering such other further relief to the Village as this Court may deem just and proper.

Dated: November 10, 2023.

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s/ Frank W. Kowalkowski

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EXHIBIT A

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

VILLAGE OF HOBART, WISCONSIN, Appellant,	)	Order Affirming Decision
v.	)	
	)	Docket No. IBIA 17-054
ACTING MIDWEST REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	September 21, 2023

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The Village of Hobart, Wisconsin (Village), seeks review by the Board of Indian Appeals (Board) of a January 19, 2017, decision (Remand Decision) of the Acting Midwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA), to accept eight properties, known as the Hobart Parcels, into trust on behalf of the Oneida Nation (Nation).[1] The Remand Decision was issued after the Board affirmed in part, and vacated in part, the original six Notices of Decision (NODs) issued by the Midwest Regional Director and Acting Midwest Regional Director between March and November 2010, and remanded the case to the Regional Director for further consideration. *Village of Hobart, Wisconsin v. Midwest Regional Director*, 57 IBIA 4, 5 (2013) (*Hobart I*). On appeal now from the Remand Decision, the Village argues that the Regional Director again failed to address its concerns regarding: (1) the tax loss to the Village; (2) land use and jurisdictional conflicts; (3) the sufficiency of BIA's environmental review; and (4) the existence of bias in the Midwest Regional Office. We affirm the Remand Decision because the Village has not met its burden to show that the Regional Director erred.[2]

Background

I. The Board's Decision in *Hobart I*

The facts of this case are not in dispute. For a more detailed explanation of the factual and procedural background, *see Hobart I*, 57 IBIA at 5-11. In 2010, the Regional Director issued six NODs to accept the Hobart Parcels into trust on behalf of the Nation.[3] *See id.* at 5 & n.5; *see generally*, Notices of Decision (Administrative Record (AR) Volume (Vol.) 7, Tab 73).[4]

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[1] The Nation's official name was changed from the Oneida Tribe of Indians of Wisconsin to the Oneida Nation in 2016. Remand Decision at 1 n.1.

[2] The Regional Director in *Hobart I* was female. For ease of reference, this decision uses female pronouns.

[3] The decisions were issued by both the Regional Director and the Acting Regional Director, but because all six NODs were issued under the authority of the Midwest Regional Director, we will refer in our decision to both the Acting Midwest Regional Director and the Midwest Regional Director as "Regional Director."

[4] The administrative record submitted by BIA in this appeal comprises 41 binders, labeled Volumes 1 through 41, with consecutively numbered tabs. The documents in the record are also bates stamped. When referencing a document, we cite to the volume and tab number. Where multiple documents are located behind one tab, we will also cite to the bates stamp for ease of reference.

The Hobart Parcels are made up of 8 properties,[5] consisting of 21 parcels and approximately 499.022 acres of land within the boundaries of the Village of Hobart, Brown County, Wisconsin. *See* 57 IBIA at 5; *see also* Opening Brief (Br.), Sept. 21, 2017, at 3. The Village appealed those Notices to the Board, the appeals were consolidated, and the Board affirmed in part, vacated in part, and remanded the matter to the Regional Director for further consideration.

Where a trust acquisition is not mandatory and the land is located within or contiguous to an Indian reservation, BIA's regulations require it to consider seven criteria before it takes land into trust on behalf of an Indian tribe. *See Hobart I*, 57 IBIA at 8-9. The seven criteria are:

> (a) The existence of statutory authority for the acquisition and any 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[; and]
>
> (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 [NEPA], and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.

25 C.F.R. § 151.10.[6]

In *Hobart I*, the Village challenged the Regional Director's consideration of these criteria and also raised several procedural and Constitutional challenges. After considering

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[5] The properties are known as the Boyea, Buck, Calaway, Catlin, Cornish, DeRuyter, Gerbers, and Lahay properties.

[6] Section 151.10(d) only applies to acquisitions for individual Indians and is therefore omitted here.

the effect of the Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009),[7] the Board affirmed the Regional Director's determination that she had authority to take land into trust for the Nation under the Indian Reorganization Act (IRA), 25 U.S.C. § 465 (now recodified as 25 U.S.C. § 5108), 57 IBIA at 18-25, and declined to consider the constitutionality of the IRA because the Board lacks jurisdiction to hear such Constitutional challenges, *id.* at 18. The Board then concluded that the Regional Director had properly considered three of the seven applicable factors set out in § 151.10: the need for the land (§ 151.10(b)), the purpose for and use of the land (§ 151.10(c)), and BIA's ability to discharge any additional responsibilities that might result from the acquisition (§ 151.10(g)). *Id.* at 11. The Board rejected the Village's procedural arguments, concluding that it was given enough time to submit comments. *Id.* at 14. The Board also denied the Village's motion to strike the Nation's brief on appeal. *Id.* at 15.

The Board concluded, however, that the Regional Director failed to adequately consider the Village's comments concerning tax loss, potential land use conflicts, and jurisdictional problems that could result from these trust acquisitions. *See id.* at 28-30. On potential tax losses, the Board found that "[t]he Regional Director did not identify the Village's concerns, much less discuss them." *Id.* at 29. The Board concluded that the Regional Director "did not provide any substance or context to her conclusory opinions" that the Village's tax concerns were "speculative," "unsupported," and "unpersuasive," "[n]or did she discuss why she believed the impact on the Village . . . would be outweighed by the economic or social benefits to be gained" from the acquisition. *Id.* Because the NODs did not "reflect consideration of any of" the Village's specific comments on tax impacts, the Board vacated the NODs and remanded them for further consideration.[8] *Id.* at 30. The Board also vacated the NODs for the Regional Director's failure to address the Village's concerns about stormwater management, and directed the Regional Director to also address, on remand, the other land use and zoning concerns raised by the Village. *Id.*

The Village raised two significant new arguments for the first time on appeal to the Board in *Hobart I*. First, the Village argued that BIA staff were biased in favor of approving these trust acquisitions because their positions were funded under a "consortium agreement" that allowed participating tribes to direct Federal funding back to BIA to expedite the processing of fee-to-trust applications. *Id.* at 15. Second, the Village raised

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[7] *Carcieri* addressed BIA's authority under 25 U.S.C. §§ 5108 (formerly § 465) and 2202 to accept land into trust for tribes. It was issued while the applications for the Hobart Parcels were pending before the Regional Director.

[8] *See Hobart I*, 57 IBIA at 29-30, for the Board's summary of the Village's comments to the Regional Director.

certain environmental concerns that it had not been able to raise fully in its comments because those comments had been submitted before BIA completed its environmental review. *Id.* at 30-31. The Board instructed the Regional Director to address these new issues on remand in the first instance since the NODs were already being remanded to the Regional Director for further review. *Id* at 16, 31.

II. Review and Reconsideration on Remand

On remand, BIA solicited updated comments from the Village on the specific issues remanded by the Board through supplemental Notices of Application (NOAs). *See* Email from Rosen to Baker, Aug. 9, 2015 (AR Vol. 12, Tab 132) (forwarding an August 2, 2013, email discussing supplemental NOAs). The supplemental NOAs were issued on August 6, 2013. Supplemental NOAs (AR Vols. 7 & 8, Tabs 81-88). The NOAs acknowledged that the Board found that the Regional Director "insufficiently addressed the information provided to her concerning the impacts relating to the Village," and that the Notices "did not address the Village's concerns in a way that would inform the Village that [they] have been heard and considered." *See, e.g.*, Supplemental NOA for DeRuyter Property, Aug. 6, 2013, at 2 (AR Vol. 7, Tab 81). The Village was advised that BIA was "soliciting the Village's comments, if any, on the remanded portions of the" NODs.[9] *Id.* at 1.

The NOAs specifically asked the Village to "explain its relationship with the County vis-à-vis taxes" and to "provide any further tax or land use information" that it believed would be relevant. *Id.* at 2. The NOAs also invited the Village to submit any additional information that it believed would aid the Regional Director in her reconsideration of its concerns about potential jurisdictional and land use conflicts, including "concerns regarding adjacent fee and trust land that are subject to . . . different zoning and uses." *Id.* And they asked the Village "to articulate its specific environmental concerns for BIA's consideration." *Id.*

In response to each of the NOAs, the Village submitted a standardized three-page summary of its comments on the proposed acquisitions, changing only the parcel numbers for each of its eight responses. *See, e.g.*, Letter from Kowalkowski to Rosen re: HB-520-1, Sept. 5, 2013 (AR Vol. 13, Tab 142 at VOH 04116); Letter from Kowalkowski to Rosen re: HB-328, Sept. 5, 2013 (Response to Supp. NOA) (AR Vol. 13, Tab 142 at VOH

[9] The NOAs were issued by the Chairman of the Nation on behalf of BIA. *See* Supplemental NOA for DeRuyter Property at 2 (explaining that on January 25, 1996, the Department granted a waiver under 25 C.F.R. § 1.2 of the requirement in 25 C.F.R. § 151.10 that the Secretary issue notices to state and local governments of applications for trust acquisitions).

04202). After quoting the Board's decision at length, the Village opined that "[i]t is important to note that the [Board] did not vacate the [NODs] because it felt that the [Regional Director] did not have enough information, or lacked information, on the Village's concerns." Response to Supp. NOA at 2. Instead, the Village explained, the NODs were vacated because they did not show that the Regional Director had considered the Village's comments. *See id.* As such, "the Village [stood] by its previously submitted comments, objections, and briefing" regarding its tax loss, zoning, bias, and environmental concerns. *See id.*

The Village did provide some new information for BIA's consideration. *See id.* at 2-3. The Village explained that it was a party to a lawsuit before the Seventh Circuit Court of Appeals involving stormwater management assessments on the Nation's trust land, and enclosed copies of its briefs to that court for the Regional Director's review. *Id.* at 2. Regarding its environmental concerns, the Village noted that Environmental Compliance Memorandum No. ECM-10-2, issued by the Secretary of the Interior on June 16, 2010, "is mandatory," but did not elaborate further. *Id.* at 3. The Village also updated its tax loss calculations and enclosed a spreadsheet showing the tax loss "associated with the [Nation's] simultaneous trust applications for approximately 142 parcels of land . . . within the Village," arguing that it would be "extremely detrimental to the Village . . . given the [Nation's] stated goal to reacquire the entire historic reservation . . . and given the fact the Village receives no money in lieu of this tax loss." *Id.* The Village closed by "maintain[ing] its position that the [Nation] must reinstate the entire fee to trust process, including the submission of a new application" because the "decision relating to this parcel was vacated." *Id.*

Over the next few years, BIA updated the tax information and completed the environmental record for the Regional Director's consideration. The agency collected tax bills for the Hobart Parcels for the period following remand of the NODs. *See* AR Vol. 8, Tabs 99-106 (2013 tax information); Vol. 7, Tab 77 (2014 tax bills); Vol. 1, Tabs 6-7 (2015 tax information). On July 7, 2015, the Midwest Regional Office concluded that the proposed trust acquisitions would not affect historic properties. *See, e.g.*, Memorandum from Kitto to Doig, Apr. 29, 2016, at 1 (2016 Compliance Memo) (AR Vol. 3, Tab 27).[10] In March 2016, the U.S. Fish and Wildlife Service (FWS) confirmed that only one threatened or endangered species might reside within the reservation boundaries. *See* Email from Hartman to Kitto, Mar. 16, 2016 (attaching FWS letter to Nation) (AR Vol. 6, Tab 54). In April, FWS forwarded the Official Species List for each parcel in compliance

[10] The Board was unable to locate the July 7, 2015, determination regarding National Historic Preservation Act (NHPA) compliance in the record.

with the Endangered Species Act (ESA), 87 Stat. 884, 16 U.S.C. § 1531 *et seq.* *See, e.g.*, AR Vol. 5, Tabs 45-47 (emails from FWS forwarding Official Species List).

In April 2016, BIA also began updating the Phase I environmental site assessments for the Hobart Parcels. Updates for seven of the eight parcels were completed in April 2016; the last update, for the Lahay parcel, was completed in June 2016. *See* AR Vols. 2-5, Tabs 17-18, 24, 27-37 (updated Phase I ESAs and related documents). The environmental protection specialist assigned to the updates determined that nothing further was required to comply with NEPA, the NHPA, or the ESA. *See e.g.*, 2016 Compliance Memo at 1.

III. The Remand Decision

The Regional Director issued her Remand Decision on January 19, 2017. Remand Decision (AR Vol. 1, Tab. 5). She considered "the comments from the Village of Hobart contained within its replies to the original Notices of Application, its filings with the [Board], and its reply to the supplemental Notice of Application." Remand Decision at 2.

A. Bias in the Fee-to-Trust Process

In *Hobart I*, the Board instructed the Regional Director to consider the Village's allegations of bias and to explain the relevance, if any, of an investigation by the Department of the Interior's Office of the Inspector General (IG) referenced in a 2006 Government Accountability Office (GAO) report. *See Hobart I*, 57 IBIA at 15-16. The Regional Director was also ordered to describe any corrective actions taken in response to the IG investigation. *Id.*

In the Remand Decision, the Regional Director began by noting that the Village did not allege actual bias by the Regional Director or any BIA employee, but instead alleged that the whole fee-to-trust process was tainted by a series of "consortium" agreements between the Midwest Regional Office and several participating tribes, including the Nation. *See* Remand Decision at 17-18; *see also* Memorandum of Understanding Between Oneida Tribe of Indians of Wisconsin and the Bureau of Indian Affairs–Midwest Regional Office (Midwest MOU) FY 2005–FY 2007 (AR Vol. 33, Tab 215 at VOH 12066); Midwest MOU FY 2008–FY 2010 (AR Vol. 21, Tab 196 at VOH 7125). These agreements established a "Midwest Fee to Trust Consortium" (Consortium) so that participating tribes could "reprogram" certain Federal funds to BIA's Midwest Regional Office, which BIA then used to hire additional employees to help process fee-to-trust applications. *See* Remand Decision at 20-21; Midwest MOU FY 2005–FY 2007 at 1. Those employees made up the Midwest Regional Office's Division of Fee-to-Trust. The Village argued that, because these trust acquisitions were processed by employees whose jobs were funded by the Nation, they were "not the product of a neutral, independent decision maker" and violated the Village's

right to due process. *See* Remand Decision at 18. The Regional Director reviewed the Village's bias claims and concluded that it had failed to meet its burden of proof. *Id.* at 24-25.

1. 2006 IG Report

The result of the IG's investigation into the use of these consortiums was set out in a final report. U.S. Dept. of the Interior, Office of Inspector General, Report of Investigation: California Fee to Trust Consortium MOU, Case No. PI-PI-06-0091-I (Sept. 20, 2006) (Opening Br., Ex. 5 at 102-114) (IG Report). On remand, the Regional Director reviewed that report. Remand Decision at 19-20. The Regional Director noted that the IG Report focused on a consortium established by BIA's Pacific Regional Office, but found that neither the Pacific MOU nor the Midwest MOU was unlawful or inconsistent with Government ethics rules. *See id.* at 20. The Regional Director also explained that the IG Report found no instances of actual bias under either MOU and that it expressly pointed out that the Midwest MOU was implemented after review by the Office of the Solicitor. *See id.* For those reasons, the Regional Director concluded that the IG investigation had "no bearing" on the Village's allegations of bias in this case. *Id.* The Regional Director also emphasized that the Midwest MOU in effect at the time of the IG investigation was replaced by the FY 2008–FY 2010 MOU, which was in effect when the NODs were issued. *Id.* "Based on these circumstances," the Regional Director found that the IG investigation did not create a conclusive presumption of actual bias. *Id.*

2. The Structure of the Midwest MOU

The Regional Director then examined whether the structure of the consortium agreement itself created a conclusive presumption of bias. The Regional Director explained that the original consortium agreement was implemented in 2004 "to address the growing backlog of fee-to-trust applications caused by limited BIA funding," and that funds reprogrammed through the consortium "are federal appropriations" that the Regional Director is authorized to reallocate within the BIA accounting system to address a tribe's needs. *See id.* at 21-22. The 2004 consortium agreement was "revised and replaced" by the FY 2008–FY 2010 Midwest MOU. *Id.* at 23. The revised agreement "clarifies" that BIA employees funded through the consortium "are . . . federal employees subject to Title 5 of the United States Code and supervised by BIA staff outside the Division [of Fee-to-Trust]."[11] *Id.* at 23-24. The revised agreement also states that "Division staff must comply

[11] The Regional Director explains that the Midwest MOU established a Division of Fee-to-Trust within the Midwest Regional office to process fee-to-trust applications submitted by tribes participating in the consortium. Remand Decision at 22.

with all requirements of 25 C.F.R. Part 151," and "mak[es] clear that only BIA officials with the delegated authority may exercise inherent federal functions." *Id.* at 24. The Regional Director concluded that "the Midwest MOU [thus] ensures against the appearance of bias or conflict of interest" and that its terms did not create an inference of bias that could overcome the presumption of honesty and integrity that applies to BIA employees.[12] *See id.* at 20, 24.

3. Regional Director's Conclusion Regarding Bias

Having considered the Village's comments, the IG Report, and the record, the Regional Director concluded that the Village's allegations of bias did "not satisfy the 'difficult burden' of overcoming the presumption that [she] discharged her duties properly in approving the Nation's applications." *Id.* at 24. She found that the Village had not shown actual bias, that her decision was based on information outside the administrative record, or that she failed to review the materials prepared by Division employees objectively. *Id.* at 24-25. The Regional Director also found that, even if the Village had shown "possible bias by BIA employees of the Division," it had failed to show that "the Regional Director's independent review of the materials did not cure any such bias." *Id.* at 25. For these reasons, the Regional Director concluded that the Village had failed to meet its burden of proof to show bias in the agency's approval of these trust acquisitions. *See id.*

B. 25 C.F.R. § 151.10(e) – Impact on the Village Tax Rolls

Next, the Regional Director considered the impacts of these trust acquisitions on the Village's tax rolls. She began by rejecting the Village's argument that BIA was required to consider "the cumulative and aggregate impact" of all of the Nation's pending trust applications, concluding instead that it "need only consider the impact on the tax rolls of a specific proposed acquisition." *Id.* at 5-6. Turning, then, to the specific proposed acquisition (i.e., the acquisition of the Hobart Parcels), the Regional Director estimated that, based on tax information for fiscal year 2015, these acquisitions would cause the Village to lose $3,997.90, or 0.1443% of its tax levy. *Id.* at 6. With respect to stormwater management fees for the Hobart Parcels, the Regional Director clarified that "any overdue or unpaid assessments on these parcels must be paid, or otherwise resolved, prior to

[12] The Regional Director also rejected the Village's contention that the Midwest MOU was invalid for its failure to address *Carcieri*, which held that the Secretary's authority to acquire land in trust under the Indian Reorganization Act (IRA) was limited to those tribes that were under Federal jurisdiction when the IRA was enacted in 1934. Remand Decision at 24. The Regional Director concluded that there "is no reason for the Midwest MOU to expressly address *Carcieri*." *Id.*

acceptance into trust." *Id.* The Regional Director also acknowledged that these acquisitions would result in the loss of $8,294.50 in taxes for the school district, but found that "no school districts submitted comments or objection[s] . . . and the Village has not explained how a loss of revenue to a school district would impact the Village's budget or operations." *Id.* at 7.

The Regional Director found that some of the financial burden imposed on the Village by these tax losses would be offset by services provided by the Nation to both tribal and non-tribal residents, and by the availability of Federal funding for other municipal services. *Id.* at 7-8. The Regional Director explained that policing and emergency services are provided by the Oneida Nation Police Department to tribal and non-tribal residents of the Oneida reservation, and that the Nation similarly provides utility services and recreation areas for all residents of the reservation. *Id.* at 8. Tribal members and their families also benefit from waste and recycling pickup, health care, various social services, housing, and public transportation provided by the Nation. *See id.* at 7-8. The Regional Director acknowledged that fire protection would continue to be provided by the Village, and that, absent an intergovernmental agreement, the Village "could go uncompensated" for those services. *Id.* at 8. Nonetheless, she found that this situation was not unlike other tax-exempt properties within the Village, such as churches and schools, and that the Village had not provided "specific information regarding the cost of fire protection." *Id.* The Regional Director also explained that while the cost of maintenance and repair of three roads identified by the Village (St. Josephs St., Shenandoah St., and Westfield Rd.) would be ineligible for Federal funding, they "do not directly service any of the proposed acquisitions currently under consideration," and "several other nearby roadways . . . are on the Indian Reservation Road Inventory (IRR), and are eligible for BIA funding . . . [which] partially offsets the Village's financial burden for road maintenance." *Id.*

Finally, the Regional Director determined that some of the Village's allegations were speculative and thus outside the scope of the Regional Director's consideration. *See id.* at 8-9. For example, the Village argued that the Nation was attempting "to thwart" its plans for industrial and economic development, depriving it of future tax revenue, and that it could not recoup future tax losses due to a state law limiting its ability to raise its taxes above a 2% levy limit. *Id.* at 8. The Regional Director concluded that BIA was not obligated to consider the Village's speculation about potential future losses, and that, in any event, the Village had not provided enough information to analyze such concerns. *Id.*

C. 25 C.F.R. § 151.10(f) – Jurisdictional and Land Use Conflicts

Turning to the Village's land use and jurisdictional concerns, the Regional Director compiled a detailed comparison of the zoning classifications of the Hobart Parcels. *See id.* at 9-10. The Regional Director found that "[o]f the 21 parcels under consideration here, the Village's zoning classification and the Nation's zoning classification are in concordance for all but three." *Id.* at 9. She found that two of those three (the Cornish and Lahay parcels) had similar zoning classifications and thus would present "a low probability for conflict in land use." *See id.* at 9.

This left the Gerbers parcel, which was zoned "A1 - Agricultural" by the Nation, but "L1 - Limited Industrial" by the Village. *Id.* The Gerbers property is located "within and adjacent to land zoned by the Village for a commercial industrial park," and the Regional Director determined that "there is a potential for land use conflict where industrial development and agriculture exist side by side." *Id.* Nonetheless, the Regional Director concluded that the Village had "failed to provide evidence" that the Nation's zoning classification for this parcel was "completely inconsistent" with the Village's development plans, and also noted that it is "not unique" to have different zones located next to each other. *See id.* The Regional Director emphasized that the Nation had not proposed a change in land use for any of the Hobart Parcels, including the Gerbers property, and that "the Village has not raised any material conflict between existing land uses and Village zoning." *Id.* at 10. The current uses of the parcels, the Regional Director found, "are also generally consistent with the Village's draft future land use map." *Id.*

Next, the Regional Director addressed potential jurisdictional conflicts over stormwater management. As the Regional Director noted, the Seventh Circuit held that the Nation is not required to pay the Village's stormwater assessments on trust land because it is the equivalent of a local tax and the Village may not impose local taxes on trust land. *See id.* at 11; *see also Oneida Tribe of Indians v. Village of Hobart*, 732 F.3d 837, 842 (7th Cir. 2013). The Regional Director acknowledged the Village's concern that the "checkerboard pattern of trust land"[13] resulting from these trust acquisitions would hurt its ability to

[13] In *Hobart I*, the Board ordered the Regional Director "to explain terms that the Village contends it does not understand." *Hobart I*, 57 IBIA at 30. The Village had complained to the Board that the phrase "jurisdictional pattern" as used in the original NODs was unclear. In the Remand Decision, the Regional Director explained that the phrase referred to the "checkerboard pattern of jurisdiction" that results when trust land is "scattered throughout the village," resulting in "Indian and non-Indian properties [forming] an irregular checkerboard pattern." Remand Decision at 12 (quoting *Oneida Tribe of Indians*, 732 F.3d at 842). The Village does not challenge this explanation on appeal.

manage stormwater. In light of the Seventh Circuit's decision, the Regional Director concluded that the Village and the Nation, if they cannot reach an agreement, may need to implement separate stormwater management programs. *Id.* at 11-12.[14]

The Village also objected to these trust acquisitions on the grounds that they could cause "jurisdictional confusion" and thus impair emergency services. *Id.* at 12. The Regional Director suggested that the best solution to resolve such jurisdictional conflicts "is the development of cooperative service agreements with other government bodies in the area," and noted that a prior service agreement between the Village and the Nation expired in November 2007. *Id.*

D. 25 C.F.R. § 151.10(h) – Compliance with Environmental Requirements

With respect to the Village's environmental concerns, the Regional Director began by acknowledging that all trust acquisitions must comply with applicable environmental laws, including the National Historic Preservation Act (NHPA), the Endangered Species Act (ESA), and the National Environmental Policy Act (NEPA), as well as various binding agency guidance documents (including 516 Department Manual (DM) 6 (NEPA Revised Implementing Procedures) and 602 DM 2 (Land Acquisitions: Hazardous Substances Determinations)). Remand Decision at 13-15. The Regional Director then explained that BIA had concluded in 2015 that nothing further was required to comply with the NHPA, because these trust acquisitions do not have the potential to affect historic properties, or the ESA, because the Nation did not propose any change in land use and thus the agency had determined that these acquisitions would have "no effect" on threatened and endangered species.[15] *Id.*

Next, the Regional Director addressed the Village's contention that the trust acquisitions did not comply with NEPA. The Regional Director explained that, because no change in land use was anticipated for these parcels, BIA had determined that the acquisitions would "not have a significant effect on the quality of the human environment (individual or cumulatively)" and that it was appropriate to rely on a categorical exclusion (CE) for these properties. *Id.* at 14. And because the trust acquisitions fell within this

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[14] The Seventh Circuit found that Congress had authorized the Environmental Protection Agency (EPA) to delegate the authority to issue stormwater permits to the states, but that Wisconsin disclaimed the authority to regulate stormwater runoff on Indian lands when it applied for such permitting authority. Remand Decision at 11; *Oneida Tribe of Indians*, 732 F.3d at 840.

[15] The FWS concurred with BIA's "no effect" determination on March 14, 2016. Remand Decision at 13.

categorical exclusion, BIA was not required to prepare either an environmental assessment (EA) or an environmental impact statement (EIS). *Id.* The Regional Director acknowledged the Village's argument that the categorical exclusion could not be applied to this trust acquisition and that an EIS should have been prepared instead, but she ultimately disagreed, finding that "all applications for the Hobart properties contemplate maintaining the current land use," and that a categorical exclusion was therefore appropriate. *Id.*at 14-15. The Regional Director concluded that BIA had complied with NEPA. *See id.* at 14.

The Regional Director then summarized the Village's four arguments that BIA failed to comply with 602 DM 2. *Id.* at 15. First, the Village objected that BIA did not consult with the Village or interview local government officials when preparing its environmental site assessments. *Id.* Second, the Village argued that the environmental site assessments were deficient because they identified nearby environmental concerns, but did not complete further (Phase II) assessments. *Id.* Third, the Village contended that the environmental site assessments were the product of institutional bias. *See id.* And fourth, the Village argued that BIA failed to comply with the requirements mandated by Environmental Compliance Memorandum No. ECM 10-2.[16] *See id.*

In response, the Regional Director explained that the purpose of 602 DM 2 is to:

> prescribe[] Departmental policy, responsibilities, and functions regarding required determinations 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 by the Department for the United States.

Id. To that end, Phase I environmental site assessments were used to "ascertain the nature and extent of any potential liability resulting from hazardous substances or other

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[16] Pre-Acquisition Environmental Assessment Guidance for Federal Land Transactions, Environmental Compliance Memorandum No. ECM 10-2 (ECM 10-2), U.S. Department of the Interior, Office of the Secretary (June 16, 2010), available at ecm-10-2-pre-acquisition-ea-guidance-for-federal-land_0.pdf (doi.gov) (last accessed Sept. 20, 2023). ECM 10-2 provides an overview of the steps taken by the Federal government when acquiring an interest in real property "to assist the bureaus and agencies in identifying environmental conditions associated with real property, and to enable them to secure, to the extent possible, the protections of the liability defenses set forth in [the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)] and [the Oil Pollution Act (OPA)]." *See id.* (cover memorandum from Director, Office of Environmental Policy and Compliance to Heads of Bureaus and Offices).

environmental problems associated with the subject property." *Id.* The Regional Director acknowledged that Phase I environmental site assessments must comply with "current ASTM standards"[17] for consultation with local officials, identification of "recognized environmental conditions," and performance by "Environmental Professionals." *See id.* (citing ASTM E1527-13).[18]

The Regional Director, however, concluded that the Phase I environmental site assessments for the Hobart Parcels satisfied those requirements. *Id.* at 17. The Regional Director explained that interviews were conducted with the Nation's environmental and land department staff, which, "[i]n combination with extensive site visits, . . . serve[d] to meet the requirements of ASTM E1527." *Id.* at 16. And despite the conditions noted by the Village, the Regional Director concluded that "evidence was not found on the Hobart properties that justified the issuance of notice of a recognized environmental condition as defined by the applicable ASTM standard." *Id.* In addition, the Regional Director disagreed with the Village's characterization of ECM 10-2 as mandatory, finding that "602 DM 2.6(a) allows bureaus to establish their own pre-acquisition environmental site assessment procedures." *Id.* at 17. The Regional Director thus found "the Village's concerns to be without merit." *Id.*

IV. Appeal of the Remand Decision to the Board

Having completed her reconsideration of the Village's comments on remand, the Regional Director issued her Remand Decision on January 19, 2017. The Remand Decision included notice of BIA's intent to accept the Hobart Parcels into trust on behalf of the Nation. *Id.* at 25. On February 22, 2017, the Village appealed the Remand Decision to the Board. The Village filed an opening brief, the Regional Director and the Nation filed answer briefs, and the Village replied.

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[17] ASTM standards are voluntary consensus technical standards for materials, products, systems, and services. *See* ASTM International, Wikipedia.org, https://en.wikipedia.org/wiki/ASTM_International (last visited September 8, 2023).

[18] ASTM E1527-13, Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process, ASTM International, West Conshohocken, PA, 2013, available at: https://www.astm.org/e1527-21.html (last accessed September 8, 2023).

Standard of Review

The standard of review in trust acquisition cases is well established. Decisions of BIA officials on requests to take land into trust are discretionary, and the Board does not substitute its judgment for BIA's. *Hobart I*, 57 IBIA at 12. Instead, the Board reviews these discretionary decisions to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of that discretion, including any limitations on its discretion that may be established in regulations. *Id.* An appellant bears the burden of proving that BIA did not properly exercise its discretion. *Id.*

"[P]roof that the Regional Director considered the factors set forth in 25 C.F.R. § 151.10 must appear in the record, but there is no requirement that BIA reach a particular conclusion with respect to each factor." *Shawano County, Wisconsin v. Acting Midwest Regional Director*, 53 IBIA 62, 68-69 (2011). An appellant cannot carry its burden of proof simply by disagreeing with BIA's decision. *Id.* at 69; *Hobart I*, 57 IBIA at 13. Moreover, the factors set out in Part 151 need not be weighed or balanced in any particular way or exhaustively analyzed. *State of Kansas v. Acting Eastern Oklahoma Regional Director*, 62 IBIA 225, 233 (2016) (quoting *State of South Dakota v. Acting Great Plains Regional Director*, 49 IBIA 84, 98 (2009)). The Board must be able to discern from the record and the Regional Director's decision, however, that due consideration was given to timely submitted comments by interested parties. *Hobart I*, 57 IBIA at 13.

In contrast to the Board's limited review of BIA's discretionary decisions, the Board has full authority to review any legal issues raised in a trust acquisition case, except those challenging the constitutionality of laws or regulations, which the Board lacks authority to adjudicate. *Shawano County*, 53 IBIA at 69.

Discussion

In *Hobart I*, the Board affirmed the Regional Director's consideration of four of the criteria set out in 25 C.F.R. § 151.10: the agency's statutory authority (§ 151.10(a)), the Nation's need and purpose for the lands (§ 151.10(b) and (c)), and the additional duties that taking this land into trust might impose on BIA (§ 151.10(g)). 57 IBIA at 16-31. The Board vacated and remanded the original notices of decision in remaining part, however, so that the Regional Director could reconsider the remaining criteria, as well as the Village's claims of bias and violations of environmental laws. *Id.* at 31. The Regional Director completed that remand on January 19, 2017. Remand Decision at 25 (AR Vol. 1, Tab 5).

The Village now appeals that Remand Decision to the Board, making three main arguments. First, it argues that it was denied due process because BIA and the Regional

Director were biased against it. Second, it challenges the Regional Director's reconsideration of the remaining criteria set out in § 151.10—tax losses (§ 151.10(e)), jurisdictional problems and land use conflicts (§ 151.10(f)), and environmental compliance (§ 151.10(h))—and argues that the Regional Director failed to comply with various environmental laws. Third, it argues that the process that the Regional Director used to reach this Remand Decision was defective.

For the reasons explained below, we reject the Village's arguments and affirm the Regional Director's Remand Decision.

I. Bias and Due Process

The Village argues that the Regional Director's decision to approve these trust acquisitions was tainted by bias and violated the requirements of due process. Opening Br. at 4-30; Reply Brief, Dec. 14, 2017, at 2-13. That bias, the Village claims, grew out of the Midwest MOU, a "consortium" agreement which allowed participating tribes (including the Nation) to consent to the reprogramming of Federal funds so that additional BIA employees could be hired to process fee-to-trust applications faster. *See* Midwest MOU FY 2008–FY 2010 (Opening Br., Exhibit (Ex.) 3 at 17-27).[19] The Village contends that BIA was pressured into approving these trust acquisitions so that it could keep this additional funding, and that, as a result, the Midwest MOU (1) fostered institutional bias at BIA, (2) encouraged impermissible ex parte communications between the Nation and BIA staff, and (3) created an unlawful conflict of interest that forced BIA staff to choose between keeping their jobs and evaluating these applications fairly. *See* Opening Br. at 4-30. The Village demands that the Remand Decision "be vacated and remanded for consideration by an independent, neutral decision-maker." *Id.* at 5.

We address each of the Village's allegations in turn below, after discussing the general principles of due process. We conclude that the Village has not shown that the Regional Director's approval of these trust acquisitions was biased or that the Village was denied due process. We find no evidence of improper institutional bias or impermissible ex parte

[19] The Midwest MOU that was in effect at the time that the original NODs were issued was the FY 2008–FY 2010 MOU. Remand Decision at 20. Throughout this order, when the Board refers to the Midwest MOU, we mean the FY 2008–FY 2010 MOU. Midwest MOU FY 2008–FY 2010 (AR Vol. 21, Tab 196, VOH 7125-31). The terms of the Midwest MOU in effect when the Remand Decision was issued (that is, the Midwest MOU FY 2014–FY 2017) do not differ materially, and the Board would reach the same conclusions regarding the Village's claims of bias and violations of due process if that MOU were applicable. *See* Midwest MOU FY 2014–FY 2017 (Opening Br., Ex. 3 at 2-9).

communications. Most importantly, even assuming that the BIA employees hired under the Midwest MOU faced a conflict of interest, due process was not violated here because those employees were not the decisionmakers. Instead, these trust acquisitions were approved by the Regional Director, who is an independent, neutral decisionmaker whose employment is not funded by the Midwest MOU.

A. General Principles of Due Process

The Due Process Clause of the Fifth Amendment states that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. This does not mean that a full courtroom trial must precede every deprivation of property; what constitutes "due process" is not "fixed," but is "flexible" and varies based on the "time, place and circumstances." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (holding that due process did not require an evidentiary hearing before the termination of disability benefits); *see also Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 320 (1985) (noting that "the processes required by the [Due Process] Clause . . . vary depending upon the importance attached to the interest and the particular circumstances under which the deprivation may occur"). But while the exact requirements vary, a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). That requirement applies both to the courts and also to "administrative agencies which adjudicate." *Withrow v. Larkin*, 421 U.S. 35, 46 (1975).

A party must do more than merely allege bias to show that it has been denied a "fair tribunal" and due process. Adjudicators enjoy a "presumption of honesty and integrity," and overcoming that presumption requires an appellant to carry a "difficult burden of persuasion." *Id.* at 47; *see also, e.g., South Dakota v. United States DOI*, 787 F. Supp. 2d 981, 1000 (D.S.D. 2011); *South Dakota v. United States DOI*, 401 F. Supp. 2d 1000, 1011 (D.S.D. 2005). As such, the Board has repeatedly confirmed that an appellant must make a "substantial showing of bias" to disqualify a hearing officer in an administrative proceeding. *See, e.g., Starkey v. Pacific Regional Director*, 63 IBIA 254, 270-71 (2016). The courts have also identified narrow situations where a "substantial showing of bias" is not required because "[e]xperience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow*, 421 U.S. at 47. Chief among these is where "the adjudicator has a pecuniary interest in the outcome" of the case.[20] *Id.*

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[20] The other such situation identified by the Supreme Court is not relevant here. *Withrow*, 421 U.S. at 47.

Thus, to succeed on its claims here, the Village must either make a substantial showing of bias or it must establish that the BIA decisionmaker had a "pecuniary interest in the outcome" of these applications. The Village argues that it need only show a "probability of unfairness" or that the adjudicator might face "a possible temptation," Opening Br. at 5, but we reject that argument. It is true that the Supreme Court has stated that "[e]very procedure which would offer a possible temptation to the average man as a judge . . . denies . . . due process of law." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). But the "procedure" at issue in that case was that the judge only got paid for his work if he convicted the defendants; as a result, he had an impermissible "pecuniary interest in the outcome" of the trial. *Id.* at 531-32, 535. No court has ever held that every judge and agency adjudicator that faces "possible temptation" must be disqualified. *See also, e.g., Fero v. Kerby*, 39 F.3d 1462, 1478 (10th Cir. 1994) (agreeing that claimant must show either "actual bias" or "that circumstances were such that an appearance of bias created a conclusive presumption of actual bias").

We also note that the Due Process Clause, as interpreted and applied by the courts, establishes the Constitutional minimum for fairness and impartiality in adjudications.[21] Less fundamental matters of bias, such as "kinship" and "personal bias," do not violate due process but may be restricted as a matter of "legislative discretion." *Tumey*, 273 U.S. at 523. Thus, Congress and Federal agencies may impose higher standards on agency adjudications through statutes and regulations (respectively). The Administrative Procedure Act (APA), for example, requires trial-type, adversarial hearings for "formal adjudications." 5 U.S.C. §§ 554, 556-57. The Regional Director's resolution of these fee-to-trust applications, however, was not a "formal adjudication" because it was not required by law to be conducted "on the record"; instead, it falls into the APA's broad, catch-all category of "informal adjudications." *See, generally,* Cong. Rsch. Serv., R46930, Informal Administrative Adjudication: An Overview (2021), at 24-28 (describing informal adjudications and their requirements). The APA imposes only minimal requirements on informal adjudications like the resolution of these trust applications: such adjudications are subject to judicial review, 5 U.S.C. §§ 701-06, and certain other modest limits that are not relevant here, *see, e.g., id.* § 555(e) (requiring the agency to provide notice and reasons for denial of requests in an informal adjudication). *See also Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 655 (1990).

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[21] The Due Process Clause only applies to those adjudications that deprive a person of life, liberty, or property. For the sake of this analysis, we assume (without deciding) that the potential reduction of the Village's future taxes by these trust acquisitions constitutes a deprivation of property.

Finally, the Village bears the burden of proof in this case. *See, e.g., Roberts County, South Dakota v. Acting Great Plains Regional Director*, 51 IBIA 35, 46 (2009); *Heirs and Successors in Interest to Mose Daniels v. Eastern Oklahoma Regional Director*, 55 IBIA 139, 145 n. 7 (2012). "[U]nsubstantiated claims of bias generally are not enough to overcome the presumption of impartiality in an administrative decision-maker." *Cty. of Charles Mix v. United States DOI*, 799 F. Supp. 2d 1027, 1044 (D.S.D. 2011). Nor can the Village reverse the burden of proof by arguing that the Regional Director has not proven an absence of bias. *See, e.g.,* Opening Br. at 23 ("[T]here is no evidence in the record that the RD independently reviewed the decisions drafted by the Division."). To prevail on its claims, the Village must show that it was denied due process and that "something more than harmless error resulted." *Cty. of Charles Mix*, 799 F. Supp. 2d at 1043.

B. Specific Claims of Bias

1. Prejudgment/Structural Bias

First, the Village argues that the Regional Director prejudged these issues because she was "going to accept these parcels into trust no matter what." Opening Br. at 13. A party is denied due process when an adjudicator has "prejudged" the party's case against them before the case is even heard. *See United States v. Morgan*, 313 U.S. 409, 421 (1941). The Village claims that the Midwest MOU created a "structural bias" that fostered prejudgment here. *See* Opening Br. at 29-30.

We reject the claim that the Midwest MOU created an unlawful "structural bias." Congress has authorized BIA to take land into trust for Indians, and it has directed BIA to advance the causes of Indian self-determination and self-government. *See, e.g.,* 25 U.S.C. § 5108 (formerly 25 U.S.C. § 465). Both the Board and the Courts have consistently rejected the argument that BIA's pursuit of those goals makes the agency "structurally biased" and disqualifies it from deciding fee-to-trust applications. *Starkey*, 63 IBIA at 270; *Thurston County, Nebraska v. Great Plains Regional Director*, 56 IBIA 296, 304 (2013); *Roberts County*, 51 IBIA at 48; *see also South Dakota*, 401 F. Supp. 2d at 1011 ("Following Congress's statutory policies does not establish structural bias warranting reversal of the Director's decision."). BIA may adjudicate trust applications without bias—and without any denial of due process—even though it has "an underlying philosophy" and "strong views" on these issues, so long as it has not prejudged the law and facts of a specific application. *See Morgan*, 313 U.S. at 421.

The Village recognizes that its argument has been rejected before, but it argues that this case is different because it is alleging that the Midwest MOU, not just BIA's general policies, creates structural bias here. *See* Opening Br. at 29. But the Village fails to show that the Midwest MOU is creating structural bias. As the Village notes, the Midwest MOU

states that "[t]he need for increased land base is imperative to the Tribes of Minnesota, Wisconsin, Michigan, and Iowa." Midwest MOU at 1. That, however, is simply a restatement of the policies that Congress has already set for BIA and, consistent with our previous decisions, does not evidence a structural bias that would disqualify BIA from deciding these trust applications. The Midwest MOU also states that the purpose of the agreement is "facilitating the expeditious processing of fee-to-trust applications." *Id.* But BIA's commitment to processing applications faster is not evidence that it has prejudged those applications; it could still deny the applications, consistent with the Midwest MOU. (We address the Village's claims that the Midwest MOU's funding mechanisms create bias and a conflict of interest in Section I.B.3 below.)

The Village has also failed to identify any evidence that the Regional Director prejudged these specific applications. The standard for proving such prejudgment is "high." *Stand Up for Cal.! v. United States DOI*, 204 F. Supp. 3d 212, 303 (D.D.C. 2016). The courts have not found it "except in cases where an agency has *committed* itself . . . to an outcome" ("for example, by contract"). *Id.* (emphasis in original); *see also, e.g., FTC v. Cement Inst.*, 333 U.S. 683, 701 (1948) (holding that plaintiff must demonstrate that the mind of the decisionmaker was "irrevocably closed" to prove denial of due process). In *Rio Arriba, New Mexico, Board of County Commissioners v. Acting Southwest Regional Director*, the Board found the "taint" of prejudgment where a Regional Director had commented in the press on the specific trust acquisition challenged by the appellant. 38 IBIA 18, 28-29 (2002) (holding that it was "inappropriate for a BIA deciding official to make public comments of this nature on a matter that is pending before him").

But here, unlike *Rio Arriba*, the Village has not pointed to any statements or actions by the Regional Director (or anyone else at BIA) that would cause the Board to question the impartiality of the Remand Decision. Nothing in the Midwest MOU shows any prejudgment about the Hobart Parcels. The Village argues that "[t]he fact that the [Regional Director's] Decision was written by [] Division employees . . . evidences prejudgment," Opening Br. at 23, but even if Division employees helped to prepare a draft of the Remand Decision for the Regional Director's use, we do not see how that shows prejudgment, as long as the Regional Director completed her own independent review and reached her own decision (and we conclude below in Section I.B.3 that she did).

Similarly, the Village cites e-mails showing that the Regional Director and Division employees made the completion of this remand a priority, *id.* at 18-19, but prioritizing a decision is not the same as prejudging the result of that decision. The Village argues that the fact that the Regional Director "has not denied one application from the Tribe related to land in the Village" since 2008 shows prejudgment. *Id.* at 17. The record, however, suggests that the Regional Director has not denied any applications because the tribes withdraw applications that are not likely to be approved, rather than risking denial. *See* IG

Report at 10 (explaining that the Regional Director had never denied a trust application because "if an application has a problematic issue, it would be dealt with prior to the application reaching the adjudication stage; if an application has an issue that cannot be overcome, the tribe simply withdraws the application since they know it will not be adjudicated favorably."). Moreover, the mere fact the Remand Decision is adverse to the Village—even on all of the issues raised—is not evidence of bias as long it is supported by the law and the facts. *See Crenshaw v. Hodgson*, 24 Fed. Appx. 619, 621 (7th Cir. 2001). The Village was required to substantiate its claim that the Regional Director impermissibly prejudged these issues—it is not enough to rely on "assumptions and speculation"—and it has failed to do so. *See Roberts County*, 51 IBIA at 50.

2. Ex Parte Communications

Second, the Village claims that it was denied due process because the Regional Director and other BIA employees (especially Division employees) engaged in impermissible ex parte communications with the Nation about these trust applications. *See, e.g.,* Opening Br. at 23 ("BIA and Division employees communicate directly with the Oneida in a joint effort to get the parcels accepted into trust."). The Village argues that "Division employees who communicate with the participating tribes [] on a regular basis . . . should not be the same employees responsible for drafting the decision 'issued' by the [Regional Director]." Reply Br. at 10 n.48. These "ex parte communications," the Village contends, "create[] an unacceptable level of bias." Opening Br. at 10-11, 20-22.

The Village, however, fails to identify any provision of any statute or regulation that prohibits ex parte communications between BIA and the applicant when reviewing a trust acquisition application. If this were a formal adjudication under the APA, then the Regional Director (as adjudicator) would be barred from engaging in off-the-record communications on the merits of the proceeding with interested parties. *See* 5 U.S.C. §§ 551(14) (definition of "ex parte communication"), 557(d)(1) (prohibiting ex parte communications in formal adjudications); *see also* 5 U.S.C. § 554(d)(1) (prohibiting ALJs from "consult[ing] a person or party on a fact in issue"). But this is not a formal adjudication or any other kind of adversarial, trial-type proceeding where ex parte communications are necessarily improper. Instead, it is an informal adjudication, and the APA's restrictions on ex parte communications do not apply.

Moreover, BIA's regulations explicitly require the agency to communicate with the tribal applicant (as well as state and local governments) to evaluate these applications. 25 C.F.R. § 151.10; *see also id.* § 151.12 (permitting BIA to "request any additional information . . . deemed necessary to reach a decision"). The Village was not deprived of due process here simply because the Nation was allowed to participate in this process with BIA.

And even if the law were on the Village's side, the Village would still have had to show, not only that the Regional Director engaged in impermissible ex parte communications, but also that those communications resulted in actual bias. *See, e.g., Menard v. EAA*, 548 F.3d 353, 360-61 (5th Cir. 2008) (rejecting claim that FAA orders were subverted by ex parte communications where plaintiffs had "not put forth a scintilla of evidence showing that bias or improper communications clouded the [agency's] judgment"). Many of the communications that the Village cites between BIA and the Nation were merely inquiries about the status of the applications. *See, e.g.,* Opening Br. at 20 (claiming that "the Oneida and BIA Division employees regularly communicate with one another regarding the status of fee-to-trust applications and the Division's accomplishments"); *id.* at 21-22 (stating that, "just days before the [Regional Director's] Decision was released, the Oneida representative inquired whether the notice of decisions for the Hobart properties had been signed and issued"). Such inquiries would not be impermissible even under the APA's stricter standards for formal adjudication. *See* 5 U.S.C. § 551(14) (excluding "requests for status reports" from the definition of "ex parte communication"); *id.* § 557(d)(1) (only prohibiting ex parte communications "relevant to the merits of the proceeding"). And while the Village cites other meetings and communications that might have been barred if this were a formal adjudication, nothing the Village cites shows that the Regional Director's interactions with the Nation improperly influenced her decision. *See Roberts County*, 51 IBIA at 49 (finding that an allegation of bias against a superintendent based on the superintendent's status as a tribal member and former tribal official was insufficient absent evidence that the superintendent's former service improperly influenced his decision). Speculation about the Regional Director's motives in approving these applications is not sufficient to meet the Village's burden of proof. *See Roberts County*, 51 IBIA at 49 n.8 ("Instead of evidence, the State simply speculates about the Superintendent's motives for approving the acquisitions."); *cf. Elec. Power Supply Ass'n v. Fed. Energy Regulatory Comm'n*, 391 F.3d 1255, 1259 (D.C. Cir. 2004) (holding that the key to determining if an ex parte communication is prohibited is "whether there is a possibility that the communication could affect the agency's decision in a contested on-the-record proceeding"). As such, we reject the Village's claim that it was denied due process because BIA engaged in impermissible ex parte communications with the Nation.

3. Conflict of Interest

Third, the Village argues that it was denied due process because the Midwest MOU created an impermissible conflict of interest. The Village alleges that, because the tribes participating in the Midwest MOU (including the Nation) were "paying the salaries of these Division employees," Opening Br. at 8, those BIA employees had to "do everything in [their] power to guarantee the land will be accepted into trust, or lose [their] job[s]," *id.* at

14; *see also* Reply Br. at 6 (arguing that the "preeminent problem" is that "the consortium tribes pay 100% of the salaries of the BIA employees who process these applications, and the employees will lose their jobs if they do not accept the parcels into trust"). The Village also contends that the Midwest MOU gave participating tribes significant power over personnel matters within the Division (including power over hiring and performance awards). *See* Opening Br. at 8-9. Due process, the Village contends, demands that this Remand Decision be vacated and remanded "to be decided by independent BIA employees whose jobs are not in jeopardy if they deny a fee-to-trust application." *Id.* at 8.

As discussed above in Section I.A, a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. at 136. A party is denied due process where an adjudicator has "a direct, personal, substantial, [and] pecuniary interest in reaching a conclusion against [that party] in [its] case." *Tumey*, 273 U.S. at 523 (holding that due process was violated where judges were only paid for convicting defendants); *see also Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (holding that due process was violated when elected judge heard a case against a corporation who had given him "campaign contributions in an extraordinary amount"). Unlike the Village's other allegations of bias, it need not show actual bias to prove a violation of due process under such circumstances, but only that the adjudicator had a pecuniary interest substantial enough that "the risk of unfairness is intolerably high." *Withrow*, 421 U.S. at 58. The Village bears the burden of proving facts that establish that the adjudicator here held such a disqualifying interest.

The Midwest MOU appears to have given Division employees some interest in having these trust applications resolved, although it is not clear whether the degree and nature of that interest would disqualify them from deciding the applications. On the one hand, Division employees did not have the kind of direct pecuniary interest in the resolution of these applications that the courts have found disqualifying: unlike the judge in *Tumey*, for example, they were not paid for each trust acquisition that was approved. *Tumey*, 273 U.S. at 531; *cf. Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (holding that administrative judges on licensing board had impermissible conflict of interest because they would inherit business if they suspended licenses of their competitors).

On the other hand, describing this funding mechanism as "reprogramming," Remand Decision at 22, does not change the fact that Division employees would likely lose their jobs if the tribes stop participating in the Midwest MOU (although apparently some might keep jobs at BIA at the expense of lower grade employees). *See* IG Report at 7, 11; Midwest MOU at 1 (stating that Division employees are hired "[t]hrough funds provided by participating tribes to supplement BIA staff"). The IG Report shows that Division employees under the former Pacific MOU worried that they would lose their jobs if tribes

stopped participating, IG Report at 9, and there is no reason to believe that Division employees hired under the Midwest MOU did not share those concerns.[22]

The Regional Director argues that there was no conflict of interest because the Midwest MOU was revised in light of the IG Report and "corrective actions" were taken. Remand Decision at 23-24. It does appear that the Midwest MOU was revised to limit the participating tribes' ability to "influence the selection, performance awards, and duties and responsibilities of the federal consortium staff," which the Inspector General found to be significant in creating a conflict of interest. *See* IG Report at 1. Notably, the Midwest MOU provided that "Federal employee's personnel rights are governed by Title 5 of the [United States Code]" and that "[s]tatutory rights and obligations will not be superseded by this Agreement." Midwest MOU at 3. In contrast to the former Pacific MOU, it also limited the role of the tribes in the hiring of Division staff. *Id.* ("It is agreed that the process for selecting staff for filling of the Division positions will follow federal personnel rules and regulations. The position descriptions, interviewing of prospective candidates, will be made by the MWRO. MWRO shall inform Advisory Council of selection criteria and the selected employees."). But none of these revisions changed the fact that the tribes control the purse strings from which the consortium staffs' salaries are dependent.

In any event, we need not decide whether the Midwest MOU disqualified Division employees from deciding these trust applications because Division employees did *not* decide these trust applications; the decisions were made by the Regional Director. While the Midwest MOU tasked Division employees with the preparation of draft "notices of determination" for the Regional Director's use, Midwest MOU at 5, those employees reported to the Regional Director's office, *id.*, and the Regional Director "alone . . . [made] all final decisions with respect to applications submitted pursuant to the Midwest MOU,"

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[22] Both the Village and BIA make loose claims about the Inspector General's report and the conclusions that it reached. In fact, the only conclusions reached in the IG Report were that the former Pacific MOU created "a patent perception of a conflict of interest," which the Inspector General's investigation found "to be, in fact, real" due to the participating tribes' ability to "influence the selection, performance awards, and duties and responsibilities of the federal consortium staff—coupled with the fact that the tribes control the purse strings from which the consortium staffs' salaries are dependent." IG Report at 1. The IG Report reaches no other conclusions. It does purport to summarize the conclusions set out in a "legal opinion rendered by the Office of the Solicitor" on the "legality of consortiums." IG Report at 1, 11-12. Because the Board does not have a copy of that legal opinion and cannot assess its reasoning, and because we review these legal issues *de novo*, we do not rely on the IG Report's characterization of the opinion of the Office of the Solicitor to decide this case and draw no inferences from the Inspector General's summary of it.

Remand Decision at 21; *see also id.* at 23 ("The Deputy Regional Director-Trust Services, a BIA employee outside the Division, reviews all application recommendations by Division staff before forwarding them to the decision maker for final determination. Final determinations are then made by the Regional Director."). The Regional Director has full authority to review decisions of her subordinates *de novo* and was not bound by the recommendations of Division employees. *Thurston County*, 56 IBIA at 304; *State of South Dakota*, 49 IBIA at 102. The Regional Director is not an employee of the Division, and her position was not funded by the Midwest MOU. She would not lose her job even if all tribes stopped participating in the Midwest MOU. As such, she was not subject to the conflict of interest that allegedly disqualified Division employees from adjudicating these applications.

Thus, even if Division employees had a conflict of interest here, the Regional Director's independent review cured that conflict of interest.[23] *Roberts County,* 51 IBIA at 49 ("Even if the State had shown possible bias on the part of the Superintendent, the State has provided no basis for us to conclude that the Regional Director's independent review of the applications did not cure any such bias."). The Village asks that these applications "be decided by independent BIA employees whose jobs are not in jeopardy if they deny a fee-to-trust application," Opening Br. at 8, but that has already happened here: the Regional Director is an "independent BIA employee," her job is "not in jeopardy if [she] den[ies] a fee-to-trust application," and she was the decisionmaker.

The Village goes on to argue that the Regional Director "merely rubber stamp[ed]" decisions already made by Division employees and never conducted her own independent review. *Id.* at 23. But the Village cites no evidence to support those allegations. Instead, the Village tries to reverse the burden of proof by arguing that "there is no evidence in the record that the [Regional Director] independently reviewed the decisions drafted by the

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[23] Similarly, under the National Environmental Protection Act (NEPA), a contractor may prepare an environmental impact statement (EIS) for a project and, even if that contractor has a conflict of interest, the conflict does not invalidate the EIS unless it is proven that the agency—as the ultimate decisionmaker—failed to engage in adequate independent oversight. *See, e.g., Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. Zinke*, 889 F.3d 584, 607-08 (9th Cir. 2018) (holding that contractor's conflict of interest did not invalidate EIS where plaintiffs had "not presented any evidence that the BIA failed to engage in adequate independent oversight over the preparation of either the DEIS or the FEIS"); *Ass'ns Working for Aurora's Residential Env't v. Colo. DOT*, 153 F.3d 1122, 1128-29 (10th Cir. 1998) (holding that, to the extent contractor had conflict of interest, it was cured by agency oversight). It should be noted that NEPA's restrictions on conflicts of interest are imposed by regulation and are not grounded in the Due Process Clause.

Division." *Id.* That is not sufficient because the Village bears the burden of proof here and was required to show that the Regional Director failed to conduct an independent review, a showing it has not made. *See Roberts County*, 51 IBIA at 50 (holding that appellant bore the burden of proving that Regional Director did not "independently and thoroughly evaluate the applications"); *Walch Logging Co. v. Assistant Portland Area Director (Economic Development)*, 11 IBIA 85, 112 (1983) (holding that "[a] legal presumption of regularity supports the official acts of public officers acting in their official capacities").

The record, moreover, does show that the Regional Director undertook her own independent review of these trust applications, the Village's comments, and the related notices of decision.[24] The comprehensiveness of the Regional Director's decision also belies the Village's claim that she undertook no independent review. *See Roberts County*, 51 IBIA at 50; *see also South Dakota*, 401 F. Supp. 2d at 1012 (holding that Regional Director's responses to objections raised by local governments was "substantial evidence that the Director conducted the proceedings in a fair, unbiased manner"). For all these reasons, we conclude that the Village was not denied due process here, even if the Midwest MOU created a conflict of interest for Division employees, because the Regional Director's independent review cured any such conflict.

C. Completion of Remand

In *Hobart I*, the Board directed the Regional Director to "address the Village's allegations of bias as well as the outcome of the IG investigation and its relevance, if any, to the Village's allegations." 57 IBIA at 16. The Regional Director did that, Remand

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[24] BIA certified that the administrative record—including the Village's comments—reflects all the documents utilized by the Regional Director in rendering the Remand Decision. *See* Memo from Regional Director to Board, June 2, 2017. Unsurprisingly, many of the documents related to the Regional Director's review of the draft notices of decision have been withheld as privileged (either under the deliberative process privilege or attorney-client privilege). The Board has not reviewed the contents of those withheld documents. Nonetheless, the descriptions of the documents set out in the privilege log (which was produced on all parties, including the Village) show that the Regional Director (and other non-consortium BIA and Solicitor's Office staff) reviewed the draft notices of decision. *See, e.g.,* AR Priv. Vol. 1, Tabs 4- 8, 12 (showing review of draft NODs by Field Solicitor's Office); AR Priv. Vol. 2, Tabs 14-15, 23 (same); AR Priv. Vol. 3, Tab 34 (showing review by BIA's Director of the draft notices of decision); *see also* Memorandum from Acting Regional Director Tammie Poitra to Field Solicitor, Twin Cities Field Office (Dec. 9, 2013) (AR Vol. 12, Tab 140) (asking Field Solicitor's Office for independent review of Village's bias claims).

Decision at 17-25, concluding that the IG Report "has no bearing on the Village's current bias claim" because it "found no instances of actual bias" and "centered on the terms of the Pacific MOU then in use, not the Midwest MOU," and because "the MOUs in effect at the time . . . have both long since expired and been replaced by restructured MOUs," *id.* at 20.

The Village disagrees with the Regional Director's conclusions. As discussed above, we have reviewed the Village's claims of bias and denial of due process *de novo* and reject those claims. The Village also argues, however, that the Regional Director failed to complete the remand ordered by the Board in *Hobart I* because she failed to grapple with the IG Report's findings. *See, e.g.,* Opening Br. at 16. This is simply untrue: the Regional Director discussed the IG Report and the Village's claims of bias at length in the Remand Decision. *See* Remand Decision at 17-25. And even if it were of "less than ideal clarity," her discussion is more than sufficient that, together with the record, her "path may reasonably be discerned" and her completion of the remand affirmed. *See, e.g., Wolf Point Community Organization v. Acting Rocky Mountain Regional Director*, 40 IBIA 131, 134 (2004) (noting that the Board will affirm a decision, even if it does not explain itself, if "the administrative record and the decision, read together, . . . show how BIA reached its conclusion"); *see also Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974) (holding that the courts will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned"). Nothing in our remand order in *Hobart I* required the Regional Director to analyze the IG Report more exhaustively, especially where she concluded that it was not relevant to her decision.

The Village also contends that the Regional Director failed to complete the remand because she reviewed only "a redacted, incomplete version of the report that did not contain any of the 19 attachments upon which the report was based."[25] Opening Br. at 12. Many of the redactions in the IG Report appear to be names (which were presumably redacted to protect the privacy of the interviewed employees). The Village has not explained why that information (or any other redacted information) would have made any difference to the Regional Director's analysis. Moreover, our order required the Regional Director to review "the outcome of the IG investigation," not the documents on which it was based. The Village has not shown that the Regional Director abused her discretion by relying on the redacted version of the IG Report or that such reliance was contrary to the Board's instructions on remand.

[25] The Regional Director explains that BIA did not obtain an unredacted copy of the IG Report because its disclosure "could only be made with the express written consent of the [Inspector General]." Remand Decision at 19 n.98.

D. Legality of the Midwest MOU

Finally, the Village argues that the Midwest MOU was "illegal" because it is inconsistent with the terms of both the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. § 5301 *et seq.*, and the Tribal Self-Governance Act (TSGA), 25 U.S.C. § 5361 *et seq.* Opening Br. at 24-25; *see also* Reply Br. at 12-13. We reject this claim for two reasons.

First, the Village has not shown that it has standing to bring this claim. Even if the Village were correct, and the reprogramming of funds authorized by the Midwest MOU was unlawful, it has not explained how its legally protected interests were harmed by that reprogramming. As discussed above, we have already concluded that the Midwest MOU did not violate the Village's right to due process. And even if BIA had been deprived of the funding provided by the consortium agreement, it still had funding to complete its review of these trust acquisitions eventually.

Importantly, the Village has not only failed to show that it has Article III standing to bring such a claim, but it has also failed to show that its interests fall within the zone of interests protected by these statutes. *See Preservation of Los Olivos (POLO) v. Pacific Regional Director*, 58 IBIA 278, 297-98 (2014). The purpose of these Acts is to support and assist Indian tribes in "the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities." 25 U.S.C. § 5302(b). Nothing in the Acts suggests that Congress meant to allow parties like the Village to bring suit to enforce the terms of these statutes simply because their economic interests might be indirectly affected by a project funded under the Acts. Nor is this a case where the Village's economic interests are "closely enough and often enough entwined with" decisions made under these Acts that parties like the Village have become "reasonable" and "predictable" challengers to such decisions. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224, 227 (2012). The Village simply has not shown that it is the proper party to challenge the legality of the Midwest MOU or BIA's reprogramming of funds under that consortium agreement. For these reasons, we conclude that the Village does not have standing to bring these claims.[26]

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[26] Similarly, the Village argues at length that the Midwest MOU violated the "annual funding agreements between the Oneida and the United States." Opening Br. at 26-28. The Village does not explain how it has standing to bring such a claim, and we conclude that it does not for the same reasons discussed in this section: because it cannot sue to vindicate the terms of an agreement to which it is not a party and which at most indirectly affects its interests.

Second, even if the Village had standing to bring these claims, we would still deny them because the Village has not shown that the Midwest MOU was unlawful. The Midwest MOU cites several provisions of law as "[l]egal authority." Midwest MOU at 1 (citing 25 U.S.C. § 123c, *id.* § 458cc(b)(3) (now codified at *id.* § 5363(b)(3)), and *id.* § 450j (now codified at *id.* § 5324)). Together, these provisions authorize the tribes to use tribal funds for many purposes (including the broad category of "expenditures for the benefit of Indians and Indian tribes," 25 U.S.C. § 123c), allow the tribes to enter into a range of "self-determination agreements," and permit the tribes to "redesign" "programs, services, functions, and activities . . . and reallocate funds for such program, services, functions, and activities," 25 U.S.C. § 5363(b)(3).

Given these provisions, it is not obvious why the Midwest MOU would be unlawful, and the Village has not presented any argument that persuades us that it was. It is certainly not sufficient, in light of these broad statutory authorizations, for the Village to argue that the Midwest MOU was unlawful simply because the Acts do not "expressly authorize the funding of a Division created for expediting fee-to-trust applications." Opening Br. at 24-25. The conclusions that the Village cites from the Solicitor's Office opinion on the Pacific MOU are also not sufficient—not only because we have those conclusions second-hand and stripped of their reasoning, as quoted in the IG Report—but also because the Solicitor's Office apparently concluded that these consortium MOUs were lawful. *See* IG Report at 11-12 (stating that the Solicitor's Office "determined that they 'do not believe that the consortiums violate the government-wide ethics rules or appropriations laws'" and that "the SOL opinion did not determine that the consortiums were 'directly inconsistent with [ISDEAA]'").

The single statutory argument that the Village makes also fails to carry its burden here. The Village claims that the Midwest MOU violated 25 U.S.C. § 5363(b)(2) because the "reprogramming of federal TPA funds for the purpose of processing fee-to-trust applications on behalf of certain tribes creates precisely the preference forbidden" by that provision of the statute. Opening Br. at 25. Section 5363(b)(2), however, merely states that "nothing *in this subsection* may be construed to provide any tribe with a preference with respect to the opportunity of the *tribe to administer* programs, services, functions, and activities" (emphases added). But Division employees are Federal employees compensated with reprogrammed funds, not tribal employees. And even assuming that the Midwest MOU created such a "preference" for the participating tribes (i.e., to expedite BIA's processing of their applications), this provision does not "forbid" such preferences; it merely states that Section 5363(b) does not itself create any preference. Thus, even if the Village had standing to bring these claims, we would still deny them because none of the Village's arguments show that the Midwest MOU was unlawful.

II. Section 151.10 Criteria and Compliance with Environmental Laws

The Board remanded these notices of decision for further consideration of three criteria set out in § 151.10: impact on tax rolls (§ 151.10(e)), jurisdictional problems and land use conflicts (§ 151.10(f)), and compliance with environmental laws (§ 151.10(h)). *See Hobart I*, 57 IBIA at 29-31. The Village now appeals the resulting remand decision, arguing that the Regional Director abused her discretion by failing to "properly consider" these criteria and asks the Board to vacate and remand the matter "to a neutral and independent decision-maker." *See* Reply Br. at 1. The Village also argues that the Regional Director violated various environmental laws, regulations, and agency guidance documents. Opening Br. at 43-56; Reply Br. at 23-28.

We disagree. The record and the Remand Decision show that the Regional Director considered the Village's comments on remand, and the Village's continued objections to the Remand Decision are not supported by the facts or the law. The Village's disagreement with the Regional Director's analysis of these acquisition criteria is not enough to show that the Regional Director erred here. Nor has the Village shown that the Regional Director violated any environmental laws.

A. Overview of § 151.10 Criteria

Through Section 5 of the Indian Reorganization Act (IRA), Congress conferred broad authority on the Secretary of the Interior to take land into trust for Indians. *See South Dakota v. United States DOI*, 423 F.3d 790, 797 (8th Cir. 2005). The only limitations that Congress imposed on that authority are that the land must be acquired for Indians, it must be acquired using authorized funds, and the acquisition must serve the goals identified in the Act's legislative history. *See id.*

That authority, here delegated to the Regional Director, is further constrained by the regulations adopted by the Department set out at 25 C.F.R. Part 151. For trust acquisitions that are "within or contiguous to an Indian reservation" and that are not mandatory, like the trust acquisitions at issue here, those regulations require the Regional Director to "consider" eight listed criteria before taking the land into trust. 25 C.F.R. § 151.10. The Regional Director need only "consider" these factors, however: there is "no requirement that [she] reach a particular conclusion with respect to each factor." *Roberts*, 51 IBIA at 46. "Nor must the factors be weighed or balanced in a particular way or exhaustively analyzed." *Id.* at 46.

Notably, nothing in the Act or these regulations prohibits the Regional Director from taking land into trust whatever her conclusions about these criteria. She is not required to "resolve" any "problems or issues" that the trust acquisition might create. *Id.* at

52. These criteria were introduced only "to insure that conflicting interests are *evaluated* before land is acquired in trust status." 45 Fed. Reg. 62035 (Sept. 18, 1980) (emphasis added). Thus, the Regional Director may take land into trust even if she concludes, for example, that doing so will create "jurisdictional problems," "potential conflicts of land use," or have a significant impact on the tax rolls of the State or its political subdivisions. *See* 25 C.F.R. § 151.10(e), (f).

To succeed on its claims here, the Village must show that the Regional Director erred, either by failing to consider one of the listed criteria or by reaching conclusions regarding those criteria that were "arbitrary and capricious" or otherwise unsupported by the administrative record. "Simple disagreement" with the Regional Director's conclusions cannot carry the Village's burden of proof. *Roberts*, 51 IBIA at 46.

B. § 151.10(e) – Impact on the Tax Rolls

On appeal, the Village raises three main objections to the Remand Decision's analysis of the impact of these trust acquisitions on the Village's tax rolls. First, the Village argues that the Remand Decision fails to address the cumulative impact of all of the Nation's pending applications for trust acquisitions. Second, the Village claims that the Remand Decision's tax calculations for fiscal year 2015 are wrong. Third, the Village argues that the Remand Decision fails to respond to the Village's comments. The Board is not persuaded by the Village's arguments.

1. Cumulative Tax Impacts

The Village argues that the Regional Director erred by failing to consider the cumulative tax impacts of all of the Nation's pending applications for trust acquisitions together. *See* Opening Br. at 30-31; Reply Br. at 18. The Village argues that this case is "exactly the type of situation" where cumulative tax impacts must be considered because the Nation's "stated goal" is "placing 100% of [the Village of] Hobart in trust." Opening Br. at 31; Reply Br. at 18 (citing *Roberts County*, 51 IBIA at 51 n.13). Because the Nation allegedly has pending applications to place over 100 parcels of land within the Village in trust, the Village contends that the Regional Director's decision not to analyze cumulative tax impacts here is "nonsensical." Opening Br. at 31.

As the Village notes, the Board has noted that BIA may be required to consider "the collective tax impact of simultaneous trust acquisitions—e.g., numerous simultaneous acquisitions which, collectively, would have a significant tax impact"—in "an appropriate case." *Roberts County,* 51 IBIA at 51-52 n.13. The Board, however, has drawn a distinction between the cumulative impacts of trust applications that are being decided simultaneously and the impacts of other applications that are merely pending before BIA (and that may or

may not ultimately be approved). *See Thurston County*, 56 IBIA at 312 n.20. We have rejected the argument that BIA must consider the cumulative effects of all pending trust applications. *Id.* ("[W]e reject the County's argument that the Regional Director must consider the cumulative impact of all fee-to-trust applications *pending* before BIA. These applications will be considered in due course by BIA and, if appropriate, BIA may then consider any cumulative impact based on, e.g., the tax loss from all applications decided simultaneously or previously in the same tax year.").

Requiring the Regional Director to determine the potential cumulative tax impacts of applications that have not been decided would result in a decision based not on the record, but on speculation about potential future effects that might never come to pass. The Board has repeatedly held that BIA is not required to consider speculation about potential future losses of revenue under this criteria.[27] *Shawano County*, 53 IBIA at 80 (BIA is only required to "consider the present impact on the tax rolls of a proposed trust acquisition"); *see also City of Eagle Butte, South Dakota v. Acting Great Plains Regional Director*, 49 IBIA 75, 82 (2009) ("The Regional Director . . . has no obligation to consider [the appellant's] speculation about what might happen in the future"). Contrary to the Village's claim that this "future tax loss is not speculative, but rather a real threat against the Village's survival as a community," Opening Br. at 35, such a cumulative analysis would require the Regional Director to speculate about each pending application and whether it will ultimately be approved or denied. Nothing in the regulations or our precedent requires that. For all these reasons, we conclude that the Regional Director was not required to consider the potential cumulative impacts of other pending (but not simultaneous) trust applications on the Village's tax rolls.[28]

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[27] The Regional Director also concluded that the Village's comments on the Wisconsin tax levy limit and its allegations concerning the Nation's efforts to "thwart" the Village's economic development plans were speculative, unsupported, and need not be considered. *See* Remand Decision at 8-9. The Village appears to have abandoned the latter argument on appeal. *See* Opening Br. at 30-35. With respect to the tax levy, the Village has not met its burden to show that the Regional Director erred in exercising her discretion, i.e., it has not shown that the concern is more than speculative.

[28] The Regional Director did consider the collective impact of the acquisition of the Hobart Parcels on the Village's tax rolls, as required by *Roberts County*, because her decisions to acquire those parcels were made simultaneously.

2. Tax Calculations

Next, the Village argues that the Remand Decision "erroneously calculates the tax loss for the Village for the year 2015." *Id.* at 31. According to the Village, the 2015 tax bills show that the Village was due $4,090.40 in taxes on the Hobart Parcels, but the Remand Decision undervalued those taxes by $92.50 (a difference of about 2%).[29] *Id.* at 31-32. Similarly, the Village argues that the Regional Director miscalculated the 2015 school district taxes, explaining that the Village collected $8,483.20 in taxes from the Hobart Parcels on behalf of the Pulaski Community School District and the West De Pere School District, which the Remand Decision incorrectly undervalued by $188.70 (again, a difference of about 2%). *Id.* at 32. The Regional Director does not dispute these errors, but contends they were harmless transcription errors and that her analysis of the tax losses would not have changed if "the proper figures [been] transcribed." Answer Br. at 24-25.

The Board concludes that these errors are harmless. The errors are small, and the Village does not argue that the Regional Director would have reached a different conclusion if not for the errors, does not allege that it was harmed by the errors, and does not allege that it was precluded from presenting colorable arguments by the errors. *See South Dakota*, 787 F. Supp. 2d at 997 (an error is more than harmless if it "precludes an interested party from presenting certain colorable arguments to the ultimate decision maker"). Most importantly, the record supports the Regional Director's explanation that these were merely transcription errors, *see* Taxes/Zoning Spreadsheet (AR Vol. 1, Tab 6) (showing improper transcriptions in work product), and that the accurate tax information is in the record and was before the Regional Director when she issued the Remand Decision, *see* 2015 Tax Bills (AR Vol. 2, Tab 22); Town, Village, and City Taxes 2015 (AR Vol. 1, Tab 7).

3. Failure to Address the Village's Comments

The Regional Director must give due consideration to all timely comments submitted by interested parties, but she need not "resolve" all objections raised in such comments to the commenter's satisfaction. *Mille Lacs County, Minnesota v. Acting Midwest Regional Director*, 62 IBIA 130, 137 (2016); *Desert Water Agency v. Acting Pacific Regional Director*, 59 IBIA 119, 127-28 (2014); *State of New York v. Acting Eastern Regional Director*, 58 IBIA 323, 329 (2014); *Jefferson County, Oregon, Board of Commissioners v. Northwest Regional Director*, 47 IBIA 187, 199-200 (2008). Here, the Village argues that the Regional Director failed to address the Village's comments on the impacts of these tax

[29] Specifically, the Remand Decision cites the taxes due on the DeRuyter property as $162.10, but the 2015 tax bills show that $254.60 was due, a discrepancy of $92.50. *Compare* Remand Decision at 6 *with* 2015 Tax Bills (AR Vol. 2, Tab 22).

losses. In particular, the Village contends that the Regional Director did not "directly" address the Village's duty to provide public services to these parcels with reduced funding and made "no meaningful analysis" of the Village's continuing obligation to provide fire protection services. Opening Br. at 33-34. The Village claims that the Regional Director dismissed its comments about road maintenance and repair without any "real review" and failed to provide evidence to support her conclusion that the Indian Reservation Road Inventory Program (IRR) would offset the Village's financial burden. *See id.* at 34. And the Village asserts that the Remand Decision "fails to recognize" that the loss of tax revenue to the school district will increase the financial burden on Village residents as student enrollment increases.[30] *See id.* at 35. But while the Village continues to disagree with the Regional Director's conclusions, it is clear from both the Remand Decision and the record that the Regional Director gave due consideration to the Village's comments.

a) Public Services

The Village argues that the Regional Director did "not directly address the Village's concerns related to the Village's obligation to continue to provide services with reduced funding." *Id.* at 33. But the Remand Decision does acknowledge the Village's comment that "it provides numerous services to those residing within the area to be acquired . . . which, if the land is taken into trust, it would have to perform with reduced funding." Remand Decision at 4. The Regional Director also recognized the absence of a service agreement between the Nation and the Village and reviewed the services provided by the Nation that may offset some of the Village's responsibilities. *See* Remand Decision at 7. Nothing in the principles of administrative law or Part 151 required the Regional Director to solve this potential problem or prohibited her from taking this land into trust even though doing so may impose some burdens on the Village. She was required to consider

[30] The Village also argues that the Regional Director abused her discretion by failing to address a statement in the original NODs that the benefits of the acquisition to the Nation outweigh the impacts on the Village. *See* Opening Br. at 33; Reply Br. at 19; *Hobart I*, 57 IBIA at 29 (finding that the Regional Director failed to provide any substance or context to the conclusory statement that she believed the impact of taking the parcels into trust would be outweighed by the economic or social benefits to be gained from the acquisition). The Regional Director was not required to explain or support this line of reasoning on remand because it does not appear in the Remand Decision and thus makes up no part of the basis for her decision here. The Regional Director was not required to address this issue by our remand order. *Hobart I*, 57 IBIA at 29-30 (noting that the Regional Director did not "discuss why she believed the impact on the Village . . . would be outweighed," but remanding because the Regional Director did not identify or discuss any of the Village's concerns regarding tax loss).

these issues and the Village's comments, and she did so. The Village's dissatisfaction with the result does not show that she violated the law or abused her discretion.

b) Fire Protection Services

The Regional Director also acknowledged the Village's comment that it was unlikely to enter into an agreement on fire protection services with the Nation in the near future, *see id.* at 7 & n.43, and thus "there is a possibility that emergency services provided by the Village, including fire protection, could go uncompensated," *id.* at 8. As the Regional Director noted, that is also true of other tax-exempt properties within the Village, such as churches and schools. *Id.* The Village continues to object, but, again, the Regional Director was only required to consider this potential problem, not fix it. The Village has not shown that she failed to consider it.

The Village also argues that the Regional Director was required to ask the Village for "specific information regarding the cost of fire protection" and failed to do so. Opening Br. at 34; *see also* Remand Decision at 8. But the Regional Director solicited additional comments from the Village, and the Village chose to rely largely on its previous comments and its briefs submitted to the Board in *Hobart I*. *See, e.g.*, Response to Supp. NOA (AR Vol. 13, Tab 142 at VOH04202). If the Village wanted the Regional Director to consider "specific information regarding the cost of fire protection," it should have submitted it then.[31] *See Thurston County*, 56 IBIA at 68 ("[I]t is arguably incumbent on the [appellant], which was informed of the remand by the Regional Director . . . to advise the Superintendent of any updated information it wished to submit.").

c) Road Maintenance

The Village argues that the Regional Director "dismissed, without any real review," its comments regarding its obligation to continue to provide road maintenance and repair services with reduced funding. Opening Br. at 34. But the Regional Director acknowledged those comments and found that the three roads identified by the Village "do not directly service any of the proposed acquisitions currently under consideration, but are only located near the Boyea property." Remand Decision at 8. Nonetheless, the Regional Director concluded that Federal funding through the Indian Reservation Road Inventory Program (IRR) (a Federal program that, among other things, funds the maintenance of public roads that provide access to Indian reservations and trust land) was available for

[31] We also note that the Village has not identified what information regarding the cost of fire protection services it would have presented if it had been given another opportunity to comment.

other nearby roadways and would "partially offset[] the Village's financial burden for road maintenance." *Id.*

The Village argues that the Regional Director failed to "provide . . . evidence to support [her] conclusion regarding BIA funding for maintenance of roads." Opening Br. at 34; Reply Br. at 14. But it is the Village's burden to show that the Regional Director failed to consider its comments or abused her discretion on appeal. The record shows that the Regional Director considered the estimated cost of road work and maintenance in the area and reviewed the directory of roads eligible for Federal funding near the Hobart Parcels. *See* Road Work Estimates (AR Vol. 5, Tab 49); Indian Reservation Road (IRR) Summary (AR Vol. 5, Tab 51). The Regional Director acknowledged the Village's concerns and considered whether other sources of funding might offset some of its road maintenance costs. That was enough to satisfy her duty to give due consideration to the Village's comments, *see Hobart I*, 57 IBIA at 13, and the Village's disagreement with her decision does not show that she erred.

d) Impact on School Funding

The Regional Director acknowledged the Village's comment that the "loss of tax revenue [for schools] will not be reflected in additional federal grants," but concluded that the Village had failed to explain how the loss of revenue for the school district would affect the Village. Remand Decision at 7. On appeal, the Village argues that the Regional Director failed to recognize that this loss of revenue could lead the schools to ask for more funding from the Village, possibly leading to "increased tax burdens" on Village residents. Opening Br. at 35. The Regional Director, however, was not required to infer or speculate about an indirect harm that the Village itself did not explicitly identify in its own comments. The Village cannot show that the Regional Director erred simply because she did not address potential harms that the Village itself did not raise in its own comments.

4. Conclusion

The Regional Director considered the impacts of these trust acquisitions on the Village's tax rolls and gave due consideration to the comments submitted by the Village. The Village disagrees with her conclusions, but has not shown that she failed to consider the Village's comments or otherwise erred.

C. § 151.10(f) – Jurisdictional Problems and Conflicts of Land Use

The Village alleges that the Regional Director failed to consider its comments on jurisdictional problems and potential conflicts of land use (the criterion set out in § 151.10(f)) "in any meaningful manner (apart from contradictory, conclusory

statements)." Opening Br. at 36. Specifically, the Village argues that these trust acquisitions will (1) impair its stormwater management programs, (2) create a "checkboard pattern of zoning" that will lead to conflicts of land use, and (3) cause jurisdictional conflicts over the provision of emergency services. *See* Opening Br. at 35-43; Reply Br. at 20-22. The Village argues that the Regional Director failed to consider these issues, and that, even if she did, "it is not enough for [her] to simply acknowledge a jurisdictional problem"; rather, she must "respond to that concern, explain why it was not warranted, or otherwise address it." Opening Br. at 36 (citing *Jefferson County*, 47 IBIA at 200).

As discussed above in Section II.A, § 151.10 only requires the Regional Director to consider potential jurisdictional problems and conflicts of land use that may arise from these trust acquisitions. She is not required to resolve or prevent those problems, nor is she required to weigh those problems against the potential benefits of the trust acquisition to the tribe. *See State of New York*, 58 IBIA at 346; *Roberts County*, 51 IBIA at 52. The law does not prohibit her from taking this land into trust even if doing so would cause all of the problems identified by the Village.

We conclude that the Regional Director's consideration of the Village's comments regarding jurisdictional problems and potential conflicts of land use was consistent with her obligations under § 151.10(f), and the Village has not shown that she erred.

1. Stormwater Management

The Village argues that the Regional Director "noted the stormwater management issue in her [Remand] Decision," but "failed to recognize" that "the current state of affairs between the Village and the Oneida" will worsen jurisdictional problems related to stormwater management if the Hobart Parcels are taken into trust. Opening Br. at 37. In *Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, the Seventh Circuit Court of Appeals found that the Village could no longer impose stormwater management fees on the Nation's trust lands. 732 F.3d 837, 842 (7th Cir. 2013). The Village argues that the trust acquisitions at issue here will "hamper" its efforts to "improve stormwater runoff" because (1) they will contribute to a "checkerboard pattern" of jurisdiction alternating between the Village and the Nation, (2) stormwater does not recognize these jurisdictional boundaries (i.e., it "does not flow in a checkerboard pattern"), and (3) the Village can no longer impose its stormwater management program on the Nation after the Seventh Circuit's decision. Opening Br. at 38-39. The Village argues that the Regional Director ignored this "real jurisdictional conflict." *Id.* at 38.

But the Regional Director did not ignore this issue. To the contrary, she summarized the Village's comments and objections as well as the Seventh Circuit's decision and its effects. Remand Decision at 11-12. She never denied that these issues may

complicate the Village's efforts to manage stormwater. She simply concluded that the "jurisdictional problem" has been resolved because jurisdiction is now clear: as a result of the Seventh Circuit's decision and the State of Wisconsin's disclaimer of authority to regulate stormwater on Indian lands, the Village and the Nation must "implement separate stormwater management programs" (although presumably they could reach an agreement to work together on this issue). *Id.* at 12. The Regional Director considered the Village's comments, and the fact that she characterized the issue differently than the Village does not show that she erred. And, again, she was only required to consider this problem, not solve it.

2. Zoning and Land Use Conflicts

The Village also argues that the Regional Director "completely ignore[d]" the Village's concerns about the "checkerboard pattern of zoning and land use" that could result from the acquisition of the Hobart Parcels. Opening Br. at 39. According to the Village, the Regional Director "fail[ed] to provide any meaningful analysis" of conflicts in zoning and relied on "unsubstantiated" and "erroneous" conclusions regarding the consistency of the Nation's and the Village's intended uses for these parcels. *See id.*

The Regional Director did not "completely ignore" the Village's comments. She compared and contrasted the Village's and the Nation's zoning and proposed uses for these properties. She found that only three parcels had inconsistent zoning and concluded that there was "a low risk for conflicting land use" for two of those three parcels. Remand Decision at 9. She found that the remaining parcel—the Gerbers parcel—did have "a potential for land use conflict," but that conflict was not "unique" and the Village itself had "created the same situation unilaterally by placing agricultural and industrial zoning districts immediately adjacent to one another." *Id.* at 9-10. The Village objects that the Regional Director failed to consider that taking the Gerbers parcel into trust would create "different zoning designations *within* a single zone," Opening Br. at 40 (emphasis in original), but, in fact, she explicitly noted that the Gerbers parcel is located "*within* and adjacent to land zoned by the Village for a commercial industrial park." Remand Decision at 9 (emphasis added).

Again, as discussed in Section II.A, the law only requires the Regional Director to consider these jurisdictional problems and potential conflicts of land use; it does not require her to resolve them, and it does not bar her from taking land into trust even if doing so would create such problems or conflicts. *See Roberts County*, 51 IBIA at 52. She was not required to "reconcile the different zoning designations," as the Village suggests. Opening Br. at 40. The Regional Director plainly considered these issues, and the Village has not shown that her conclusions were "arbitrary and capricious" or unsupported by the record. Finally, to the extent that the Village argues that the Regional Director failed to follow the

Board's "order[] . . . to provide more detail" in her consideration of § 151.10(f), *see* Opening Br. at 41, we note that the Board did not decide that the Notices of Decision failed to address this criteria, *see Hobart I*, 57 IBIA at 30, but were remanded instead because they failed to address the stormwater management issues and so that the Regional Director could "address [the zoning issues] in more detail to make clear they have been considered," *id.* The Regional Director's analysis in the Remand Decision complies with that order.

3. Emergency Services

The Village argues that the Regional Director failed to "properly consider" that these trust acquisitions will harm its ability to provide emergency services because they will contribute to the "checkerboard pattern" of alternating jurisdiction which complicates, for example, police responses. *See* Opening Br. at 41-43; Reply Br. at 21-22. Again, though, the Regional Director explicitly acknowledged these issues and responded to the Village's comments. Remand Decision at 12. She concluded that a cooperative services agreement is "the most feasible solution." *Id.* And while the Village contends that no such agreement is "anticipated," due to its ongoing conflict with the Nation, the Regional Director also recognized that conflict and acknowledged that the "inability of the Village and Nation to execute an intergovernmental service agreement contributes to the jurisdictional conflict that the Village complains of." *Id.*

Again, this is all that was required. The Regional Director heard the Village's comments and considered these potential jurisdictional problems. She was not required to resolve them and was not required to balance the factors in any particular way. She was not prohibited from taking this land into trust even if it may affect the Village's ability to provide emergency services. The Village has not shown that the Regional Director erred.

D. Compliance with Environmental Laws and § 151.10(h)

The Village claims that the Regional Director ignored its environmental concerns and relied on "inconsistent and outdated environmental information." Opening Br. at 47. As a consequence, the Village argues that the Regional Director (1) failed to complete the remand ordered by the Board; (2) violated various environmental laws, regulations, and binding agency guidance documents (including NEPA, the NHPA, and the ESA); and (3) did not properly consider the potential environmental effects of this trust acquisition, as the Village alleges is required by § 151.10(h). We conclude that, even assuming that the Village has standing to bring these claims, it has not shown that the Regional Director failed to complete the Board's remand, violated any environmental laws, or erred in her consideration of the criterion set out in § 151.10(h).

1. Remand on Environmental Issues

First, the Village again claims that the Regional Director failed to complete the remand ordered in *Hobart I*, here because it alleges that the Remand Decision does not address "any of the environmental concerns the Village raised in its prior . . . briefs." *See* Opening Br. at 47-48. In fact, the Remand Decision addresses the Village's environmental concerns at length. *See* Remand Decision at 12-17. What the Village seems to be arguing is that the Regional Director failed to complete the remand because she treated many of these environmental issues generally and did not address each one specifically. For example, the Village argues that the presence of a "major pipe line and three sets of high voltage power lines located near the Lahay property as well as one underground storage tank upslope of the Lahay property" triggered the need for a more detailed environmental site assessment. Opening Br. at 48. The Regional Director provided a general response to the Village's argument that more detailed site assessments were needed, but did not specifically address the pipeline or power lines or many of the other specific environmental conditions identified by the Village. *See, e.g.,* Remand Decision at 15 (summarizing the Village's concern as: "[t]he Phase I ESA's were deficient . . . because they identified environmental concerns nearby (e.g., an underground storage tank 0.2 miles from the Lahay property), yet no Phase II studies were completed").

The Regional Director argues that she did complete the remand because, "instead of addressing and refuting each particularized claim, [she] addressed the issue at [the] heart of each claim." Answer Br. at 48. We agree. Nothing in our remand order or the principles of administrative law required the Regional Director to discuss each of these alleged environmental issues separately or prohibited her from considering them collectively where appropriate. It is clear from the Remand Decision that the Regional Director did consider these issues. *See* Remand Decision at 12-17; *see State of South Dakota v. Acting Great Plains Regional Director*, 63 IBIA 179, 180 (2016) ("BIA's consideration of comments and objections, individually or collectively, must be demonstrated in the decision or the record."). The Village's briefs from its last appeal are also in the record and thus were part of the basis for the Regional Director's Remand Decision. *See, e.g.,* VOH Opening Br. (Lahay) (AR Vol. 15, Tab 162); VOH Opening Br. (Buck, Catlin, Calaway, DeRuyter) (AR Vols. 16-17, Tab 168). The Village has not shown that the Regional Director failed to complete this remand simply because she did not specifically and explicitly address, for example, "three sets of high voltage power lines located near the Lahay property." *See* Opening Br. at 48.

2. Environmental Laws, Regulations, and Guidance

a) NEPA

Second, the Village argues that the Regional Director violated NEPA. Opening Br. at 50-54; Reply Br. at 24-26. BIA must comply with NEPA before approving a trust acquisition. NEPA does not prohibit an agency from taking any action, even if it will harm the environment, but it does require the agency to be fully apprised of the likely environmental impacts of its action. *See, generally*, *Voices for Rural Living v. Acting Pacific Regional Director*, 49 IBIA 222, 239 (2009). To ensure that, NEPA requires all Federal agencies to prepare a detailed "environmental impact statement" (EIS) if they are considering taking an action that may "significantly affect[] the quality of the human environment." 42 U.S.C. § 4332(C). Where an agency concludes that its action will not "significantly affect the quality of the human environment," however, it is not required to prepare an EIS and may comply with NEPA by preparing a less-comprehensive "environmental assessment" (EA) and reaching a "finding of no significant impact" (FONSI). 40 C.F.R. §§ 1501.5, 1501.6. Alternatively, NEPA also allows agencies to "categorically exclude" whole classes of actions from further NEPA review where they do not "individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1501.4; *id.* § 1508.4.

Here, the Regional Director applied a "categorical exclusion" to these trust acquisitions because she concluded that they would not result in any significant change in land use (and thus she completed her NEPA review without preparing an EA or EIS). Remand Decision at 14. The Village argues that these trust acquisitions were not eligible for a categorical exclusion because they will, in fact, cause changes in land use. *See* Opening Br. at 51. The Village also argues that BIA failed to comply with Departmental guidance because it did not consult with local officials on those effects. *See id.* at 54-55.

(1) Standing

As a threshold matter, the Village has not shown that it has standing to challenge the Regional Director's NEPA compliance. An appellant must demonstrate that it has standing to have a right to appeal to the Board. *See* 25 C.F.R. § 2.2 (2022) (definitions of "Appellant" and "Interested party");[32] 43 C.F.R. § 4.331 (Who may appeal); *County of Santa Barbara, California v. Pacific Regional Director*, 65 IBIA 204, 211 (2018). An

[32] The Board's regulations incorporate by reference the definitions in 25 C.F.R. § 2.2 (2022). *See* 43 C.F.R. § 4.330(a). The 25 C.F.R. Part 2 regulations were amended effective September 8, 2023. 88 Fed. Reg. 53774.

appellant must demonstrate standing for each of its claims. 65 IBIA at 211; *Thompson v. Great Plains Regional Director*, 58 IBIA 240, 241 (2014); *County of Sauk, Wisconsin v. Midwest Regional Director*, 45 IBIA 201, 218 (2007), *aff'd sub nom. Sauk County v. U.S. Dep't of the Interior*, No. 07-543, 2008 U.S. Dist. LEXIS 42552 (W.D. Wis. May 29, 2008). To evaluate standing, the Board applies the elements of constitutional standing articulated by the Federal courts. *Santa Barbara*, 65 IBIA at 211 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The elements of constitutional standing require an appellant to demonstrate 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 causally connected with or fairly traceable to the challenged action; and (3) the injury will likely be redressed by a favorable decision. *See Lujan*, 504 U.S. at 560-61; *POLO*, 58 IBIA at 296-97. These standards may be relaxed when an appellant asserts a "procedural" injury, such as a claim that an agency has failed to comply with the procedures required by NEPA. *Arizona State Land Department v. Western Regional Director*, 43 IBIA 158, 169 n.14 (2006) (emphasis omitted) (quoting *Lujan*, 504 U.S. at 573 n.7).

In addition to the constitutional elements of standing, the Board also applies the principle of "prudential standing": An appellant must show that "the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Ass'n. of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970); *see POLO*, 58 IBIA at 297-98; *County of Sauk*, 45 IBIA at 219. The zone of interests test is "not meant to be especially demanding." *Clarke v. Sec. Indus. Ass'n.*, 479 U.S. 388, 399 (1987).

Here, while standing may be somewhat relaxed for procedural claims brought under NEPA, the Village was still required to show that these trust acquisitions had some potential to harm its environmental interests. The Village's economic interests do not give it standing to bring a NEPA claim because they do not fall within the "zone of interests" that NEPA is meant to protect. *See Ass'n. of Data Processing Serv. Orgs., Inc.*, 397 U.S. at 153; *see also Voices for Rural Living*, 49 IBIA at 237. The Village's recitation of a list of alleged environmental hazards on these parcels (e.g., "used tires, waste piles, machinery and used drums on the Calaway property," Opening Br. at 51) does not demonstrate standing because, again, the Village has not alleged that these hazards will harm its environmental interests. Moreover, it is not enough for the Village to show that environmental hazards may exist on these parcels; to demonstrate standing, it had to show that BIA's acquisition of these lands in trust would somehow cause those hazards to harm the Village's environmental interests. The Village's briefs and notice of appeal contain only vague allegations of environmental harm. *See, e.g.,* Notice of Appeal at 4 ("The placement of such a substantial amount of land into trust will have serious detrimental, social, economic and environmental [e]ffects on the local community"). In any event, even assuming that the

Village has standing to bring these NEPA claims, we conclude for the reasons discussed below that it has not shown that the Regional Director violated NEPA.

(2) Categorical Exclusion

Where there is a "category of actions" that "do not individually or cumulatively have a significant effect on the human environment," a Federal agency may adopt a "categorical exclusion" that excludes such actions from further NEPA review (and thus no EA or EIS need be prepared). 40 C.F.R. § 1508.4. BIA has adopted a categorical exclusion for "[a]pprovals or grants of conveyances and other transfers of interests in land where no change in land use is planned." 516 DM 10.5(I). The Board has consistently affirmed the application of this categorical exclusion to trust acquisitions where there is no anticipated change in land use. *See, e.g.*, *Benewah County, Idaho v. Northwest Regional Director*, 55 IBIA 281, 297-98 (2012); *Thurston County*, 56 IBIA at 297; *State of New York*, 58 IBIA at 349-350. BIA applied that categorical exclusion here to exclude these trust acquisitions from further NEPA review (and did not prepare an EA or EIS). Remand Decision at 14.

The Village makes two arguments challenging this use of the categorical exclusion. First, it argues that the exclusion cannot be applied here because the use of these lands will change once they are taken into trust. Opening Br. at 51. But as evidence of those alleged changes, the Village cites only certain slight differences in zoning. *Id.* (referring back to *id.* at 39-41). A change in zoning does not necessarily mean that there will be a change in land use, and, in fact, the Nation "has not proposed a change in use for any of the subject properties." Remand Decision at 10. It is certainly possible that some uses will change after the trust acquisition, but the Regional Director was not required to speculate about possible future land uses.[33] *See City of Yreka, California v. Pacific Regional Director*, 51 IBIA 287, 297 (2010), *aff'd, City of Yreka v. Salazar*, No. 10-1734, 2011 WL 2433660 (E.D. Cal. June 14, 2011). By its own terms, this categorical exclusion may be applied as long as no change in land use is "planned," and no change is planned here.

Second, the Village argues that "extraordinary circumstances" prevented the use of this categorical exclusion. *See* Reply Br. at 25. NEPA's regulations require categorical exclusions to include a "safety valve" that compels further environmental review of an

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[33] In addition, the Village's argument may be barred by the law of the case because, in *Hobart I*, the Board affirmed the Regional Director's consideration of the "purposes for which the land will be used" (25 C.F.R. § 151.10(c)), in part, on the grounds that the Nation's "intended uses and purposes for [these] lands . . . will remain unchanged." 57 IBIA at 27; *see Estate of Richard Lucero*, 1 IBIA 46, 54 (1970) (discussing the "law of the case" rule).

action, even if it would normally be excluded, if that action may have a significant environmental effect due to "extraordinary circumstances." 43 C.F.R. §§ 46.205(c), 46.215 (listing criteria for such extraordinary circumstances); *see also* Council on Environmental Quality, Final Guidance for Federal Departments and Agencies on Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act, 75 Fed. Reg. 75628, 75629-30 (Dec. 6, 2010). The Village, however, fails to make a case that any such extraordinary circumstances existed here. Instead, it lists the extraordinary circumstances set out in NEPA's regulations and argues that they "may exist." Reply Br. at 25. Arguing that "extraordinary circumstances" "may" exist is not enough to carry the Village's burden of proof, and it cannot reverse that burden of proof by demanding that the Regional Director prove that extraordinary circumstances do not exist. *See id.* To prevail on these claims, the Village had to show that the Regional Director erred by applying this categorical exclusion, and it has failed to make that showing.

b) NHPA and ESA Compliance

The Village also argues that the Regional Director used outdated information to comply with the National Historic Preservation Act (NHPA) and that there is nothing in the record or the Remand Decision to show what the Regional Director considered in making the determination that no further compliance with the NHPA was necessary. Opening Br. at 49-50. The Village has not demonstrated that it has standing to bring these NHPA claims. It does not allege any injury to its own legally protected interests from these alleged violations of the NHPA. It has not even argued that the Regional Director's determination was in error or that these trust acquisitions would have a detrimental effect on any historic property. *See id.*; Reply Br. at 23-25. As such, we deny these claims for lack of standing. And even if we considered these claims, we would still deny them because the Village has failed to show that the Regional Director violated the NHPA.

Similarly, the Village argues that the Regional Director violated the Endangered Species Act (ESA) because she relied on "outdated determinations" and failed "to provide any analysis of the threatened species" that the FWS identified as living within the boundaries of the reservation. *See* Opening Br. at 50. The Village also objects that BIA did not follow up with the FWS after 12 months (as that agency recommended) to determine if the information remained current. *Id.* But again, the Village has not explained how these alleged violations of the ESA have injured its own legally protected interests. Moreover, BIA determined that these trust acquisitions would have "no effect" on ESA-listed species, and the FWS concurred in that determination. Letter from Fasbender, Field Supervisor, USFWS to Flowers, Oneida Nation (Mar. 14, 2016) (AR Vol. 6, Tab 54) (stating that "the Service would concur that these transactions are appropriate to document as a 'no effect'"). The Village does not argue that these trust acquisitions will affect listed species or that BIA's "no effect" determination or the FWS's concurrence were in error. As such, we hold that

the Village lacks standing to bring an ESA claim against BIA and that, even if it did, it has failed to prove any violation of the ESA or that the Regional Director erred in her analysis.

c) 602 DM 2 – Hazardous Substance Determination

The Village also argues that the environmental site assessments that BIA prepared for these parcels failed to comply with the requirements set out in binding agency guidance in the Departmental Manual (at 602 DM 2) and in an Environmental Compliance Memorandum (ECM) (ECM 10-2). Opening Br. at 46-47, 52-54; Reply Br. at 25-28. Specifically, the Village claims that these assessments are defective because they did not recommend further environmental review, BIA failed to interview local government officials when preparing them, and they were allegedly not updated after the Board remanded the Regional Director's original decision. Opening Br. at 46-47, 52-54; Reply Br. at 25-28.

Again, the Village has not demonstrated standing to bring these claims. The purpose of the cited provisions of the Departmental Manual and the Environmental Compliance Memorandum is to protect the Department—not the Village—from environmental liability. *See* 602 DM 2.1 (stating that its purpose is to "prescribe[] Departmental policy, responsibilities, and requirements regarding determinations of the potential to expose the Department . . . to liabilities and costs of remediation related to the release or threatened release of hazardous substances"); ECM 10-2 at 1 (stating that its purpose is to "minimize environmental liability by not acquiring contaminated real property"). In this appeal, the Village must defend its own interests, not the Department's. *See, e.g., Cheyenne River Sioux Tribe v. Acting Great Plains Regional Director*, 41 IBIA 308, 311 (2005) (a party must assert its own rights and interests, and cannot rest its claim of relief upon the rights or interests of others). As discussed above in Section II.D.2(a)(1), the Village has not clearly alleged that these trust acquisitions will harm its environmental interests, much less that its environmental interests will somehow be harmed by the agency's alleged failure to properly complete these site assessments. Thus, the Village has failed to show that it has standing to bring these claims.

And even if the Village had standing, we would still deny these claims. For example, the Village argues that BIA must prepare a more comprehensive (Phase II) environmental site assessment for the Gerbers property because the original assessment identified "unknown containers on the property" and "there is still no evidence . . . that those containers have been removed or what hazards may be present." Opening Br. at 52. BIA, however, considered this issue and concluded that these containers—and the other environmental issues identified by the Village—posed minimal environmental concerns. Phase I ESA (Boyea), Apr. 27, 2016 (AR Vol. 5, Tab 36 at VOH 1388). The Village's argument—that this land cannot be taken into trust as long as there is any unresolved

environmental concern, even if it has been reviewed and found to be insignificant—finds no support in the law, and we reject it.

d) Consultation Under 516 DM 1.6

Next, the Village argues that the Regional Director erred because she "did not consult or coordinate with the Village on any environmental-related concerns," which the Village claims was required by two provisions set out in the Department of the Interior's Departmental Manual. Opening Br. at 54-55 (citing 516 DM 1.6(A)(1) & (C)(1)). Those provisions require certain Departmental officials to "consult, coordinate, and cooperate" with State, local, and tribal governments on the potential environmental effects of the Department's "plans and programs," as well as on the plans and programs of State, local, and tribal governments. 516 DM 1.6(A)(1) & (C)(1).

These provisions do not apply here. They only require consultation when the Department is "planning or implementing Departmental plans and programs" (or when State, local, or tribal governments are planning or implementing their own plans and programs), and the Regional Director's approval of these trust acquisitions is not a "plan or program." *See* 516 D.M. 1.6(A)("Departmental Plans and Programs"), (C) ("Plans and Programs of Other Agencies and Organizations").

Even if they did apply, the Village has not shown that the Regional Director violated these requirements because she did attempt to consult with the Village: the supplemental notices of application, mailed to the Village on August 6, 2013, expressly asked the Village to "articulate its specific environmental concerns for BIA's consideration." Supplemental NOA at 2. In response, the Village chose to stand "by its previously submitted comments, objections, and briefing on these issues." Response to Supp. NOA at 3. It cannot now be heard to complain that BIA refused to consult with it.

3. § 151.10(h) – Environmental Compliance

Next, the Village argues that § 151.10(h) required BIA to consider the potential environmental effects of this trust acquisition and that the Regional Director failed to do so. Opening Br. at 47-49; Reply Br. at 24. Section 151.10(h) requires the Regional Director to consider "[t]he extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, [NEPA] Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations." 25 C.F.R. § 151.10(h). The Village claims that the Regional Director violated this requirement because "she failed to properly consider environmental concerns" and "relied upon inconsistent and outdated environmental information." Reply Br. at 23; Opening Br.

at 47-49. The Village lists nine environmental concerns that the Regional Director allegedly ignored. *See* Opening Br. at 48.

As discussed above, we have already reviewed the merits of the Village's environmental claims and concluded that it has not shown that the Regional Director violated 516 DM 6, appendix 4 or 602 DM 2 (or any environmental laws or that she failed to complete the remand ordered by the Board). The Village does not allege, much less prove, that the Regional Director failed to consider the criterion actually set out in § 151.10(h); namely, the extent to which the Nation provided the information needed to comply with the provisions of 516 DM 6, appendix 4, and 602 DM 2. As such, we reject the Village's claims that the Regional Director did not properly consider the factor in § 151.10(h).

III. Procedure on Remand

Third and finally, the Village argues that the process that the Regional Director used to reach this Remand Decision was defective. The Village contends that, because the Board vacated the original NODs in part, the Nation was required to start the whole process over again by submitting new applications for these trust acquisitions. Opening Br. at 56; Reply Br. at 28. But nothing in the Board's decision in *Hobart I* required the Nation or BIA to start over; to the contrary, the Board affirmed the original NODs in part and only remanded certain issues to the Regional Director. Requiring the Nation to submit new applications now would circumvent the Board's decision. Moreover, the Village points to no authority, and we have found none, that supports its argument: the Board has never required BIA to start the trust acquisition process over, with a new application, simply because some aspects of a decision were remanded. Nor is it "contrary to due process to allow judges and administrators who have had their initial decisions reversed on appeal to confront and decide the same questions a second time around"; rather, it is fundamental to our legal system. *Withrow*, 421 U.S. at 56-57.

The Village also argues that the Regional Director should have solicited updated comments from it throughout the remand proceedings and cites *Okanogan County, Washington v. Acting Portland Area Director*, 30 IBIA 42 (1996), for the proposition that the Board has "vacated decisions for the BIA's failure to solicit or request additional information after a significant passage of time." Reply Br. at 28. But *Okanogan County* is inapposite here because the Regional Director did ask the Village to supplement and update its comments. *See* Supplemental NOAs (AR Vols. 7 & 8, Tabs 81-88). In response, the Village submitted standardized comments for each property that focused on summarizing the issues remanded by the Board and stated that "the Village stands by its previously submitted comments, objections, and briefing on these issues." *See* Response to Supp. NOA at 2-3. Because the Village chose not to submit whatever updated information it now

believes was relevant, it cannot complain that the Regional Director did not solicit its comments.

We conclude that the Village has not shown that the Regional Director made any procedural errors that would require vacatur of the Remand Decision.[34]

Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the decision of January 19, 2017.

I concur:

JAMES MAYSONETT

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Date: 2023.09.21 13:32:03 -04'00'

James A. Maysonett
Administrative Judge

Thomas A. Blaser
Chief Administrative Judge

[34] The Village attempts to incorporate all of its previous arguments by reference to "preserv[e] [those] arguments for further appeal." *See* Opening Br. at 57. This is not sufficient; on appeal, an appellant must show error in the decision being appealed and making that showing requires more than a cursory incorporation by reference. *See Crest-Dehesa-Granite Hills-Harbison Canyon Subregional Planning Group v. Acting Pacific Regional Director*, 61 IBIA 208, 217 (2015). We reject these arguments and any other remaining arguments made by the Village that we have not already explicitly addressed above.

Village of Hobart, Wisconsin v.
Acting Midwest Regional Director,
Bureau of Indian Affairs
Docket No. IBIA 17-054
Order Affirming Decision
Issued September 21, 2023
69 IBIA 84

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EXHIBIT B

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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VILLAGE OF HOBART, WISCONSIN, Appellant, v. ACTING MIDWEST REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	Order Affirming in Part and Vacating in Part, and Remanding Docket Nos. IBIA 10-091 10-092 11-045
VILLAGE OF HOBART, WISCONSIN, Appellant, v. MIDWEST REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	Docket Nos. IBIA 10-107 10-131 11-002 May 9, 2013

The Village of Hobart, Wisconsin (Village), appeals to the Board of Indian Appeals (Board) from six Notices of Decision (NODs) issued by the Midwest Regional Director and Acting Midwest Regional Director (Regional Director[1]), Bureau of Indian Affairs (BIA), accepting a total of eight properties—consisting of 21 parcels and 499.022 acres—into trust on behalf of the Oneida Tribe of Indians of Wisconsin (Tribe). We consolidate

[1] Because all six NODs were issued under the authority of the Midwest Regional Director, we will refer in our decision to the Acting Midwest Regional Director and the Midwest Regional Director as "Regional Director."

these six appeals for purposes of our decision today,[2] and we affirm in part, vacate in part, and remand each of the NODs to the Regional Director. With the exception of the Village's bias claim, which we leave for the Regional Director to consider in the first instance on remand, we reject the Village's procedural challenges to the Tribe's fee-to-trust applications and we do not address the Village's constitutional challenges, over which we lack jurisdiction. We affirm the Regional Director's decisions as to her authority to accept land into trust on behalf of the Tribe under the Indian Reorganization Act (IRA), 25 U.S.C. § 465, and her consideration of the Tribe's need for the land, the Tribe's purposes for and uses of the land, and BIA's ability to absorb any additional responsibilities (25 C.F.R. § 151.10(a), (b), (c), & (g)). However, because the Regional Director failed to address certain information in the record and objections presented by the Village to the proposed trust acquisitions concerning tax loss, potential land use conflicts, and jurisdictional problems, we vacate the remainder of her decisions and remand these matters to her so that the Regional Director may give those the consideration that is due as well as consider the Village's arguments with respect to environmental concerns (25 C.F.R. § 151.10(e), (f), & (h) (NEPA[3])).

Background

I. Procedural Background

On April 12, 2006, the Tribe's Business Committee enacted multiple resolutions requesting BIA to accept into trust certain tracts of fee land owned by the Tribe. The following year, the Tribe submitted a total of 56 fee-to-trust applications to BIA.[4] Here, we review six resulting NODs that approved the fee-to-trust applications for eight properties consisting of 21 parcels of land with a combined acreage of 499.022.[5] Each of

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[2] The Board previously consolidated Docket Nos. IBIA 10-091, 10-092, and 10-107 and later consolidated Docket Nos. IBIA 10-131 and 11-002. *See* Orders Granting Motions to Consolidate, Docket Nos. 10-131, 11-002, Oct. 26, 2010, and Docket Nos. IBIA 10-091, 10-092, 10-107, Aug. 31, 2010; and Order Consolidating Appeals, Docket Nos. IBIA 10-091, 10-092, May 19, 2010.

[3] National Environmental Policy Act, 42 U.S.C. §§ 4321-4335.

[4] These 56 applications sought trust status for a total of 133 parcels with a combined acreage of 2673.

[5]

Docket No.	Properties	Date of NOD
10-091	Boyea	Mar. 17, 2010
10-092	Cornish	Mar. 17, 2010
10-107	Gerbers	May 5, 2010

(continued...)

the eight properties is located within the boundaries of the Tribe's reservation in Wisconsin and also within the boundaries of the Village.[6] The Gerbers, Calaway, Catlin, and DeRuyter properties form a large and contiguous, if irregular-shaped, land mass; the Cornish, Buck, Lahay, and Boyea properties are not contiguous to any other property that is the subject of our decision.

Relative to the eight properties at issue in these consolidated appeals, it appears that the Village submitted at least two comment letters to BIA in response to the Tribe's applications for trust status. The first letter from the Village, dated October 6, 2007, objected to the fee-to-trust application for the Catlin property and two other properties not presently at issue. Catlin AR Vol. 4, Tab 20. A later letter from the Village, dated November 26, 2008, objected to each of the 56 fee-to-trust applications. AR Vol. 2, Tab 16 (Comment Letter).[7] The Comment Letter was 25 pages long with substantial attachments. In its letter, the Village raised a number of objections to the trust acquisitions, including

- procedural concerns (e.g., lack of access, despite its request, to view the applications submitted by the Tribe to BIA);
- its concern that the Tribe's well-publicized goal of reclaiming all of the land within its original reservation boundaries would eliminate the Village as a governmental entity;

(...continued)

10-131	Buck	July 8, 2010
11-002	Catlin	Aug. 16, 2010
" "	Calaway	" "
" "	DeRuyter	" "
11-045	Lahay	Nov. 23, 2010

[6] We note that the Village apparently takes the position that Congress disestablished the Tribe's reservation. The Tribe disagrees. Resolution of that issue is not germane to our decision. The parties do not dispute that each of the eight parcels lies within the original borders of the Tribe's reservation or that BIA applied the correct fee-to-trust criteria of 25 C.F.R. § 151.10, which governs on-reservation fee-to-trust land acquisitions. *See* 25 C.F.R. §§ 151.2(f), 151.3; *Shawano County, Wisconsin v. Acting Midwest Regional Director*, 53 IBIA 62, 76-77 (2011).

[7] The NODs, the administrative records, and the briefs are substantially identical for each of the decisions before the Board. Therefore, unless otherwise stated, all references to AR, NOD, and briefs are to those submitted for the Lahay property.

- the Tribe's lack of any need for the lands beyond simply expanding its land base because the Tribe has not utilized much of the 1581 acres presently held in trust in the Village;
- the loss of property tax revenue;[8]
- the loss of special assessments, such as storm water infrastructure assessments, that will adversely impact the Village's ability to implement, e.g., its storm water drainage plan in compliance with the Clean Water Act and jurisdictional complications for managing storm water runoff;[9]
- the inability to collect delinquent amounts owed by the Tribe and assessed against the Gerbers property and one parcel of the Boyea property (HB-1331), *see* Nov. 26, 2008, Comment Letter at Ex. Q.; and
- land use conflicts and jurisdictional problems.[10]

The Tribe provided a detailed written response to the Village's comments (Tribe's Response). Tribe's Response, Jan. 16, 2009 (AR Vol. 2, Tab 8).

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[8] In its Comment Letter, the Village provides the total loss of property tax ($36,148.88 in 2009) from all 133 parcels. *See* Comment Letter at 11. The administrative records contain the property tax invoices submitted by the Tribe with its fee-to-trust applications for each of the properties at issue, except for the DeRuyter property. These invoices show, *inter alia*, the portion of the property tax belonging to the Village out of the property taxes paid to the county. *See* Boyea AR Vol 1, Tab 46(8); Cornish AR Vol. 2, Tab 32(8); Gerbers AR Vol. 1, Tab 53(8); Buck AR Vol. 1, Tab 26(8); Catlin AR Vol. 1, Tab 21(8); Calaway AR Vol 2, Tab 17 (10); and Lahay AR Vol. 1, Tab 27 (11). It is possible that the tax invoices for the DeRuyter property, which consists of five tax parcels, were inadvertently omitted from the record prepared for the Board since the invoices are present in the records for the remaining properties at issue in these appeals. On remand, the Regional Director should determine whether BIA received these invoices and overlooked them in putting the administrative record together for the Board.

[9] According to a spreadsheet provided by the Village, the 21 parcels at issue here collectively were billed in $1,404 in storm water project assessments in 2009. *See* Nov. 26, 2008, Comment Letter at Ex. Q.

[10] The Village maintains that the Gerbers property is located in an area zoned by the Village for commercial or industrial use and where the Village claims it is actively working to stimulate commercial development; in contrast, the Tribe's zoning for the Gerbers parcel is agricultural, which apparently is its present and historical use, and which the Tribe maintains will not change, thus the Village claims that the Tribe's use of the property does not not conform to neighboring land use and interferes with the Village's development plans.

While the applications were pending before the Regional Director, the Supreme Court decided *Carcieri v. Salazar*, 555 U.S. 379 (2009), which addressed BIA's authority under 25 U.S.C. §§ 465 and 2202 to accept land into trust for tribes. The Village supplemented its Comment Letter with new arguments based on the decision in *Carcieri*, and the Regional Director requested the Tribe to submit additional materials. *See* Regional Director's Request for Additional Information, Mar. 25, 2009 (AR Vol. 2 (*Carcieri* Log), Tab 5); Village's Supplemental Comment Letter, Mar. 18, 2009 (AR Vol. 2 (*Carcieri* Log), Tab 6) (Supplemental Comment Letter). The Tribe responded to both the Village's submission and the Regional Director's request in a single filing. Tribe's *Carcieri* Response, Apr. 28, 2009 (AR Vol. 2 (*Carcieri* Log), Tab 3).

Thereafter, the Regional Director issued six NODs accepting into trust the eight properties at issue in these appeals.

II. Regulatory Structure for the Regional Director's Decisions

The statutory and regulatory framework that governs fee-to-trust acquisitions by the Department of the Interior (Department) on behalf of Indian tribes was succinctly explained in *State of South Dakota v. Acting Great Plains Regional Director*:

> Section 5 of the IRA, 25 U.S.C. § 465, authorizes the Secretary of the Interior (Secretary) to acquire land for Indians in her discretion. . . . In evaluating requests to acquire land located within or contiguous to an Indian reservation, BIA must consider the criteria set forth in 25 C.F.R. § 151.10(a)-(h).[*] These criteria are:
>
> (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
>
> (b) The need of the individual Indian or the tribe for additional land;
>
> (c) The purposes for which the land will be used;
>
> (d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;
>
> (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;

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* Requests for off-reservation trust acquisitions are controlled by 25 C.F.R. § 151.11, which requires the Secretary to consider the criteria listed in 25 C.F.R. § 151.10 plus additional factors.

(f) Jurisdictional problems and potential conflicts of land use which may arise; and

(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.

(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.

49 IBIA 129, 130-31 (2009).

III. Regional Director's Decisions

The six NODs each contain a discussion of the requisite criteria of 25 C.F.R. § 151.10. In the discussion of § 151.10(a), the Regional Director determined that the IRA (25 U.S.C. § 465) authorized her to accept land from the Tribe into trust. Based on the record, the Regional Director concluded that the Tribe had been in continuous existence and in relations with the United States since approximately 1784. In particular, the Regional Director determined that—based on its "long standing relationship with the [F]ederal government, which culminated in [a Federal election in which the Tribal membership] voted to accept the IRA" and the subsequent approval of the Tribe's constitution, in 1936, by the Secretary—the Tribe was under Federal jurisdiction in 1934 when the IRA was enacted. NOD at 2 (unnumbered).

In discussing § 151.10(b), concerning the Tribe's need for additional land, the Regional Director considered that each parcel was originally part of the Tribe's reservation, then lost by the Tribe through allotment, and subsequently repurchased by the Tribe. The Regional Director considered that holding the parcels in trust would return the land to its original inalienable status to be held for the benefit of the Tribe, thus "ensur[ing] that tribal investments within the Oneida Reservation will never be lost." *Id.*

With respect to § 151.10(c), concerning the Tribe's intended use of the land, the Regional Director noted that each of the parcels presently is used for residential or agricultural purposes or both, and that the Tribe expected to continue these uses for the properties. The NODs observe that the Tribe's established goals include the acquisition of lands to assure future generations that sufficient lands will be available for economic development, housing, and agriculture. The Regional Director cited to a recent report of socioeconomic conditions on the Tribe's reservation to highlight a critical housing deficit on the reservation, and noted that community well-being is supported and reinforced through the connection to the land over generations. NOD at 3 (unnumbered).

In her discussion of § 151.10(e),[11] concerning the impact on the Village of the removal of the parcels from the tax rolls, the Regional Director characterized the comments received from the Village as "unsupported speculations and assertions [that] were unpersuasive in this decision." NOD at 3 (unnumbered). The Regional Director did not identify the Village's arguments or explain why she believed them to be unsupported or speculative.[12] The Regional Director asserted that the Tribe had provided documentation of its intent to renew a service agreement with the Village but noted that the existing agreement expired in 2007 and the parties were unsuccessful in negotiating a new agreement. The remainder of the Regional Director's comments addressed the impact on other local governments, particularly Brown County, which did not submit any comments on the proposed acquisitions. The Regional Director concluded her discussion by stating, "we have determined that there will be no additional fiscal impacts on county services and that the economic and social benefits of the planned use of this property outweigh any impact on the State or local political subdivisions." *Id.* at 4 (unnumbered).[13]

As to § 151.10(f), the Regional Director commented on the fact that Pub. L. 83-280 applies to criminal offenses in Indian country in Wisconsin, including the Tribe's lands, and noted that primary responsibility for patrolling the Tribe's reservation falls to the Tribe's police department. The Regional Director stated that "Tribal members are entitled to city services, such as[] police, fire, etc. [from the Village]." *Id.* at 5

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[11] The Regional Director did not discuss § 151.10(d), which applies only to fee-to-trust applications for individual Indians.

[12] The Village specifically cited road repair and provided an estimate for the repair of three roads that primarily serve Tribal trust and fee lands. The Village explained that state law requires local government services to be available to everyone, and many such services, such as fire, emergency, and law enforcement have "fixed costs that cannot be reduced." Comment Letter at 11. Finally the Village argued that it could offset the costs by raising taxes on the remaining fee lands except that state law prohibits the Village from raising "taxes above a 2% tax levy limit." *Id.*

[13] The Regional Director asserted, in a different section of her NODs, that in its application, the Tribe "stated that [it is] willing to accept any additional costs in regards to law enforcement, road maintenance, and lease administration, after the land is accepted into trust." NOD at 5 (unnumbered); *see also* Gerbers NOD at 6 (unnumbered) ("The Tribe has stated in this application that they are prepared to pay for whatever municipal services that may be required in connection with the newly acquired property, if any."). The Regional Director did not elaborate on these isolated comments in her NODs, and none of the parties address them in their briefs.

(unnumbered). The Regional Director concluded that "as a result of the [Pub. L. 83-280 findings], and given the jurisdictional pattern on the reservation is well established, we have determined that no new jurisdictional problems are likely to result from the transfer of this property into trust." *Id.* The Regional Director did not mention any of the specific land use or jurisdictional issues raised by the Village, such as the Gerbers property, which is within the area set aside by the Village for an industrial park, and issues relating to the implementation of the Village's storm water plan.

Turning to § 151.10(g), concerning BIA's ability to discharge additional responsibilities from the addition of these parcels to the Tribe's trust land base, the Regional Director found that the impact on BIA would be "limited" because the Tribe already administers, through Pub. L. 93-638 contracts, *see* 25 U.S.C. § 450f, many of the services that BIA otherwise would provide. NOD at 5-6 (unnumbered). Thus, the Regional Director concluded that BIA could absorb the additional responsibilities that would attach to taking these parcels into trust.

Finally, with respect to § 151.10(h), and more specifically, environmental compliance, the Regional Director found that each parcel was categorically excluded from the need for an Environmental Assessment or an Environmental Impact Statement because no change in land use for the parcels is anticipated. *Id.* at 6 (unnumbered). BIA completed an Environmental Site Assessment, and found that there were no recognized environmental conditions, contamination-related concerns, or other environmental liabilities.

Having thus considered the requisite criteria under § 151.10, the Regional Director granted the Tribe's applications to take the eight properties into trust. The Village timely appealed each of the NODs to the Board. The Village, the Tribe, and the Regional Director have fully briefed the appeals.

Discussion

I. Introduction

We affirm in part and vacate in part each of the NODs at issue in these appeals, and remand them for further consideration by the Regional Director. At the outset, we have considered but are not persuaded by the procedural challenges raised by the parties. On the merits, we affirm the Regional Director's NODs insofar as her consideration of § 151.10(a), (b), (c), & (g). We agree with the Regional Director that the Tribe was under Federal jurisdiction at the time the IRA was enacted in June 1934 because the Federal government held an election later that year pursuant to the IRA for the Tribe to decide whether to reject the application of the IRA. Although that fact is dispositive of this issue, we briefly address why other evidence would independently be sufficient to show that the

Tribe was under Federal jurisdiction in 1934. To the extent that the Village argues that the IRA is unconstitutional or that § 465 in particular is unconstitutional, we lack jurisdiction to determine the constitutionality of laws and regulations, and thus we do not address these claims.

We conclude that the Regional Director adequately considered the Tribe's need and purposes for the proposed acquisitions, and that the Regional Director also adequately considered whether BIA would be able to discharge its administrative responsibilities for the new lands. However, we conclude that the Regional Director failed to give adequate consideration to the tax information provided by the Tribe along with information concerning potential land use conflicts and jurisdictional problems. With respect to the impact to the Village from the removal of the land from the tax rolls, the Regional Director simply asserted in conclusory terms that the Village's comments "provide[d] unsupported speculations and assertions." There was nothing speculative or unsupported about the tax loss to the Village that was documented by the Tribe. As to land use conflicts and jurisdictional problems, the Regional Director again did not articulate any specific consideration of the Village's contentions regarding the disparity between the Tribe's existing and intended uses and the Village's zoning for the parcels, and regarding the Village's concerns for storm water management. Therefore, we vacate those portions of the Regional Director's NODs and remand these matters to her for further consideration. In addition, on remand, the Regional Director shall also consider the Village's arguments as to the environmental analysis and alleged bias in the decision making. Although we affirm as to the Regional Director's consideration of the criteria at § 151.10(a), (b), (c), and (g), nothing in our decision precludes the Regional Director from weighing those findings, in conjunction with her reconsideration on remand of the remaining factors, as part of her ultimate reconsidered decision on the Tribe's fee-to-trust applications.

II. Standard of Review

The standard of review in trust acquisition cases is well-established. Decisions of BIA officials on requests to take land into trust are discretionary, and the Board does not substitute its judgment for BIA's in discretionary decisions. *Shawano County*, 53 IBIA at 68-69; *Arizona State Land Department v. Western Regional Director*, 43 IBIA 158, 159-60 (2006). Instead, the Board reviews discretionary decisions to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of that discretion, including any limitations on its discretion that may be established in regulations. *Shawano County*, 53 IBIA at 68. An appellant bears the burden of proving that BIA did not properly exercise its discretion. *Id.* at 69; *Arizona State Land Department*, 43 IBIA at 160; *South Dakota v. Acting Great Plains Regional Director*, 39 IBIA 283, 291 (2004), *aff'd sub nom. South Dakota v. U.S. Dep't of the Interior*, 401 F. Supp. 2d 1000 (D.S.D. 2005), *aff'd*, 487 F.3d 548 (8th Cir. 2007).

"[P]roof that the Regional Director considered the factors set forth in 25 C.F.R. § 151.10 must appear in the record, but there is no requirement that BIA reach a particular conclusion with respect to each factor." *Shawano County*, 53 IBIA at 68-69; *Arizona State Land Department*, 43 IBIA at 160. Simple disagreement with or bare assertions concerning BIA's decisions are insufficient to carry this burden of proof. *Shawano County*, 53 IBIA at 69; *Arizona State Land Department*, 43 IBIA at 160. The factors need not be "weighed or balanced in a particular way or exhaustively analyzed." *Shawano County*, 53 IBIA at 69; *see also County of Sauk, Wisconsin v. Midwest Regional Director*, 45 IBIA 201, 206-07 (2007), *aff'd sub nom. Sauk County v. U.S. Dep't of the Interior*, No. 07-0543, 2008 WL 2225680 (W.D. Wis. May 29, 2008). We must be able to discern from the Regional Director's decision, or at least from the record, that due consideration was given to timely submitted comments by interested parties. *See Jefferson County, Oregon v. Northwest Regional Director*, 47 IBIA 187, 199-200 (2008) (BIA's failure to consider county's concerns as to jurisdiction in a proposed trust acquisition is grounds for remand); *Cass County, Minnesota v. Midwest Regional Director*, 42 IBIA 243, 247 (2006) (BIA's decision must reflect "consideration [of] all facts which were, or should have been known to it and which were critical to the analysis under 25 C.F.R. § 151.10.").

In contrast to the Board's limited review of BIA discretionary decisions, the Board has full authority to review any legal issues raised in a trust acquisition case, except those challenging the constitutionality of laws or regulations, which the Board lacks authority to adjudicate. *Shawano County*, 53 IBIA at 69.

The scope of the Board's review ordinarily is "limited to those issues that were before the . . . BIA official on review." 43 C.F.R. § 4.318. Thus, the Board ordinarily will decline to consider for the first time on appeal matters that could have been but were not first raised before the Regional Director. *See Kansas v. Acting Southern Plains Regional Director*, 53 IBIA 32, 36 (2011).

III. Procedural Issues

As a preliminary matter, we note that the parties raised several procedural issues related to the Regional Director's consideration of the fee-to-trust applications. We reject all but one of these arguments, as detailed below. Because we remand these decisions to the Regional Director on the merits, *see infra*, we decline to address the Village's bias argument but refer this argument to the Regional Director for her consideration in the first instance.

A. Adequacy of Time for Comments on the Fee-to-Trust Applications

The Village argues that, given the volume of fee-to-trust applications that were submitted, the 30-day comment period set by the regulations was insufficient for it to draft adequate responses. *See* Notice of Appeal at 5.

Although 25 C.F.R. § 151.10 states that "state [and] local government[s] . . . will [have] 30 days in which to provide written comments," that provision does not bar BIA from granting additional time in which to respond. Here, the Village apparently received notices from BIA of the proposed acquisitions and requests for comments on June 11, September 23, and October 8, 2008, each of which requested the Village's comments within 30 days.[14] Letter from the Village to Regional Director, Oct. 13, 2008, at 1 (AR Vol. 1, Tab 26). The Village responded to the Regional Director and requested an extension of time to November 30, 2008, for filing its comments, which the Regional Director granted. *Id.* at 2; Letter from Regional Director to the Village, Oct. 17, 2008 (AR Vol. 1, Tab 22). The Village submitted its comments within the extended deadline, and did not seek any further extensions.

Because the Village received the extension of time it asked for and submitted its comments to BIA without seeking another extension, it cannot now complain that the comment period was insufficient to craft an adequate response. Nothing in the Regional Director's grant of additional time suggested that no further extensions would be granted and the Village does not claim that it was discouraged from seeking any further extensions of time. We therefore conclude that the Village had adequate time to submit its comments on the proposed acquisitions.[15]

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[14] The Tribe asserts that it also sent notices and requests for comment to the Village in 2006. *See, e.g.,* AR Vol. 1, Tab 27(9).

[15] The Village complains that the Regional Director did not provide it with an opportunity to respond to documents that the Regional Director requested from the Tribe in the wake of the Supreme Court's decision in *Carcieri*. Opening Br. at 27 n.77. The Village does not argue, however, that this constitutes reversible error, and we conclude it does not. This information was offered to the Regional Director to assess and determine whether she had authority to take land into trust for the Tribe. Whether or not she is so authorized is a mixed question of law and fact, but it is not a discretionary determination. Therefore, the Board may review the evidence, the arguments of the parties, and the Regional Director's decision, and determine—as a matter of law—whether the Regional Director was authorized to take land into trust for the Tribe.

B. Village's Motion to Strike Tribe's Brief

The Village argues that the Tribe's answer brief in Docket No. IBIA 11-045 (Lahay) should not be considered because the Tribe is not a party to the appeal and had not filed a motion to intervene. *See* Village's Reply to Tribe's Answer Br. at 2.[16] We construe this argument as a motion to strike the Tribe's brief, and it is denied. The Tribe is automatically an interested party in the appeals before the Board by virtue of its status as the fee-to-trust applicant whose applications are now before the Board. *See* 25 C.F.R. § 2.2 (definition of "Interested Party" includes a tribe "whose interests could be adversely affected by a decision in an appeal"), incorporated by reference into the Board's regulations at 43 C.F.R. § 4.330(a). When the Board granted the Tribe's motion to intervene in Docket Nos. IBIA 10-091 and IBIA 10-092 (Boyea and Cornish, respectively), we expressly stated that the Tribe was an interested party that was already identified on the distribution list and thus it was not required to file a motion to intervene. *See* Order Granting Motion to Intervention, Docket Nos. IBIA 10-091 & IBIA 10-092, June 7, 2010. For the same reason, the Tribe is also an interested party in Docket No. IBIA 11-045 and is not required to file a motion to intervene. Therefore, we deny the Village's motion to strike the Tribe's brief.

C. Bias

The Village argues that the BIA staff members who processed the Tribe's fee-to-trust applications were tainted by "blatant bias." Opening Br. at 48. The claim of bias stems from a "consortium agreement," whereby a group of tribes apparently directed Federal funding back to BIA specifically to fill staff positions to process the tribes' fee-to-trust applications.[17] According to a 2006 Government Accountability Office (GAO) report, *Indian Issues: BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications*, GAO-06-781 at 20, two such agreements, including one involving BIA's Midwest Regional Office, were then under investigation by the Inspector General of the Department (IG). *Id.*;[18] *see also* Memorandum of Understanding

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[16] This argument was only raised in the Village's appeal from the proposed acquisition of the Lahay property.

[17] The tribes apparently received the funding from BIA as part of their Tribal Priority Allocation funding pursuant to Indian Self-Determination and Education Act contracts or Tribal Self-Governance compacts with BIA.

[18] The Village cited to but did not provide a copy of the GAO report. A copy was found online at www.gao.gov/assets/260/250940.pdf. This document is one of many cited by the Village in its briefs to the Board for which no copy appears in the administrative records or in the appendices to the Village's briefs. In addition to citing the GAO report, the Village

(continued...)

Between Tribe and Midwest Regional Office for FY 2008-2010 (Opening Br., App. at 37). The outcome of the investigation is not made clear in the briefs or in the Administrative Records. On remand, the Regional Director should specifically address the Village's allegations of bias as well as the outcome of the IG investigation and its relevance, if any, to the Village's allegations. The Regional Director should also discuss any corrective actions that may have been taken in response to the IG investigation prior to the NODs at issue, if relevant to the Village's allegations of bias.[19]

IV. Regional Director's Consideration of the § 151.10 Criteria[20]

A. BIA's Authority for Taking Land into Trust (25 C.F.R. § 151.10(a))

The Regional Director determined that 25 U.S.C. § 465 provided the requisite authority to accept land into trust on behalf of the Tribe. In particular and pursuant to the Supreme Court's decision in *Carcieri*, the Regional Director found that the Tribe was under Federal jurisdiction at the time the IRA was enacted. On appeal to the Board, the parties devote considerable attention in their briefs to the *Carcieri* decision: The Village contends that the authorizing statute, 25 U.S.C. § 465, is unconstitutional and that the Tribe was not under Federal jurisdiction in 1934 as required for the acquisition in trust of land for the Tribe; the Tribe and the Regional Director contend otherwise and further argue that the Village's argument is time-barred.

(...continued)
also cited to a BIA publication, *Acquisition of Title to Land Held in Fee or Restricted Fee*, and to an NOD for the Shakopee Mdewakanton Sioux Community, June 7, 2007. See Opening Br. at 49, 59. Neither of these documents appear in the record nor did the Village provide a copy. The Board is not part of BIA, see *In re Shingle Spring Band of Miwok Indians*, 54 IBIA 339, 340 (2012), and does not have ready access to documents that may be in BIA's possession. Any party that wishes to have the Board consider such documents, or arguments based on such documents, must provide copies of them to the Board and to the parties on the distribution list.

[19] We note that the IG investigation apparently was underway in 2006 prior to the NODs at issue in this appeal and prior to the consortium agreement in effect at the time of NODs.

[20] The Village contends that the Tribe's fee-to-trust applications were insufficient. We reject this argument. The application process is not meant to be onerous but simply must set out the "identity of the parties, a description of the land to be acquired, and other information which would show that the acquisition comes within the terms of this part." 25 C.F.R. § 151.9. If additional information is required for a decision on the application, BIA may request the applicant to provide the information needed. *Id.* § 151.12. We do not find fault with the Tribe's applications in these proposed fee-to-trust acquisitions.

We first conclude that timeliness does not bar our consideration of the Village's argument that the Regional Director lacks authority under the IRA to take land into trust for the Tribe. We decline to consider the Village's arguments concerning the constitutionality of § 465 because we lack jurisdiction to do so. Turning to the merits of the Village's argument that the Tribe is ineligible to have land taken into trust under § 465, we disagree with the Village. It is evident that the Tribe was under Federal jurisdiction at the time the IRA was enacted: The Federal government held an election in December 1934 for the Tribe to vote on whether it would reject the application of the IRA to the Tribe. For this reason, we affirm the Regional Director's conclusion that § 465 authorizes the acceptance of land into trust for the Tribe. We turn now to a detailed examination of the parties' arguments.

1. Timeliness of the Village's Challenge to BIA's Authority to Take Land into Trust

The Tribe and the Regional Director contend that the Village's arguments concerning BIA's authority to take land into trust for the Tribe are untimely. Tribe's Answer Br., App. A at 23-26; Regional Director's Answer Br. at 9. According to the Tribe, BIA approved the Tribe's constitution in 1936 under the authority of the IRA and, subsequently, upon enactment of the Administrative Procedure Act of 1946 (APA), 5 U.S.C. § 551 *et seq.*, the Village then should have challenged BIA's action as outside the scope of its jurisdiction. Thus, according to the Tribe, the statute of limitations lapsed long ago on the Village's challenge to whether the Tribe was under Federal jurisdiction in 1934. Tribe's Answer Br., App. A at 24-25; *see also* Regional Director's Answer Br. at 9 (claiming only that the 1936 determination by the Department makes the Village's current challenge "untimely," without citing the APA). We reject this argument.

First, the BIA "action" challenged here consists of decisions to take eight parcels in trust and there is no question about the timeliness of the Village's appeal to the Board from those decisions. What both BIA and the Tribe appear to be arguing is that we should apply a doctrine of laches to bar consideration of the Village's argument that BIA lacks authority to accept the eight parcels in trust. The difficulty with this argument is that it is not clear that the Village would have been injured by BIA's approval of the Tribe's constitution sufficient to establish standing to challenge the determination that the Tribe was under Federal jurisdiction in 1934. And, assuming the Village *could* have challenged BIA's authority by objecting to the approval of the Tribe's constitution simply does not mean that the Village waived its challenge or should now be time-barred from raising the challenge in a different factual context. Moreover, the time for the Tribe to raise this issue was during the pendency of the appeals before the Regional Director. It did not, and therefore, the Tribe arguably waived the argument. And finally, the Regional Director fails to explain on what basis *she* reached and decided the merits of this issue if she now contends that the

Board, which exercises the delegated authority of the Secretary, lacks such authority. Thus we conclude that the Village's challenge to BIA's authority to take land into trust for the Tribe is not time-barred.

2. Constitutionality of § 5 of IRA (25 U.S.C. § 465)

The Village raises several arguments that challenge the constitutionality of the IRA or, more particularly, 25 U.S.C. § 465. *See, e.g.*, Opening Br. at 31-42. The Board lacks authority to adjudicate the constitutionality of statutes and regulations. *See, e.g.*, *Voices for Rural Living v. Acting Pacific Regional Director*, 49 IBIA 222, 250 (2009); *South Dakota,* 49 IBIA at 141. Therefore, we do not address these claims.

3. BIA's Authority to Take Land Into Trust for the Tribe Under the IRA

The Regional Director determined that the IRA, specifically 25 U.S.C. § 465, authorized her to accept the parcels into trust. To be eligible to have land taken into trust for it under § 465, the Tribe must be a "[Federally] recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. "Now," as used in § 479, means 1934 when the IRA was enacted. *Carcieri*, 555 U.S. at 395. Here, the Village maintains that the Tribe was neither Federally recognized nor under Federal jurisdiction in 1934. We disagree.

a. Historical Background

Events in the Tribe's history relevant to this appeal date back to the 18th century. The Oneidas of Wisconsin originally were part of a larger Oneida tribe in New York. In the 1830s, the United States negotiated treaties with the Menominee Tribe in Wisconsin for land for the Oneidas and several other New York tribes. Treaty with the Menomonies [sic], Feb. 8, 1831, 7 Stat. 342; Treaty with the Menominee Nation, Oct. 27, 1832, 7 Stat. 405. Groups of New York Oneidas, including the "First Christian" and "Orchard" parties, left New York to colonize the new tribal lands. A final treaty with the First Christian and Orchard parties was executed in 1838 and created a 65,540 acre reservation (Reservation) for those two groups in Wisconsin. Treaty with First Christian and Orchard Parties, Feb. 3, 1838, 7 Stat. 566.

The enactment of the General Allotment Act (Dawes Act) in 1887 brought about the transfer of tribal lands into individual ownership. 24 Stat. 388, Feb. 8, 1887. The patents for the allotments were to be held in trust by the United States for a period of 25 years. 25 U.S.C. § 348. Most of the land on the Reservation was allotted during this period, but not all of it, *and*, while most of the allottees ultimately received fee patents for their land, not all did. At least three executive orders were signed that extended the trust period on certain Wisconsin Oneida allotments to 1937. *See* Executive Order (E.O.)

Nos. 2623 (May 19, 1917) (1 year), 2856 (May 4, 1918) (9 years), and 4600 (Mar. 1, 1927) (10 years) (copies added to Docket no. IBIA 10-091 (Boyea)).[21] With the enactment of the IRA in 1934, the trust period was extended indefinitely. *See* 25 U.S.C. § 462.

In 1931, BIA remained aware that there were still "a few scattered tracts of [tribal] land on the Oneida reservation." Letter from Comm'r of Indian Affairs (Comm'r or Commissioner) to Oscar Archiquette, Nov. 13, 1931 (Opening Br., App. Tab 15); *see also* Letter from Comm'r to Chauncey Doxtator, Nov. 19, 1931 (Opening Br., App. Tab 16) (same). On these lands, state laws did not apply. *See, e.g., id.* ("State game laws apply to the Indians, except when exercising their hunting or fishing privileges within their reservation on restricted tribal or allotted [trust] land.").

In 1934, the year in which the IRA was enacted, Federal correspondence reflected the following situation for the Oneida Indians of Wisconsin: Few of their lands remained in trust and the Federal government had limited involvement. In February 1934, the Commissioner wrote the Secretary that the Oneidas "lost all of their land" through fee patenting and other allotment procedures, an assertion that proved to be factually incorrect. Opening Br., App. Tab 23. He went on to say that the Indians were "living practically unprotected and not in any real way under Federal jurisdiction. They are one of the groups that ought to be brought into new land as an organized community." *Id.* In March 1934, in a more accurate statement, the Secretary wrote that most of the fee-patented land had passed out of Oneida ownership by that time, but "about 20 allotments, or parts of allotments, containing between 500 and 600 acres, remain[ed] under trust." Letter from Secretary to Walter B. Watkins, Mar. 13, 1934 (Opening Br., App. Tab 24).[22] The Secretary went on to describe two bills then pending in Congress, including H.R. 7902, that would become the IRA: "[T]he purpose of [these bills] is to establish a new policy with respect to Indian rights, acquisition of lands upon which to establish Indian communities or colonies where worthy landless Indians could be supplied with home

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[21] Under the cited Executive Orders, 21 allotments on the Oneida Reservation were to remain in trust through 1937. *See also* Modification, Nov. 17, 1961, *Estate of Edwin John Skenandore*, Prob. No. A-34-49 (Dep't of the Interior) (distributing share of Allotment No. 1410, belonging to Daniel Skenandoah, who is one of the deceased allottees identified in E.O. No. 4600) (copy added to Docket no. IBIA 10-091 (Boyea)).

[22] *See also* E. O. No. 4600; Declaration of Rebecca M. Webster, Esq., Apr. 28, 2009, at ¶ 3 (AR Vol. 2 (*Carcieri* log), Tab 4, Attach.) (confirming that 591 acres of land on the Oneida Reservation "have never been patented in fee and have always been held as either restricted treaty land or individual trust land or tribal trust land.")

places, and for other purposes." *Id.* The Secretary stated, "[I]f enacted [these bills] *would no doubt be applicable to the Oneidas*." *Id.* (emphasis added.)[23]

In his annual report for 1934, submitted in April of that year, the Commissioner reported on the Indian population in the continental United States. He tabulated his population statistics first by state, followed by jurisdiction, then by reservation, and by tribe. The Oneida Tribe is listed, and its listing appears under the jurisdiction of the Keshena Agency and "Oneida Reservation." AR Vol. 2 (*Carcieri* log), Tab 3, Attach. 1. The census counted 2,992 Oneidas on the Reservation. *Id.*

On June 18, 1934, the IRA became law. In the IRA, Congress legislated an about-face with respect to Indian policy, immediately halting the allotment process, abandoning the assimilation policy that generated the General Allotment Act, and freezing the trust status of Indian lands. 25 U.S.C. §§ 461-62. Additional provisions in the IRA sought to restore tribal land bases, strengthen tribal governments, and authorize the establishment of new reservations. *Id.* §§ 463, 467, 469, 476. Of particular note, the IRA was *not* to "apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary . . . , shall vote *against* its application." *Id.* § 478 (emphasis added).

On December 15, 1934, a Federal election was held by the Department for the Oneidas to vote on whether to reject the IRA (IRA election). *Ten Years of Tribal Government under IRA . . .* , United States Indian Service (1947) (Haas Rpt.) at 20 (Regional Director's Answer Br., Docket No. IBIA 10-091 (Boyea), Attach.). The Tribe did not vote against the IRA, and thus ratified the application of the IRA to the Tribe. *Id.* In 1936, the Tribe drafted a Constitution pursuant to the IRA, 25 U.S.C. § 476, which was approved that year by the Tribe and by the Secretary. *Id.* at 26; *Oneida Tribe of Indians of Wisconsin v. Village of Hobart, Wisconsin*, 891 F. Supp. 2d at 1058, 1060 (E.D.Wis. 2012). The Tribe was included on the Commissioner's 1937 list of Tribes that had adopted, and organized under, the IRA. Letter from Comm'r to Indian Affairs Subcommittee Chairman, Mar. 18, 1937, Attach. (Opening Br., App. Tab 27.) Also in 1937, the Secretary issued a Charter of Incorporation, *see* 25 U.S.C. § 477, to the Tribe, which the Tribe subsequently ratified in an election. Haas Rpt. at 26.

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[23] After the Secretary's letter to Watkins, Congress added the phrase, "now under Federal jurisdiction," to the definition of "Indian" in H.R. 7902. But this amendment does not alter the import of the Secretary's statement: The Secretary explained that the United States continued to hold land in trust for the Tribe or its members. While any number of factors may establish that a tribe is "under Federal jurisdiction," it cannot reasonably be disputed that when the United States holds land in trust for a tribe or its members, that tribe is then "under Federal jurisdiction."

b. *Carcieri v. Salazar* and *Shawano County*

During the time that the Tribe's applications were under consideration by the Regional Director, the Supreme Court delivered a decision on the reach of the Secretary's authority to take land into trust under § 465. *Carcieri v. Salazar*, 555 U.S. 379 (2009). In *Carcieri*, the Secretary had agreed to take land into trust on behalf of the Narragansett Indian Tribe in the State of Rhode Island pursuant to his authority under § 465. The Supreme Court, in construing § 465, held that Congress intended the Secretary's land acquisition authority to apply only to those recognized tribes "under . . . federal jurisdiction . . . when the IRA was enacted in 1934." 555 U.S. at 395.[24] Because the parties stipulated that the Narragansett Indian Tribe—for which the Secretary did not hold an IRA election—was not under Federal jurisdiction in 1934, the Court concluded that BIA lacked authority under § 465 to take land into trust for the Narragansetts. Given the parties' stipulation, the Court did not take up the issue of how BIA or a tribe establishes that a tribe was under Federal jurisdiction in 1934. However, we took up this issue in *Shawano County*.

In *Shawano County,* the Board held that one brightline test for determining whether a tribe was "under Federal jurisdiction" in 1934 turns on whether an IRA election was held for the tribe. As we explained in *Shawano County*, 53 IBIA at 71-72,

> Under § 18 of the IRA, 25 U.S.C. § 478, the terms of the IRA would not apply to a reservation if the adult Indians of a reservation voted to reject its application. To permit tribes to exercise this option, the Secretary was required to conduct elections pursuant to § 478. The Secretary held such an election for the [Stockbridge-Munsee] Tribe on December 15, 1934, at which the majority of the Tribe's voters voted not to reject the provisions of the IRA. [T]he Secretary's act of calling and holding this election for the Tribe informs us that the Tribe was deemed to be "under Federal jurisdiction" in 1934. That is the crux of our inquiry, and we need look no further to resolve this issue.

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[24] The Court's decision turned on the word "now," as used in one portion of the definition of "Indian": "'Indian' as used in [§465] . . . shall include all persons of Indian descent who are members of any recognized Indian tribe *now* under Federal jurisdiction . . . ." 25 U.S.C. § 479 (emphasis added). The United States contended that this provision referred to whether a tribe was under Federal jurisdiction at the time of the decision to take land into trust for the tribe; the State of Rhode Island maintained that it referred to the status of the tribe in 1934 when the IRA was enacted, i.e., whether the tribe seeking to have land taken into trust for it was "under Federal jurisdiction" in 1934.

c. Analysis

Here, it is undisputed that the Secretary held an IRA election for the Tribe, and therefore we conclude that the Tribe was under Federal jurisdiction at the time the IRA was enacted and that the Regional Director is authorized pursuant to 25 U.S.C. § 465 to take land into trust for the Tribe.

The Village criticizes our decision in *Shawano* as conclusory and as assuming, with no foundation, that because the Secretary held an IRA election for a particular tribe, that tribe necessarily was deemed and confirmed to be under Federal jurisdiction in 1934, within the meaning of the IRA. According to the Village, "the IRA allowed Indians to become organized and *then fall under federal jurisdiction*." Village's Reply to Tribe's Br. at 11 (emphasis added). The Village misconstrues the IRA, as applied in this case, and the significance of a decision by the Executive Branch, through the Secretary, to conduct a referendum on the IRA for a particular tribe, and we reaffirm our decision in *Shawano*.

The tribal referenda held by the Secretary pursuant to 25 U.S.C. § 478 commonly are described as elections on whether to "accept or reject" the IRA, but in reality § 478 required the Secretary to call special elections to afford the adult Indians of tribes with the opportunity to *reject* the IRA by majority vote because it otherwise applied by default as a matter of law and remained applicable in the absence of such a vote. This distinction is significant in understanding why the Secretary's decision to hold an IRA referendum for a particular tribe necessarily means that the Secretary recognized the tribe as being under Federal jurisdiction.

As interpreted by Solicitor Margold shortly after enactment of the IRA in 1934, the IRA "continues to apply to a reservation" unless rejected by the tribe, and only then does it "cease to apply to such reservation." Sol. Op., "Wheeler-Howard Act Interpretation," M-27810 (Dec. 13, 1934) (§ 478 does not call for election for the purpose of adopting or rejecting the IRA; it simply provides that a majority of the Indians of any reservation may *reject* the act); *accord Carcieri*, 555 U.S. at 395 (the IRA "allowed tribal members to reject the application of the IRA to their tribe"). The "whole purpose" of § 478, as construed at the time, was "to assure every group of Indians the fullest opportunity to continue the *status quo ante* if it disapproves of the purposes of the act." Sol. Op. M-27810. The status quo "ante" was the status quo as it existed before the IRA was enacted and applied to tribes and their reservations by default. The Indians who were entitled to vote on the IRA under § 478 were those who "may be seriously affected by the application of the [IRA] to a given

reservation." *Id.*[25] An Indian, or an Indian tribe, that was not under Federal jurisdiction in 1934 would not automatically have been affected by application of the IRA, and thus had no need to be afforded the right to vote on whether "to reject the application of the IRA to their tribe." *Carcieri*, 555 U.S. at 395.

The legal predicate, and necessary determination by the Secretary prior to holding an IRA election for a particular tribe, was that the tribe was one to which the IRA applied (i.e., it was under Federal jurisdiction) and to which its provisions were available, ***unless and until*** the tribe expressly ***rejected*** the IRA in the referendum. Thus, as interpreted at the time by the Solicitor, and recently by the Supreme Court, the purpose of the IRA referenda was not to bring existing tribes under Federal jurisdiction, but to afford ***those tribes that were already under Federal jurisdiction*** a right to opt out of the IRA, if they so chose.[26]

The Department's holding of the IRA election pursuant to 25 U.S.C. § 478 in 1934 for the Oneidas of Wisconsin necessarily was premised upon a determination by the Executive Branch that the individuals who were allowed to vote were "adult Indians" within the meaning of 25 U.S.C. § 479, which in turn meant that they must have been "persons of Indian descent who are members of [a] recognized Indian tribe now under Federal

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[25] Of course, if an Indian tribe and its members no longer had any lands in trust or restricted fee, the provisions of the IRA that applied to reservation lands would remain without practical effect until a land base was restored, although other provisions of the IRA (e.g., tribal government reorganization) could still affect a tribe unless a majority of its members voted to reject the IRA's applicability.

Undoubtedly, Congress and the Department considered the IRA to provide a significant *benefit* to tribes and their members. *See* 1934 Annual Report of the Comm'r at 83. But as the Solicitor recognized, concerns had been raised during hearings on the IRA about forcing change on the Indians, and for that reason the Indians who would be affected by its application were afforded a right to reject it for their reservation. Sol. Op. M-27810.

[26] As noted by Justice Breyer in his concurrence in *Carcieri*, the Federal government overlooked some tribes in conducting IRA referenda, but the fact that the Federal government failed to afford certain tribes under Federal jurisdiction the right to opt out of the IRA does not mean that they were not under Federal jurisdiction. 555 U.S. at 397-98. In order to conduct an IRA vote, the Secretary necessarily must have determined that a tribe was under Federal jurisdiction, or else there would have been no need to hold the election because there was no need to give the Indians the right to opt out of the IRA. But the failure to hold an election carried no contrary necessary determination because it may simply have been an oversight, or a failure to appreciate the jurisdictional significance of the Federal government's dealings with a particular Indian group that was, in fact, a tribe.

jurisdiction," *id.*[27] Otherwise, the Secretary would not have afforded the Oneidas of Wisconsin an opportunity to opt out from application of the IRA to their tribe.

Although the Secretary's action in calling an IRA election in 1934 for the Wisconsin Oneidas is dispositive, the historical record serves to further illustrate the Secretary's decision to call the election, and to understand why such an election was required. Most notably, it is undisputed that in 1934, there were still tribal and individual lands that were held in trust for the Tribe or its members by the United States. Even if, as the Village argues, the dissolution of trusteeship over Oneida lands was commensurate with the dissolution of Federal jurisdiction over the Tribe and its members, the dissolution of Federal jurisdiction could not occur unless and until the last parcel of Oneida land passed out of trust status. Until that happened, the lands remained Indian country, subject to Federal and Tribal jurisdiction, and the Tribe necessarily remained under Federal jurisdiction, regardless of whether state jurisdiction had attached to certain allottees and their allotted lands for which unrestricted fee patents had been issued. *See, e.g.,* Letter from Comm'r to Archiquette ("State game laws apply to the Indians, *except when exercising their hunting or fishing privileges within their reservation on restricted tribal or allotted [trust] land.*" Emphasis added.); Letter from Secretary to Walter B. Watkins, Mar. 13, 1934 (Opening Br., App. Tab 24) ("about 20 allotments, or parts of allotments, containing between 500 and 600 acres, remain under trust."). Notably, the Secretary had "no doubt" that the then-pending bill that became the IRA would "be applicable to the Oneidas." Letter from Secretary to Watkins.

The record contains various other indicia of the Federal government's jurisdiction over the Oneidas of Wisconsin—inclusion in the Indian population census and assignment of the Tribe to the jurisdiction of a BIA agency. It also contains strong evidence of the

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[27] The Village contends that the IRA vote for the Wisconsin Oneidas could not have been premised on one of the IRA's alternate definitions of "tribe"—Indians residing on one reservation—because, the Village argues, the Oneida Reservation had been disestablished. If the Village's disestablishment argument were correct, it would reinforce—not undercut—our conclusion that the Tribe was under Federal jurisdiction in 1934 because § 479 defines "tribe" as an Indian (1) tribe, (2) organized band, (3) pueblo, *or* (4) the Indians residing on one reservation. If the Wisconsin Oneidas no longer had a reservation, then the "tribe" could *only* refer to an entity that the Federal government understood at the time to be an "Indian tribe" or "organized band," within the meaning of 25 U.S.C. § 479, and not "the Indians residing on one reservation." *Id.* (Nothing in the record or the parties' contentions suggests that the Tribe's IRA vote was limited to "persons of one half or more Indian blood," *see* 25 U.S.C. § 479, and thus we need not consider this definition of "Indian;" "pueblo" is generally reserved for certain Indian tribes in the state of New Mexico.)

Secretary's conscious understanding that the Tribe was among the tribes that were under Federal jurisdiction. *Id.*

The Village attaches great significance to the Commissioner's statement that the Tribe was "not in any real way under Federal jurisdiction," *see* Letter from Comm'r to Secretary, Feb. 24, 1934, but if anything, the qualifying language—"any real way"—could be read to imply recognition that the Tribe was under Federal jurisdiction, but that the Federal government's active involvement with the Tribe had diminished appreciably, commensurate with the issuance of fee patents to the allottees.

The Regional Director found that the Tribe had a "long standing relationship with the federal government, [as evidenced by treaties, statutes, and executive orders,] which culminated in the fact that the . . . Tribe voted to accept the IRA." NOD at 2 (unnumbered). With these facts, she determined that the Tribe was under Federal jurisdiction in 1934 and therefore 25 U.S.C. § 465 supplied the necessary authority to take these lands into trust for the Tribe. We affirm her NODs based on the Tribe's inclusion among the tribes deemed eligible to vote on whether to reject the IRA.

B. Consideration of Remaining Criteria Under 25 C.F.R. § 151.10

We first address the Regional Director's consideration of the three additional criteria in § 151.10 that we conclude were adequately considered (§ 151.10(b), (c), & (g)) before turning to her consideration of those criteria that we found deficient. Because the Regional Director's consideration of criteria (b), (c), and (g) was explained and is supported by the record, we affirm. The Village has not shown that the Regional Director's consideration was misplaced or inadequate.

1. Need — § 151.10(b)

We affirm the Regional Director's consideration of § 151.10(b) concerning the Tribe's "need" for the land. The Regional Director addressed this criterion by noting that the acquisition of these parcels of land in trust would "ensure[] that tribal investments within the . . . Reservation will never be lost." NOD at 2 (unnumbered). She also noted that each of the parcels had originally been allotted to a member of the Tribe, had passed out of Indian ownership, and had been subsequently repurchased by the Tribe. *Id.* She noted that trust status would protect the land for future generations by restricting alienation, and would generally support "community well-being." *Id.* at 3 (unnumbered).

The Village argues that the Tribe does not "need" the land proposed for trust acquisition because it is already self-sufficient, but instead the acquisition satisfies a Tribal "goal," which the Village identifies as both the acquisition of all lands within the exterior

boundaries of the Reservation and the elimination of tax liability. Opening Br. at 51. The Village criticizes the Regional Director for not considering the relative prosperity of the Tribe and the extent of its current land holdings. Further, the Village argues that the acquisition was improper because the Tribe did not explain why it needed the land in trust status instead of fee status.

First, and contrary to the Village's assertions concerning the Tribe's "goal" of reacquiring reservation lands lost to non-Indian ownership, such a "goal" was considered by the Regional Director: She asserted that the Tribe "has established goals [to reacquire reservation lands] to further the assurance that future generations of Tribal members will have lands available [for economic, residential, and agricultural purposes]." NOD at 3 (unnumbered). Therefore, the Regional Director considered the Tribe's "goals" and found them to be appropriate. *See South Dakota*, 39 IBIA at 292. The Village apparently believes that the Tribe's goals should be considered detrimental goals by the Regional Director, but provides no support for viewing them in this negative light and we know of none.

The Village argues that the Regional Director failed to explain just what "investments" the Tribe has for which trust status is necessary to ensure they "will never be lost." Opening Br. (Docket IBIA 10-091 (Boyea)) at 50. While it would certainly not have been inappropriate for the Regional Director to elaborate, it is not required. Regardless of how "investments" might be characterized—e.g., generally, as in the actual purchase of the lands or specifically, as in the investment in agricultural/residential uses on the lands—trust status for the lands broadly ensures that the land as well as its uses remain secure for the present and for future generations. Finally, there is a significant difference between lands held in fee and lands held in trust beyond the payment of property taxes: State and local laws apply to lands held in fee; tribal laws apply to lands held in trust, subject to the plenary jurisdiction of the United States.[28]

In its comments to the Regional Director on the proposed acquisitions, the Village did not argue that the Tribe's financial status somehow should preclude the trust acquisition of the lands, nor did the Village argue that the Tribe had failed to explain why it needed to have the lands held in trust vis-à-vis fee. Therefore, the Regional Director did not have these comments before her to consider and they are outside the scope of our review. But even if the Regional Director had overlooked such comments by the Village, they are not required considerations in the context of a fee-to-trust acquisition. *See South Dakota v.*

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[28] The state still retains criminal jurisdiction over lands in trust for the Tribe and certain civil regulatory/prohibitory jurisdiction pursuant to Pub. L. 83-280 (codified at 18 U.S.C. § 1162 and 28 U.S.C. § 1360). *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

Acting Great Plains Regional Director, 49 IBIA 84, 104-105 (2009); *County of Sauk*, 45 IBIA at 210; *South Dakota*, 39 IBIA at 290-91; *County of Mille Lacs, Minnesota v. Midwest Regional Director*, 37 IBIA 169, 173 (2002); *see also South Dakota*, 401 F. Supp 2d at 1007. The Village also raised for the first time in its appeal to the Board that the Regional Director's NODs failed to comply with a BIA handbook on fee-to-trust acquisitions, *Acquisition of Title to Land Held in Fee or Restricted Fee*. Not only did the Village fail to raise this argument first before the Regional Director, the Village failed to provide the Board with a copy of the handbook. *See* n.19 *supra*.[29] If the Village believed that these issues merited consideration by the Regional Director, it should have brought them to the Regional Director's attention.

2. Purpose and Use — § 151.10(c)

We also affirm the Regional Director's consideration of § 151.10(c) concerning the Tribe's intended uses and purposes for the lands, which will remain unchanged. At the time of the applications, each of these eight properties was used for agricultural or residential purposes (or both), and the Tribe does not intend to alter the existing use(s). With the exception of the Lahay property, which we address below, the Village does not challenge the Regional Director's consideration of this particular factor.[30]

Concerning the Lahay property, the Village argues that there is an inconsistency between the asserted use and purpose set forth in the environmental documents (the land is leased for Tribal police storage) and that set forth in the NOD (residential use). The Tribe explains in its brief to the Board that the Lahay property is leased as a residential property, which is consistent with the Regional Director's determination. The Tribe also explains that another property, known as the McFarlin property, is leased for Tribal police storage purposes. In its reply brief, the Village does not dispute the Tribe's explanation, and therefore we accept the Tribe's explanation and conclude that the Regional Director

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[29] According to BIA's website, this publication was superseded in July 2011 with the publication of the "Fee to Trust Handbook." *See* http://www.bia.gov/cs/groups/xraca/documents/text/idc-002543.pdf.

[30] The Village asserted that the Regional Director should have considered the potential use of the lands for Class II or Class III gaming under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq. Nothing in the record suggests that any of the subject properties will be used for gaming, and it is well established that the Regional Director is not required to engage in speculation concerning future uses to which the lands may be put. *See City of Yreka v. Pacific Regional Director*, 51 IBIA 287, 297 (2010), *aff'd, City of Yreka v. Salazar*, No. 10-1734, 2011 WL 2433660 (E.D. Cal. June 14, 2011), *app. dism'd*, No. 11-16820 (9th Cir. Feb. 21, 2013).

properly considered the purpose of the Lahay property. To the extent that the Village raises any additional arguments or concerns regarding the purpose and use for the subject properties, we have considered each one and do not find any to be persuasive.

3. BIA's Ability to Discharge Additional Responsibilities — § 151.10(g)

We also affirm the Regional Director's consideration of § 151.10(g) concerning BIA's ability to discharge additional responsibilities that may result with accepting the properties into trust. The Village claims that there is no foundation for the Regional Director's conclusion that BIA will be able to discharge any additional responsibilities because the Tribe failed to identify any additional services that it would need. According to the Village, the BIA handbook, *Acquisition of Title to Land Held in Fee or Restricted Fee*, requires a statement of "the anticipated services that [the applicant tribe] will need from BIA" for any land accepted into trust. Opening Br. at 76. Neither the Village nor the Regional Director provided the Board with a copy of this publication. *See* n.19 *supra*. Therefore, the Village has not supported its argument. Moreover, the Village does not argue that BIA will be unable to discharge any additional responsibilities that would attend the acquisition in trust of the subject properties. We see no reason to revisit BIA's determination on appeal to the Board. *See Kansas*, 53 IBIA at 39.

4. Tax Revenue Impact and Jurisdictional/Land Use Conflicts — § 151.10(e) & (f)

With respect to the Regional Director's consideration of § 151.10(e) and (f), we vacate each of her NODs and remand these matters so that BIA may give consideration to the Village's comments and address the facts in the record that relate to the impact of the proposed acquisitions on the Village. It is particularly striking that the Regional Director found much to discuss concerning the impact of the proposed trust acquisitions on affected local jurisdictions that did *not* submit comments. The Tribe had submitted a substantial volume of information with its applications concerning the potential impacts on local jurisdictions, including the Village, and the Regional Director appropriately considered this information with respect to the non-commenting jurisdictions but not with respect to the Village.

In *Jefferson County*, we explicitly held that "[w]hile we cannot substitute our judgment for BIA's consideration of a factor [under § 151.10], a failure to consider a factor addressed by a county commenter is not sufficient." 47 IBIA at 200. And in *Cass County*, we observed that BIA must consider all facts known to it or that should have been known to it in evaluating an application to accept land into trust. 42 IBIA at 247. Here, the Regional Director did not address the information provided to her concerning the impact on the Village (e.g., tax information, potential disruption of storm water management) and

made little, if any, attempt to identify the Village's concerns, let alone address them in any meaningful way that would inform the Village that its concerns have been heard and considered. The Village correctly pointed out in its brief to the Board that it had raised numerous concerns to BIA in its Comment Letter and "the [Regional Director] completely failed to consider those concerns." Opening Br. at 61; *see also id.* at 2, 51, 55, 57, 60. Even where the comments, as here, apply to a larger group of proposed fee-to-trust applications that includes the subset under consideration, BIA must determine whether the comments nevertheless can be applied to the subset and, if not, explain why not. We turn now to a discussion of each of these two criteria.

a. Loss of Tax Revenue — § 151.10(e)

With respect to the Village's comments about the impact of the loss of property tax revenue (§ 151.10(e)), the Regional Director found the comments to be "speculat[ive]," "unsupported," and "unpersuasive," and concluded by asserting that "the economic and social benefits of the planned use of this property outweigh any impact on the . . . local political subdivisions." NOD at 3, 4 (unnumbered). The Regional Director did not identify the Village's concerns, much less discuss them. Nor did she discuss why she believed the impact on the Village from taking these parcels into trust would be outweighed by the economic or social benefits to be gained from the agricultural and residential uses of these properties. In other words, the Regional Director did not provide any substance or context to her conclusory opinions.

The Village commented to BIA that it must continue to provide municipal services to lands held in trust (and their residents, if any) with reduced funding. It contended that it is limited in its ability to raise taxes on remaining fee lands as a result of a state-imposed cap on increases. The Village provided specific costs for the repair of three roads, which appear to be near the Boyea property though not necessarily a usual means of access for that property.[31] The Village also asserted that the Tribe has refused to negotiate any agreement to provide "in lieu" payments, *see Shawano County*, 53 IBIA at 80, as has been done with the county and other local jurisdictions and has enacted a Tribal resolution prohibiting the Tribe from entering into any such agreements with the Village. Additionally, the Village asserted that the Tribe is in arrears on two of the parcels for assessments that have been made, and thus the Village objects to these parcels being taken into trust while there are outstanding arrearages. *See* Opening Br., Ex. Q. Finally, the Tribe submitted with its application its property tax invoices on which the Village's portion is clearly set forth. The

[31] The Tribe avers that the Village has refused to submit any roads into the Indian Reservation Road program, which the Tribe suggests would offer relief to the Village with respect to road maintenance. *See* 25 C.F.R. Part 170.

Regional Director's NODs do not reflect consideration of any of these items, for which reason we remand each of the NODs.

b. Jurisdictional and Land Use Conflicts — § 151.10(f)

With respect to the Village's concerns about land use and jurisdictional issues (§ 151.10(f)), the Regional Director did address law enforcement matters, noting that Wisconsin is a state covered under Pub. L. 83-280.[32] However, she failed to mention, much less discuss, the Village's land use concerns regarding adjacent fee and trust lands that are subject to very different uses and zoning (e.g., the Gerbers property will continue to be used and zoned by the Tribe for agricultural and residential purposes; it is located within and adjacent to land zoned by the Village for a commercial industrial park) and the Village's concerns regarding implementation of its storm water management plan, given the increasing checkerboard geography of fee and trust land within the Village's boundaries. The Regional Director concluded her consideration of § 151.10(f) by asserting that because "the jurisdictional pattern on the reservation is well established, we have determined that no new jurisdictional problems are likely to result." NOD at 5 (unnumbered). The Village argues that the Regional Director does not explain what she means by a "jurisdictional pattern." Opening Br. at 65.

We agree that the Regional Director's failure to address the storm water management issues that may arise is sufficient to vacate and remand the NODs with respect to § 151.10(f). We are not in agreement on whether the Village has met its burden to establish that the NODs were deficient with respect to other land use and zoning conflicts that allegedly could arise from the trust acquisition. But we are in agreement that, on remand, if the Regional Director again decides to approve these trust acquisitions, she should address these issues in more detail to make clear they have been considered and to explain terms that the Village contends it does not understand.

5. Environmental Concerns — § 151.10(h) (NEPA)

Finally, and with respect to environmental issues, we note that the environmental reviews had not been completed at the time that the Village's comments on the proposed trust acquisitions were due. *See, e.g.,* Environmental Review for Lahay Property, Aug. 9, 2010 (AR Vol. 1 Tab 18) (finalized almost 2 years after the Comment Letter was

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[32] Public Law 83-280, enacted in 1953, grants jurisdiction to certain states, including Wisconsin, over criminal offenses and civil causes of action in Indian country. For a discussion of Pub. L. 83-280, *see* Cohen's Handbook of Federal Indian Law 544-54 (2005 ed.).

submitted). Therefore, the Village has presented its comments on the environmental reviews in the first instance to the Board. In light of our remand to the Regional Director on other issues, *see supra*, the Regional Director should also consider the arguments raised by the Village with respect to environmental concerns.

To the extent that the Village raised new arguments in its briefs to the Board with respect to these proposed acquisitions, the Regional Director should consider and address those arguments as well on remand.

Conclusion

We affirm the Regional Director's NODs as to her authority to take land into trust for the Tribe pursuant to 25 U.S.C. § 465, her consideration under 25 C.F.R. § 151.10 of the Tribe's need and purpose for the lands (§ 151.10(b) and (c)), and her consideration of whether her staff can absorb any additional duties attendant to accepting the lands into trust (§ 151.10(g)). We take no position concerning the constitutional challenges raised by the Village to § 465. Except for the Village's bias argument, which we remand to the Regional Director for her consideration in the first instance, we reject the procedural arguments raised by the Village.

We vacate and remand to the Regional Director the remainder of the NODs to reconsider the remaining criteria under § 151.10(e) and (f), including any new or expanded arguments raised by the Village in its briefs before the Board. In addition, on remand, the Regional Director should address the Village's claims of bias and the Village's NEPA concerns, which we do not here address.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms in part, vacates in part, and remands the Regional Director's March 17, May 5, July 8, August 16, and November 23, 2010, notices of decision for further consideration consistent with this order.

I concur:

Debora G. Luther
Administrative Judge

Steven K. Linscheid
Chief Administrative Judge

Village of Hobart, Wisconsin v. Midwest Regional Director, Bureau of Indian Affairs
Docket Nos. IBIA 10-091, 10-092, 11-045 10-107, 10-131 and 11-002
Order Affirming in Part and Vacating in Part, and Remanding
Issued May 9, 2013
57 IBIA 4

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EXHIBIT C

MEMORANDUM OF UNDERSTANDING
Between
ONEIDA TRIBE OF INDIANS OF WISCONSIN
And
THE BUREAU OF INDIAN AFFAIRS-MIDWEST REGIONAL OFFICE

FY 2014 - FY 2017

This Memorandum of Understanding (hereinafter the "Agreement") is entered into by and between ONEIDA TRIBE OF INDIANS OF WISCONSIN and the Bureau of Indian Affairs (BIA), Midwest Regional Office (hereinafter MWRO), said entities collectively referred to as the "Parties."

This Agreement is being entered into for the purpose of setting forth, in writing, the understanding of the relationship of the Parties and facilitating the expeditious processing of fee-to-trust applications and reservation proclamations submitted by Participating Tribes. Through funds provided by Participating Tribes to supplement BIA staff, the MWRO will hire employees/contract staff whose sole duties and responsibilities will be to process Fee-to-Trust applications and reservation proclamations in a manner consistent with the terms contained herein.

RECITALS

A. The need for increased land base is imperative to the Tribes of Minnesota, Wisconsin, Michigan, and Iowa. Most Tribes do not have sufficient land to meet current housing, community, environmental protection, quality of life and economic development needs and a number of Tribes have very little or no trust land at all.

B. A number of combining factors have made it difficult for the Midwest Region and Agency staff to manage the fee-to-trust acquisition needs. As a result of these factors, a backlog of pending applications exists and it is compounded by the increasing number of applications filed each year.

C. The gap between fee-to-trust applications and land being accepted into trust by the Secretary of the Interior is widening.

D. Legal authority for this MOU is at 25 U.S. C. § 123 (c), § 458 cc (b) (3) (1998) and § 450 (j) (1998), 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions; Hazardous Substances Determinations.

E. The MWRO shall have oversight, responsibility and accountability for the administration of the regional and agency staff funded and supported by this agreement.

F. Fee-to-Trust Applications used herein, include all Tribal applications that may qualify for status as On-reservation, Contiguous/Adjacent, Off-reservation or Mandatory Acquisitions.

G. Definitions:

Council. The group of representatives of the Participating Tribes and the MWRO Supervisory Realty Specialist (SRS).

Division. The Midwest Region Director and group of staff assigned to work on trust acquisition cases under this Agreement.

Participating Tribe. A Tribe, Band or Community that is federally recognized and a signatory to this Agreement and who meets all requirements contained in this Agreement.

Tribe. A Tribe, Band or Community that is federally recognized.

TERMS AND CONDITIONS

1. Conditions Precedent/Eligibility

a. The Tribal Resolution: Participation in the Agreement will not become effective until the SRS (as defined above) has received a signed Tribal Resolution from the interested Tribe that contains an acknowledgement of the financial contribution and/or commitment of the required Tribal Priority Allocation (TPA) funds, and acknowledgment of the necessity to commit to becoming a signatory of the Agreement and to be bound by its terms.
b. The Agreement and Contribution: The Tribe must also sign the Agreement and complete any additional paperwork necessary to facilitate the re-programming of TPA funds, if applicable, to the Project. Or, the Tribe and MWRO will sign an agreement detailing outside funds being committed to the Division.
c. In addition to the Tribal Resolution, the Tribe will submit a letter identifying the designated tribal representative and alternates for the purpose of representation at Council meetings. A Participating Tribe reserves the right to change the names of its individual tribal representative at its discretion.

2. Qualifications for Participation/Minimum Financial Participation

a. The following shall serve as the minimum criteria for a Participating Tribe:
   i. The Participating Tribe must have the internal administrative support system necessary to process the intra-tribe portion of the fee-to-trust application.
   ii. The Participating Tribe understands that it shall be its responsibility to make an effort to work with its local or neighboring municipal governments.

b. Minimum financial participation:
   i. The budget for the Division will be funded by the Participating Tribes and divided evenly between the Participating Tribes for the four years.
   ii. Tribes may participate by contributing a minimum of **(TBD)** per fiscal year from their TPA or other funds for four consecutive years.
   iii. After year four, if this Agreement is renewed, it shall be funded by the Participating tribes.

3. Agreement Term

a. This Agreement shall be in effect for four years.
b. If this Agreement is not renewed at least six months (6) before the close of the fourth fiscal year of the Agreement, it will be deemed expired as of the date of the end of the fourth year and the terms and conditions contained herein will terminate.
c. The term of this Agreement may be extended at any time by the signatories in writing.
d. Altering the operational requirements of this Agreement must be approved by a majority of the Participating Tribes.

4. Division Employee Selection*

a. The Parties agree that the BIA personnel for the Division shall be governed by the terms of the Agreement. Any conflict involving the duties and/or responsibilities of the personnel shall be resolved in accordance with this Agreement and MWRO personnel policies. Federal employees' personnel rights are governed by Title 5 of the U.S.C.A. Statutory rights and obligations will not be superseded by this Agreement.
b. The Parties agree that additional employees in the MWRO office will be necessary to achieve the goals of this Project. The specific number and positions of the employees will be determined by the MWRO and the Advisory Council through a mutually agreed upon process.
c. The Parties agree that the process for selecting staff for filling of the Division positions will follow federal personnel rules and regulations. The position descriptions, interviewing of prospective candidates, will be made by the MWRO.

The MWRO shall inform the Advisory Council of selection criteria and the selected employees.

*Selection not applicable if tribal or contract staff are used.

5. Establishment of the Oversight Advisory Council

a. Oversight will be through a Joint tribal/MWRO Advisory Council (hereinafter the "Council) that will be composed of the MWRO Regional Director and one representative of each Participating Tribe. The Council shall meet at least twice a year in a manner determined by the Participating tribes.
b. The Parties to this agreement may appoint an Executive Committee for the purpose of providing more timely input to the Regional Director, which shall meet as necessary. The Committee will be comprised of both tribal and federal members.
c. A quorum of the Council shall be 100% of the Participating tribes, only if the number of Participating Tribes with an Agreement is less than four (4), or if there are four or more Participating Tribes, three-fourths of those tribes shall establish a quorum.
d. Decision making for the Council shall be by consensus vote of the attending Participating Tribes after a quorum is established.

6. Supervision of Office

The Division employees and consultants will report directly to the Regional Director's Office.

7. Scope of Work

The Division Project Leader will be the Division Supervisory Realty Specialist, (hereinafter "SRS"). The duties of the SRS are entailed in the attached job description. In addition, the SRS will be responsible for seeing that the Division staff will adhere to the duties described below in the Agreement as the basis for the processing of Fee-to-Trust Applications and reservation proclamations for the Participating Tribes.

8. Fee-to-Trust Activities

a. The SRS and employee (s) will be responsible for assuring that each request for fee-to-trust acquisition shall fulfill completely all of the administrative requirements of 25 CFR Part 151 for the request under consideration. This shall include but not be limited to:

    i. Maintaining a master checklist for each transition consistent with the Activity log attached to this MOU as Exhibit 1.

ii. Serving as liaison and maintaining communication between the MWRO and the Participating Tribe for Fee-to-Trust issues.
iii. Reviewing and commenting on any deficiencies in any current application package, and reviewing and providing technical assistance in the preparation of any future applications, as requested by the Participating Tribe.
iv. Assuring that adequate notification is provided to all possible units of local government with current jurisdiction over the property.
v. Reviewing and providing technical assistance, where requested, of all Environmental documents as required of the Participating Tribe or the BIA, and Phase I Surveys as may be required in accordance with 516 DM 6, Appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.
vi. Assisting the Field Solicitor in preparation of the Preliminary Title Opinions (PTO). Such assistance may include preparing draft PTO's, assistance in acquiring a Commitment for Title Insurance, and monitoring the progress of the Solicitor's Office in processing the PTO.
vii. Assisting Participating Tribes where requested in developing responses to comments received from other units of government with jurisdiction.
viii. Preparing the Notice of Decision on a requested parcel.
ix. Preparing the record for appeal under 25 CFR Part 2.
x. Assisting the Participating Tribes in eliminating or mitigating any of the Solicitor's objections in the PTO.
xi. Assisting in the preparation of Notice for Publication under 151.12(b).
xii. Preparing all documentation necessary for title examination required under 151.13.

b. The SRS and employee(s) will be responsible for assuring that each request for reservation proclamation shall fulfill completely all of the policy requirements as established.

9. Record Keeping

a. Books of Account: The SRS shall cause to be kept complete books of account of operations in which each project transaction shall be fully and accurately entered into an appropriate database.
b. Accounting: The financial statements shall be prepared in accordance with generally accepted accounting principles and shall be appropriate and adequate for the intended purpose and for carrying out the provisions of the Agreement. The format of the Accounting Reports shall be that of the attached budget submitted by MWRO. The fiscal year of the Project shall be October 1st through September 30th.
c. Records: At all times during the term of existence of the Agreement, the SRS shall keep or cause to be kept the books of account referred to in Section (9) (a), together with:

i. A current list of contact information, which also identifies the Participating Tribe contribution.
ii. A copy of this Agreement and any other operating documents.
iii. Financial statements of the Project.
iv. The books and records (including budgets) of the project as they relate to internal affairs.

d. Status Reports: A minimum of once per quarter, the MWRO-SRS shall cause to be prepared a Fee-to-Trust Division land into trust report.

e. Budget justification should contain some, if not all, of the following:
i. Personnel-Salary-Fringe
ii. Equipment, furnishing, facilities
iii. Material and supplies
iv. Travel
v. Sub-Contracts
vi. Other items of cost, television, radio, newspaper if necessary
vii. Printing costs
viii. Other real and personal property

10. Freedom of Information Act (FOIA)

Any Freedom of Information Act (hereinafter "FOIA") requests to the BIA shall be disclosed immediately to the particular Participating Tribe upon which the particular request is made, including the details of the specific information requested.

11. Periodic Consultation

In addition to consultation concerning specific applications or activities, the Participating Tribes, the SRS, and the BIA agree to meet and confer as necessary on matters of mutual concern. To the extent practicable, each party shall provide the other with a list of topic issues to be discussed at least five business days in advance of each such meeting.

12. Dispute Resolution

Any dispute as to interpretation of any provision of this Agreement will be submitted to the Council who will review all relevant material pertaining to the dispute. The council will issue the written decision. The decision of the Division is final except that it may not issue any decision in contravention of employee rights as governed by Title 5 of the Anti-Deficiency Act at Title 31 of the United States Code. Parties to the Agreement may use services of the Department's Alternative Dispute Resolution Office.

13. Entire Agreement

This Agreement sets forth the entire agreement and understanding between the Parties as to the subject matter hereof and merges and supersedes all prior

discussions, agreements and understandings of any and every nature between them, and neither party shall be bound by any condition, definition, warrant or representation other than expressly set forth or provided for in the Agreement, or as may be, on or subsequent to the date hereof, set forth in writing and signed by the Parties to bound thereby; and this Agreement may not be changed or modified except by an agreement in writing by the Parties.

14. Amendment

The parties may, from time to time, amend the provisions of the Agreement as may be deemed necessary or appropriate. Either party may request to amend this Agreement and it shall be incumbent upon the other party to consider and discuss such amendment with the requesting party in good faith. No provision of this Agreement may be changed, amended, waived, discharged, or terminated orally, but only by an instrument in writing signed by a duly authorized representative of the Participating Tribes and the MWRO.

15. Dissolution/Withdrawal

This agreement may be dissolved by the affirmative vote of the majority of the members taken at least 60 days before the end of the then-current fiscal year, to be effective at the end of the fiscal year in which the vote is taken. A Participating Tribe may withdraw from the Agreement for the remainder of the term of this Agreement by giving written notice, by Tribal Resolution, of such intent to the Division SRS at least 90 days prior to the end of the then-current fiscal year. The notice shall state the actual date the Participating Tribe will officially withdraw. If any Participating Tribe withdraws, funding contributed by the Participating Tribe for that fiscal year shall not be refunded.

16. Sovereign Immunity

Nothing in this MOU shall waive the Sovereign Immunity of the Tribe or its subsidiaries to suit in any court of competent jurisdiction.

CERTIFICATION

This Agreement entered into by and between the ONEIDA TRIBE OF INDIANS OF WISCONSIN by the authorized signatory below, and the Midwest Regional Director does hereby take effect beginning the Fiscal Year October 1, 2013 through Fiscal Year ending September 30, 2017.

Midwest Regional Office

By: Diane K. Rosen — Regional Director — 1/2/13 — Date

ONEIDA TRIBE OF INDIANS OF WISCONSIN

By: Edward Delgado — Chairman, Edward Delgado — 11-14-12 — Date

10-24-12-C — Tribal Resolution # — Date

MEMORANDUM OF UNDERSTANDING
Between
Oneida Tribe of Indians of Wisconsin
And
THE BUREAU OF INDIAN AFFAIRS-MIDWEST REGIONAL OFFICE

FY 2010 - 2013

This Memorandum of Understanding (hereafter the "Agreement") is entered into by and between participating tribes of the Midwest Region Division of Fee to Trust (hereinafter the "Division") and the Department of the Interior (DOI), Bureau of Indian Affairs (BIA), Midwest Regional Office (hereinafter "MWRO") (collectively referred to as the "Parties") as of the date set forth below.

This Agreement is being entered into for the purpose of setting forth, in writing, the understanding of the relationship of the Parties and facilitating the expeditious processing of Fee-to-Trust applications and reservation proclamations submitted by participating Division Tribes (hereinafter the "Project"). Through funds provided by participating tribes to supplement BIA staff, the MWRO will hire employees/contract staff whose sole duties and responsibilities will be to process Fee-to-Trust applications and reservation proclamations in a manner consistent with the terms contained herein.

RECITALS

A. The need for increased land base is imperative to the Tribes of Minnesota, Wisconsin, Michigan, and Iowa. Most Tribes do not have sufficient land to meet current housing, community and economic development needs and a number of Tribes have very little or no trust land at all.

B. A number of combining factors have made it difficult for the Midwest Region and Agency staff to manage the fee-to-trust acquisition needs. As a result of these factors a backlog of pending applications exists and it is compounded by the increasing number of applications filed each year.

C. The gap between fee-to-trust applications and land being accepted into trust by the Secretary of the Interior is widening.

D. Legal authority for this MOU is at 25 U.S. C. § 123 (c), § 458 cc (b) (3) (1998) and § 450 (j) (1998), 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions; Hazardous Substances Determinations.

E. The MWRO shall have oversight, responsibility and accountability for the administration of the regional and agency staff funded and supported by this agreement.

F. Fee-to-Trust Applications used herein, include all Tribal applications that may qualify for status as On-reservation, Contiguous/Adjacent, Off-reservation or Mandatory Acquisitions.

TERMS AND CONDITIONS

1. Conditions Precedent/Eligibility

a. The Tribal Resolution: Participation in the Project will not become effective until the Division Project Leader (as defined in Section 7) has received a signed Tribal Resolution from the interested Tribe that contains an acknowledgement of the financial contribution and/or commitment of the required TPA funds, and acknowledgment of the necessity to commit to becoming a signatory of the Agreement and to be bound by its terms.

b. The Agreement and Contribution: The Tribe must also sign the Agreement and complete any additional paperwork necessary to facilitate the re-programming of TPA funds, if applicable, to the Project or the tribe and MWRO sign an agreement detailing outside funds being committed to the Division.

c. In addition to the Tribal Resolution, the Tribe will submit a letter identifying the designated tribal representative and alternates for the purpose of representation at Division meetings. A Division Tribe reserves the right to change the names of their individual tribal representative at their discretion.

2. Qualifications for Participation/Minimum Financial Participation

a. The following shall serve as the minimum criteria for participation in the Division:
   i. The tribe must have the internal administrative support system necessary to process the intra-tribe portion of the fee-to-trust application.
   ii. The tribe understands that it shall be their responsibility to work with their local or neighboring municipal governments.

b. Minimum financial participation:
   i. The budget for the Division will be funded by the participating tribes and divided evenly between the tribes for the three years.
   ii. Tribes may participate by contributing a minimum of **(TBD)** per fiscal year from their TPA or other funds for three consecutive years.
   iii. After year three, if the Division is renewed, the Division shall be funded by the participating tribes on a pro-rata basis.

3. Division Agreement Term

a. This Agreement shall be in effect for three years, at which time it shall be reviewed for possible extension.

b. If this Agreement is not renewed at least six months (6) before the close of the third fiscal year of the Agreement, it will be deemed expired as of the date of the end of the third year and the terms and conditions contained herein will terminate.

4. Division Employee Selection*

a. The Parties agree that the BIA personnel for the Division shall be governed by the terms of the Agreement. Any conflict involving the duties and/or responsibilities of the personnel shall be resolved in accordance with this Agreement and MWRO personnel policies. Federal employee's personnel rights are governed by Title 5 of the U.S.C.A. Statutory rights and obligations will not be superseded by this Agreement.

b. The Parties agree that additional employees in the MWRO office will be necessary to achieve the goals of this Project. The specific number and positions of the employees will be determined by the MWRO and the Advisory Council through a mutually agreed upon process.

c. It is agreed.that the process for selecting staff for filling of the Division positions will follow federal personnel rules and regulations. The position descriptions, interviewing of prospective candidates, will be made by the MWRO. MWRO shall Inform Advisory Council of selection criteria and the selected employees.

*Selection not applicable if tribal or contract staff are used.

5. Establishment of the Oversight Advisory Council

a. Oversight of the Project will be through a Joint tribal/MWRO Advisory Council (hereinafter the "Division") that will be composed of the MWRO Regional Director and one representative of each participating Tribe. The Division shall meet at least twice a year in a manner determined by the participating tribes.

b. The Parties to this agreement may appoint an Executive Committee for the purpose of providing more timely input to the Regional Director, which shall meet as necessary. The Committee will be comprised of both tribal and federal members.

c. A quorum of the Division shall be 100% of the participating tribes, only if the amount of tribes with an Agreement participating is less than four (4), or if there are more than four (4) participating tribes, three-fourths of those tribes shall establish a quorum.

d. Decision making for the Division shall be by consensus vote of the attending tribes after a quorum is established.

6. Supervision of Office

a. The Division employees and consultants will report directly to the Regional Director's Office.

7. Scope of Work

a. The Division Project Leader will be the Division Supervisory Realty Specialist, (hereinafter "SRS"). The duties of the SRS are entailed in the attached job description. In addition, the SRS will be responsible for seeing that the Division staff will adhere to the duties described below in the Agreement as the basis for the processing of Fee-to-Trust Applications and reservation proclamations for the Division Tribes.

8. Fee-to-Trust Activities

a. The SRS and employee (s) will be responsible for assuring that each request for fee-to-trust acquisition shall fulfill completely all of the administrative requirements of 25 CFR Part 151 for the request under consideration. This shall include but.not be limited to:

i. Maintaining a master checklist for each transition consistent with the Activity log attached to this MOU as Exhibit 1.
ii. Serving as liaison and maintaining communication between the MWRO and Tribe/Band of Fee-to-Trust issues.
iii. Review and comment on any deficiencies in any current application package, and review and provide technical assistance in the preparation of any future applications, as requested by the Tribe/Band.
iv. Assuring that adequate notification is provided to all possible units of local government with current jurisdiction over the property.
v. Review and provide technical assistance, where requested, of all Environmental Assessments, NEPA reports required of the Tribe/Band or the BIA, and Level I Surveys as may be required in accordance with 516 DM 6, Appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.
vi. Assisting the Field Solicitor in preparation of the Preliminary Title Opinions (PTO). Such assistance may include preparing draft PTO's, assistance in acquiring a Commitment for Title Insurance, and monitoring the progress of the Solicitor's Office in processing the PTO.
vii. Assisting Tribes where requested in developing responses to comments received from other units of government with jurisdiction.

viii. Preparation of the Notice of Determination on a requested parcel.
ix. Preparing the record for appeal under 25 CFR Part 2.
x. Assisting the Tribes in eliminating or mitigating any of the Solicitor's objections, if any, in the PTO.
xi. Assisting in the preparation of Notice for publication under 151.12(b).
xii. Preparing all documentation necessary for title examination required under 151.13.

b. The SRS and employee (s) will be responsible for assuring that each request for reservation proclamation shall fulfill completely all of the policy requirements as established.

9. Record Keeping

a. Books of Account: The SRS shall cause to be kept complete books of account of the Project's operations in which each project transaction shall be fully and accurately entered into an appropriate data base.

b. Accounting: The financial statements of the Project shall be prepared in accordance with generally accepted accounting principles and shall be appropriate and adequate for the Project's intended purpose and for carrying out the provision of the Agreement. The format of the Accounting Reports shall be that of the attached budget submitted by MWRO. The fiscal year of the Project shall be October 1st through September 30th.

c. Records: At all times during the term of existence of the Project, the SRS shall keep or cause to be kept the books of account referred to in Section (9) (a), together with:
   i. A current list of contact information, which also identifies the Division member contribution.
   ii. A copy of this Agreement and any other operating documents.
   iii. Financial statements of the Project.
   iv. The books and Record (including budgets) of the project as they relate to the Project's internal affairs.

d. Status Reports: A minimum of once per quarter, the MWRO-SRS shall cause to be prepared a Fee-to-Trust Division land into trust report.

e. Budget justification should contain some, if not all, of the following:
   i. Personal-Salary-Fringe
   ii. Equipment, furnishing, facilities
   iii. Material and supplies
   iv. Travel
   v. Sub-Contracts
   vi. Other items of cost, television, radio, newspaper if necessary
   vii. Printing costs

viii. Other real and personal property

10. Freedom of Information Act (FOIA)

a. Any Freedom of Information Act (hereinafter "FOIA") requests to the BIA shall be disclosed immediately to the particular tribe upon which the particular request is made, including the details of the specific information requested.

11. Periodic Consultation

a. In addition to consultation concerning specific applications or activities, the Division Tribe (s), the SRS, and the BIA agree to meet and confer as necessary on matters of mutual concern. To the extent practicable, each party shall provide the other with a list of topic issues to be discussed at least five business days in advance of each such meeting.

12. Dispute Resolution

a. Any dispute as to interpretation of any provision of this Agreement will be submitted to the Division who will review all relevant material pertaining to the dispute. The Division will issue the written decision. The decision of the Division is final except that it may not issue any decision in contravention of employee rights as governed by Title 5 of the Anti-Deficiency Act at Title 31 of the United States Code. Parties to the Agreement may use services of the Department's Alternative Dispute Resolution Office.

13. Entire Agreement

a. This Agreement sets forth the entire agreement and understanding between the Parties as to the subject matter hereof and merges and supersedes all prior discussions, agreements and understandings of any and every nature between them, and neither party shall be bound by any condition, definition, warrant or representation other than expressly set forth or provided for in the Agreement, or as may be, on or subsequent to the date hereof, set forth in writing and signed by the Parties to bound thereby; and this Agreement may not be changed or modified except by an agreement in writing by the Parties.

14. Amendment

a. The parties may, from time to time, amend the provisions of the Agreement as may be deemed necessary or appropriate. Either party may request amendment of this Agreement, or it shall be incumbent upon the other party to consider and discuss such amendment with the

requesting party in good faith. No provision of this Agreement may be changed, amended, waived, discharged, or terminated orally, but only by an instrument in writing signed by a duly authorized representative of the Tribes and the MWRO.

15. Dissolution/Withdrawal

a. The Division may be dissolved by the affirmative vote of the majority of the members taken at least 60 days before the end of the then-current fiscal year, to be effective at the end of the fiscal year in which the vote is taken.

b. A Tribe may withdraw from the Division for the remainder of the term of this Agreement by giving written notice, by Tribal Resolution, of such intent to the Division SRS at least 90 days prior to the end of the then-current fiscal year.

16. Sovereign Immunity

a. Nothing in this MOU shall waive the Sovereign Immunity of the Tribe/Band or its subsidiaries to suit in any court of competent jurisdiction.

CERTIFICATION

This Agreement entered into by and between the Division members set forth below, and the Midwest Regional Director does hereby take effect beginning the Fiscal Year October 1, 2010 through Fiscal Year ending September 30, 2013 at which time this Agreement may be extended, amended or rescinded.

Midwest Regional Office

By: Diane K. Rosen — 11/13/09
ACTING Regional Director — Date

Division Member

By: Kathy Hughes — Oct 28, 2009
Tribal Representative — Date

Richard G. Hill — oct. 28. 2009
Tribal Resolution # — Date

MEMORANDUM OF UNDERSTANDING
Between
Oneida Tribe of Indians of Wisconsin
And
THE BUREAU OF INDIAN AFFAIRS-MIDWEST REGIONAL OFFICE

FY 2008 - FY 2010

This Memorandum of Understanding (hereafter the "Agreement") is entered into by and between participating tribes of the Midwest Region Division of Fee to Trust (hereinafter the "Division") and the Department of the Interior (DOI), Bureau of Indian Affairs (BIA), Midwest Regional Office (hereinafter "MWRO") (collectively referred to as the "Parties") as of the date set forth below.

This Agreement is being entered into for the purpose of setting forth, in writing, the understanding of the relationship of the Parties and facilitating the expeditious processing of fee-to-trust applications submitted by participating Division Tribes (hereinafter the "Project"). Through funds provided by participating tribes to supplement BIA staff, the MWRO will hire employees/contract staff whose sole duties and responsibilities will be to process Fee-to-Trust applications in a manner consistent with the terms contained herein.

RECITALS

A. The need for increased land base is imperative to the Tribes of Minnesota, Wisconsin, Michigan, and Iowa. Most Tribes do not have sufficient land to meet current housing, community and economic development needs and a number of Tribes have very little or no trust land at all.

B. A number of combining factors have made it difficult for the Midwest Region and Agency staff to manage the fee-to-trust acquisition needs. As a result of these factors, a backlog of pending applications exists and it is compounded by the increasing number of applications filed each year.

C. The gap between fee-to-trust applications and land being accepted into trust by the Secretary of the Interior is widening.

D. Legal authority for this MOU is at 25 U.S. C. § 123 (c), § 458 cc (b) (3) (1998) and § 450 (j) (1998), 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions; Hazardous Substances Determinations.

E. The MWRO shall have oversight, responsibility and accountability for the administration of the regional and agency staff funded and supported by this agreement.

TERMS AND CONDITIONS

1. Conditions Precedent/Eligibility

a. The Tribal Resolution: Participation in the Project will not become effective until the Division Project Leader (as defined in Section 7) has received a signed Tribal Resolution from the Interested Tribe that contains an acknowledgement of the financial contribution and/or commitment of the required TPA funds, and acknowledgment of the necessity to commit to becoming a signatory of the Agreement and to be bound by its terms.

b. The Agreement and Contribution: The Tribe must also sign the Agreement and complete any additional paperwork necessary to facilitate the re-programming of TPA funds, if applicable, to the Project or the tribe and MWRO sign an agreement detailing outside funds being committed to the Division.

c. In addition to the Tribal Resolution, the Tribe will submit a letter identifying the designated tribal representative and alternates for the purpose of representation at Division meetings. A Division Tribe reserves the right to change the names of their individual tribal representative at their discretion.

2. Qualifications for Participation/Minimum Financial Participation

a. The following shall serve as the minimum criteria for participation in the Division:
   i. The tribe must have the internal administrative support system necessary to process the intra-tribe portion of the fee-to-trust application.
   ii. The tribe understands that it shall be their responsibility to work with their local or neighboring municipal governments.

b. Minimum financial participation:
   i. The budget for the Division will be funded by the participating tribes and divided evenly between the tribes for the three years.
   ii. Tribes may participate by contributing a minimum of (TBD) per fiscal year from their TPA or other funds for three consecutive years.
   iii. After year three, if the Division is renewed, the Division shall be funded by the participating tribes on a pro-rata basis.

3. Division Agreement Term

a. This Agreement shall be in effect for three years, at which time it shall be reviewed for possible extension.

b. If this Agreement is not renewed at least six months (6) before the close of the third fiscal year of the Agreement, it will be deemed expired as of the date of the end of the third year and the terms and conditions contained herein will terminate.

4. Division Employee Selection*

a. The Parties agree that the BIA personnel for the Division shall be governed by the terms of the Agreement. Any conflict involving the duties and/or responsibilities of the personnel shall be resolved in accordance with this Agreement and MWRO personnel policies. Federal employee's personnel rights are governed by Title 5 of the U.S.C.A. Statutory rights and obligations will not be superseded by this Agreement.

b. The Parties agree that additional employees in the MWRO office will be necessary to achieve the goals of this Project. The specific number and positions of the employees will be determined by the MWRO and the Advisory Council through a mutually agreed upon process.

c. It is agreed that the process for selecting staff forfilling of the Division positions will follow federal personnel rules and regulations. The position descriptions, interviewing of prospective candidates, will be made by the MWRO. MWRO shall inform Advisory Council of selection criteria and the selected employees.

*Selection not applicable if tribal or contract staff are used.

5. Establishment of the Oversight Advisory Council

a. Oversight of the Project will be through a Joint tribal/MWRO Advisory Council (hereinafter the "Division") that will be composed of the MWRO Regional Director and one representative of each participating Tribe. The Division shall meet at least twice a year in a manner determined by the participating tribes.

b. The Parties to this agreement may appoint an Executive Committee for the purpose of providing more timely input to the Regional Director, which shall meet as necessary. The Committee will be comprised of both tribal and federal members.

c. A quorum of the Division shall be 100% of the participating tribes, only if the amount of tribes with an Agreement participating is less than four (4), or if there

are more than four (4) participating tribes, three-fourths of those tribes shall establish a quorum.

d. Decision making for the Division shall be by consensus vote of the attending tribes after a quorum is established.

6. Supervision of Office

a. The Division employees and consultants will report directly to the Regional Director's Office.

7. Scope of Work

a. The Division Project Leader will be the Division Lead Realty Specialist, (hereinafter "LRS"). The duties of the LRS are entailed in the attached job description. In addition, the LRS will be responsible for seeing that the Division staff will adhere to the duties described below in the Agreement as the basis for the processing of Fee-to-Trust Applications for the Division Tribes.

8. Fee-to-Trust Activities

a. The LRS and employee (s) will be responsible for assuring that each request for fee-to-trust acquisition shall fulfill completely all of the administrative requirements of 25 CFR Part 151 for the request under consideration. This shall include but not be limited to:

i. Maintaining a master checklist for each transition consistent with the Activity log attached to this MOU as Exhibit 1.
ii. Serving as liaison and maintaining communication between the MWRO and Tribe/Band of Fee-to-Trust issues.
iii. Review and comment on any deficiencies in any current application package, and review and provide technical assistance in the preparation of any future applications, as requested by the Tribe/Band.
iv. Assuring that adequate notification is provided to all possible units of local government with current jurisdiction over the property.
v. Review and provide technical assistance, where requested, of all Environmental Assessments, NEPA reports required of the Tribe/Band or the BIA, and Level I Surveys as may be required in accordance with 516 DM 6, Appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.
vi. Assisting the Field Solicitor in preparation of the Preliminary Title Opinions (PTO). Such assistance may include preparing draft PTO's, assistance in acquiring a Commitment for Title Insurance, and monitoring the progress of the Solicitor's Office in processing the PTO.

vii. Assisting Tribes where requested in developing responses to comments received from other units of government with jurisdiction.
viii. Preparation of the Notice of Determination on a requested parcel.
ix. Preparing the record for appeal under 25 CFR Part 2.
x. Assisting the Tribes in eliminating or migrating any of the Solicitor's objections, if any, in the PTO.
xi. Assisting in the preparation of Notice for publication under 151.12(b).
xii. Preparing all documentation necessary for title examination required under 151.13.

9. Record Keeping

a. Books of Account: The LRS shall cause to be kept complete books of account of the Project's operations in which each project transaction shall be fully and accurately entered into an appropriate data base.

b. Accounting: The financial statements of the Project shall be prepared in accordance with generally accepted accounting principles and shall be appropriate and adequate for the Project's intended purpose and for carrying out the provision of the Agreement. The format of the Accounting Reports shall be that of the attached budget submitted by MWRO. The fiscal year of the Project shall be October 1st through September 30th.

c. Records: At all times during the term of existence of the Project, the LRS shall keep or cause to be kept the books of account referred to in Section (9) (a), together with:
   i. A current list of contact information, which also identifies the Division member contribution.
   ii. A copy of this Agreement and any other operating documents.
   iii. Financial statements of the Project.
   iv. The books and Record (including budgets) of the project as they relate to the Project's internal affairs.

d. Status Reports: A minimum of once per quarter, the MWRO-LRS shall cause to be prepared a Fee-to-Trust Division land into trust report.

e. Budget justification should contain some, if not all, of the following:
   i. Personal-Salary-Fringe
   ii. Equipment, furnishing, facilities
   iii. Material and supplies
   iv. Travel
   v. Sub-Contracts
   vi. Other items of cost, television, radio, newspaper if necessary
   vii. Printing costs.
   viii. Other real and personal property

10. Freedom of Information Act (FOIA)

a. Any Freedom of Information Act (hereinafter "FOIA") requests to the BIA shall be disclosed immediately to the particular tribe upon which the particular request is made, including the details of the specific information requested.

11. Periodic Consultation

a. In addition to consultation concerning specific applications or activities, the Division Tribe (s), the LRS, and the BIA agree to meet and confer as necessary on matters of mutual concern. To the extent practicable, each party shall provide the other with a list of topic issues to be discussed at least five business days in advance of each such meeting.

12. Dispute Resolution

a. Any dispute as to interpretation of any provision of this Agreement will be submitted to the Division who will review all relevant material pertaining to the dispute. The Division will issue the written decision. The decision of the Division is final except that it may not issue any decision in contravention of employee rights as governed by Title 5 of the Anti-Deficiency Act at Title 31 of the United States Code. Parties to the Agreement may use services of the Department's Alternative Dispute Resolution Office.

13. Entire Agreement

a. This Agreement sets forth the entire agreement and understanding between the Parties as to the subject matter hereof and merges and supersedes all prior discussions, agreements and understandings of any and every nature between them, and neither party shall be bound by any condition, definition, warrant or representation other than expressly set forth or provided for in the Agreement, or as may be, on or subsequent to the date hereof, set forth in writing and signed by the Parties to bound thereby; and this Agreement may not be changed or modified except by an agreement in writing by the Parties.

14. Amendment

a. The parties may, from time to time, amend the provisions of the Agreement as may be deemed necessary or appropriate. Either party may request amendment of this Agreement, or it shall be incumbent upon the other part to consider and discuss such amendment with the requesting party in good faith. No provision of this Agreement may be

changed, amended, waived, discharged, or terminated orally, but only by an instrument in writing signed by a duly authorized representative of the Tribes and the MWRO.

15. Dissolution/Withdrawal

a. The Division may be dissolved by the affirmative vote of the majority of the members taken at least 60 days before the end of the then-current fiscal year, to be effective at the end of the fiscal year in which the vote is taken.

b. A Tribe may withdraw from the Division for the remainder of the term of this Agreement by giving written notice, by Tribal Resolution, of such intent to the Division LRS at least 90 days prior to the end of the then-current fiscal year.

16. Sovereign Immunity

a. Nothing in this MOU shall waive the Sovereign Immunity of the Tribe/Band or its subsidiaries to suit in any court of competent jurisdiction.

CERTIFICATION

This Agreement entered into by and between the Division members set forth below, and the Midwest Regional Director does hereby take effect beginning the Fiscal Year October 1, 2007 through Fiscal Year ending September 30, 2010 at which time this Agreement may be extended, amended or rescinded.

Midwest Regional Office

By: _____ 4-13-07
Regional Director Date

Division Member

By: _____ 3/30/07
Tribal Representative Date

03-28-07-B 03-28-07
Tribal Resolution# Date

MEMORANDUM OF UNDERSTANDING
Between
MIDWEST FEE TO TRUST CONSORTIUM TRIBES AND THE BUREAU OF INDIAN AFFAIRS – MIDWEST REGIONAL OFFICE

FY 2005 – FY 2007

This Memorandum of Understanding (hereinafter the "Agreement") is entered into by and between the Midwest Fee to Trust Consortium Tribes (hereinafter the "Consortium") and the Department of Interior, Bureau of Indian Affairs Midwest Regional Office, (hereinafter "MRO") (collectively referred to as "the Parties") as of the data set forth below.

This Agreement is being entered into for the purpose of setting forth, in writing, the understanding of the relationship of the Parties and facilitating the expeditious processing of fee-to-trust applications submitted by participating Consortium tribes (hereinafter the "Project"). Through funds provided by participating Tribes to supplement Bureau of Indian Affairs realty staff, the MRO will hire employees/contract staff whose sole duties and responsibilities will be processing fee-to-trust applications in a manner consistent with the terms contacted herein.

RECITALS

A. The need for increased land base is imperative to the Tribes of Minnesota, Wisconsin, Michigan, and Iowa. Most tribes do not have sufficient land to meet current housing, community, and economic development needs and a number of Tribes have very little or no trust land at all.

B. A number of combining factors have made it difficult for the Midwest region and Agency staff to manage the fee-to-trust acquisition needs. As a result of these factors a back log of pending applications exists and it is compounded by the increasing number of applications filed each year.

C. The gap between fee-to-trust applications and land being accepted into trust by the Secretary of the Interior is widening.

D. Legal authority for this MOU is at 25 U.S.C. § 123 (c), § 458 cc (b) (3) (1998) and § 450j (j) (1998), 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions; Hazardous Substances Determinations.

E. The Midwest Regional Office shall have oversight, responsibility, and accountability for the administration of the regional and agency staff funded and supported by this agreement.

TERM AND CONDITIONS

1. Conditions Precedent/Eligibility

   a. The Tribal Resolution: Participation in the Project will not become effective until the Consortium Project Leader (as defined in Section 5) has received a signed tribal Resolution from the interested Tribe, which contains an acknowledgement of the financial contribution and/or commitment of the required TPA funds, and acknowledgment of the necessity to commit to becoming a signatory of the Agreement and to be bound by its term.

   b. The Agreement and Contribution: The tribe must sign the Agreement and complete any additional paperwork necessary to facilitate the re-programming of TP A funds, if applicable, to the Project or the tribe and MRO sign an agreement detailing outside funds being committed to the Consortium.

   c. In addition to the tribal Resolution, Tribes will submit a letter identifying the designated tribal representative and alternates for the purpose of representation at Consortium meetings. A Consortium tribe reserves the right to change the names of their individual tribal representatives at their discretion.

2. **Qualifications for Participation/Minimum Financial Participation**

   a. The following shall serve at the minimum criteria for participation in the Consortium:
      i. The tribe must have the internal administrative support system necessary to process the intra-tribe portion of the fee-to-trust application.
      ii. Tribe must be willing to work with their local or neighboring municipal governments.
      iii. Tribe cannot submit for consideration through this Consortium any off-reservation land; the Consortium will allow submission of land contiguous to the reservation.

   b. Minimum financial participation:
      i. The budget for the consortium will be funded by the participating tribes and divided evenly between the tribes for the first three years.
      ii. Tribes may participate by contributing a minimum of (TBD) per fiscal year from their TPA or other funds for three consecutive years.
      iii. After year three, if the Consortium is renewed, the Consortium shall be funded by the participating tribes on a pro-rata basis.

3. **Consortium Agreement Term**

   a. This Agreement shall be in effect for three years, at which time it shall be reviewed for possible extension.

b. If this Agreement is not renewed at least six months (6) before the close of the third fiscal year of the Agreement, it will be deemed expired as of the date of the end of the third fiscal year and the terms and conditions contained herein will terminate.

4. **Consortium Employee Selection***

a. The Parties agree that the BIA personnel for the Consortium shall be governed by the terms of the Agreement. Any conflict involving the duties and/or responsibilities of the personal shall be resolved in accordance with this Agreement and MRO personnel policies. Federal employees personnel rights are governed by Title 5 of the U.S.C.A. Statutory rights and obligations will not be superceded by this agreement.

b. The Parties agree that additional employees in the MRO office will be necessary to achieve the goals of this Project. The specific number and job descriptions of those employees will be determined by the MRO and the Advisory Council through a mutually agreed upon process.

c. It is agreed that the process for selecting staff for filing of the Consortium positions will follow federal personnel rules and regulations. The position descriptions, interviewing of prospective candidates, will be made by the MRO. MRO shall inform Advisory Council of selection criteria and the selected employees.

*Section not applicable if tribal or contract staff are used.

5. **Establishment of the Oversight Advisory Council**

a. Oversight of the Project will be through a Joint tribal/MRO Advisory Council (hereinafter the "Consortium") which will be composed of the MRO Regional Director and one representative of each participating tribe. The Consortium shall meet at least twice a year.

b. The Parties to this agreement may appoint an executive Committee for the purpose of providing more timely input to the Regional Director, which shall meet as necessary. The committee will be comprised of both tribal and federal members.

c. A quorum of the Consortium shall be three-fourths of the participating tribes.

d. Decision making for the Consortium shall be by unanimous vote of the attending tribes after a quorum is established.

6. **Supervision of Office**

a. The consortium employees and consultants will report directly to the Regional Director's Office.

7. Scope of Work

a. The Consortium Project leader will be the Consortium Lead Realty Specialist (hereinafter "LRS"). The duties of the LRS are entailed in the attached job description. In addition, the LRS will be responsible for seeing that the Consortium staff will adhere to the duties described below in this Agreement as the basis for the processing of Fee-to-Trust Applications for Consortium tribes.

8. Fee-to-Trust Activities – the employee(s) will be responsible for assuring that each request for fee-to-trust acquisition shall fulfill completely all of the administrative requirements of 25 CFR Part 151 for the request under consideration. This shall include but not be limited to:

1. Maintaining a master check list for each transition consistent with the "Midwest Regional Office – Status of all Pending Land Acquisitions" attached to this MOA as Exhibit 2.

2. Serving as liaison and maintaining communication between the Agency and the Tribal/Band on fee-to-trust issues.

3. Review and comment on any deficiencies in any current application package, and review and technical assistance in the preparation of any future applications, as requested by the Tribe/Band.

4. Assuring that adequate notification is provided to all possible units of local government with current jurisdiction over the property.

5. Review and technical assistance, where requested, of all Environmental Assessments, NEPA reports required of the tribe/Band or the BIA, and Level 1 surveys as may be required in accordance with 516 DM 6, Appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions; Hazardous Substances Determinations.

6. Assisting the Field Solicitor in preparation of the Preliminary Title Opinion (PTO). Such assistance may include preparing draft PTO's, assistance in acquiring a Commitment for Title Insurance, and monitoring the progress of the Solicitor's office in processing the PTO.

7. Assisting Tribes in developing responses to comments received from other units of government with jurisdiction.

8. Preparation of the letter of determination on a requested parcel.

9. Preparing the record for appeal under 25 CFR Part 2.

10. Assisting the Tribes in eliminating or migrating any of the Solicitor's objections in the PTO.

11. Assisting in the preparation of Notice under 151.12(b).

12. Preparing all documentation necessary for title examination required under 151.13.

9. Record Keeping

a. Accounts

1. Complete account of the Project's operations, in which each Project transaction shall be fully and accurately entered into a database under the care of the LRS.

b. Accounting: The financial statements of the Project shall be prepared in accordance with generally accepted accounting principles and shall be appropriate and adequate for the Project's intended purpose and for carrying out the provision of this Agreement. The format of the Accounting Reports shall be that of the attached budget submitted by MRO. The fiscal year of the Project shall be October 1 through September.

c. Records: At all times during the term of existence of the Project, the LRS shall keep or cause to keep the books of account referred to in Section (6)(a), together with:

1. A current list of contact information, which also identifies the Consortium member contribution.
2. A copy of this Agreement and any other operating documents (if any);
3. Financial statements of the Project.
4. The books and Record (including budgets) of the project as they relate to the Project's internal affairs.

d. Status Reports: A minimum of once per quarter, the MRO-LRS shall cause to be prepared a Fee-to-Trust Consortium land into trust status report.

e. Budget Justification should contain some, if not all, of the following:

1. Personnel-Salary-Fringe
2. Equipment, furnishing, facilities
3. Material and supplies
4. Travel
5. Sub-contracts

6. Other items of cost, television, radio, newspaper, if necessary
7. Printing costs
8. Other real and personal property

10. **Freedom of Information Act (FOIA)**
Any Freedom of Information Act (hereinafter "FOIA") requests to the BIA shall be disclosed immediately to the particular tribe upon which the particular request is made, including the details of the specific information requested and a copy of the response and enclosures.

11. **Periodic Consultation**
In addition to consultation concerning specific applications or activities, the Consortium Tribe(s), the LRS, and the BIA agree to meet and confer as necessary on matters of mutual concern. To the extent practicable, each party shall provide the other with a list of topic issues to be discussed at least five business days in advance of each such meeting.

12. **Dispute Resolution**
Any dispute as to interpretation of any provision of this Agreement will be submitted to the Committee who will review all relevant material pertaining to the dispute. The Committee will issue a written decision. The decision of the Committee is final except that it may not issue any decision in contravention of employee rights as governed by Title 5 of the Anti-Deficiency Act at title 31 of the United States Code. Parties to the agreement may use services of the Department's Alternative Dispute Resolution Office.

13. **Entire Agreement**
This agreement sets forth the entire agreement and understanding between the Parties as to the subject matter hereof and merges and supersedes all prior discussions, agreements and understandings of any and every nature between them, and neither party shall be bound by any condition, definition, warrant or representation other than expressly set forth or provided for in this Agreement, or as may be, on or subsequent to the date hereof, set forth in writing and signed by the Parties to be bound thereby; and this Agreement may not be changed or modified except by an agreement in writing signed by the Parties.

14. **Amendment**

The Parties may from time to time amend the provisions of this Agreement as may be deemed necessary or appropriate. Either party may request amendment of this Agreement, and it shall be incumbent upon the other party to consider and discuss such amendment with the requesting party in good faith. No provision of this Agreement may be changed, amended, waived, discharged, or terminated orally, but only by an instrument in writing signed by a duly authorized representatives of the tribes and the MRO.

15. **Dissolution/Withdrawal**

a. The Consortium may be dissolved by the affirmative vote of a majority of the members taken at least 60 days before the end of the then-current fiscal year, to be effective at the end of the fiscal year in which the vote is taken.

b. A Tribe may withdraw from the Consortium for the remainder of the term of this Agreement by giving written notice, by Tribal Resolution, of such intent to the Consortium LRS at least 90 days prior to the end of the then-current fiscal year.

CERTIFICATION

This Agreement entered into by and between the Consortium members set forth below, and the Midwest Regional Director does hereby take effect beginning the Fiscal year October 1, through Fiscal Year ending September 30, at which time this Agreement may be extended, amended, or rescinded.

Midwest Regional Office

By: _____ 12/20/04
Regional Director — Date

Consortium Member (Tribe) Oneida Tribe of Indians of Wisconsin

By: _____ 1/3/05
Authorized Tribal Official — Date

Cristina Danforth
Print Name

10-06-04-B — 10/06/04
Tribal Resolution Number — Date

EXHIBIT D

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Midwest Regional Office
5600 West American Boulevard, Suite 500
Bloomington, Minnesota 55437

JAN 19 2017

In Reply Refer to:
Division of Fee to Trust
Hobart Parcels (Remanded Decision)

NOTICE OF DECISION

BY CERTIFIED MAIL - 9171 9690 0935 0036 0346 94

Honorable Cristina Danforth
Tribal Chairwoman
Oneida Nation
P.O. Box 365
Oneida, Wisconsin 54155

RE: Decision on Remand from Village of Hobart v. Midwest Regional Director, Bureau of Indian Affairs, 57 IBIA 4 (2013).

Dear Chairwoman Danforth:

On May 9, 2013, the Interior Board of Indian Appeals (IBIA) affirmed in part, vacated in part, and remanded, the six Notices of Decisions issued by the Midwest Regional Director to accept eight properties—consisting of 21 parcels and 499.022 acres—into trust on behalf of the Oneida Tribe of Indians of Wisconsin (Oneida Nation or Nation).[1] The IBIA affirmed the Regional Director's decisions as to: (1) her authority to accept land into trust on behalf of the Nation under the Indian Reorganization Act (IRA), 25 U.S.C. § 5108[2] (25 C.F.R. § 151.10(a)); (2) her consideration of the Nation's need for the land (25 C.F.R. § 151.10(b)); (3) the Nation's purposes for and uses of the land (25 C.F.R. § 151.10(c)); and (4) the Bureau of Indian Affairs' (BIA) ability to absorb any additional responsibilities (25 C.F.R. § 151.10(g)).[3]

The IBIA vacated and remanded the Regional Director's decisions as to loss of tax revenue (25 C.F.R. § 151.10(e)) and jurisdictional and land use conflicts (25 C.F.R. § 151.10(f)).[4] Additionally, the Regional Director, on remand, was directed to address the Village's arguments regarding environmental concerns (25 C.F.R. § 151.10(h)).[5] Finally, the Regional Director was instructed to

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[1] The official name of the tribal entity was changed from "Oneida Tribe of Indians of Wisconsin" to "Oneida Nation." Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 81 Fed. Reg. 81, 26829 (May 4, 2016).
[2] Formerly codified at 25 U.S.C. § 465.
[3] Village of Hobart v. Midwest Reg'l Dir., Bureau of Indian Affairs, 57 IBIA 4, 5 (2013).
[4] Id.
[5] Id.

consider the Village of Hobart's claim of alleged bias in decision making.[6] This Notice of Decision specifically addresses the matters vacated or otherwise remanded by the IBIA.

Background

Between January 24, 2007 and September 20, 2007, the Oneida Nation submitted fee-to-trust applications for eight properties known as the Boyea, Buck, Calaway, Catlin, Cornish, DeRuyter, Gerbers, and Lahay parcels (Hobart Parcels). We have reviewed the legal description and maps and determined this acquisition qualifies for processing under the regulations found at 25 CFR § 151.10 for on-reservation acquisitions. The parcels are located in the Village of Hobart, Brown County, Wisconsin, and are described in Exhibit A (enclosed).[7]

In 2010, the Regional Director[8] issued six notices of decision of intent to accept into trust the eight properties, consisting of 21 parcels and 499.022 acres, for the Nation. Subsequently, the Village of Hobart timely appealed each decision. Through a series of Orders in 2010, the IBIA consolidated the six appeals, docketed as listed below:

Docket No.	Property Name	Date of Notice of Decision
10-091	Boyea	Mar. 17, 2010
10-092	Cornish	Mar. 17, 2010
10-107	Gerbers	May 5, 2010
10-131	Buck	July 8, 2010
11-002	Catlin	Aug. 16, 2010
11-002	Calaway	Aug. 16, 2010
11-002	DeRuyter	Aug. 16, 2010
11-045	Lahay	Nov. 23, 2010

The IBIA remanded portions of the decisions for reconsideration by the Regional Director. *Village of Hobart v. Acting Midwest Reg'l Dir., Bureau of Indian Affairs*, 57 IBIA 4, 5 (2013). Upon remand, additional comments were solicited from interested parties through the issuance of a supplemental Notice of Application.[9] Our analysis herein includes and considers the comments from the Village of Hobart contained within its replies to the original Notices of Application, its filings with the IBIA, and its reply to the supplemental Notice of Application.

Regulatory Authority

The applicable regulations are set forth in 25 C.F.R. Part 151. The regulations specify that it is the Secretary's policy to accept lands "in trust" for the benefit of Tribes when such acquisition is authorized by an Act of Congress; and (1) when such lands are within the exterior boundaries of the Tribe's reservation or adjacent thereto, or within a Tribal consolidation area; or (2) when the

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[6] Id.
[7] *See* Letter of Application for the Boyea Parcel from the Oneida Nation, to Terrence Virden, Midwest Reg'l Dir., Bureau of Indian Affairs (Jan. 24, 2007); Buck Parcel (Sept. 20, 2007); Calaway Parcel (Sept. 20, 2007); Catlin Parcel (Sept. 20, 2007); Cornish Parcel (Sept. 20, 2007); DeRuyter Parcel (Sept. 20, 2007); Gerbers Parcel (Feb. 8, 2007); Lahay Parcel (Sept. 20, 2007) (on file with the Midwest Regional Office).
[8] Some decisions were issued by an "Acting" Regional Director under the Regional Director's authority.
[9] Notice of (Non-Gaming) Land Acquisition Application (Aug. 6, 2013) (on file with the Midwest Regional Office).

Tribe already owns an interest in the land; or (3) when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.[10]

The Buck, Gerbers, Lahay, and Cornish acquisitions facilitate Indian housing and self-determination. The Boyea, Calaway, Catlin, and DeRuyter acquisitions facilitate economic development and self-determination. Accordingly, these acquisitions fall within the purview of Department's land acquisition policy. Pursuant to 25 C.F.R. § 151.10, the Secretary is required to consider the following requirements in evaluating tribal requests for the acquisition of lands in trust status, when the land is located within or contiguous to the tribe's reservation, and the acquisition is not mandated:

(a) the existence of statutory authority; (b) need of the tribe for additional land; (c) the purpose for which the land will be used; (e) impact on the State and its political subdivisions resulting from removal of the land from the tax rolls; (f) jurisdictional problems and potential conflicts of land use which may arise; (g) whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status; and (h) compliance with 516 DM 6, Appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.

This decision addresses the issues remanded by the IBIA, including the criteria set forth in 25 C.F.R. § 151.10 (e), (f), and (h).

Village of Hobart Comments

In its reply[11] to the Notices of Application and in its Opening Briefs to IBIA,[12] the Village of Hobart provided information regarding taxes, special assessments, services provided to the parcel, zoning, and regulatory issues, along with numerous other complaints. Specifically, the Village provided the following objections:

1) The Village maintains that the Nation must restart the entire fee to trust process including the submission of a new application because "the decision relating to [these parcels] was vacated."[13]

2) The Village states that there is a substantial negative impact on the Village resulting from the removal of the subject properties from the tax rolls. The Village also alleges numerous fiscal impacts that result from the Nation's trust acquisitions, including lost development potential at commercial/industrial parks, lack of service agreements, loss

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[10] 25 C.F.R. § 151.3.
[11] Letter from Paul G. Kent, Attorney for the Vill. of Hobart, to Terrence Virden, Midwest Reg'l Dir., Bureau of Indian Affairs (Nov. 6, 2008) (on file with the Midwest Regional Office).
[12] Village of Hobart's Opening Brief, Village of Hobart v. Midwest Reg'l Dir., Bureau of Indian Affairs, 57 IBIA 4 (2013) (Nos. 10-131 and 11-002) (Buck, Catlin, Calaway, DeRuyter); Village of Hobart's Opening Brief, Hobart, 57 IBIA 4 (Nos. 10-091 and 10-092) (Boyea, Cornish); Village of Hobart's Opening Brief, Hobart, 57 IBIA 4 (No. 10-107) (Gerbers); Village of Hobart's Opening Brief, Hobart, 57 IBIA 4 (2013) (No. 11-045) (Lahay) (on file with the Midwest Regional Office).
[13] Letter from Frank W. Kowalkowski, Attorney for the Vill. of Hobart, to Diane Rosen, Midwest Reg'l Dir., Bureau of Indian Affairs (Sept. 5, 2013) (on file with the Midwest Regional Office).

of tax income to school districts, and hypothetical future loss of tax income due to other trust acquisitions.[14]

3) The Village states that it provides numerous services to those residing within the area to be acquired, including transportation, sewer, water, parkland, firefighting, land use planning, and economic development which, if the land is taken into trust, it would have to perform with reduced funding due to removal from property tax rolls.[15]

4) The Village states that significant land use conflicts exist and that the BIA failed to properly identify the proposed uses of the properties. Specifically, the Village argues that:

   a) BIA must consider whether the proposed future uses are consistent with the Village's Comprehensive Plan.[16]

   b) The Village's zoning code will be supplanted by the Oneida Nation's land use regulations if the property is transferred into trust.[17]

   c) Fourteen parcels within the Village are zoned Limited Industrial by the Village, but Agricultural by the Nation.[18]

   d) The Nation has attempted to stymie the Village's land use plans by making land purchases that interfere with Village development projects.[19]

   e) Oneida Nation's tribal regulations permit mobile homes, while Village regulations do not.[20]

   f) The Nation has encouraged its members and other entities not to comply with Village regulations.[21]

5) The Village states that non-contiguous trust acquisitions cause checker-boarding of jurisdiction for zoning and emergency services.[22] The Village is specifically concerned with the potential for confusion and conflict between Village and Oneida Nation tribal law enforcement.[23]

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[14] Letter from Paul G. Kent, Attorney for the Vill. of Hobart, to Terrence Virden, Midwest Reg'l Dir., Bureau of Indian Affairs (Nov. 26, 2008) (on file with the Midwest Regional Office).
[15] Id.
[16] Village of Hobart's Opening Brief at 60, Hobart, 57 IBIA 4 (Nos. 10-091 & 10-092) (on file with the Midwest Regional Office).
[17] Id. at 61-68.
[18] Id.
[19] Id. at 61-62.
[20] Id. at 61.
[21] Id. at 63-64.
[22] Id. at 63.
[23] Id. at 67-68.

6) The Village states that the Regional Director did not adequately explain the term "jurisdictional pattern."[24]

7) The Village states that the proposed trust acquisition (and trust acquisitions in general) is detrimental to the Village's stormwater management program due to loss of fees and duplication of services.[25]

8) The Village stated that an Environmental Assessment (EA) or Environmental Impact Statement (EIS) should have been performed due to the "highly controversial effects" and "unresolved conflicts" caused by the proposed action, or because BIA failed to identify a change in land use.[26]

9) The Village states that the Phase I Environmental Site Assessments performed by BIA failed to properly categorize nearby hazardous materials and/or environmental contamination as Recognized Environmental Conditions (RECs) for the subject properties.[27] The Village further argues that the BIA failed to consult adequately with local government officials when preparing the Phase I ESA.[28]

10) The Village also states that the acquisitions did not comply with Environmental Compliance Memorandum No. ECM 10-2, which it claims is mandatory.[29]

11) The Village states that the Regional Director is biased, and the BIA is biased at an administrative level.[30]

25 CFR § 151.10 (e) – Impact on the State and its political subdivisions resulting from the removal of this property from the tax rolls.

The IBIA remanded the Regional Director's previous consideration of 25 C.F.R. § 151.10 (e), regarding tax loss to local governments.

In its combined reply brief,[31] the Village states that the Regional Director refused to consider the cumulative and aggregate impact of the simultaneous trust applications, which affect 133 parcels for an approximate tax loss of $36,148.88. Likewise, in its September 5, 2013, response to the supplemental August 6, 2013, Notice of Application, the Village presented recently updated calculations on the total property tax loss associated with the Nation's trust applications for approximately 142 parcels of land, totaling 3,156.070 acres located within the Village. Based on 2012 taxes and land values, the Village anticipates its property tax loss for these 142 parcels to be

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[24] Village of Hobart's Opening Brief at 65, Village of Hobart v. Midwest Reg'l Dir., Bureau of Indian Affairs, 57 IBIA 4 (2013) (No.11-045) (on file with the Midwest Regional Office).
[25] Village of Hobart's Opening Br. at 65-66, Hobart, 57 IBIA 4 (Nos. 10-091 & 10-092) (on file with the Midwest Regional Office).
[26] Village of Hobart's Opening Br. at 81, Hobart, 57 IBIA 4 (No. 11-045) (on file with the Midwest Regional Office) (citing 516 DM 2, Appendix 2 at 2.3.)
[27] Id. at 84-85.
[28] Id. at 86; Village of Hobart's Opening Brief at 85, 88, Hobart, 57 IBIA 4 (Nos. IBIA 10-131 & 11-002).
[29] Letter from Frank W. Kowalkowski, Attorney for the Vill. of Hobart, to Diane Rosen, Midwest Reg'l Dir., Bureau of Indian Affairs (Sept. 5, 2013) (on file with the Midwest Regional Office)
(Village's response letter to Supplemental Notice of Application).
[30] Village of Hobart's Opening Brief at 42-48, Hobart, 57 IBIA 4 (Nos. 10-091 & 10-092).
[31] Appellant's Combined Reply Brief, Hobart, 57 IBIA 4 (Nos. IBIA 10-131 & 11-002).

approximately $29,317.54. However, in this case, the BIA need only consider the impact on the tax rolls of a specific proposed acquisition, i.e., the taxes currently assessed.[32]

For the eight applications (consisting of 21 parcels) actually under consideration here,[33] the total tax loss for the Village for 2015 (payable 2016) is an estimated $3,997.90[34]:

Parcel Name	2015 taxes (due 2016)
Boyea	$ 686.30
Buck	$ 179.40
Calaway	$ 163.30
Catlin	$ 725.70
Cornish	$ 638.00
DeRuyter	$ 162.10
Gerbers	$ 932.60
Lahay	$ 510.50
Total	**$ 3,997.90**

The Brown County tax levy for 2015 was $84,432,779.00.[35] The Village of Hobart's 2015 property tax levy was $2,770,548.00.[36] The total property tax charged on the property in 2015 was $17,457.10, of which the Village received $3,997.90.

Village Tax	Village Levy	Percentage of Levy
$3,997.90	$2,770,548.00	0.1443%

Taxes – Unpaid past due assessments and stormwater fees

The 2015 Stormwater Management fees for the subject properties are $1,328.52.[37]

In 2008, the Village stated that these proposed trust acquisitions "have an adverse impact on local revenues because the tribe has not paid over $430,000 in past due assessments and stormwater fees." On November 2, 2016, updated property tax records were retrieved for each property subject to this decision; the property tax records (which include payment information) indicate that there are currently no delinquent past due assessments or stormwater fees. Further, 25 CFR § 151.13 requires the elimination of "liens, encumbrances, or infirmities" if these would "make title to the land unmarketable." Therefore, any overdue or unpaid assessments on these parcels must be paid, or otherwise resolved, prior to acceptance into trust.

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[32] City of Eagle Butte v. Acting Great Plains Reg'l Dir., Bureau of Indian Affairs, 49 IBIA 75, 81-82 (2009).
[33] The IBIA asked the Regional Director to address whether the Administrative Record omitted the DeRuyter property tax invoices. After examining the casefile, it appears that the Nation never submitted those tax invoices. For our review on remand, we requested updated tax invoices for all 21 parcels including the DeRuyter property. The invoices have been considered in our analysis.
[34] State of Wisconsin Real Estate Property Tax Bills for 2015 (on file with the Midwest Regional Office).
[35] Bureau of Local Gov't Serv., Div. of State and Local Finance, Wis. Dep't of Revenue, Town, Village, and City Taxes-2015, Taxes Levied 2015 – Collected 2016 5-6 (n.d.).
[36] Id.
[37] State of Wisconsin Real Estate Property Tax Bills for 2015 (on file with the Midwest Regional Office).

Tax loss to school districts

The 2015 School District tax charged for the subject parcels is $8,294.50.[38] The 2015 levy for school districts within the Village of Hobart is $6,034,569.00.[39]

School Districts Tax	School Districts Levy	Percentage of Levy
$8,294.50	$6,034,569.00	0.1374497%

The Village stated that "loss of tax revenue [for schools] will not be reflected in additional federal grants."[40] While local school districts will lose revenue as a result of the trust acquisition, Congress has attempted to mitigate this effect with Impact Aid provided on a per student basis. Importantly, no school districts submitted comments or objected to the applications, and the Village has not explained how a loss of revenue to a school district would impact the Village's budget or operations.

Services provided by Village and Tribe

Brown County and other nearby municipalities have executed service agreements with the Nation regarding delivery of services to tribal lands within the County. For example, on May 29, 2008 (amended September 16, 2008 and June 29, 2010), the Oneida Nation and Brown County entered into a service agreement which includes cross-deputation for law enforcement and mutual aid secondary assistance in emergency services.

The Nation and the Village entered into a Service Agreement, effective November 16, 2004 through November 16, 2007. During the term of the agreement, the Nation compensated the Village based on a formula accounting for property values (rather than lost property tax) and the cost of services provided by the Village. The Village has asserted that the Nation has passed a tribal resolution that prohibits the Tribe from entering into a new agreement with the Village.[41] Contrary to the Village's contention, documents provided by the Oneida Nation show that it has made clear that it is open to negotiating new service agreements, which may include payments in lieu of taxes, if the Village were to recognize the Nation as a government pursuant to federal law.[42] However, the parties are not currently negotiating a new agreement, nor is the commencement of negotiations anticipated in the near future.[43]

Direct services provided by the Oneida Nation for tribal members and their families include: waste and recycling pickup, health care, elderly services, public safety, education and library services,

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[38] Id.
[39] Bureau of Local Gov't Serv., Div. of State and Local Finance, Wis. Dep't of Revenue, Town, Village, and City Taxes-2015, Taxes Levied 2015 – Collected 2016 5-6 (n.d.).
[40] Village of Hobart's Opening Brief at 56, Village of Hobart v. Midwest Reg'l Dir., Bureau of Indian Affairs, 57 IBIA 4 (2013) (Nos. 10-091 & 10-092).
[41] Letter from Paul G. Kent, Attorney for the Vill. of Hobart, to Terrence Virden, Midwest Reg'l Dir., Bureau of Indian Affairs (Nov. 26, 2008) (on file with the Midwest Regional Office); *See* Village of Hobart v. Midwest Reg'l Dir., Bureau of Indian Affairs, 57 IBIA 4, 29 (2013).
[42] Oneida Business Committee (BC) Resolution No. 10-12-11-B, Oct. 12, 2011 (on file with the Midwest Regional Office) (rescinding and replacing BC Resolution No. 2-20-08-C regarding government to government relations with the Village of Hobart).
[43] Oneida Nation, Socioeconomic Conditions within the Reservation of the Oneida Tribe of Indians of Wisconsin 17 (Mar. 18, 2015) (on file with the Midwest Regional Office) (stating that entering into a future service agreement is unlikely).

recreation programs, public works, utilities, public transportation, housing, and mortgage loans and rentals. The Nation also provides many community services to non-tribal residents of the Oneida reservation. Services provided by the Oneida Police Department include first responders, traffic violations, criminal arrests, investigations, pick-ups and transportation. The Oneida Nation does not receive any reimbursement for these services. Fines from traffic tickets issued by the Nation are given to the county and/or state. The Nation provides utility services (sewer and water) within the Oneida Sanitary District Parks and recreation areas have been constructed and maintained by the Nation for the benefit of tribal and non-tribal residents.[44]

While the Nation provides all of these services to its membership on the reservation, fire coverage is handled by the municipalities, in this case the Village of Hobart. Without an intergovernmental agreement in place there is a possibility that emergency services provided by the Village, including fire protection, could go uncompensated. However, this is similar to the situation for other tax-exempt properties within the Village, such as churches and schools. And, although fire protection is paid through property taxes, the Village has not provided specific information regarding the cost of fire protection.

In the Village's November 26, 2008 comment letter it raised the issue of the cost of repair for three roads (St. Josephs St., Shenandoah St., and Westfield Rd.) serving "mainly tribal trust or tribal fee lands" arguing that such repairs exceeded $100,000 for 2009. While these three roads service Oneida Trust land, we note that there are also a significant number of private fee parcels serviced by these roads. Further, the three roads in question do not directly service any of the proposed acquisitions currently under consideration, but are only located near the Boyea property. Similar to the Village, the BIA provides funding for maintenance of roads serving tribal lands. Many of these roads benefit tribal members and non-tribal members throughout the community. While the three specific roads are not currently eligible for this funding, several other nearby roadways (e.g. Seminary Rd, Jason Dr., and Hwy 54) are on the Indian Reservation Road Inventory (IRR), and are eligible for BIA funding. This program partially offsets the Village's financial burden for road maintenance.

Speculative Future Losses

The Village has complained that the Nation has made various efforts to thwart the Village's industrial and commercial economic development plans, thus depriving the Village of future tax revenues.[45] The Village has also expressed concern about its ability to raise taxes to offset any loss caused by fee-to-trust acquisitions, citing a Wisconsin law that it argues prohibits it from raising taxes above a 2% levy limit.[46] The Village has also provided information regarding the cumulative tax impact for 142 parcels of land, comprised of both previous and *potential future* trust acquisitions.[47]

The BIA "has no obligation to consider an appellant's speculation about what might happen in the future"[48] and the Village has not provided sufficient information to properly analyze its concerns.

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[44] Id. at 2.
[45] Village of Hobart's Opening Brief at 61, Hobart, 57 IBIA 4 (Nos. 10-091 & 10-092).
[46] Letter from Paul G. Kent, Attorney for the Vill. of Hobart, to Terrence Virden, Midwest Reg'l Dir., Bureau of Indian Affairs (Nov. 26, 2008) (on file with the Midwest Regional Office).
[47] Letter from Frank W. Kowalkowski, Attorney for the Vill. of Hobart, to Diane Rosen, Midwest Reg'l Dir., Bureau of Indian Affairs (Sept. 5, 2013) (on file with the Midwest Regional Office).
[48] City of Eagle Butte v. Acting Great Plains Reg'l Dir., Bureau of Indian Affairs, 49 IBIA 75, 82 (2009).

BIA need not consider speculative future tax loss, only the impact on the tax rolls of a particular proposed acquisition, i.e., the taxes currently assessed.[49]

25 CFR § 151.10 (f) – Jurisdictional and land use conflicts

Regarding land use and jurisdictional issues, IBIA stated the following:

> With respect to the Village's concerns about land use and jurisdictional issues (§ 151.10(f)), the Regional Director . . . failed to mention, much less discuss, the Village's land use concerns regarding adjacent fee and trust lands that are subject to very different uses and zoning (e.g., the Gerbers property will continue to be used and zoned by the Tribe for agricultural and residential purposes; it is located within and adjacent to land zoned by the Village for a commercial industrial park) and the Village's concerns regarding implementation of its storm water management plan, given the increasing checkerboard geography of fee and trust land within the Village's boundaries.

In addition, the Village contends that the Regional Director did not explain what she meant by a "jurisdictional pattern." The IBIA instructed that should the "Regional Director again decide to approve these trust acquisitions, she should address [land use and zoning conflict] issues in more detail to make clear they have been considered and to explain terms that the Village contends it does not understand."[50]

Zoning

Of the 21 parcels under consideration here, the Village's zoning classification and the Nation's zoning classification are in concordance for all but three, listed below. The other 18 parcels are zoned "A1 - Agricultural" by both the Village and the Nation.

For the Cornish property, parcel HB-91-1, the Village has zoned the property "R2R - Rural Residential" while the Nation has zoned the property "A1 - Agricultural." There is a low probability for conflict in land use here. The Village's zoning allows for agriculture and single family housing, as does the Nation's.

For the Lahay property, parcel HB-520-1, the Village has zoned the property "R2R - Rural Residential" while the Nation has zoned the property "R1 - Single Family." This situation also presents a low risk for conflicting land use. Both zoning districts allow low density residential development.

For the Gerbers property, parcel HB-328, the Village has zoned the property "L1 - Limited Industrial" while the Nation has zoned the property "A1 - Agricultural." The Gerbers property is located within and adjacent to land zoned by the Village for a commercial industrial park. As the Village noted in its Opening Brief,[51] there is a potential for land use conflict where industrial development and agriculture exist side by side. However, the Village failed to provide evidence to support its contention that "residential and/or agricultural purposes are completely inconsistent with urban development and light industrial development." Further, this condition is not unique to the Gerbers property. Contrary to the Village's claim that these "purposes are inconsistent," we

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[49] Id. at 81-82.
[50] Village of Hobart v. Midwest Reg'l Dir., Bureau of Indian Affairs, 57 IBIA 4, 30 (2013).
[51] Village of Hobart's Opening Brief at 50-52, Hobart, 57 IBIA 4 (No. 10-107).

note on Fernando Drive, just north of the Gerbers parcel, the Village has created the same situation unilaterally by placing agricultural and industrial zoning districts immediately adjacent to one another. Further, much of the land surrounding the industrial park (albeit separated by roadways) has been zoned "A1 - Agricultural" by the Village. We note that, in this case, the Nation's zoning designation, A1 - Agricultural, is more restrictive than the Village's.

The Nation has not proposed a change in use for any of the subject properties, and the Village has not raised any material conflict between existing land uses and Village zoning.

The Village has indicated a general concern that the Nation's zoning regulations permit mobile home parks, while the Village's prohibit them.[52] However, the Nation has not proposed such a use for any of the parcels under consideration here.

The Village has stated that BIA should consider whether the proposed uses for the property are consistent with the future uses identified in the Village's comprehensive plan.[53] The Village did not provide a specific comparison of the comprehensive plan's future land uses and the Nation's proposed uses. The comprehensive plan is available on the Village website[54] including a *draft* Future Land Use Map. The relationship between the Nation's proposed uses, the Village's current zoning, and the Village's draft Future Land Use Map is as follows:

Parcel Name	Proposed use	Village Zoning (current)	Village *draft* Future Land Use Map
Buck	Residential	Agriculture	Mixed Use Commercial and Residential
Gerbers	Residential and Agriculture	Limited Industrial	Mixed Commercial / Industrial
Boyea	Agriculture	Agriculture	Mostly residential, small portion Mixed Commercial / Industrial
Catlin	Agriculture	Agriculture	Agriculture / Future Residential
DeRuyter	Agriculture	Agriculture	Split between Agriculture / Future Residential and Residential
Calaway	Agriculture	Agriculture	Residential
Cornish	Residential	Residential	Residential
Lahay	Residential	Residential	Residential

Again, the Oneida Nation has not proposed any change in land use for any of the subject parcels. The proposed uses are also generally consistent with the Village's draft future land use map.

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[52] Village of Hobart's Opening Brief at 61, Hobart, 57 IBIA 4 (Nos. 10-091 & 10-092).
[53] Id. at 59-60.
[54] *Chapter 7- Land Use*, Village of Hobart Comprehensive Plan, http://www.hobart-wi.org/vertical/sites/%7B354A483F-042E-454E-A570-720BFEDE46D9%7D/uploads/Pre-Hearing_DRAFT_Ch_7_-_Land_Use.pdf (last visited Jan. 18, 2017).

Jurisdiction - Potential disruption of stormwater management

IBIA has ordered on remand that BIA provide additional consideration of stormwater management issues that may arise with respect to § 151.10(f). The Village, in its response to the Supplemental Request for Comments dated August 6, 2013, states:

> The Village, Tribe, and United States Government are presently parties in a lawsuit involving storm water fees on trust land which is pending before the 7th Circuit Court of Appeals. The Village, as an operator of a regulated small MS4, is mandated by federal law to implement a storm water management program. The EPA issued draft NPDES permits to the Village, Tribe, and County. The Tribe has refused to pay storm water fees for trust land, and has claimed that to the extent the fees are owed, they are owed by the United States Government. Storm water does not flow according to a checkerboard pattern of trust land. Rather, this is a serious jurisdictional and land use conflict.[55]

In 2007, the Village passed an ordinance assessing stormwater management fees on all parcels of land located within the village, to include those owned by the Oneida Nation. The assessment would finance a stormwater management system. The Village stated that although the Nation "generally paid these assessments in the past," the Nation "may not be paying these fees if the property is taken into trust." The Village also expressed concern that the properties "will not be subject to state law" and the Village's "expensive and painstaking efforts to improve surface water quality may be wasted." Finally, the Village argued that the Nation "should agree to be bound by the Village's stormwater program."[56] When the Nation sought declaratory judgment that the assessment could not be lawfully imposed on it, the Village filed a third-party complaint against the United States. In *Oneida Tribe of Indians v. Village of Hobart,* the district court judge rendered summary judgment for the Nation and granted the United States' motion to dismiss the third-party claim, which the Village appealed.[57] The Seventh Circuit affirmed the court's ruling on October 18, 2013, and determined that the assessment is a tax, not a fee, and that the tribe owed no debt to the Village.[58] The Village pursued the matter by filing a *writ of certiorari* in the Supreme Court of the United States, which was denied.[59] Because the Seventh Circuit held in favor of the Oneida Nation and the Department of the Interior (DOI) on this matter, this issue is resolved.

The Seventh Circuit also stated, "Congress has authorized the EPA to delegate to states the authority to issue stormwater management permits."[60] Wisconsin, however, in applying for permitting authority, "disclaimed authority to regulate stormwater runoff on Indian Lands."[61] Therefore, in Wisconsin, it is Indian governments, as opposed to the state, that may assume

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[55] Letter from Frank W. Kowalkowski, Attorney for the Vill. of Hobart, to Diane Rosen, Midwest Reg'l Dir., Bureau of Indian Affairs (Sept. 5, 2013) (on file with the Midwest Regional Office) (Village's response letter to Supplemental Notice of Application).
[56] Letter from Paul Kent, Attorney for Vill. of Hobart, to Terrence Virden, Midwest Reg'l Dir., Bureau of Indian Affairs (Dec. 2, 2008) (on file with the Midwest Regional Office).
[57] Oneida Tribe of Indians v. Village of Hobart, 891 F. Supp. 2d 1058, 1059 (E.D. Wis. 2012).
[58] Oneida Tribe of Indians of Wis. v. Village of Hobart, 732 F.3d 837, 842 (7th Cir. 2013)
[59] Village of Hobart v. Oneida Tribe of Indians, 732 F.3d 837, 842 (7th Cir. 2013), *cert. denied*, 134 S. Ct. 2661 (2014).
[60] *Oneida Tribe*, 732 F.3d at 840.
[61] Id. at 841.

regulatory authority under the Clean Water Act. As a result, the Village and Oneida Nation implement separate stormwater management programs.

Jurisdiction - VOH Checkerboard Pattern

The Village has expressed concern regarding the potential for jurisdictional confusion in relation to emergency services.[62] Specifically, it notes that police dispatch calls in the Village may go to both the Village and Tribal police departments, causing potential confusion and conflict between the departments, and possibly reducing response time. The Village has also stated that the term "jurisdictional pattern" is unclear as used in the original Notices of Decision.[63]

In the *Village of Hobart* decision, the Seventh Circuit noted that 17 percent of Hobart's population is comprised of Indians of the Oneida Nation. The "Indians' homes...are scattered throughout the village and as a result the Indian and non-Indian properties form an irregular checkerboard pattern."[64] In fact, "6.6 percent of the village's total land – is held by the United States in trust for the Oneida Tribe." The court acknowledged that this checkerboard pattern of jurisdiction is an "awkward" but "familiar feature of American government." In fact, "federal facilities of all sorts, ranging from post offices to military bases, are scattered throughout the United States...a similar scatter is common in Indian country."[65] The term "jurisdictional pattern" used in our previous Notices of Decision refers specifically to this checkerboard pattern of jurisdiction.

In our view, the most feasible solution to the "checkerboard" issue is the development of cooperative service agreements with other government bodies in the area, though such agreements are not required by the BIA. It is important to note that a service agreement between the Village and Nation was in place from November 16, 2004 through November 15, 2007. As previously mentioned, this agreement expired and was not renewed. The Nation has made it clear that it is open to negotiating service agreements if the Village were to recognize the Nation as a government pursuant to federal law, with inherent authority to regulate its members and its land on the Oneida Reservation.[66] The inability of the Village and Nation to execute an intergovernmental service agreement contributes to the jurisdictional conflict that the Village complains of.

After examining each parcel's proposed land use, current zoning, and the Village's draft Future Land Use Map, we recognize that the trust acquisition of these parcels is crucial to the Nation's ability to govern its own land as a sovereign nation.

151.10 (h) – Environmental Hazards

On remand, IBIA has required BIA to consider the Village's comments with respect to environmental concerns. The IBIA stated:

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[62] Village of Hobart's Opening Brief at 67, Hobart v. Midwest Reg'l Dir., Bureau of Indian Affairs, 57 IBIA 4 (2013) (Nos. 10-091 & 10-092).
[63] Village of Hobart's Opening Brief at 65, Hobart, 57 IBIA 4 (No. 11-045).
[64] Oneida Tribe of Indians of Wis. v. Village of Hobart, 732 F.3d 837, 842 (7th Cir. 2013)
[65] Id. at 839.
[66] Oneida Business Committee (BC) Resolution No. 10-12-11-B, Oct. 12, 2011 (on file with the Midwest Regional Office) (rescinding and replacing BC Resolution No. 2-20-08-C regarding government to government relations with the Village of Hobart).

Finally, and with respect to environmental issues, we note that the environmental reviews had not been completed at the time that the Village's comments on the proposed trust acquisitions were due. See, e.g., Environmental Review for Lahay Property, Aug. 9, 2010 (AR Vol. 1 Tab 18) (finalized almost 2 years after the Comment Letter was submitted). Therefore, the Village has presented its comments on the environmental reviews in the first instance to the Board. In light of our remand to the Regional Director on other issues, see supra, the Regional Director should also consider the arguments raised by the Village with respect to environmental concerns.[67]

Environmental Compliance

All fee-to-trust acquisitions require compliance with the National Historic Preservation Act (NHPA), the Endangered Species Act (ESA), and 25 C.F.R. § 151.10(h), which includes compliance with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.

National Historic Preservation Act (NHPA) Compliance

No further compliance with NHPA is required. The Bureau of Indian Affairs- Midwest Regional Office (BIA-MRO) determined that the Hobart Parcels trust acquisitions do not have the potential to cause effects on historic properties (36 CFR 800.3 (a) (1)). The BIA-MRO issued determinations on the following dates:

Boyea	July 7, 2015
Cornish	June 29, 2015
Gerbers	July 7, 2015
Buck	June 29, 2015
Catlin	June 29, 2015
Calaway	July 7, 2015
DeRuyter	July 7, 2015
Lahay	July 13, 2015

Endangered Species Act (ESA) Compliance

No further compliance with ESA is required. The Oneida Nation received concurrence from the U.S. Fish and Wildlife Service (USFWS) for a "No Effect" determination for Threatened and Endangered Species on March 14, 2016. The "No Effect" determination was based on the intent of the Nation to maintain current land use. The BIA-MRO issued this determination on the following dates:

Boyea	July 7, 2015
Cornish	June 29, 2015
Gerbers	July 7, 2015
Buck	June 29, 2015
Catlin	June 29, 2015
Calaway	July 7, 2015

[67] Village of Hobart v. Midwest Reg'l Dir., Bureau of Indian Affairs, 57 IBIA 4, 18 (2013).

DeRuyter	July 7, 2015
Lahay	July 13, 2015

National Environmental Policy Act (NEPA)

No further compliance with NEPA is required. 25 C.F.R. § 151.10(h) requires 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, the latter of which is discussed below. 516 DM 6, appendix 4 provides for the BIA Official to determine whether or not plans for development or physical alteration are established to the point where NEPA review of the proposed activity should be done in conjunction with the land transfer. Secondly, if a proposed action belongs to a category of actions, as published by the DOI or the BIA, that have no potential for significant or cumulative environmental effects, it can be categorically excluded from further analysis and documentation in an environmental assessment or an environmental impact statement.

The BIA-MRO determined that no change in land use is anticipated; therefore, the Hobart Parcels fee-to-trust acquisitions will not have a significant effect on the quality of the human environment (individually or cumulatively), and neither an Environmental Assessment (EA) nor an Environmental Impact Statement (EIS) is required (40 CFR 1508.4; 43 CFR 46.205). Thus, the parcels can be categorically excluded.

BIA-MRO issued the Categorical Exclusion (CE) on the following dates:

Boyea	July 7, 2015
Cornish	June 29, 2015
Gerbers	July 7, 2015
Buck	June 29, 2015
Catlin	June 29, 2015
Calaway	July 7, 2015
DeRuyter	July 7, 2015
Lahay	July 13, 2015

The Village of Hobart's Comments

The Village's environmental concerns are centered on BIA-MRO's perceived failure to comply with 516 DM 6, appendix 4, NEPA Revised Implementing Procedures and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.

516 DM 6, appendix 4, NEPA Revised Implementing Procedures

The Village states that the Regional Director failed to comply with the requirements of NEPA as outlined in 25 C.F.R. § 151.10(h). Specifically, the Village claims that the Regional Director failed to comply with § 151.10(h) by erroneously relying on a categorical exclusion for each of the properties.[68] The Village states, in a letter dated December 2, 2008, there should be an EIS

[68] Village of Hobart's Opening Brief at 81, Hobart, 57 IBIA 4 (No. 11-045) (citing 516 DM 2, Appendix 2 at 2.3).

prepared to assess the impact of placing 2,673 acres (133 parcels) into Trust.[69] This Decision only addresses the 8 remanded decisions comprising 499.022 acres (22 parcels).

At the time of the application, the Oneida Nation proposed to: 1) maintain the existing agricultural and/or residential use for seven of the eight Hobart properties; and 2) maintain land use on the Buck property with the possibility of future residential development. However, the Nation later clarified that no construction is likely on the Buck site in the foreseeable future. Currently, the Buck property is designated rural vacant and has minimal development.[70] Therefore, all applications for the Hobart properties contemplate maintaining the current land use and a categorical exclusion is appropriate, thereby rendering an environmental impact statement unnecessary.

602 DM 2 (Phase I Environmental Site Assessment)

The Village has four claims related to 602 DM 2: (1) The Regional Director failed to comply with Part 602 of the Interior Department Manual because the DOI did not consult or coordinate with the Village on any environmentally related concerns, nor did the Department interview local government officials as part of the Phase I ESA;[71] (2) The Phase I ESA's were deficient and did not satisfy 25 CFR 151.10(h) because they identified environmental concerns nearby (e. g., an underground storage tank 0.2 miles from the Lahay property), yet no Phase II studies were completed.[72] (3) the Phase I ESAs were prepared or approved by an employee of the BIA who receives compensation from the Tribe pursuant to a side agreement between the Tribe and the BIA; (4) DOI failed to comply with Environmental Compliance Memorandum No. ECM 10-2, which the Village believes is mandatory. Each of these concerns is addressed below.

602 DM 2 prescribes Departmental policy, responsibilities, and functions regarding required determinations 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 by the Department for the United States. It requires the acquiring bureau to ascertain the nature and extent of any potential liability resulting from hazardous substances or other environmental problems associated with the subject property. Pre-acquisition Environmental Site Assessments (P1 ESA) procedures may be developed by the implementing bureau; however, these procedures must adopt current ASTM standards. P1 ESA(s) are prepared inclusive of four components: 1) Records review; 2) Site Reconnaissance; 3) Interviews; and 4) Report. It also requires the acquiring bureau to adopt current ASTM-standards to the implementing bureau's pre-acquisition environmental site assessment procedures.

The relevant ASTM requirements are as follows:

ASTM E1527-13[73] (Section 11.5.1) states interviews should occur with at least one staff member of *any one* of the following types of agencies: 1) state and/or local agency officials; 2) the local fire

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[69] Letter from Paul G. Kent, Attorney for the Vill. of Hobart, to Terrence Virden, Midwest Reg'l Dir., Bureau of Indian Affairs (Nov. 26, 2008) (on file with the Midwest Regional Office).
[70] Letter from Fred Muscavitch, Oneida Div. of Land Mgmt., to Scott Heber, Envtl. Prot. Specialist, Bureau of Indian Affairs (Mar. 6, 2009) (on file with the Midwest Regional Office).
[71] Village of Hobart's Opening Brief at 86, Hobart, 57 IBIA 4 (No. 11-045); Village of Hobart's Opening Brief at 85, 88, Hobart, 57 IBIA 4 (Nos. 10-131 & 11-002).
[72] Village of Hobart's Opening Brief at 85, Hobart, 57 IBIA 4 (No. 11-045).
[73] ASTM E1527-05 was effective until superseded by ASTM E1527-13 on November 1, 2013.

department serving the property; 3) state or local agency regulating hazardous waste; or 4) local agencies regulating building or groundwater permits.

ASTM E 1527 defines a "recognized environmental condition" as the presence or likely presence of any hazardous substances or petroleum products in, on, or at a property: 1) due to any release to the environment; 2) under conditions indicative of a release to the environment; or 3) under conditions that pose a material threat of a future release to the environment. De minimis conditions are not recognized environmental conditions. BIA-MRO uses Level I Contaminant Surveys as a resource to determine the presence or likely presence of an environmental condition on a given property, as permitted by the ASTM standards.

The ASTM standards also define an Environmental Professional as "a person meeting the education, training, and experience requirements as set forth in 40 CFR § 312.10(b)." BIA-MRO hires qualified personnel in accordance with the standardized hiring practices as established and regulated by the Office of Personnel Management. Environmental professionals performing P1 ESAs are required by ASTM E 1527 to certify that: 1) the professional meets the definition of an Environmental Professional and; 2) the study was developed and performed in conformance with the standards and practices set forth in 40 CFR Part 312.

With respect to the Village's first claim, the Oneida Nation has operational divisions tasked with the delivery of services including environmental monitoring and land management. In this case, interviews were conducted with Oneida Nation's environmental and land department staff. These Oneida Nation governmental agencies have intimate knowledge of the properties and are the best source of information regarding potential contamination on the properties. In combination with extensive site visits, these interviews serve to meet the requirements of ASTM E1527.

With respect to the Village's second claim – that environmental concerns warranted a level II study – evidence was not found on the Hobart properties that justified the issuance of notice of a recognized environmental condition as defined by the applicable ASTM standard. The BIA-MRO complied with 602 DM 2 for the Hobart properties through the development and approval of P1 ESA(s) for the subject properties. None of the P1 ESA(s) identified recognized environmental conditions in accordance with ASTM E1527. Therefore, no further environmental investigation was/is required on the subject properties.

Phase 1 Environmental Site Assessment(s) (ESA) were prepared by BIA-MRO on the following dates:

Boyea	1) 07/2009; 2) 12/2009; 3) 04/2016; 4) 09/2016
Cornish	1) 02/2010; 2) 04/2016; 3) 09/2016
Gerbers	1) 01/2010; 2) 04/2010; 3) 04/2016; 4) 09/2016
Buck	1) 03/2009; 2) 12/2009; 3) 04/2016; 4) 09/2016
Catlin	1) 02/2010; 2) 05/2010; 3) 04/2016; 4) 09/2016
Calaway	1) 02/2010; 2) 05/2010; 3) 04/2016; 4) 09/2016
DeRuyter	1) 02/2009; 2) 05/2009; 3) 04/2016; 4) 09/2016
Lahay	1) 08/2010; 2) 02/2016; 3) 09/2016

The Regional Director has approved the NEPA Coordinator Review and Phase I Environmental Site Assessment Report (Update) for the Hobart Parcels on the dates listed below.

Boyea	September 19, 2016
Cornish	September 19, 2016
Gerbers	September 19, 2016
Buck	September 19, 2016
Catlin	September 19, 2016
Calaway	September 19, 2016
DeRuyter	September 19, 2016
Lahay	September 12, 2016

The Village's third claim, which involves claims of institutional bias, is discussed in the subsequent section. Finally, with respect to the issue of compliance with ECM 10-2, compliance is not mandatory. 602 DM 2.6(a) allows bureaus to establish their own pre-acquisition environmental site assessment procedures. Interim Guidance issued by the Director of the Bureau of Indian Affairs on June 27, 2012, specifies that "non-scope considerations" discussed in ECM 10-2 should be implemented in the same manner as they were prior to April 25, 2009 and need not be analyzed in the Phase I.[74]

Therefore, the Phase I site assessments for the parcels satisfy the requirements of 602 DM 2, and we find the Village's concerns to be without merit.

Bias

On remand, the IBIA directed the Regional Director to consider in the first instance the Village's allegations of institutional bias in the decision making and also to address the following issues: the outcome of the investigation by the Inspector General of the Department (IG) referenced in a 2006 Government Accountability Office (GAO) report; the relevance, if any, of that IG investigation to the Village's allegations; and any corrective actions that may have been taken in response to the IG investigation prior to the Oneida Notices of Decision (NODs) at issue, if relevant to the Village's allegations of bias.[75]

Village Bias Allegations

The Village of Hobart did not allege actual bias by the Regional Director in issuing the Oneida NODs or by BIA employees in reviewing the Nation's applications or in preparing the records the Regional Director relied on in issuing the NODs. The Village pointed to no materials in the administrative record to show actual bias or substantive error,[76] and the Village ultimately stated it did not claim structural bias against the BIA.[77]

The Village instead alleged bias based on a FY2008-FY2010 memorandum of understanding between the Midwest Region and participating tribes in the Region (the Midwest MOU or MOU),

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[74] Memorandum from Dir., Bureau of Indian Affairs to All Reg'l Dirs."Interim Guidance - ECM 10-2" (June 27, 2012) (on file with the Midwest Regional Office).
[75] Village of Hobart v. Midwest Reg'l Dir.. Bureau of Indian Affairs, 57 IBIA 4, 16 (2013).
[76] Fero v. Kerby, 39 F.3d 1462, 1478 (10th Cir. 1994); McQueen v. Acting Northwest Reg'l Dir., 63 IBIA 222, 232 (2016).
[77] Village of Hobart's Combined Reply Brief to Appellee's Brief and Oneida Tribe of Indians' Brief, Village of Hobart v. Midwest Regional Director, Dkt. Nos. IBIA 10-107, 10-91, 10-92 at 28 (Oct. 27, 2010) ("Hobart Reply") ("The Village's bias argument is not based on structural bias within the BIA").

including the Oneida Nation.[78] The Village asserted that the MOU made "clear" that the Oneida NODs "were not the product of a neutral, independent decision maker."[79] The Village alleged in particular that:

- the MOU lacked statutory authority;[80]
- the Nation paid the salaries of BIA employees directly;[81]
- BIA employees worked only on fee-to-trust applications submitted by MOU tribes;[82]
- the MOU governed BIA employees;[83]
- BIA employees were "members" of a Tribal consortium";[84]
- the Regional Director could not reasonably rely on documents prepared by BIA employees.[85]

Although the Regional Director responded to the Village's claims in briefing before the IBIA, the IBIA remanded the Village's claims to the Regional Director to consider in the first instance.

Burden of Proof for Bias Claims

The BIA's review of an application to take land into trust is subject to the Due Process clause and must be fair and unbiased.[86] Because public officers are presumed to discharge their official duties properly,[87] a party challenging an administrative decision for bias bears a heavy burden of persuasion.[88] A party must ordinarily demonstrate either actual bias by the decision-maker or circumstances such that an appearance of bias creates a conclusive presumption of actual bias.[89]

The BIA's policies of self-determination, Indian self-governance, and hiring preference for Indians are policies established by Congress in the Indian Reorganization Act,[90] ISDEAA and TSGA. Such policies are reasonable and rationally designed to further Indian self-government and do not

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[78] A description of the Midwest MOU is provided below.
[79] Hobart Reply at 30.
[80] Hobart, 57 IBIA at 15, citing Village of Hobart's Opening Brief, Dkt. Nos. IBIA 10-107, 10-91, 10-92 at 43-44 (July 29, 2010) ("Hobart Op. Br."); Hobart Reply at 29.
[81] Hobart Op. Br. at 44; Hobart Reply at 28-31 (Tribe pays large sums of money for the salaries of the BIA employees who process Tribe's fee-to-trust applications).
[82] Hobart Op. Br. at 44.
[83] Id.
[84] Id. at 48.
[85] Id. at 48.
[86] County of Charles Mix v. U.S. Dep't of the Interior, 799 F.Supp. 2d 1027, 1043 (D.S.D. 2011), citing Withrow v. Larkin, 421 U.S. 35, 46-47 (1975). See also State of South Dakota, et al. v. U.S. Dep't of the Interior, 401 F. Supp. 2d 1000, 1011 (D.S.D. 2005), aff'd, 475 F.3d 993, opinion replaced 487 F.3d 548 (8th Cir. 2007) (BIA review of fee-to-trust application subject to due process clause and must be unbiased).
[87] State of South Dakota, 401 F.Supp.2d at 1011, citing Sokaogon Chippewa Cmty. v. Babbitt, 929 F.Supp. 1165, 1176 (W.D. Wisc. 1996). See also Menard v. FAA, 548 F.3d 353, 361 (5th Cir. 2008) (administrative officers presumed objective and capable of fairly rendering decision in matter based on its own circumstances); Withrow, 421 U.S. at 47 (party alleging administrative bias must overcome presumption of honesty and integrity in those serving as adjudicators).
[88] State of South Dakota, 401 F.Sup.2d at 1011 (party alleging administrative bias bears "heavy burden" to show unfairness).
[89] Fero, 39 F.3d at 1478 ("compelling" evidence of actual bias or prejudice required for disqualification). See also DCP Farms v. Yeutter, 957 F.2d 1183, 1188 (5th Cir. 1992); Menard, 548 F.3d at 360.
[90] State of South Dakota, 401 F.Supp. at 1011.

violate due process,[91] and following Congress' statutory policies does not establish structural bias warranting reversal of a BIA official's decision.[92] The federal courts and the IBIA have rejected claims challenging decisions by BIA officials to acquire land in trust under the IRA based on structural bias.[93] Lacking allegations of actual bias, the Regional Director interprets the Village's claim of "blatant bias"[94] as alleging the circumstances that create a conclusive presumption of actual bias[95] sufficient to override the presumption of honesty and integrity of BIA employees.[96]

The 2006 IG Investigation and Its Relevance

The Village's claims of bias relied on a reference to an investigation by the Department's Inspector General contained in report of the Government Accountability Office on the processing of fee-to-trust applications by the BIA.[97] The IG investigation concluded its investigation two months after publication of the 2006 GAO Report.[98]

The IG Report, titled "California Fee to Trust Consortium MOU," examined a fee-to-trust memorandum of understanding utilized by the BIA Pacific Region since 2000 (the Pacific MOU). The purpose of the IG's investigation was to consider whether the use of such MOUs raised potential conflicts of interest or improperly augmented appropriations. In issuing its Report and closing its investigation in September 2006, the IG agreed that the MOUs did not violate government-wide ethics rules, were not inconsistent with ISDEAA, and their use of Tribal Priority Allocation funds did not constitute an unlawful augmentation of appropriations. The IG found no instances of a lack of impartiality in the processing of fee-to-trust applications. However the IG concluded that the terms of the Pacific MOU as written could be interpreted as giving MOU tribes authority over funding and staffing of the Pacific Region fee-to-trust consortium and thus give rise

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[91] South Dakota, 401 F.Supp. at 1011, citing Morton v. Mancari, 417 U.S. 535, 555 (1974).

[92] South Dakota, 401 F.Supp.2d at 1011, citing Brooks v. N.H. Sup. Ct., 80 F.3d 633, 640 (1st Cir. 1996); see also Doolin Security Savs. Bank v. FDIC, 53 F.3d 1395, 1407 (4th Cir. 1995), cert. denied, 516 U.S. 973.

[93] See South Dakota v. United States DOI, 775 F.Supp.2d 1129, 1141 (D.S.D. 2011); Roberts County, S.D. v. Acting Great Plains Reg'l Dir., 51 IBIA 35, 48 (2009) (argument that structural bias disqualifies BIA as decision-maker squarely rejected by the courts); Starkey v. Pacific Reg'l Dir., 63 IBIA 254, 270 (2016).

[94] Hobart Op. Br. at 48.

[95] Fero v. Kerby, 39 F.3d 1462, 1478 (10th Cir. 1994) ("compelling" evidence of actual bias or prejudice required for disqualification). See also DCP Farms v. Yeutter, 957 F.2d 1183, 1188 (5th Cir. 1992); Menard v. FAA, 548 F.3d 353, 360 (5th Cir. 2008).

[96] Fero, 39 F.3d at 1478. The Village appears to assert that it failed to raise the issue of bias earlier because it learned of the Midwest MOU after the Regional Director rendered her decisions. Hobart Reply at 28-29.

[97] Hobart Op. Br. at 43-45, citing U.S. Government Accountability Office, GAO-06-781: BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications at 20 (July 2006) ("2006 GAO Report"). See also Hobart, 57 IBIA at 15-16.

[98] U.S. Dept. of the Interior, Office of Inspector General, "Report of Investigation: California Fee to Trust Consortiums MOU," Case No. PI-PI-06-0091-I (Sept. 20, 2006) ("IG Report") (on file at BIA Midwest Regional Office). When issued, the Office of the Inspector General stated that further disclosure of the IG Report could only be made with the express written consent of the IG Office of General Counsel. In 2013, the IG provided a redacted version of the IG Report in response to a request made under the Freedom of Information Act, 5 U.S.C. § 552. See Appellants No More Slots Opening Brief, Ex. I, Kramer, et al. v. Pacific Reg'l Dir. (AS-IA) (Dec. 31, 2015). All references to the IG Report herein are to the redacted FOIA version.

to the appearance of bias, for which reason the IG Report recommended that the MOU as then structured be discontinued.

The IG Report focused on the structure and implementation of the Pacific MOU as it then existed. However it included a brief discussion of the Midwest MOU as it then existed. The IG Report noted that the Midwest MOU had been reviewed by the Department's Office of the Solicitor prior to its utilization in 2004. The terms of the Midwest MOU differed the Pacific MOU's terms, including, among other things, provisions making clear that BIA staff who processed fee-to-trust applications pursuant to the Midwest MOUs were federal employees governed by Title 5 of the United States Code.

I conclude that the 2006 IG investigation has no bearing on the Village's current bias claim. First, contrary to the Village's claims, the IG investigation found no instances of actual bias in the BIA's processing of fee-to-trust applications under either the Pacific or Midwest MOU. The IG agreed that the consortiums did not violate government-wide ethics rules, were not inconsistent with ISDEAA and that the reprogramming of TPA funds (described below) did not constitute an unlawful augmentation of appropriations. Second, the IG investigation centered on the terms of the Pacific MOU then in use, not the Midwest MOU. As both the IG and the 2006 GAO Report pointed out, the Midwest MOU was implemented in 2004 after review by the Office of the Solicitor.[99] Finally, the MOUs in effect at the time of the IG investigation have both long since expired and been replaced by restructured MOUs. The 2004 Midwest MOU was replaced by the FY2008-FY2010 MOU, which was in effect when the Oneida NODs issued.

Based on these circumstances, we conclude that the IG investigation and its subsequent Report do not create a conclusive presumption of actual bias[100] sufficient to override the presumption of honesty and integrity of BIA employees. For the reasons that follow, we conclude that the FY2008-FY2010 Midwest MOU does not show a conclusive presumption of actual bias sufficient to override the presumption of honesty and integrity of BIA employees.

The Midwest MOU

As explained in the prior proceedings,[101] authority for the Midwest MOU derives from the Indian Self-Determination and Education Assistance Act (ISDEAA)[102] and the Tribal Self-Governance Act of 1994 (TSGA),[103] whose policies of tribal self-determination the Midwest MOU is intended to further. ISDEAA and TSGA permit tribes to contract with BIA to perform some or all of the realty functions that BIA would perform, other than those deemed inherently federal.[104] The Midwest MOU makes clear that the BIA retains control over all inherent federal functions in the trust acquisition process and that staff of the Midwest Region Division of Fee-to-Trust (described below) remain BIA employees with rights and obligations governed by Title 5 of the United States

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[99] *Id.* at 11. *See also* 2006 GAO Report at 20.
[100] Fero, 39 F.3d at 1478 ("compelling" evidence of actual bias or prejudice required for disqualification). See also DCP Farms v. Yeutter, 957 F.2d 1183, 1188 (5th Cir. 1992); Menard, 548 F.3d at 360.
[101] See Appellee's Brief, Village of Hobart v. Midwest Regional Director, Dkt. No. IBIA No. 10-107, 10-91, 10-92 at 29-31 (Sept. 27, 2010) ("RD Resp. Br.").
[102] Indian Self-Determination and Education Assistance Act of 1975, Pub. L. 93-638, 88 Stat.2203 (Jan.4,1975), as amended, codified as 25 U.S.C. § 5301 et seq. (2012), and implementing regulations.
[103] Tribal Self-Governance Act of 1994, Pub. L. 103-413, 108 Stat. 4271 (Oct. 25, 1994), codified as 25 U.S.C. § 5361 et. seq., and implementing regulations.
[104] Id. at 29-30.

Code.[105] The Regional Director alone approves all environmental documents and makes all final decisions with respect to applications submitted pursuant to the Midwest MOU, and her decisions remain subject to review by the IBIA.[106] As the courts and the IBIA have noted, BIA decision-making is not institutionally biased when it complies with applicable statutes and congressional policy toward Indians.[107]

Relying on the statutory authority of ISDEAA and the TSGA, the Midwest Region implemented the Midwest MOU in 2004 to address a growing backlog of fee-to-trust applications caused by limited BIA funding. Under the Midwest MOU, each participating tribe agrees to the reprogramming of federal Tribal Priority Allocation (TPA) funds for use by the Midwest Region to increase the number of BIA employees available to process fee-to-trust application packages.

The use of TPA funding for Midwest Region realty operations is consistent with the congressional policies and purposes behind ISDEAA. TPA funds are federal appropriations earmarked for use for tribal government operations and service provision.[108] TPA funds may be allocated among eight general categories, including Trust Services, a sub-activity that encompasses the processing of fee-to-trust applications.[109] Tribes may access TPA funds directly through contracts to operate tribal programs, or they may leave TPA funds with BIA for use in BIA-provided services[110] and for BIA management and administrative costs.[111] A Regional Director has the authority to approve reprogramming within his or her Region's TPA base.[112] In reprogramming TPA funds, BIA reallocates funds within the Department of the Interior's Indian Affairs accounting system from one program class to another.[113] Though reprogrammed for use by the Midwest Region, TPA funds are and remain federal funds appropriated by Congress for use in delivering tribal programs and services.

The Village's claims of bias relied in part on a misreading of a 1998 GAO report on TPA funds.[114] The report did not "call[] into question" TPA funds, as the County asserted, but raised concerns for how TPA funds were distributed among tribes. Far from suggesting the Regional Director's

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[105] Id. at 30.
[106] Id.
[107] Id. at 30-31, citing State of South Dakota, 401 F.Supp.2d at 1011.
[108] Harvard Project on American Indian Economic Development, California Fee-to-Trust Consortium at 2 (2010). Available at: http://hpaied.org/sites/default/files/publications/california%20fee-to-trust.pdf.
[109] U.S. Dept. of Interior, Bureau of Indian Affairs, Report on Tribal Priority Allocations 14 (July 1999) ("DOI TPA Rpt.") at 48, 140-42.
[110] U.S. Government Accountability Office, GAO/RCED-98-181: Tribal Priority Allocations Do Not Target the Neediest Tribes 4 (July 1998) ("GAO 98-181") at 3; Samish Indian Nation, 657 at 1336 (Fed. Cir. 2011); see also 25 C.F.R. part 1000.
[111] U.S. Government Accountability Office, GAO/T-RCED-98-168: BIA's Distribution of Tribal Priority Allocations 1 (April 21, 1998). *See also* U.S. Commission on Civil Rights, A Quiet Crisis: Federal Funding and Unmet Needs in Indian Country 25 (July 2003). Funding agreements under the TSGA permit tribes to administer services and activities provided through BIA and to specify the functions and responsibilities of the tribe and Secretary pursuant to such agreement. 25 U.S.C. § 458cc (now codified as 25 U.S.C. § 5363). Under such agreements, tribes may elect to allow BIA to retain TPA funds for BIA to carry out functions that a Tribe could have assumed but chose not to. See also 25 C.F.R. § 1000.101 (tribal shares may be left, in whole or part, with BIA for certain programs); 25 C.F.R. § 1000.82(c).
[112] 26 IAM § 5.5.B(3).
[113] Indian Affairs Manual (IAM), ch. 26, § 5.3.A.
[114] Hobart Reply at 30, n. 90, citing GAO 98-181 at 1, 3.

reprogramming of TPA funds was improper, the GAO noted that tribes may receive TPA funds *either* through contracts for operating tribal programs *or* "through BIA-provided programs."[115]

Tribes that participate in the Midwest MOU do not "contribute" or otherwise "return" federal funds to the BIA.[116] The BIA reprograms the funds it already holds within its TPA base for use in providing trust services, which includes the processing of fee-to-trust applications. Such reprogramming is consistent with the purpose behind TPA, which is to "further Indian self-determination by giving the tribes the opportunity to establish their own priorities and to move funds among programs accordingly, in consultation with BIA."[117] By relying on Tribal governments to identify their own spending priorities based on their needs,[118] TPA allows tribes to decide how scarce federal funds should be allocated for tribes' needs.[119]

Midwest Region Division of Fee-to-Trust

The Midwest MOU establishes the Division of Fee-to-Trust (Division) within the Midwest Regional Office to process fee-to-trust application submitted by participating tribes. The staff of the Division, who are all BIA employees with rights governed by Title 5 of the United States Code, consist of a Supervisory Realty Specialist (SRS), a Program Analyst and five Realty Specialists, as well as an Environmental Protection Specialist position committed to providing services under the Division of Environmental, Cultural Resources Management and Safety (DECRMS). The SRS supervises the Division and reports directly to the Deputy and Regional Director outside the Division. Division employees have no supervisory authority over BIA staff outside the Division. None of the TPA funds reprogrammed for the Division's operations fund staff outside the Division.

The Village made the following allegations about BIA employees of the Division: that they work only on fee-to-trust applications submitted by participating tribes; that records they prepared were biased, inaccurate, and not to be relied on; that they were "members" of a tribal consortium; and that they were regulated by the Midwest MOU. The Village's claims rely solely on the terms of the Midwest MOU, and the Village pointed to no other evidence in the administrative record to support its claims.

As noted above, BIA employees within the Division are federal employees with rights and responsibilities governed by Title 5 of the United States Code. BIA employees in the Division are not required to work "solely" on applications from MOU tribes,[120] and may process fee-to-trust applications for non-MOU tribes as their workload allows. By focusing their efforts on the fee-to-trust applications of MOU tribes, BIA staff in the Division free BIA realty specialists outside the Division to tend to realty matters for non-MOU tribes. BIA employees of the Division play no

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[115] GAO 98-181 at 3.
[116] Hobart Op. Br. at 45; Hobart Reply at 29.
[117] GAO 98-181 at 4.
[118] DOI TPA Rpt. at 14. See, e.g., 25 C.F.R. § 46.2 (defining TPA as BIA budget formulation process allowing direct tribal government involvement in the setting of relative priorities for local operating programs); 25 C.F.R. § 1000.101 (Tribal shares may be left in whole or in part with BIA for certain programs at the discretion of a Tribe or Tribal consortium); 25 C.F.R. § 1000.82 (requiring ISDEAA annual funding agreements to specify funding to be retained by BIA to carry out functions that a Tribe or Tribal consortium could have assumed but elected to leave with BIA).
[119] DOI TPA Rpt. at 14. See, e.g., Mountain Community College v. Acting Aberdeen Area Dir., 34 IBIA 131 (1999) (Tribal challenge to BIA reprogramming of TPA funds).
[120] Hobart Op. Br. at 44.

role in preparing fee-to-trust applications for submission, and their role is limited to the review and processing of submitted applications.

The Midwest MOU does not provide or change the standards by which fee-to-trust applications must be reviewed. In reviewing fee-to-trust applications, all BIA employees must fulfill completely the requirements of 25 C.F.R. Part 151 and the BIA's standard procedures for processing fee-to-trust applications set forth in the BIA's *Fee-to-Trust Handbook*.[121] BIA employees in the Division evaluate each fee-to-trust application according to the factors set forth in 25 C.F.R. Part 151, document their case analysis, and prepare draft decision documents based only on the facts in the record.[122] The Deputy Regional Director-Trust Services, a BIA employee outside the Division, reviews all application recommendations by Division staff before forwarding them to the decision maker for final determination. Final determinations are then made by the Regional Director.

As explained above, the Midwest MOU is consistent with ISDEAA and TSGA. Division employees do not perform any inherently federal functions, which are instead exercised only by authorized Region officials, whose decisions remain subject to review by the IBIA or Assistant Secretary – Indian Affairs pursuant to 25 C.F.R. Part 2. Division staff are limited to performing the same administrative requirements for processing fee-to-trust applications under 25 C.F.R. Part 151 as non-Division staff. The fact that ISDEAA already prohibits consortium employees from exercising inherent federal functions eliminates the need for the Midwest MOU to state this expressly.[123]

The structure of the Midwest MOU and the operation of the Division of Fee-to-Trust are consistent with the policy and provisions of ISDEAA and with the purposes that motivated its enactment by Congress. Congress declared that the purpose of ISDEAA was to assure "maximum Indian participation in the direction of...Federal services...so as to render such services more responsive to the needs and desires of those communities."[124] Congress further declared its commitment to "effective and meaningful participation by the Indian people in the planning, conduct and administration" of such programs and services.[125]

Corrective Actions

The 2006 IG Report did not specifically identify corrective actions to be taken beyond recommending that BIA restructure the MOUs to prevent the appearance of bias or a conflict of interest. The IG found no actual instances of a lack of impartiality in the processing of fee-to-trust applications in the Midwest or Pacific Regions. As noted by the IG, the original 2004 Midwest MOU was reviewed by the Field Solicitor prior to implementation. As noted above, the original 2004 Midwest MOU was subsequently revised and replaced by the FY2008-FY2010 MOU, which was in effect when the Oneida NODs issued. As noted above, the Midwest MOU ensures against the appearance of bias or conflict of interest by relying on the statutory authority of ISDEAA and TSGA and the use of federally appropriated TPA funds; clarifying that Division staff are BIA federal employees subject to Title 5 of the United States Code and supervised by BIA staff outside

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[121] U.S. Dept. of the Interior, Bureau of Indian Affairs, Acquisition of Title to Land Held in Fee or Restricted Fee Status (Fee-to-Trust Handbook) (2014) ("FTT Handbook").
[122] FTT Handbook at 16.
[123] See U.S. Dept. of the Interior, Office of the Solicitor, "Inherently Federal Functions Under the Tribal Self-Governance Act" (May 17, 1996).
[124] 25 U.S.C. § 5302(a).
[125] 25 U.S.C. § 5302(b).

the Division; stating that Division staff must comply with all requirements of 25 C.F.R. Part 151; and making clear that only BIA officials with the delegated authority may exercise inherent federal functions.

Carcieri

The Village further claimed that the Midwest MOU is contrary to law because it does not address Carcieri v. Salazar, 555 U.S. 379 (2009).[126]

In Carcieri, the Supreme Court considered whether the United States could acquire land under Section 5 of the IRA for the Narragansett Tribe of Rhode Island. Section 5 gives the Secretary of the Interior the authority to acquire land in trust for "Indians."[127] Section 19 defines the term "Indians" as meaning, in relevant part, "all persons of Indian descent who are members of any recognized tribe now under federal jurisdiction."[128] Applying a strict statutory construction analysis, Justice Thomas for the Court held that the phrase "now under federal jurisdiction" unambiguously referred to tribes that were under federal jurisdiction in 1934 when Congress enacted the IRA. The parties had not disputed that the Narragansett Tribe was not under federal jurisdiction in 1934.

There is no reason for the Midwest MOU to expressly address Carcieri. The Midwest MOU provides that fee-to-trust applications shall be evaluated under 25 C.F.R. Part 151, section 151.10(a) of which already requires the Secretary to consider the statutory authority for each application "and any limitations contained in such authority." The Supreme Court's determination in Carcieri that "now" in Section 19 unambiguously means "1934" necessarily controls the Secretary's interpretation of the first definition of "Indian" in the IRA.[129]

Moreover, after the decision in Carcieri (and the start of this litigation), the Solicitor issued an M-Opinion interpreting the meaning of "under federal jurisdiction" as used in Section 19 of the IRA.[130] The analysis laid out in the M-opinion further supports our determination that the Tribe is "under federal jurisdiction" under *Carcieri*, as does the Board's prior ruling in this matter.[131]

No Bias Shown

The Village's claims of "blatant bias" do not satisfy the "difficult burden" of overcoming the presumption that the Regional Director discharged her duties properly in approving the Nation's applications.[132] The Village did not allege or show actual bias on the part of the Regional Director

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[126] Hobart Op. Br. at 49.
[127] 25 U.S.C. § 5108.
[128] 25 U.S.C. § 5129.
[129] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 984 (2005), citing Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 131 (1990); Lechmere, Inc. v. NLRB, 502 U.S. 527, 536-537 (1992).
[130] U.S. Dept. of the Interior, Office of the Solicitor, The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act, Op. M-37029 (March 12, 2014).
[131] Hobart, 57 IBIA at 17 (rejecting Village's claim that Oneida Nation was not under federal jurisdiction in 1934 and concluding "[i]t is evident the Tribe was").
[132] State of South Dakota, 401 F.Supp.2d at 1011, citing Sokaogon Chippewa Cmty. v. Babbitt, 929 F.Supp. 1165, 1176 (W.D. Wisc. 1996). See also Menard, 548 F.3d at 361 (administrative officers presumed objective and capable of fairly rendering decision in matter based on its own circumstances); Withrow, 421 U.S. at 47 (party alleging administrative bias must overcome presumption of honesty and integrity in those serving as adjudicators).

or any strong, direct interest by the Regional Director in the outcome of the Oneida NODs.[133] The Village did not show that the Regional Director rendered her decisions based on anything other than the record before her, or that she had any incentive to do otherwise.[134] The Village has not shown that the Regional Director failed to review the materials prepared by the Division in anything other than an objective manner. Even if the Village had provided evidence to show possible bias by BIA employees of the Division, the Village provided no basis to conclude that the Regional Director's independent review of the materials did not cure any such bias.[135] Indeed, the Village challenged no part of the administrative record for bias.[136] Moreover, the Midwest MOU ensures against the appearance of bias or conflict of interest by relying on the statutory authority of ISDEAA and TSGA and the use of federally appropriated TPA funds. It clarifies that Division staff are BIA employees subject to Title 5 of the United States Code who are supervised by BIA staff outside the Division. It makes clear that Division staff must comply with all requirements of 25 C.F.R. Part 151 and that only BIA officials with delegated authority may exercise inherent federal functions.

Based on the above, we conclude that the Village has provided no evidence to suggest the appearance of bias sufficient to create a conclusive presumption of actual bias.[137] Though it claims otherwise, the Village relies on the Midwest MOU to raise a claim of structural rather than actual bias. The IBIA and the federal courts have held, however, that following Congress' statutory policies does not establish structural bias warranting reversal of the Regional Director's decisions.

Conclusion

Based on the foregoing, we issue notice of our intent to accept the Hobart Parcels into trust status. Title will vest in the United States of America in trust for the Oneida Nation, in accordance with Section 5 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. § 5108,[138]provided the Nation delivers marketable title to the property in a manner as required in 25 CFR Part 151, Land Acquisition Regulations. In accordance with 25 CFR Part 151.13, we have requested an examination of the title evidence by the Office of the Field Solicitor, Bloomington, Minnesota, to determine whether title to the parcels is marketable. The parcels will not be accepted in trust until all identified title objections have been met.

Appeal Rights

This decision may be appealed to the Interior Board of Indian Appeals, 801 North Quincy Street, Suite 300, Arlington, Virginia 22203, in accordance with 43 CFR § 4.310-4.340. Your notice of appeal to the Board must be signed by you or your attorney and **must be mailed within 30 days of the date that you receive this decision.** It should clearly identify the decision being appealed. If possible, attach a copy of the decision. You must send copies of your notice of appeal to (1) Assistant Secretary – Indian Affairs, 1849 C Street N.W., Washington, D.C. 20240, (2) each

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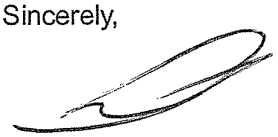
[133] Fero, 39 F.3d at 1479.
[134] Id.
[135] Roberts County, S.D. v. Acting Great Plains Reg'l Dir., 51 IBIA 35, 49 (2009)
[136] Menard, 548 F.3d at 361.
[137] Fero v. Kerby, 39 F.3d 1462, 1478 (10th Cir. 1994) ("compelling" evidence of actual bias or prejudice required for disqualification). See also DCP Farms v. Yeutter, 957 F.2d 1183, 1188 (5th Cir. 1992); Menard v. FAA, 548 F.3d 353, 360 (5th Cir. 2008).
[138] Formerly § 465.

interested party known to you, and (3) this office. Your notice of appeal sent to the Board of Indian Appeals must certify that you have sent copies to these parties. If you are not represented by an attorney, you may request assistance from this office in the preparation of your appeal. If you file a notice of appeal, the Interior Board of Indian Appeals (IBIA) will notify you of further procedures.

If no appeal is timely filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a notice of appeal.

If you have any questions regarding this decision, please contact Russell Baker, Supervisory Realty Specialist, at (612) 725-4583.

Sincerely,



Acting Regional Director

CC BY CERTIFIED MAIL:

Office of the Governor of Wisconsin
115 East State Capitol
Madison, Wisconsin 53702

9171 9690 0935 0036 0347 00

Office of the Executive
Brown County
P.O. Box 23600
Green Bay, Wisconsin 53707

9171 9690 0935 0036 0347 17

Hobart Village President
2990 S. Pine Tree Road
Hobart, WI 54155

9171 9690 0935 0036 0347 24

CC BY FIRST CLASS MAIL:

Jo Anne House, Chief Counsel
Oneida Law Office
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P.O. Box 109
Oneida, Wisconsin 54155

Patrick Pelky, (acting) Director
Division of Land Management
Oneida Tribe of Indians of Wisconsin
P.O. Box 365
Oneida, Wisconsin 54155

Superintendent, Great Lakes Agency
Bureau of Indian Affairs
916 West Lake Shore Drive
Ashland, Wisconsin 54806

EXHIBIT A – LEGAL DESCRIPTIONS

Boyea

All that part of Indian Claims 153, 154, 171, and 172; all of Indian Claims 170; Section 34, Township 24 North, Range 19 East of the Fourth Principal Meridian, and Section 3, Township 23 North, Range 19 East of the Fourth Principal Meridian, Town of Hobart, Brown County, Wisconsin, containing a combined total of 80.11 acres more or less. Tax Parcel Nos. HB-1327-3, HB-1331, HB-1366, HB-1367 and HB-1371-1, which is more fully described as follows:

Commencing at SW corner of said Section 34; thence N 84°37'54"E, 178.64 feet to the Point of Beginning; thence N 31° 06'08"E, 467.36 feet; thence along the arc of a curve to the left, 644.51 feet (chord bearing N 50°18'32" E, 643.21 feet); thence N 58°28'28" W, 277.11 feet; thence along the arc of a curve to the right, 16.38 feet (chord bearing S 43°51'38"W, 16.38 feet); thence S 58°28'58"E, 174.38 feet; thence along the arc of a curve to the left, 16.43 feet (chord bearing N 44°36'59"E, 16.43 feet); thence S 58°28'58"E, 102.51 feet; thence along the arc of a curve to the left, 427.70 feet (chord bearing N 39°48'52"E, 427.31 feet); thence N 35°37'42"E, 910.20 feet; thence N 86°46'26"E, 133.79 feet; thence N 78°48'40"E, 774.87 feet; thence S 70°06'21"E, 371 feet more or less to the center of Duck Creek; thence South to Southwesterly along said center, 3470 feet more or less; thence N 62°27'32"W, 1246 feet more or less; thence S 31°26'03"W, 580.24 feet; thence N 55°46'17"W, 684.91 feet to the Point of Beginning, excepting therefrom those parts used for roads purposes.

AND

Part of Lot 2, Volume 37, Certified Survey Maps, Page 374, as Document No. 1636330, Brown County Records, being part of Indian Claim 171, Section 34, T24N-R19E, of the 4th Principal Meridian, Town of Hobart, Brown County, Wisconsin, more fully described as follows:

Beginning at the Southeast corner of Lot 2, Volume 37, Certified Survey Maps, Page 374, as Document No. 1636330, Brown County Records, thence N58°28'58"W, 174.61 feet along the South line of said Lot 2 to the Easterly right-of-way of Riverdale Drive, also known as C.T.H. "J"; thence 20.44 feet along the arc of a 1949.86-foot radius curve to the left whose long chord bears N43°22'59"E, 20.44 feet; thence S58°28'58"E, 174.92 feet to the West right-of-way of the Kewaunee, Green Bay and Western Railroad; thence 20.50 feet along the arc of a 2826.92-foot radius curve to the right whose long chord bears S44°13'57"W, 20.50 feet to the Southeast corner of said Lot 2, Volume 37, Certified Survey Maps, page 374, Document No. 1636330, and the point of beginning.

Cornish

The North 1 acre of the South 9 acres of Government Lot C, Section 2, Township 23 North, Range 19 East, containing 0.852 acres, more or less, Fourth Principle Meridian, Brown County, Hobart, Wisconsin, excepting therefrom part described in Vol. 812 Records, page 241. Tax Parcel HB-91-3

Gerbers

Part of the Northwest Quarter of the Southwest Quarter (NW ¼ of SW ¼), and part of the Northeast Quarter of the Southwest Quarter (NE ¼ of SW ¼), and part of the Southeast Quarter of the Southwest

Quarter (SE ¼ of SW ¼), and all of the Southwest Quarter of the Southwest Quarter (SW ¼ of SW ¼), and part of Lot Eleven (11), all in Section Twenty-four (24), Township Twenty-three (23) North, Range Nineteen (19) East, of the Fourth Principal Meridian, in the Village of Hobart, Brown County, Wisconsin, described as follows:

Beginning at the Southwest corner, Section 24, Township 23 North, Range 19 East; thence North 00 deg. 41 min. 21 sec. East, 854.02 feet along the West line of the SW ¼; thence South 89 deg. 23 min. 36 sec. East, 771.91 feet; thence North 00 deg. 41 min. 58 sec. East, 600.00 feet; thence North 89 deg. 23 min. 36 sec. West, 772.02 feet; thence North 00 deg. 41 min. 21 sec. East, 580.90 feet; thence North 89 deg. 03 min. 30 sec. East, 1,026.23 feet; thence South 38 deg. 30 min. 02 sec. East, 377.27 feet; thence North 01 deg. 30 min. 21 sec. East, 959.80 feet; thence South 75 deg. 26 min. 13 sec. East, 1,137.26 feet; thence North 02 deg. 20 min. 04 sec. East, 16.84 feet; thence South 71 deg. 14 min. 01 sec. East, 169.86 feet; thence South 72 deg. 40 min. 25 sec. East, 385.20 feet; thence South 01 deg. 14 min. 10 sec. West, 411.55.feet; thence 57.39 feet along the arc of a 220.00 foot radius curve to the right whose chord bears South 08 deg. 42 min. 35 sec. West, 57.23 feet; thence South 16 deg. 11 min. 00 sec. West, 153.90 feet; thence 18.85 feet along the arc of a 12.00 foot radius curve to the right whose chord bears South 61 deg. 07 min. 04 sec. West, 17.00 feet; thence 66.07 feet along the arc of a 180.00 foot radius curve to the left whose chord bears North 84 deg. 28 min. 13 sec. West, 65.70 feet; thence South 85 deg. 01 min. 03 sec. West, 1,463.66 feet; thence 33.68 feet along the arc of a 20.00 foot radius

curve to the right whose chord bears North 46 deg. 44 min. 17 sec. West, 29.84 feet; thence North 01 deg. 30 min. 23 sec. East, 4.48 feet; thence North 88 deg. 29 min. 45 sec. West, 80.00 feet; thence South 01 deg. 30 min. 23 sec. West, 17.92 feet; thence 29.76 feet along the arc of a 20.00 foot radius curve to the right whose chord bears South 44 deg. 08 min. 18 sec. West, 27.09 feet; thence 30.81 feet along the arc of a 460.00 foot radius curve to the right whose chord bears South 88 deg. 41 min. 22 sec. West, 30.80 feet; thence South 00 deg. 36 min. 24 sec. West, 80.00 feet; thence 52.69 feet along the arc of a 540.00 foot radius curve to the left whose chord bears North 87 deg. 48 min. 45 sec. East, 52.67 feet; thence North 85 deg. 01 min. 03 sec. East, 776.80 feet; thence South 04 deg. 58 min. 57 sec. East, 400.00 feet; thence South 85 deg. 01 min. 03 sec. West, 458.09 feet; thence South 04 deg. 00 min. 56 sec. East, 463.37 feet; thence South 85 deg. 01 min. 07 sec. West, 310.00 feet; thence South 04 deg. 00 min. 56 sec. East, 467.00 feet; thence South 85 deg. 01 min. 07 sec. West, 1,355.52 feet to the point of beginning.

AND

Part of the Northwest Quarter of the Southwest Quarter (NW ¼ of SW ¼), and part of the Southwest Quarter of the Southwest Quarter (SW ¼ of SW ¼), Section Twenty-four (24), Township Twenty-three (23) North Range Nineteen (19) East, of the Fourth Principal Meridian, in the Village of Hobart, Brown County, Wisconsin, described as follows:

Commencing at the Southwest comer, Section 24, Township 23 North, Range 19 East; thence North 00 deg. 41 min. 21 sec. East, 854.02 feet along the West line of the SW ¼ of SW ¼, to the point of beginning; thence North 00 deg. 41 min. 21 sec. East, 600.00 feet; thence South 89 deg. 23 min. 36 sec. East, 772.02 feet; thence South 00 deg. 41 min. 58 sec. West, 600.00 feet; thence North 89 deg. 23 min. 36 sec. West, 771.91 feet to the point of beginning.

AND

Part of Lot One (I), Vol. 37 Certified Survey Maps, Page 359, Map No. 5724; said Map being part of the Southeast Quarter of the Southwest Quarter (SE ¼ of SW ¼), Section Twenty-four, (24), Township Twenty-three (23) North, Range Nineteen (19) East, of the Fourth Principal Meridian, in the Village of Hobart, Brown County, Wisconsin, described as follows:

Commencing at the South Quarter corner of Section 24, Township 23 North, Range 19 East; thence South 83 deg. 36 min. 46 sec. West, 545.92 feet; thence North 05 deg. 25 min. 18 sec. West, 680.37 feet to the point of beginning; thence South 83 deg. 36 min. 46 sec. West, 324.71 feet; thence North 05 deg. 25 min. 18 sec. West, 250.04 feet to the North line of Lot I, Vol. 37 Certified Survey Maps, Page 359, Map No. 5724; thence North 83 deg. 36 min. 46 sec. East, 324.71 feet to the East line of said Certified Survey Map; thence South 05 deg. 25 min. 18 sec. East, 250.04 feet along said line to the point of beginning. Combined, the total acreage is 103.85 acres more or less, Tax Parcel No. HB-328.

Buck

That part of Government Lot 6, Section 10, Township 24 North, Range 19 East, of the Fourth Principal Meridian, in the Village of Hobart, Brown County, Wisconsin, containing 10.01 acres, more or less, and described as follows:

Commencing at the West quarter section corner of Section 10; thence North 0 deg. 02 min. East along the West line of said Section 429.00 feet to the point of beginning; thence continuing North 0 deg. 02 min. East along said West line 890.66 feet to the Northwest corner of said Lot 6; thence North 87 deg. 54 min. 30 sec. East 495.00 feet to the Northeast corner of said Lot; thence South 0 deg. 2 min. West along the East line of said lot 893.00 feet; thence South 88 deg. 10 min. 30 sec. West 495.00 feet to the point of beginning, excepting therefrom that part used for road purposes. Tax Parcel No. HB-496

ALSO DESCRIBED AS:

A parcel of land located in part of Government Lot 6 of Section l0, Township 24 North, Range 19 East, of the Fourth Principal Meridian, in the Village of Hobart, Brown County, Wisconsin, containing 10.01 acres, more or less, and described as follows:

Commencing at the West quarter corner of Section 10; thence North 1 deg. 30 min. 10 sec. East along the West line of said Section 10 a distance of 429.00 feet to the point of beginning; thence continuing North 1 deg. 30 min. 10 sec. East along said line 890.77 feet to the Northwest corner of Government Lot 6; thence North 89 deg. 22 min. 40 sec. East along the North line of said Government Lot 6 490.12 feet to the Northeast corner of said Government Lot 6; thence South 1 deg. 36 min. 34 sec. West along the East line of said Government Lot 6 a distance of 892.44 feet; thence South 89 deg. 33 min. 58 sec. West 488.40 feet to the point of beginning, excepting therefrom that part used for road purposes.

Catlin

Part of the Southeast Quarter of the Northeast Quarter and part of the Northeast Quarter of the Southeast Quarter, all of Lot 3, Section 23, Township 23 North, Range 19 East, containing 80.15 acres more or less, Fourth Principal Meridian, Brown County, Hobart, WI, described as follows:

Commencing at the East quarter of Section 23, Township 23 North, Range 19 East, Fourth Principal Meridian; thence S89°25'17" W, a distance of 44.53 feet to the Point of Beginning; thence S00°41'59"W along the West right-of-way line South Pine Tree Road (C.T.H. "GE") a distance of 1313.39 feet; thence S89°59'53" W along the South line of the Northeast quarter of the Southeast quarter of Section 23 a distance of 1282.25 feet; thence N00°44'32" E along the West line of the Northeast quarter of the Southeast quarter of Section 23 a distance of 516.84 feet; thence S89°51'09" W along the South Line of Lot 3 a distance of 1313.03 feet; thence N01°14'31" E along the West line of Lot 3 a distance of 788.37 feet; thence S89°56'48" E along the North line of Lot 3 a distance of 1306.09 feet; thence N00°46'15" E along the West line of the Southeast quarter of the Northeast quarter of Section 23 a distance of 1080.41 feet; thence S53°11'38" E a distance of 971.88 feet; thence S59°33'31" E a distance of 569.69 feet; thence S00°41'59" W along the West right-of-way line of South Pine Tree Road (C.T.H. "GE") a distance of 196.49 feet to the Point of Beginning. Tax Parcel Nos. HB-316, HB-294 and HB 308.

Calaway

Part of Lots C, D, E and Lots 17, 18, 19, 23, 24, 25, 26 and 27 all in the Southeast 1/4, Section 26, Township 23 North, Range 19 East of the containing 104.34 acres more or less, Fourth Principal Meridian, Town of Hobart, Brown County, Wisconsin, more fully described as follows:

Commencing at the South 1/4 corner, Section 26, Township 23 North, Range 19 East of the Fourth Principal Meridian; thence N00 deg 06'28"E, 475.93 feet along the West line of the SW 1/4 of the SE 1/4 of said Section 26 to the point of beginning; thence N00 deg 06'28"E, 864.22 feet along said West line; thence N00 deg 09'31"E, 1,329.46 feet along the West line of the NW 1/4 of SE 1/4 of said Section 26 to the NW corner of NW 1/4 of the SE 1/4; thence N89 deg 54'53"E, 1,290.59 feet along the North line of the NW 1/4 of SE 1/4; thence S03 deg 02'10"E, 47.58 feet; thence N89 deg 17'54"E, 293.17 feet; thence S00 deg 13'31"W, 454.33 feet; thence N89 deg 27'05"E, 486.61 feet; thence S00 deg 21'44"W, 1,124.78 feet; thence S00 deg 08'36"E, 416.16 feet ; thence S00 deg 13'31"W, 342.41 feet to the centerline of Nathan Road; thence S68 deg 53'51"W, 638.55 feet along said centerline; thence 167.16 feet along the arc of a 800.00 foot radius curve to the right whose chord bears S74 deg 53'00"W, 166.86 feet to the East line of the SW 1/4 of the SE 1/4 of said Section 26; thence S00 deg 21'14"W, 9.00 feet to the South line of the SW 1/4 of the SE 1/4 of said Section 26; thence S89 deg 28'03"W, 35.01 feet along the South line of the SW 1/4 of the SE 1/4; thence N00 deg 21'18"E, 475.96 feet; thence S89 deg 28'02"W, 1,280.08 feet to the point of beginning. Tax Parcel Nos. HB-390-2, HB-380, HB-394 & pt of HB-386 (NKA HB-386-3).

DeRuyter

All of Government Lots 4, 5, 6, 10, and 11, part of Lot 12, and part of the Southeast 1/4 of the Southeast 1/4 of Section 23, Township 23 North, Range 19 East, containing 117.78 acres, more or less, Fourth Principal Meridian, Town of Hobart, Brown County, Wisconsin, more fully described as follows:

Commencing at the South 1/4 corner of Section 23, T23N-R19E; thence N00 deg 30'07"E, 46.28 feet along the West line of Lot 12 to the point of beginning; thence continuing N00 deg 30'07"E, 1267.48 feet along the West line of said Lot 12 and Lots 10 and 11 to the Northwest corner of said Lot 10; thence S89 deg 44'42"W, 991.14 feet along the South line of Lots 5 and 6, Section 23; thence N00 deg 28'21"E, 1323.63 feet along the West line of said Lot 6; thence S89 deg 41'08"E, 1008.71 feet along the North line of said Lots 5 and 6; thence S01 deg 14'31"W, 788.37 feet along the East line of said Lot 5; thence N89

deg 51'09"E, 1313.03 feet along the North line of Lot 4, said Section; thence S00 deg 44'32"W, 516.84 feet along the East line of said Lot 4; thence N89 deg 59'53"E, 1282.69 feet along the North line of the Southeast 1/4 of the Southeast 1/4 of said Section 23; thence S00 deg 41'26"W, 1200.31 feet along the Westerly right of way of C.T.H. "GE", also known as South Pine Tree Road; thence S44 deg 20'10"W, 87.62 feet to the Northerly right of way of C.T.H. "EE", also known as Orlando Drive; thence 374.29 feet along said right of way being the arc of a 11,414.20 foot radius curve to the right whose long chord bears S88 deg 49'26"W, 374.27 feet; thence S89 deg 45'48"W, 565.08 feet along said right of way; thence N00 deg 14'12"W, 282.91 feet; thence S89 deg 45'48"W, 611.12 feet; thence S00 deg 14'12"E, 282.91 feet; thence S89 deg 45'48"W, 984.93 feet along said right of way; thence S89 deg 40'48"W, 0.51 feet along said right of way to the point of beginning. Tax Parcels HB-295, HB-296, HB-317

And

All of Government Lots 3 and 13 and part of Lots 1 and 2, Section 26, Township 23 North, Range 19 East, containing 66.755 acres, more or less, Fourth Principal Meridian, Town of Hobart, Brown County, Wisconsin, more fully described as follows:

Commencing at the North 1/4 corner of Section 26, T23N-R19E; thence S00 deg 11'28"W, 43.72 feet along the West line of Lot 1, Section 26 to the point of beginning; thence N89 deg 40'48"E, 1.50 feet along the Southerly right of way of C.T.H. "EE", also known as Orlando Drive; thence N89 deg 45'48"E, 897.70 feet along said right of way; thence S00 deg 12'28"W, 140.00 feet along with West line of Parcel A, Volume 2, Certified Survey Maps, page 447, Brown County Records; thence N89 deg 45'48"E, 320.01 feet along the South line of said Parcel A; thence S00 deg 12'28"W, 117.00 feet; thence N89 deg 45'48"E, 101.00 feet; thence S00 deg 12'28"W, 1014.58 feet along the East lines of Lots 2 and 3, Section 26; thence S89 deg 49'36"W, 329.96 feet along the South line of said Lot 3; thence S00 deg 12'15"W, 1315.38 feet along the East line of Lot 13, Section 26; thence S89 deg 54'53"W, 989.58 feet along the South line of said Lot 13; thence N00 deg 11'31"E, 1313.86 feet along the West line of said Lot 13; thence N00 deg 11'28"E, 1270.12 feet along the West line of said Lots 1, 2, and 3, to the point of beginning. Tax Parcels: HB-363 and HB-375

Lahay

The South 14 rods (231 feet) of the West 22 Rods (363 feet) of the East 40 Rods (660 feet) of the Southeast Quarter of the Southeast Quarter of Section 10, Township 24 North, Range 19 East of the Fourth Principal Meridian, in the Town of Hobart, Brown County, Wisconsin, excepting therefrom that part being used for road purposes. The subject parcel contains 1.93 acres, more or less, and is also identified as Brown County Tax Parcel No. HB-520-1.

EXHIBIT E

Office of Inspector General
Program Integrity Division
U.S. Department of the Interior

Report of Investigation

Case Title	Case Number
California Fee to Trust Consortium MOU	**PI-PI-06-0091-I**
Case Location	**Report Date**
Sacramento, California	**September 20, 2006**
Subject	
Final Report of Investigation	

SYNOPSIS

On November 10, 2005, the Department of the Interior's Office of Inspector General received an unsigned Memorandum of Understanding (MOU) between the Bureau of Indian Affairs Pacific Regional Office (BIA-PRO) and "California Fee To Trust Consortium Tribes." The MOU describes a process by which the BIA-PRO "re-programs" Tribal Priority Allocation (TPA) funds back to BIA-PRO to hire federal employees dedicated solely to processing Consortium members' fee-to-trust (FTT) applications.

This MOU created a Consortium Oversight Committee (hereinafter "Committee"), comprised solely of tribal representatives, that possesses a wide array of powers and authority with respect to the consortium staff (federal employees). Additionally, the funding structure of the MOU, based predominately upon the tribes' election to redirect their TPA funds to the program, creates a situation where the tribes are literally paying the salaries of federal employees. The ability of an all-tribal body to influence the selection, performance awards, and duties and responsibilities of the federal consortium staff—coupled with the fact that the tribes control the purse strings from which the consortium staffs' salaries are dependent results in a patent perception of a conflict of interest. This investigation has found this appearance of a conflict of interest to be, in fact, real. In addition to the conflict of interest issue, violations of the Privacy Act were also identified in relation to the screening of federal employment applications by private persons (Committee members).

Regarding the legality of the consortiums, a recent legal opinion rendered by the Office of the Solicitor (SOL) determined that the consortiums do not "violate the government-wide ethics rules or appropriations laws"; however, the opinion recommended that "BIA discontinue the fee-to-trust consortiums, as they are currently structured."

BACKGROUND

According to BIA-PRO [redacted] in 2000, BIA PRO had "over 300" FTT applications backlogged **(Attachment 1)**. It was not a primary responsibility of any BIA-PRO employee

Reporting Official/Title [redacted], **Senior Special Agent**	**Sig**
Approving Official/Title [redacted], **Program Integrity Division**	**Sig**

Distribution: Original Case File Copy - SAC/SIU Office Copy –

[redacted]

to process these applications, but rather a low priority, collateral duty of those employees working within the real estate division. Indeed, it was considered a "big deal" when an application was processed and adjudicated. The California tribes were unhappy about this large backlog; therefore, BIA-PRO met with the Californian tribes several times in an attempt to figure out a solution to this issue. As a result of these meetings, [redacted] and former BIA-PRO [redacted] "worked with the tribes" in creating the MOU between BIA-PRO and the California Fee to Trust Consortium Tribes **(Attachment 2)**.

No one person drafted the MOU, but rather it was drafted by a "conglomerate" of persons from the tribes and BIA-PRO. Tribal counsel participated in drafting the MOU, whereas the Department of the Interior's (DOI) SOL was not consulted in drafting the MOU, nor were they asked to review the final MOU draft. [redacted] does not believe the possibility of having SOL review the document "ever came up" during BIA-PRO's discussions concerning the MOU [redacted] s uncertain whether the SOL reviewed the original MOU in 2000. In retrospect, he stated that it was "pretty stupid" of him to not ensure the MOU was reviewed by SOL; however, he stated that the SOL certainly was aware of the program and "knew what [BIA-PRO] were doing" **(Attachment 3)**.

After consultation with the tribes, it was decided that the consortium tribes were willing to "give up" certain amounts of their TPA funds so that BIA could hire "professional staff" to assist in the processing of consortium FTT applications. The tribes that decided to join the consortium elected to "re-direct" TPA funds that were earmarked for the individual tribes to fund the FTT program. Each California tribe was then given the option to join the consortium. The original MOU was in effect for 3 years, beginning with fiscal year (FY) 2000 through FY 2002. Each tribe electing to join the consortium was required to donate a minimum of $3000 TPA per year and to commit to making these donations for the life of the agreement (3 years); there was no maximum donation. Accordingly, one consortium tribe could donate a total of $9,000 over the 3-year life span of the MOU; whereas another tribe could donate unlimited amounts of TPA funds to the program (e.g., Santa Rosa tribe donated $100,000/year, totaling $300,000 for all 3 years).

This MOU was renewed for 3-year terms, with minor modifications, in 2002, and then again in 2005. The current MOU in place runs from FY 2006 through FY 2008. When the MOU terminates at the end of each 3-year period, all Californian tribes are provided the opportunity to participate (or not) in the new MOU. Accordingly, tribes that were members of the initial consortium could elect to not re-join the consortium if they no longer had an interest in the program (e.g., they had all of their FTT applications processed during the first 3 years of the program). In the same vein, if not enough of tribes elect to join the program and redirect their TPA funds to BIA-PRO, the MOU would not be renewed since it is dependent upon TPA funds.

The redirected TPA funds donated to the program are used to hire BIA federal full time equivalent (FTE) positions, which are designated as "consortium staff." Their sole duties and responsibilities are to review and process tribal FTT applications that are submitted by consortium member tribes. Under the MOU, these federal employees are forbidden to perform any work on non-consortium tribe applications. In addition to processing Notices of Application to the public, the consortium staff reviews the FTT applications' title status and conducts environmental reviews of the involved properties. Additionally, realty specialists review the applications for compliance with the criteria listed under Title 25 of the Code of Federal Regulations, section 151 (25 CFR 151), and make recommendations as to whether the applications satisfy these criteria. Finally, once the review process is completed, the consortium staff makes a recommendation to the adjudicating official whether they believe the application should be accepted into trust or not; according to [redacted] "Generally, these recommendations are favorable."

The consortium staff act as facilitators in reviewing the FTT applications; they work closely with the tribes by informing them if their applications are insufficient in a specific area and making recommendations to the tribes as to what they need to do in order to receive a favorable recommendation. As a general rule, the tribe members confer with BIA about the application prior to submitting an application. A premium service is "definitely" being provided to consortium FTT applications, according to [redacted] "It is expected," and the "whole purpose" is to ensure these applications receive a favorable recommendation.

Once the applications receive a favorable recommendation, the consortium staff prepares the proposed Notice of Decision for signature by the respective adjudicating official. Generally, an area superintendent is the adjudicating official for "on-reservation" applications, the regional director is the adjudicating official for "contiguous" applications, and BIA Washington Central Office (WCO) is the adjudicating official for "off-reservation" and gaming applications. The BIA-PRO consortium staff processes off-reservation and gaming applications; however, these applications are ultimately forwarded to WCO for adjudication. Once adjudication is made, this decision may be appealed to the Interior Board of Indian Appeals.

BIA currently has 10 FTE positions dedicated to this MOU, 7 of which are currently filled and 3 remain vacant.

Under the original MOU, valid from FY 2000 through FY 2002, 55 tribes elected to participate by donating $2.2 million of TPA funds. From FY 2003 through 2005, 60 tribes participated by donating $1.9 million of TPA funds. Under the current MOU, from FY 2006 through 2008, 42 tribes have elected to participate by pledging TPA donations totaling $1.4 million **(Attachment 4)**.

During the 2000-2002 term of the MOU, 5,553.01 acres were placed into trust on behalf of the consortium tribes. From 2003 through 2005, 5,874.5 acres were placed into trust on behalf of the consortium tribes. As of January, 2006, 11.9 acres were placed in trust on behalf of the consortium tribes for the 2006-2008 term of the MOU **(Attachment 5)**.

DETAILS

In November 2005, a copy of the MOU was provided to DOI's Office of Inspector General (OIG). After review of the MOU, the DOI Inspector General issued a November 28, 2005 Memorandum to the DOI Secretary requesting a review of the "genesis, legal authority and propriety of this 'Project'" **(Attachment 6)**. At that time, DOI-OIG initiated its own investigation into these matters.

MOU Consortium Oversight Committee

Dispute Resolution

The California Fee to Trust Consortium MOU represents a legally binding agreement/contract between the California Fee to Trust Consortium Tribes and BIA-PRO. Under the MOU, a Committee "comprised of Consortium members, will have oversight of the Project and the obligation to assure that the terms of this Memorandum of Understanding are met." This Committee is "made up of nine (9) elected Tribal Officials representing their respective region"; there is not any federal government representation on this Committee.

Under the 'Consortium Employees' section of the MOU, the "[P]arties agree that the BIA personnel for the Consortium shall be governed by the terms of this Agreement. Any conflict involving the duties and/or responsibilities of the personnel shall be resolved in accordance with this Agreement and the PRO personnel policies." Under the 'Dispute Resolution' section of the MOU, "[A]ny dispute as to the interpretation of any provision of this Agreement will be submitted to the Committee who will review all relevant material pertaining to the dispute. The Committee will issue a written decision. The decision of the Committee is final."

When interpreted in conjunction with one another, these two sections of the MOU provide the all-tribal Committee the authority to determine the "duties and/or responsibilities" of the BIA-PRO federal employees if a conflict were to arise regarding those duties and/or responsibilities. The only apparent restriction on this authority over the federal employees is that the Committee cannot dictate duties and responsibilities that run afoul of BIA-PRO personnel policies.

When asked about why BIA-PRO would grant such authority to a committee that does not include any federal representation, BIA-PRO [redacted] acknowledged that the contract, as written, does apparently grant such powers to the Committee. [redacted] stated, however, that he would not allow the Committee to direct BIA-PRO federal employees to perform any duties averse to their obligations as government employees **(Attachment 7)**. He stated he would be obligated to override the Committee in such a circumstance, regardless of the fact that his actions could technically represent a breach of contract. [redacted] stated that he is unaware of any conflict occurring since the inception of the MOU that would have invoked "dispute resolution." He stated that, in practicality, the consortium staff is managed by BIA-PRO officials and not the Committee. Ultimately, however, he acknowledged that the Dispute Resolution section probably needs to be "re-visited."

Employee Selection

Regarding the selection of consortium staff, under the MOU:

- It is agreed that the process for selecting Consortium staff for filling of the Consortium positions will include the direct participation of the Committee.
- Such participation may include, but may not be limited to, the development of position descriptions, and interviewing prospective candidates.
- The Oversight Committee has the authority to make recommendations to the Bureau regarding the filling of open positions.
- All federal personnel rules and regulations will apply to this process.

According to [redacted] the Committee did review and provide input in the drafting of the initial position descriptions (PDs) for the consortium staff positions. The PDs were then classified by BIA's personnel office.

According to [redacted] BIA issues the announcements for vacant positions, receives applications, and produces a list of certified candidates. [redacted] then stated that BIA-PRO officials select an employee from the certified list of applicants after reviewing their applications. After the BIA-PRO official makes a selection, the selected candidate's name is then put before the Committee for their review and recommendation. The ultimate decision whether to select the applicant rests with BIA-PRO.

Former BIA-PRO consortium [redacted] currently [redacted] BIA-Midwest Regional Office (BIA-MRO), described the consortium selection process a bit

differently **(Attachment 8)**. According to [redacted] when he was reviewing a certified list of top candidates for consortium positions, he would "sit down with the Committee," and together, they would jointly review the applications and make a selection. In one instance, [redacted] and the Committee decided to conduct telephone interviews of the three applicants on the list. Members of the Committee helped draft the interview questions and "sat in" on the telephone interviews; none of the three applicants were ultimately hired and the position was re-advertised.

According to [redacted] BIA-PRO personnel made position selections without consulting with the Committee only when the position advertised was for a "clerk" or a "term" position; in these cases, the Committee provided prior approval for the selection. Conversely, all realty specialist positions were selected only after the Committee reviewed the applications with [redacted] called this Committee review of applications a "courtesy."

Regarding consortium staff selection, consortium [redacted] stated that she was told by [redacted] that the Committee's approval was "the final word," which BIA-PRO did not overrule **(Attachment 9)**. In fact, she claimed that [redacted] had told her the Committee recently did not approve one of his applicant selections for an environmental specialist consortium position; as a result, [redacted] had to re-announce the position. Upon [redacted] presenting another selected applicant to the Committee for an office automation position, the Committee determined that the consortium did not need to hire such a position; this resulted in BIA-PRO cancelling the announcement without hiring the selected applicant.

[redacted] refuted this claim of [redacted] by stating that the Committee never overrode a selection he made. However, in one instance, the Committee made a selection recommendation that [redacted] overruled. As to the specific example cited by [redacted] regarding the environmental specialist position, [redacted] stated that he was not the hiring official for such a position, but rather BIA-PRO [redacted] was responsible for selecting all environmental specialist positions.

[redacted] is the selecting official for the environmental specialists that work for the consortium **(Attachment 10)**. Since the inception of the consortium MOU, [redacted] has hired three environmental specialists: [redacted] and [redacted] selected [redacted] after a panel, including all-tribal Committee members, reviewed applications of candidates listed on the certification list. [redacted] selected [redacted] after reviewing his application with the assistance of an all-federal employee panel; as opposed to the panel that reviewed [redacted] application, no Committee members were present on the panel that reviewed [redacted] application. After [redacted] was selected by [redacted] his selection was put forward to the Committee for their recommendation. In 2005 [redacted] selected [redacted] after reviewing his application with an all-federal employee panel. [redacted] selection was provided to the Committee for their recommendation during a consortium meeting; although [redacted] was not present at the consortium meeting and is not certain whether the Committee was provided [redacted] application for review.

The Committee has never made an unfavorable recommendation regarding [redacted] selection of an environmental specialist for the consortium. [redacted] was asked what would happen if the Committee were to make an unfavorable recommendation regarding one of the applicants [redacted] selected. [redacted] stated that BIA-PRO would consider the Committee's input; however, BIA-PRO would make it clear to the Committee that this is a federal position.

Employee Performance

Regarding consortium staff performance, under the MOU:

> - It is further agreed that participating tribes may submit documentation to the Committee and PRO-LRS [supervisory realty specialist] concerning the performance of the Project employee's duties under this Agreement and that the PRO-LRS and the Committee shall give such documentation due consideration with respect to conducting employee performance evaluations.
> - Recommendations for incentive or star awards will be brought forward to the Fee to Trust Consortium Oversight Committee.

According to [redacted] generally, the Committee has agreed with BIA-PRO's award proposals for consortium staff. The Committee did, however, once refuse to approve an award proposed by BIA-PRO for a consortium employee because the Committee did not want to have TPA funds used to pay the cash award. Since that time, the cash used to pay these awards has come from BIA-PRO administrative account funds. Regarding employee performance, if the Committee has a problem with a consortium employee, they will contact the supervisory realty specialist and discuss their concerns. Consortium staff are aware that the all-tribal Committee has input in their performance evaluations and potential awards. [redacted] acknowledges that there could be the perception that the tribe's input on these awards may influence an employee's judgment to favorably recommend a tribe's application. However, [redacted] claims the Committee does not perform employee evaluations or ultimately decide who receives an award, but rather are simply consulted on these matters and make recommendations. The Committee does not "sign off" on employee evaluations.

According to [redacted] during his tenure as [redacted] for the consortium, recommendations for awards for consortium staff were proposed by an agency superintendent or the employee's supervisor. Committee members did not participate in establishing performance standards or goals for the consortium staff, and they did not participate in performance reviews of the staff. However, the Committee could submit written assessments of the staff to BIA-PRO, which were given due consideration. While [redacted] was working for the consortium, the Committee submitted only one negative written assessment on a consortium employee; this employee had also received a poor employee evaluation from [redacted] for insubordination. The Committee rarely sent in positive assessments of consortium staff.

Regarding whether an employee may be influenced to favorably recommend an FTT application in order to receive a performance award, all interviewed indicated that it is the underlying goal of the consortium staff to favorably recommend all of these applications to the adjudicating official; they act as facilitators in processing these FTT applications, not as objective third party decision makers. Accordingly, since the core objective of their position is to have all these applications approved, the potential for receiving an award provides little incentive to be so influenced.

However, according to [redacted] the ability of the Committee and tribes to influence performance awards of consortium staff does affect the treatment of the FTT applications by the consortium staff. The tribes that donate higher amounts of money to the program "definitely receive more attention" than tribes that donate less money to the program. The FTT applications from the tribes that make high donations to the program "are worked on immediately by [redacted]" while other applications are "put on the back burner." [redacted] believes that [redacted] puts more effort towards these applications because the successful processing of these applications will result in more gifts and award recommendations for

[redacted] Conversely, the FTT applications of tribes that only donate the minimum are directed to lower level consortium staff, such as [redacted]

Consortium [redacted] was unaware that the MOU provides for the Committee to review BIA's award proposals for consortium staff **(Attachment 11)**. She stated that had she known this, it would affect her decision making in processing consortium FTT applications.

MOU Funding Structure

The MOU is predominately funded by TPA funds donated by the consortium tribes. Along with the program's base operating expenses, these TPA funds are used to pay the salaries of all of the consortium staff. Consequently, if the tribes stopped donating TPA funds to the program, all of those interviewed acknowledged that the consortium employees would be subject to a Reduction in Force (RIF), and the program would cease to exist.

When asked why these positions were not originally classified as "term positions" (rather than FTEs) since they were dependent upon funds derived by a contract requiring continuous renewal, [redacted] stated that former BIA-PRO [redacted] decided that "he would run the risk" of not making the positions term in order to better attract qualified candidates. At that time, they discussed the possibility of making these term positions, yet they both believed that many experienced federal employees would not apply to a term position. [redacted] confirmed that he decided to "take the risk" to hire the consortium staff as FTEs rather than term positions because of his belief that BIA-PRO would be able to better attract qualified applicants. [redacted] hoped that Congress would appropriate funds for these employees once the program became successful and demonstrated there was a need for such staff. Both [redacted] and [redacted] acknowledged that a RIF would occur if the tribes decided to stop redirecting their TPA funds to the program.

Regarding the potential for a RIF [redacted] stated that higher grade consortium employees would not actually be out of a job because they would "bump" lower grade employees within the region, who, in turn, would "bump" even lower grade employees, and so on. Accordingly, BIA-PRO would lose several GS-5/7 FTE positions if the TPA funds became unavailable to pay the GS-13, GS-12, and GS-11 consortium FTEs. After acknowledging that these consortium positions were more tenuous than other appropriated positions, [redacted] was asked if the candidates for the consortium positions were notified of this tenuous funding structure. [redacted] stated that the funding nature of the positions was not identified in their respective job announcements.

Current consortium [redacted] stated that she was not aware of the funding structure of her job at the time she accepted her consortium position in [redacted] **(Attachment 12)**. [redacted] inadvertently learned TPA funds were being used to pay her salary a few months after starting her consortium job. After she discovered this fact, she became anxious about the nature of the funding used to pay her salary. At the end of the first 3-year term of the MOU (2002), there was "talk" of a potential RIF of the consortium staff if the tribes decided to not renew the MOU for another 3-year term. This RIF potential made [redacted] "nervous" about her job stability and caused her to perform personal research on RIF rules and regulations in order to familiarize herself with the process. At the time of her interview by OIG, [redacted] did not possess as much anxiety about her job stability because she learned from her personal research that her seniority will be taken into account in any RIF process [redacted] further expressed comfort in her position's financial stability by noting that the MOU has been successfully extended two times since its inception in 2000.

As with [redacted] BIA-PRO did not inform [redacted] that her new position's salary would be funded by TPA donations prior to her acceptance of the consortium job in [redacted] it was not mentioned in the job announcement. Prior to accepting her consortium position, [redacted] was a [redacted] with [redacted] in [redacted] she was hired as a [redacted] for the consortium. [redacted] assumed that she would be "working for BIA, not for the tribes." A few months after accepting her consortium position, when she learned how her position was being funded, she asked her supervisor, [redacted] what would happen if the tribes decided to stop redirecting TPA funds to the program. [redacted] told her, "We will be out of a job." [redacted] stated that she would not have applied, nor accepted, the consortium position, regardless of the grade jump, if she knew of its funding structure.

[redacted] was hired by BIA-PRO as a [redacted] in [redacted] Prior to accepting her current position, [redacted] was employed as a [redacted] with [redacted] in [redacted] Similar to [redacted] and [redacted], BIA-PRO did not notify [redacted] that her new position's salary would be funded by TPA monies; the job announcement she applied under made no mention of this funding structure **(Attachment 13)**. Her original supervisor, [redacted] told her that her salary was funded by TPA funds shortly after she moved to California and began working for the consortium. This revelation, that she could lose her job if the TPA funding stopped, was "kind of scary." If BIA-PRO informed her of this funding structure, [redacted] stated, unequivocally, that she would not have left her home in [redacted] and her FTE position, in order to move to California. At the time of her interview, [redacted] was [redacted] this upcoming significant [redacted] has exacerbated her anxiety regarding her job's financial stability.

During his interview, [redacted] confirmed that a RIF of all consortium positions would need to occur if the redirection of TPA funds to the program were to cease. [redacted] was not personally concerned about his job security when he supervised the program because he knew his seniority would ensure he would not be jobless. The potential for a RIF of the consortium staff under him did, however, cause [redacted] a substantial amount of stress and anxiety because, as their supervisor, he was the person responsible for "negotiating with the tribes" every 3 years to obtain the necessary funding to renew the program; he knew that if he failed to successfully negotiate this funding, his staff would be subject to a RIF. In fact, [redacted] admitted that this stressful obligation led to his decision to seek a different job outside of the consortium after he successfully renewed the MOU in 2005. He further emphasized the high degree of anxiety this obligation created by pointing out that the first consortium supervisor, [redacted] similarly decided to leave the consortium shortly after renewing the MOU in 2002 because of the stress and anxiety she endured during the funding negotiation process. During her interview, [redacted] confirmed she retired in [redacted] after renewing the MOU as a result of the stress and apprehension she felt about the possibility of her staff losing their jobs if she failed in negotiating the funding needed to renew the MOU **(Attachment 14)**.

[redacted] was asked whether the job announcements advertised for consortium positions indicated the funding structure of the position, [redacted] stated that he "didn't think so." [redacted] was then asked if he thought it "fair" that these announcements were not informing job applicants that these positions are not based upon appropriated funds, but rather are subject to the need for continuous funding renewal, especially in light of the fact that these candidates were often leaving appropriated FTE positions. [redacted] admitted, in retrospect, he did not believe it to be "fair." In fact, he stated, as the [redacted] of BIA-MRO, he planned on ensuring future BIA-MRO consortium staff announcements do contain language that identifies the nature of the job's funding (BIA-MRO has a similar MOU, discussed hereinafter).

According to [redacted] and [redacted] a consortium tribe does not receive preferential treatment commiserate with the amount of TPA funds they donate to the program; whether a tribe donates $3,000 per year, or $100,000 per year, their respective FTT applications are similarly processed in a first-in-first-out (FIFO) approach by consortium staff. [redacted] however, stated that she feels certain that tribes who donate large amounts of TPA funds do receive better treatment than tribes who donate less money to the program. As noted above, [redacted] stated that [redacted] pays more attention to applications from higher donating tribes because their successful processing will result in more gifts and award recommendations. In support of this belief, [redacted] stated that during a recent July 2005 consortium meeting [redacted] and [redacted] received gifts from the tribes because "a lot of land was recently placed in trust." All three of these BIA employees received ceremonial blankets from the tribes for their help in having these lands placed into trust. [redacted] confirmed that he received a ceremonial blanket at this meeting.

Beyond the incentive of award recommendations [redacted] also feels that the TPA funding structure results in the consortium staff, including herself, feeling that they are working directly for the tribes as opposed to working for the government. [redacted] is regularly reminded by her BIA-PRO supervisors that "we work for the tribes" and that the tribes "pay our salaries and expect results." This mantra has made [redacted] feel as if the consortium tribes "are breathing down her neck" to get the applications processed and approved. [redacted] stated that she often receives direct telephone calls from consortium tribal attorneys, sometimes on a daily basis, to monitor her processing of their tribe's applications. In consideration that her salary is literally "being paid by the tribes," she feels beholden to respond to these tribal attorneys with celerity. As noted above, at the time of her interview [redacted] was [redacted] As an example of the pressure placed on her because of the MOU's funding structure, [redacted] stated that the morning prior to her interview, she received a telephone call from her current supervisor, [redacted] questioning when [redacted] planned on returning to work in California. During this conversation, [redacted] told [redacted] that "If we don't produce, we will lose our jobs," and that [redacted] is resulting in a negative impact on the consortium staff's productivity. In response, [redacted] told [redacted] she would travel back to California as soon as physically possible [redacted]

Non-consortium FTT applications v. consortium FTT applications

BIA-PRO consortium staff are allowed to only work on consortium FTT applications; they are not permitted to spend any time processing non-consortium FTT applications. Several tribes that elected to not participate in the consortium have submitted FTT applications to BIA-PRO. According to [redacted] these non-consortium applications are processed by one realty specialist, [redacted] as a collateral duty. Prior to the advent of the consortium MOU, all FTT applications were processed by [redacted] and one other realty specialist in this manner (which resulted in the large backlog of applications).

During her interview [redacted] confirmed that she is the only person assigned to process non-consortium FTT applications, which she handles as a "low-priority" collateral duty **(Attachment 15)**. Similar to how consortium staff process consortium applications [redacted] processes non-consortium applications on a FIFO basis; however, some applications may move ahead of others if there are delays with certain applications (i.e., waiting for information from a title company) [redacted] does not maintain a database of the non-consortium FTT applications that would identify application success rates, process timelines, dates, or total amounts of acres placed into trust. Accordingly, a comparison of non-consortium applications with consortium applications was not possible [redacted] indicated there is a current backlog of non-consortium applications.

[redacted] possesses the most experience and knowledge of all realty specialists at BIA-PRO (including consortium staff) regarding FTT applications. Accordingly [redacted] is called upon to review all finalized consortium applications prior to their submission to the regional director for adjudication [redacted] reviews the application in order to ensure it is thorough and complete. In contrast with the restriction preventing consortium staff form working on non-consortium applications [redacted] is allowed to work on consortium applications.

[redacted] explained that tribes have different reasons for not joining the FTT consortium. One reason she articulated was that many "on-reservation" FTT applications are handled at the field office level and thus do not need the regional-level consortium staff to process their applications; however, all applications are forwarded to the regional level if there is any controversy with the application. The other reason some tribes do not join the consortium is that they may not currently be interested in having lands placed into trust (e.g., they may have already had their FTT applications successfully processed).

Since the advent of the MOU, understandably, the processing time for consortium FTT applications has improved. Concomitantly [redacted] claims the amount of time it takes for her to process non-consortium FTT applications has also improved because of her diminished workload.

In 2002, BIA-PRO's congressional appropriations included $323,000 for the hiring of five FTE GS-5 positions to assist with the backlog of FTT applications. According to [redacted] this money was divided amongst all PRO tribes as individual "shares." Based upon the determined share amounts for each of the tribes participating in the FTT consortium, $175,000 was directed to the funding of the consortium staff. The share amounts for all non-consortium tribes (totaling $98,000) were directed to the BIA-PRO's region-wide realty fund, to the benefit of all tribes in BIA-PRO (including consortium tribes). The remaining share amounts, totaling $50,000, were directed to the California Trust Reform Consortium for use by their member tribes.

[redacted] confirmed that BIA-PRO directed $175,000 of these appropriated funds to the FTT consortium program in 2003, 2004, and 2005. [redacted] also stated, however, that the entire amount of the appropriation ($323,000) was funneled to the FTT consortium program the first year BIA-PRO received the appropriation (2002). After this first year, it was determined that in order to be more equitable, these funds needed to be distributed to each tribe as a "share" rather than using the entire amount solely for the benefit of the consortium tribes. As such, $175,000 is the representative "share" amount of the consortium tribes, and thus this amount is now directed to the FTT consortium program.

In comparing the approval rates of the FTT applications for both consortium and non-consortium tribes, it was discovered that all FTT applications receive favorable adjudications if they reach the decision stage in the process. According to [redacted] and [redacted] has never denied an FTT application that reached his desk for adjudication because all of the decision makers at BIA-PRO, including [redacted] and [redacted] are aware of the various applications and any potential issues with the applications during the processing stages of the applications. Accordingly, if an application has a problematic issue, it would be dealt with prior to the application reaching the adjudication stage; if an application has an issue that cannot be overcome, the tribe simply withdraws the application since they know it will not be adjudicated favorably. Accordingly, once an application reaches [redacted] desk for adjudication with a favorable recommendation from the BIA-PRO staff, [redacted] readily approves the application.

BIA Midwest Region's MOU

In 2004, BIA-MRO [redacted] proposed adopting an FTT consortium MOU, similar to BIA-PRO's MOU, in order to address the large backlog of FTT applications in BIA-MRO **(Attachment 16)**. Unlike BIA-PRO, [redacted] requested SOL to review the MOU prior to its utilization in BIA-MRO. This review was conducted by [redacted]

[redacted] noted in her interview that she identified the following problems in BIA-PRO's MOU:

- The need to add BIA employees to the consortium committee
- The need for consortium employees to be covered under Title 5 and work for the BIA as a federal employee
- The need to limit the consortium committee's authority to tribal issues **(Attachment 17)**.

[redacted] provided her review of the MOU in the form of a three-page memorandum to [redacted] on December 8, 2004 **(Attachment 18)**. This review did not address the validity of the underlying legal authority cited in BIA-PRO's MOU; however, additional authorities were cited in BIA-MRO's MOU .

Similar to the BIA-PRO's MOU, under the BIA-MRO's MOU, the salaries of the consortium staff are dependent upon TPA funding. BIA-MRO [redacted] stated that these consortium positions would also similarly be subject to a RIF if the TPA funding for the MOU were to cease. [redacted] also confirmed that BIA-MRO does not list the funding structure of the positions in the respective job announcements; however, he did indicate that he would ensure this notice is provided in any future BIA-MRO consortium job advertisements in light of his recognition that these candidates should be made aware of this tenuous funding structure.

According to [redacted] under the BIA-MRO MOU, non-consortium tribes benefit from the FTT program because the realty specialists assigned to work on their applications have a diminished workload. BIA-MRO has four consortium employees that are working on 35-40 consortium applications. Regarding non-consortium applications in BIA-MRO, there are two non-consortium employees processing the applications; one employee spends approximately 75 percent of his time on FTT applications and the other employee processes the applications as a collateral duty.

Legality of Consortiums

On July 7, 2006, SOL issued its legal opinion regarding the legality of the consortiums being utilized in BIA-PRO and BIA-MRO **(Attachment 19)**. In the opinion, SOL determined that they "do not believe that the consortiums violate the government-wide ethics rules or appropriations laws." However, the opinion recognized the patent appearance of a conflict of interest created by the consortiums by pointing out that the consortium's structure and use by the tribes and BIA "reflects an insufficient separation of organizational functions, the possibility of the appearance of unfairness of the fee-to-trust application process, and a concentration of resources within regional BIA offices in a way that favors consortium tribes over other tribes served by the regional offices."

Specifically, the opinion identified several different ways in how the consortium structure gives the "appearance of unfairness" in the "approval process" of the consortium tribes' fee-to-trust applications that were directly supported by this investigation. According to the opinion:

The appearance of unfairness also extends to the approval process itself. First, because the functions that would have been performed by the tribes are now performed by BIA employees, the arrangement may have the effect of conferring increased credibility on these applications, as compared to those of other tribes, as they proceed through the final approval process.

Second, these employees review and make recommendations exclusively upon the fee-to-trust applications submitted by the tribes that are essentially funding their positions. Fee-to-trust applications are frequently controversial and their review and processing requires the exercise of substantial independent judgment. The assignment of employees hired directly as a result of the tribes' return of their TPA funds to work exclusively on the applications of these tribes raises serious questions about the independence of judgment expected of BIA employees reviewing fee-to-trust applications submitted by the tribes that have redirected their TPA funds in a way that enabled the employees to be hired by BIA. We do not believe that BIA has instituted or considered any limits or controls on communication between these employees and the consortium tribes, or other measures that could assure that the these employees do not appear beholden or inappropriately connected to the consortium tribes whose applications they are processing.

Third, there is no evidence that BIA has established internal controls to assure that the contractible application functions – those functions subject to the Public Law 93-638 agreement with the tribes – are sufficiently separated from the final review and approval of the applications – the "inherently federal" review function always performed by the BIA. It appears that the employees hired as a result of the consortium agreement perform both types of functions without distinction. As a result, we do not believe BIA can assure that the final decisions on the consortium fee-to-trust applications are fair and unbiased, and also are perceived as such. While we are not aware of any actual instances of a lack of impartiality in the processing of these applications thus far, the absence of sufficient internal controls creates a potential for bias or the perception of bias in the review of the applications by these employees.

Additionally, although the SOL opinion did not determine that the consortiums were "directly inconsistent with the Indian Self-Determination and Education Assistance Act," the opinion stated that "these consortiums are not structured in the conventional sense and could be seen to be inconsistent with the general intent, if not the letter, of the Indian Self-Determination Act." Specifically, the opinion stated:

> [B]y using the funds in the manner intended by the consortium tribes, BIA essentially takes over the function that was intended to be managed by the tribes. Additionally, BIA uses the funds in a way that determines how the work on the fee-to-trust applications of the particular consortium tribes will be performed. This is antithetical to the intent of the Indian Self-Determination Act.

The SOL opinion concluded by recommending "that BIA discontinue the fee-to-trust consortiums, as they are currently structured."

SUBJECT(S)
None.

DISPOSITION

ATTACHMENTS

1. Investigative Activity Report: Interview of [redacted] dated February 2, 2006
2. Memorandum of Understanding between BIA-PRO and the California Fee to Trust Consortium Tribes
3. Investigative Activity Report: Interview of [redacted], dated February 2, 2006
4. BIA-PRO Fee-to-Trust TPA Funding Spreadsheets for 2000-2002, 2003-2005, & 2006-2008
5. BIA-PRO Fee-to-Trust Acres-into-Trust Spreadsheet for 2000-2006
6. DOI Inspector General Memorandum to DOI Secretary, dated November 28, 2005
7. Investigative Activity Report: Interview of [redacted], dated January 31, 2006
8. Investigative Activity Report: Interview of [redacted], dated February 10, 2006
9. Investigative Activity Report: Interview of [redacted] dated February 7, 2006
10. Investigative Activity Report: Interview of [redacted] dated February 14, 2006
11. Investigative Activity Report: Interview of [redacted] dated February 3, 2006
12. Investigative Activity Report: Interview of [redacted] dated February 1, 2006
13. BIA Merit Promotion Announcement No.: PR-05-03
14. Investigative Activity Report: Interview of [redacted], dated February 27, 2006
15. Investigative Activity Report: Interview of [redacted], dated February 2, 2005
16. Investigative Activity Report: Interview of [redacted], dated December 14, 2005
17. Investigative Activity Report: Interview of [redacted] dated December 13, 2005
18. SOL Review of MOU on behalf of BIA-MRO, dated December 8, 2004
19. SOL legal opinion response to Inquiry regarding BIA's Fee-to-Trust Consortium in Pacific Region and Midwest Region, dated July 7, 2006

Office of Inspector General
Office of Investigations
U.S. Department of the Interior

Investigative Activity Report

Case Title	Case Number
California Fee to Trust Consortium MOU	PI-PI-06-0091-I Related File(s)
Case Location Sacramento, California	**Report Date** January 24, 2006
Report Subject [redacted] Interview	

DETAILS

On January 18, 2006, Special Agents [redacted] and [redacted] interviewed [redacted], Bureau of Indian Affairs (BIA), Pacific Region Office (PRO), in her [redacted], office from 0800 to 1115 hours regarding the California Fee to Trust Consortium Memorandum of Understanding (MOU). [redacted] offered the following information:

In 2000, BIA-PRO had "over 300" fee-to-trust (FTT) applications backlogged. It was not a primary responsibility of any BIA-PRO employee to process these applications, but rather a low priority, collateral duty of those employees working within the real estate division. Indeed, it was considered a "big deal" when an application was processed and adjudicated. The California tribes were unhappy about this large backlog, therefore BIA-PRO met with the Californian tribes several times in an attempt to figure out a solution to this issue. As a result of these meetings, former BIA-PRO [redacted] and [redacted] "worked with the tribes" in creating the MOU.

No one person drafted the MOU, but rather it was drafted by a "conglomerate" of persons from the tribes and BIA-PRO. Tribal counsel participated in drafting the MOU, whereas the Department of the Interior's Office of the Solicitor (SOL) was not consulted in drafting the MOU, nor were they asked to review the final MOU draft. [redacted] does not believe the possibility of having SOL review the document "ever came up" during BIA-PRO's discussions about the MOU.

In 2004, BIA-PRO sent a copy of their MOU to the BIA Midwest Regional Office (BIA-MRO) for their considered use. BIA-MRO had the [redacted] Solicitor review the MOU, which resulted in several modifications to the document. When asked why BIA-PRO did not request a copy of the modified MOU, in order to review the SOL's comments, [redacted] stated she was unaware that BIA-MRO requested such a review.

Under the MOU, tribes may elect to "re-direct" Tribal Priority Allocation (TPA) funds that are earmarked for the individual tribes to the FTT program. Each California tribe has the option of joining the FTT consortium; the minimum TPA donation is $3000 per year, whereas there is no maximum donation.

Reporting Official/Title	Signature
[redacted], Special Agent	

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The re-directed TPA funds are used to hire BIA federal, full-time employees who are designated as "consortium staff." Their sole duties and responsibilities are to review and process tribal FTT applications that are submitted by FTT consortium member tribes (tribes which have re-directed TPA funds into the program). In addition to processing Notices of Application to the public, the consortium staff reviews the FTT applications' title status (Realty Specialists) and conducts environmental reviews of the involved properties (Environmental Specialists). Additionally, Realty Specialists review the applications for compliance with the criteria listed under Title 25 of the Code of Federal Regulations, section 151 (25 CFR 151), and make recommendations whether the applications satisfy these criteria. Finally, once the review process is completed, the consortium staff makes a recommendation to the adjudicating official whether they believe the application should be accepted into trust or not; according to [redacted] "generally, these recommendations are favorable."

The consortium staff act as facilitators in reviewing the FTT applications; they work closely with the tribes by informing them if the application is insufficient in a specific area and making recommendations to the tribes as to what they need to do in order to receive a favorable recommendation. As a general rule, the tribe members confer with BIA about the application prior to submitting an application. A premium service is "definitely" being provided to consortium FTT applications; according to [redacted] "it is expected," and the "whole purpose" is to ensure these applications receive a favorable recommendation. [redacted] would not refer to the consortium staff as "ministerial" or "paper pushers."

Once the applications receive a favorable recommendation, the consortium staff prepares the proposed Notice of Decision for signature by the respective adjudicating official. Generally, an area superintendent is the adjudicating official for "on-reservation" applications, the regional director is the adjudicating official for "contiguous" applications, and BIA Washington Central Office (WCO) is the adjudicating official for "off-reservation" and gaming applications. The BIA-PRO consortium staff processes off-reservation and gaming applications; however, these applications are ultimately forwarded to WCO for adjudication. Once adjudication is made, this decision may be appealed to the Interior Board of Indian Appeals.

BIA has a "re-occurring request" before Congress for "realty money." In 2000, BIA's congressional appropriations included $323,000 for the hiring of five Full Time Equivalent (FTE), GS-5 positions to assist with the backlog of FTT applications. This money was divided amongst all PRO tribes as individual "shares." Based upon the determined share amounts for each of the tribes participating in the FTT consortium, $175,000 was directed to the funding of the consortium staff. The total share amounts for all the tribes that are not members of the consortium ($98,000) was directed to the BIA-PRO's region-wide realty fund, to the benefit of all tribes in BIA-PRO (including consortium tribes). The remaining share amounts, totaling $50,000, were directed to the California Trust Reform Consortium for use by their member tribes.

The California Trust Reform Consortium was created "around 1998" and includes seven tribes. This consortium was created in order to organize resistance to the transfer of Indian property, money, and services from BIA to the Office of Special Trustee (OST). In this consortium, TPA funds are similarly used to hire four federal BIA employees; approval for this TPA staff funding is located in section 139 of the 2003 Appropriations Bill.

According to [redacted] TPA funds are in fact "appropriated funds." Under the MOU, the TPA funds are used to hire staff to perform inherently governmental functions as a "direct service" to the tribes. Tribes have the discretion to use TPA funds in any way they choose; they may choose to have the funds retained by BIA in order to have BIA perform the services on their behalf (this is mandatory for inherently

governmental functions), or they may choose to request the funds under a PL 638 contract in order to perform the services themselves. If a tribe initially elects to direct their TPA funds to BIA in order to perform a non-inherently governmental function, and then later decides to request the funds under a PL 638 contract, the BIA employees who were hired to perform the services would then be released by BIA via a Reduction in Force (RIF). [redacted] acknowledged that if the consortium tribes stop re-directing TPA funds under the FTT MOU, BIA consortium staff employees would similarly be subject to a RIF.

[redacted] creates a budget determining how the TPA funds will be utilized under the program. This budget is then presented to the Consortium Oversight Committee (hereinafter "Committee") for their approval. This all-tribal Committee is comprised of representative tribal members from various consortium tribes. The Committee usually approves the budget; however, in recent years, the Committee has been loath to approve use of TPA funds for cash awards to consortium staff.

All current FTT applications are at "some point in the process" because the consortium staff is capable of handling each application as they are received by BIA. Prior to the MOU, when there was a large backlog of applications, the applications were handled in a "first-in-first-out" (FIFO) approach. This FIFO approach is still utilized by the one realty specialist who handles all non-consortium applications.

Non-consortium applications are processed by Realty [redacted], the "most experienced realty person" in BIA-PRO. In addition to processing non-consortium applications, [redacted] reviews all consortium applications once they are completed due to her expertise and knowledge. Using the same approach that was used for all FTT applications prior to the MOU; [redacted] processes the non-consortium applications as a collateral duty, when she has time to do so.

Consortium staff are full-time, federal employees hired under a competitive announcement. BIA initially intended to hire 12 positions under the MOU, whereas they currently have 10 positions designated under the MOU. Seven of these positions are filled, with three vacancies. The currently filled positions are identified at the following General Schedule (GS) levels:

Grade	# of employees
GS-13	1 (Supervisory Realty Specialist)
GS-12	2 (Environmental Specialist and Realty Specialist)
GS-11	1 (Realty Specialist)
GS-7/9/11	3 (one Environmental Specialist and two Realty Specialists)

Consortium staff receive mainly "on-the-job" training. Any formal training is funded by TPA funds.

As noted above, if tribes decide to stop re-directing TPA funds to the program, these federal employees would be subject to a RIF. [redacted] however, pointed out that the "senior level" employees would not necessarily be out of a job because they would "bump" lower level employees within the Region, who, in turn, would bump other lower level employees, and so on. Accordingly, BIA would ultimately need to lay off several GS-5/7 federal employees in order to offset the loss of the TPA funding currently being used to fund the GS-13, GS-12, and GS-11 consortium staff positions.

[redacted] stated that, at the time of the MOU's inception in 2000, she and Former [redacted] discussed the possibility of identifying these consortium positions as term positions (as opposed to FTE positions). However, it was decided by [redacted] that "he would run the risk" of not making the positions term in order to better attract highly qualified candidates. [redacted] and [redacted] both recognized that

experienced federal employees would not apply to these positions if they were announced as term positions.

[redacted] was asked if BIA-PRO notified the federal employees working as consortium staff, at the time they applied for the positions, that these jobs are funded solely by TPA monies. She stated that the announcements did not indicate that these positions were funded by TPA funds. She did acknowledge that these positions are more tenuous than other appropriated positions due to their reliance on TPA funding; however, she pointed out that, with respect to appropriated positions, "loss of appropriations happens all the time." She further acknowledged that "most or all" consortium staff, who were already federal employees prior to transferring to the consortium staff positions, did receive upgrades when they transferred to their current positions.

The all-tribal Committee is comprised of members of several different consortium tribes. They are not solely representative of the tribes contributing the most TPA funds, but rather represent tribes that have the strongest interest in the program. The Committee does not contain any federal employees; however, the purpose of the Committee is to meet with BIA and discuss relevant issue related to the program.

The Committee did review and provide input in the drafting of the initial Position Descriptions (PD's) for the consortium staff positions. The PDs were then classified by BIA's personnel office. BIA issues the announcements for vacant positions, receives applications, and produces a list of certified candidates. BIA officials select an employee from the certified list and then inform the Committee of the selection. The Committee reviews the selection and makes a favorable or unfavorable recommendation; however, the ultimate decision whether to select the applicant rests with BIA. Regarding potential conflicts if an applicant were to be from a consortium tribe, [redacted] stated the consortium staff does not include any California Indians.

Regarding the MOU's provision that "recommendations for incentive or star awards will be brought forward to the [Committee]," generally, the Committee has agreed with BIA's award proposals for consortium staff. The Committee did, however, once refuse to approve an award proposed by BIA for a consortium employee because the Committee did not want to have TPA funds used to pay the cash award. Since that time, the cash used to pay these awards has come from BIA administrative account funds.

Regarding employee performance, if the Committee has a problem with a consortium employee, they will contact [redacted] and discuss their concerns. Consortium staff are aware that the all-tribal Committee has input in their performance evaluations and potential awards. [redacted] acknowledges that there could be the perception that the tribe's input on these awards may influence an employee's judgment to favorably recommend a tribes' application. However, [redacted] claims the Committee does not perform employee evaluations or ultimately decide who receives an award, but rather are simply consulted on these matters and make recommendations. The Committee does not "sign off" on employee evaluations.

[redacted] was asked if she felt the MOU violates Executive Order 12731, Section 101(h), inasmuch as these consortium employees only perform work for one select group of tribes, to the exclusion of other tribes. According to [redacted] consortium staff do not provide any more preferential treatment to certain tribes (i.e. consortium tribes), to the exclusion of other tribes, than the BIA agencies in Montana who perform services exclusively for one tribe. She explained that all five BIA agencies in Montana provide services exclusively to the respective tribe in their service area, to the exclusion of other tribes. According to [redacted] the nature of how BIA is structured results in this necessity.

[redacted] does not believe the MOU results in an augmentation of funds because the BIA never received money from anyone. She did acknowledge that the authority cited in the MOU is "probably not the appropriate authority."

Office of Inspector General
Program Integrity Division
U.S. Department of the Interior

Investigative Activity Report

Case Title	Case Number
California Fee to Trust Consortium MOU	PI-PI-06-0091-I Related File(s)
Case Location Sacramento, California	**Report Date** February 2, 2006
Report Subject [redacted] Interview	

DETAILS

On January 19, 2006, Special Agent [redacted] telephonically interviewed [redacted], former [redacted], Bureau of Indian Affairs (BIA), Pacific Regional Office (PRO), by calling [redacted], from 1230 to 1315 hours regarding the California Fee to Trust Consortium Memorandum of Understanding (MOU). [redacted] offered the following information:

In 2000, [redacted] and [redacted] created the original MOU in collaboration with California tribes in an effort to address the large backlog of Fee to Trust (FTT) applications at BIA-PRO. The processing of these FTT applications was a top priority for the California tribes, whereas BIA-PRO did not have ample personnel to timely process the applications. After consultation with the tribes, it was decided that the tribes were willing to "give up" certain amounts of their Tribal Priority Allocation (TPA) funds so that BIA could hire "professional staff" to assist in the processing of these applications.

In [redacted] was partially based upon his creation of the FTT consortium.

Creation of the consortium under the MOU has had a positive effect on behalf of both BIA and the tribes. During [redacted] tenure as [redacted], BIA did not receive any complaints from either consortium or non-consortium tribes concerning the program.

Regarding the potential conflict of interest perception created by the employee selection and evaluation/award process contained in the MOU, [redacted] stated that BIA always retained the final word in these processes; the all-tribal Consortium Oversight Committee simply made recommendations.

[redacted] decided to "take the risk" to hire the consortium staff as full time equivalent (FTE) positions rather than term positions. He based this decision upon the notion that BIA would be able to better attract qualified applicants if the positions were FTE, rather than term. He hoped that Congress would appropriate funds for these employees once the program became successful and demonstrated there was a need for such staff. Based upon the fact that these federal employees' salaries are entirely dependent on

Reporting Official/Title	Signature
[redacted], Special Agent	

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the re-direction of TPA funding by the tribes, [redacted] acknowledged that a Reduction in Force (RIF) would occur if the tribes decided to stop re-directing their TPA funds to the program.

[redacted] is uncertain whether the Office of the Solicitor (SOL) reviewed the original MOU in 2000. In retrospect, he stated that it was "pretty stupid" of him to not ensure the MOU was reviewed by SOL; however, he stated that the SOL certainly was aware of the program and "knew what we [BIA] were doing."

Regarding the Dispute Resolution section of the MOU, which states that the all-tribal Consortium Oversight Committee' decisions will be final concerning the duties and responsibilities of the federal employees (BIA consortium staff), [redacted] claimed that they "never had any issues or conflicts whatsoever related to this MOU" during his tenure as [redacted].

[redacted] was asked if he believed the non-consortium tribes received equal services from BIA in the area of FTT application processing. He stated that the single person who had the collateral duty of handling all of the FTT applications prior to the MOU, and is now only responsible for the non-consortium applications, has a diminished workload as a result of the MOU. Accordingly, she is able to donate more time to processing the non-consortium applications; this was "the whole idea" of how the non-consortium tribes would also benefit from this MOU. All other services are equal "across the board" for consortium and non-consortium tribes.

Overall, [redacted] believes this to be a good program and it "works great for everyone." He "can now see" how it would have been beneficial to have the SOL review the MOU prior to its use. He suggested that the SOL could now review the MOU and ensure the conflicts of interest issues are removed. If this could be done, the program could continue to the benefit of BIA and the tribes.

United States Department of the Interior

OFFICE OF INSPECTOR GENERAL
Washington, DC 20240

NOV 28 2005

Memorandum

To: Secretary

From: Earl E. Devaney
Inspector General

Subject: California Fee To Trust Consortium

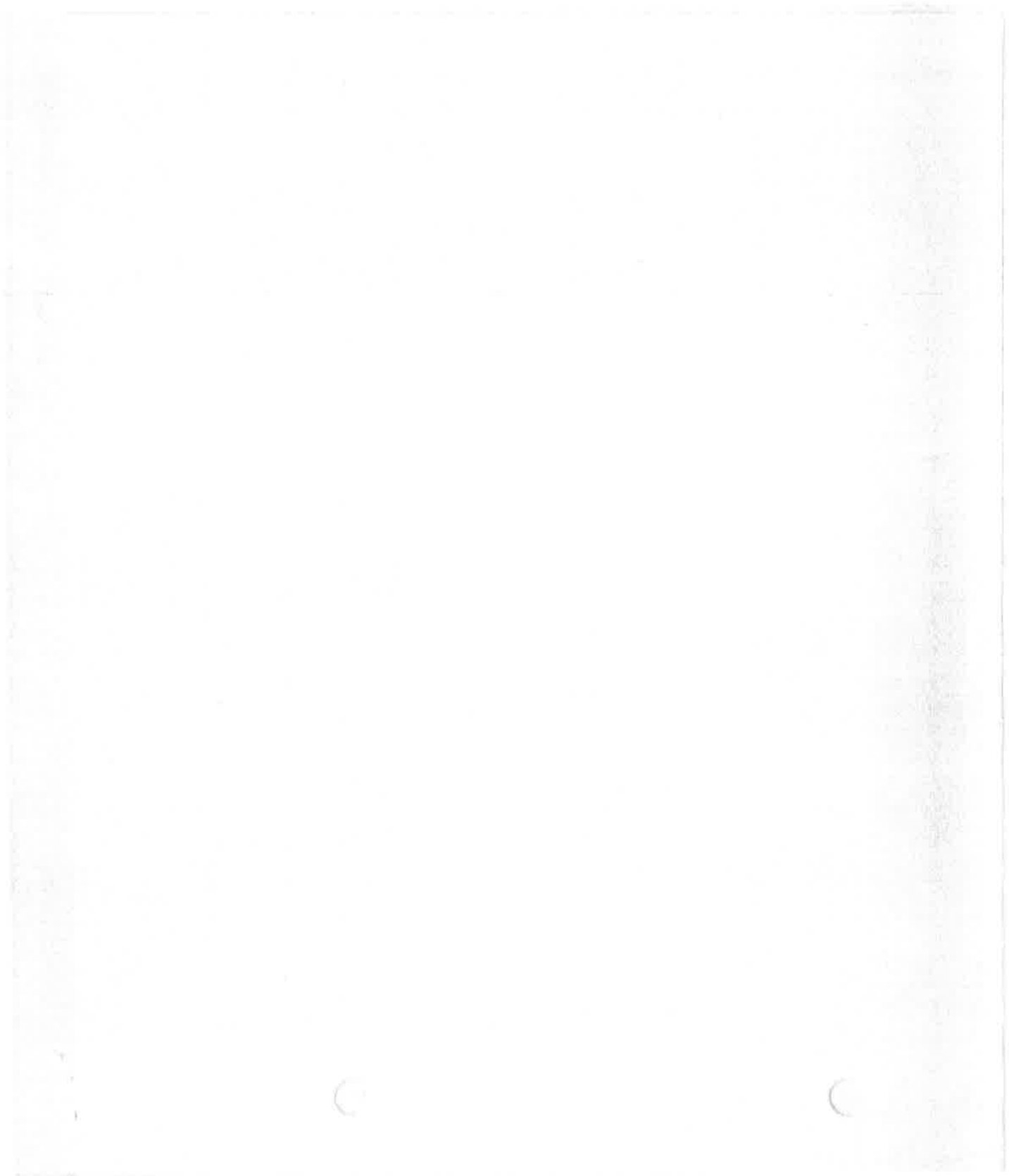
The Office of Inspector General (OIG) was recently provided a copy of an unsigned Memorandum of Understanding (MOU) between the Bureau of Indian Affairs Pacific Regional Office (BIA-PRO) and "California Fee To Trust Consortium Tribes." The MOU describes a process by which the BIA-PRO "re-programs" Tribal Priority Allocation (TPA) funds back to BIA-PRO to hire employees dedicated to processing Consortium members' fee to trust applications.

In addition to some profound conflict of interest concerns, the description contained in the MOU suggests the very real potential that BIA-PRO is improperly augmenting its appropriations with funds earmarked for distribution to tribes.

The MOU cites 25 U.S.C. §123c as authority for this "Project." Our initial review of this statute finds no authority for BIA to receive funds from tribes – for this, or any other, reason. We are left with the view that BIA-PRO is providing preferential treatment to tribes who "contribute" to BIA-PRO a minimum of $3,000 per year for three consecutive years.

While the OIG Office of Investigations has opened an investigation, I would request that you review the genesis, legal authority and propriety of this "Project," and, if appropriate, suspend the "Project" pending the results of our investigation.

I would appreciate being kept apprised of any findings you may make or actions you take. I would also appreciate it if you would direct BIA-PRO to secure and protect all documents related to this matter until OIG investigators review them.



Office of Inspector General
Office of Investigations
U.S. Department of the Interior

Investigative Activity Report

Case Title	Case Number
California Fee to Trust Consortium MOU	PI-PI-06-0091-I
	Related File(s)
Case Location	**Report Date**
Sacramento, California	January 31, 2006
Report Subject	
[redacted] Interview	

DETAILS

On January 18, 2006, Special Agents [redacted] and [redacted] interviewed [redacted], Bureau of Indian Affairs (BIA), Pacific Regional Office (PRO), in his [redacted] office from 1115 to 1200 hours regarding the California Fee to Trust Consortium Memorandum of Understanding (MOU). [redacted] offered the following information:

Overall, [redacted] is very happy with how the project is working; he believes it to be "high-powered and efficient." However, during a recent review of the MOU, [redacted] stated that he is uncomfortable with the provisions in the MOU that grant the all-tribal Consortium Oversight Committee (hereinafter "Committee") substantial participation in the selection and performance evaluations/awards of BIA consortium employees. He suggested these provisions needed some "shoring up" or "re-negotiation."

[redacted] attention was directed to the Dispute Resolution section of the MOU, which states that the all-tribal Committee's findings regarding "any disputes as to the interpretation of any provision of this Agreement" will be final. This section, read in conjunction with Section III B, results in this all-tribal Committee having the final word in determining the duties and responsibilities of the consortium staff (federal employees) if a conflict were to arise. [redacted] acknowledged that the contract, as written, does apparently grant the Committee such powers over the consortium federal employees; however, he stated that he would not allow the Committee to direct the federal employees to perform any duties averse to their obligations as government employees. He stated he would be obligated to override the Committee in this circumstance, regardless of the fact that his actions would technically represent a breach of contract. [redacted] stated that he is unaware of any conflict occurring since the inception of the MOU that would have invoked "dispute resolution." He stated that, in practicality, the consortium staff are managed by BIA officials and not the Committee. Ultimately, however, he acknowledged that the Dispute Resolution section probably needs to be "re-visited."

Based upon his initial reading of the MOU, [redacted] felt that the authority cited for the MOU was insufficient.

Reporting Official/Title	Signature
[redacted], Special Agent	

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Regarding the potential perception of a conflict of interest with respect to the all-tribal Committee's participation in reviewing proposed employee awards, [redacted] stated that the Committee's review is simply a "rubber stamp" of BIA's proposals. He did acknowledge that one could perceive a conflict of interest based upon the wording of the MOU.

[redacted] learned that the BIA Midwest Regional Office (BIA-MRO) had the MOU reviewed by the Office of the Solicitor (SOL) approximately 18 months ago. BIA-MRO [redacted] told [redacted] that the MOU was only altered with respect to the "funding structure." When asked why he did not request a copy of the SOL review, [redacted] stated that he believed that the BIA-PRO's MOU had been reviewed by the SOL prior to its initial use in 2000 (he became [redacted]). He has only recently learned that the BIA-MRO had never been reviewed by any Department of the Interior attorney.

Upon learning of the SOL's review of the MOU, in conjunction with acknowledging the BIA-PRO MOU may present some perception of a conflict of interest, [redacted] stated that he planned on reviewing the BIA-MRO's version of the MOU. Based upon his review of the BIA-PRO MOU, he would discuss any potential changes to the MOU with the consortium tribes in order to "shore it up."

[redacted] acknowledged that since the MOU is dependent on Tribal Priority Allocation (TPA) funding, if the tribes chose to not re-direct these monies to the program, the consortium staff would be subject to a Reduction in Force (RIF). He is unsure of whether the consortium staff employees knew the funding structure of their positions prior to them accepting the positions.

[redacted] believes the Fee to Trust program created by the MOU is a "very important" program because the California tribes do not possess a large land base. This program is helping to restore the lands that were taken away from the tribes and thus provide them with a greater sense of community and sovereignty.

Office of Inspector General
Program Integrity Division
U.S. Department of the Interior

Investigative Activity Report

Case Title	Case Number
California Fee to Trust Consortium MOU	PI-PI-06-0091-I Related File(s)
Case Location Sacramento, California	**Report Date** February 10, 2006
Report Subject [redacted] Interview	

DETAILS

On February 9, 2006, Special Agent [redacted] telephonically interviewed [redacted], Bureau of Indian Affairs (BIA), Midwest Regional Office (MRO), from 0945 to 1215 hours regarding the California Fee to Trust Consortium Memorandum of Understanding (MOU). [redacted] offered the following information:

Prior to accepting his current position in [redacted] was the [redacted] for the Fee to Trust Consortium (FTT) at the BIA Pacific Regional Office (PRO). [redacted] was hired as a [redacted] for the FTT in [redacted] and worked under former FTT [redacted] [redacted] became the [redacted] for the FTT after [redacted] transferred from BIA-PRO in 2002. Former BIA-PRO [redacted] negotiated the MOU with the California tribes prior to [redacted] arrival at BIA-PRO.

The MOU dictates that the selection of "consortium positions will include the direct participation of the [Consortium Oversight] Committee." According to [redacted] once BIA receives a certification list, based upon a competitive announcement, the FTT [redacted] would "sit down with the Committee" and review the applications of the applicants on the list. After reviewing the applications together, the [redacted] and the all-tribal Committee would select an applicant for the vacant FTT consortium position. In one instance, the [redacted] and Committee decided to conduct telephone interviews of the three applicants on the list. Members of the Committee helped draft the interview questions and "sat in" on the telephone interviews; none of the three applicants were ultimately hired and the position was re-advertised.

BIA personnel made position selections without consulting with the Committee only when the position advertised was for a "clerk" or a "term" position; in these cases, the Committee provided prior approval for the selection. Conversely, all realty specialist positions were selected only after the Committee reviewed the applications with the [redacted] [redacted] called this Committee review of applications a "courtesy."

The Committee never overrode a selection made by [redacted] However, in one instance, the Committee made a selection recommendation that [redacted] overruled.

Reporting Official/Title	Signature
[redacted], Special Agent	

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[redacted] was asked whether he made a selection for an environmental specialist that the Committee overruled after he presented the applicant to the Committee for approval during a [redacted] FTT Meeting at [redacted] (See [redacted] IAR). [redacted] does not remember presenting such an applicant to the Committee for approval. [redacted] explained that, as the [redacted] he did not select environmental specialist positions; [redacted] made the selections for these positions within the consortium staff.

Recommendations for awards for consortium staff are proposed by an agency superintendent or the employee's supervisor. [redacted] and [redacted] received cash awards in the first year of the MOU (2000); however, since that time, the consortium tribes decided they did not want pay cash awards from the Tribal Priority Allocation (TPA) funds they donate to fund the program. The award he received in the first year of the MOU was the only award [redacted] received while working for the consortium and he is uncertain whether any awards have been proposed for other consortium staff since he left BIA-PRO.

Committee members did not participate in establishing performance standards or goals for the consortium staff and they do not participate in performance reviews of the staff. However, the Committee may submit written assessments of the staff to BIA, which are given due consideration. During [redacted] time as the [redacted] the Committee submitted only one negative written assessment on a consortium employee; this employee had also received a poor employee evaluation from [redacted] for insubordination. The Committee rarely sent in positive assessments of consortium staff.

The FTT consortium program is predominantly funded by the re-direction of TPA funds from participating (consortium) tribes to BIA. Accordingly, [redacted] acknowledged that if the re-direction of TPA funds to the program were to surcease, a Reduction in Force (RIF) would need to occur. In the case of a RIF, [redacted] was not concerned about his job security because he knew his seniority would ensure he would not be jobless. The potential for a RIF of the consortium staff under him did, however, cause [redacted] a substantial amount of stress and anxiety because, as the [redacted] he was the person responsible for "negotiating with the tribes" every 3 years to obtain the necessary funding to renew the program; he knew that if he failed to successfully negotiate this funding, his staff would be RIF'd. In fact, [redacted] admitted that this stressful obligation of the [redacted] position led to his decision to seek a different position outside of the consortium after he successfully renewed the MOU in 2005. He further emphasized the high degree of anxiety this obligation created by stating that the first consortium [redacted] similarly decided to leave the consortium shortly after renewing the MOU in 2002 due to the stress and anxiety she endured during the process.

In recognizing the potential for a RIF of the consortium positions, depending upon the existence of the TPA funding, [redacted] stated that he was fully informed about the TPA funding structure of the consortium position before he decided to accept his first consortium position in [redacted]. He was not certain, however, that all others persons who accepted positions with the consortium knew of the funding structure. When asked whether the job announcements advertised for the consortium positions indicated the funding structure of the position, [redacted] stated that he "didn't think so." [redacted] justified this lack of notice by analogizing this situation with how BIA regularly advertises for grant-funded positions; these positions are similarly advertised by BIA without identifying the temporary nature of the position. He then explained that people accept these grant positions, unaware of its funding structure, and then quickly start looking for another job once they figure out the position is not based upon appropriated funds. [redacted] was then asked if he thought it "fair" that these announcements were not informing potential applicants that these positions are not based upon appropriated funds, but rather are subject to the need for continuous funding renewal. [redacted] admitted, in retrospect, he did not believe it to be

"fair." In fact, he stated that he planned on ensuring future BIA-MRO consortium staff announcements do contain language that identifies the nature of the job's funding.

As noted above, the FTT consortium program is predominately funded by TPA funds. These TPA funds are supplemented by congressional appropriations designated for "realty services." In 2002, congress appropriated $323,000 to BIA-PRO for these realty services. The first year BIA-PRO received these appropriated funds, the entire amount was funneled into the FTT consortium program. After the first year, BIA-PRO determined it would be more equitable to split the funds amongst all of the tribes and not use the entire amount to solely benefit the consortium tribes. Accordingly, the funds were divided into "shares" for each tribe, and the total amount of funds representing the shares of consortium tribes ($175,000) was then directed to the FTT consortium program.

[redacted] often tells BIA employees that "we work for the tribes – they pay our salary." He believes all BIA employees, from a philosophical standpoint, do "work for the tribes" since the BIA's mission is to essentially serve the Indian population. He was then asked if an employee could perceive this phrase as a threat when the employee's salary is *literally* paid by the tribes, as is the case with consortium staff that is dependent on TPA funding, especially when the phrase is accompanied by statements such as "we will lose our jobs if we do not produce for the tribes." [redacted] acknowledged this perception could exist; however, he stated that he never used this phrase as a threat.

[redacted] accepted a ceremonial blanket as a gift from consortium tribal members during a July 2005 consortium meeting. In addition to [redacted] BIA-PRO [redacted], along with consortium staff [redacted], [redacted], and [redacted] all received ceremonial blankets as gifts at this meeting ([redacted] was not present at the meeting; her blanket was brought back to BIA-PRO for her). [redacted] gave the blanket he received to a (non-BIA) personal acquaintance. He does not know what the other BIA staff did with their gifted blankets.

In [redacted] attended a meeting for [redacted] BIA managers. At this meeting, he received ethics training that covered the area of "gifts." He learned in this training that the ethics regulations require him to turn any gift he receives, over a certain de minimus value, to the BIA property custodian. At the time of this training, [redacted] had already given his gifted blanket to his friend.

During his tenure as the [redacted] of the BIA-PRO FTT Consortium, Committee members represented the following tribes: Elk Valley, Tule River, Santa Rosa, Big Sandy, Table Mountain, Picayune, North Fork, Sycuan, Pala, Viejas, and Tuolumne. Tribes that made high donations of TPA funds to the program and/or were represented on the Committee did not receive "better" service than tribes making the minimum donation to the program.

Tribal attorneys may have called periodically in order to check the status of a FTT application; however, they did not call consortium staff directly to "tell them how to do their jobs." [redacted] highly doubts that a tribal attorney made daily calls to a consortium staff employee. If this did happen, the consortium employee should report the matter to the [redacted] [redacted] he was the contact for tribal attorneys.

According to [redacted] the functions performed by consortium staff are NOT inherently governmental; the only process that is inherently governmental is the actual issuance of a decision regarding the application. Accordingly, the tribes could compact, or contract all of these services, as opposed to re-directing the funds to BIA to hire consortium staff. This includes the services provided by environmental specialists; these functions could be contracted out and then presented to BIA for their final environmental decision (e.g., Finding of No Significant Impact - FONSI). Oneida Tribe of Indians of

Wisconsin is an example of a tribe that contracts all of these functions and then presents a complete, final package to BIA solely for its decision.

According to [redacted] a Certificate of Inspection and Possession (CIP) is completed at the "final stages" of the FTT process; it may be completed before, or after, a property is placed into trust. He does not know why this CIP is not required to be completed prior to the land being placed in trust inasmuch as its purpose is to certify the status of the land prior to the government taking it into trust in order to protect the government from potential liability. Based upon [redacted] understanding, the CIP is required to be completed prior to the final title opinion under the US Department of Justice Title Standards, but not necessarily prior to the land being taken into trust by the government. As a "good business practice," [redacted] always attempted to have the CIP completed prior to the land being placed into trust.

All CIPs must be completed after a physical inspection of the concerned property. Accordingly, [redacted] stated that he would never ask someone to sign a CIP without that person physically inspecting the property.

Non-consortium tribes benefit from the FTT program because the realty specialists assigned to work on their applications have a diminished workload. BIA-MRO has four consortium employees that are working on 35-40 consortium applications. Regarding non-consortium applications in BIA-MRO, there are two non-consortium employees processing the applications; one employee spends approximately 75 percent of his time on FTT applications and the other employee processes the applications as a collateral duty.

Office of Inspector General
Program Integrity Division
U.S. Department of the Interior

Investigative Activity Report

Case Title	Case Number
California Fee to Trust Consortium MOU	PI-PI-06-0091-I Related File(s)
Case Location Sacramento, California	**Report Date** February 7, 2006
Report Subject [redacted] Interview	

DETAILS

On January 27, 2006, Special Agent [redacted] telephonically interviewed [redacted], Bureau of Indian Affairs (BIA), Pacific Regional Office (PRO), from 1330 to 1430 hours regarding the California Fee to Trust Consortium Memorandum of Understanding (MOU). [redacted] offered the following information:

Prior to accepting her current position, [redacted] was employed as a [redacted] with BIA in [redacted]. As a [redacted], she assisted in the processing of Fee to Trust (FTT) applications submitted to BIA by [redacted] tribes. In [redacted], she was hired as a [redacted] for the FTT Consortium.

At the time [redacted] was hired as consortium staff, BIA did not notify her that her new position's salary would be funded by Tribal Priority Allocation (TPA) monies. Her original supervisor, [redacted], told her that her salary was funded by TPA funds shortly after she moved to California and began working. In acknowledging that she could lose her job if the TPA funding stopped, she stated the situation was "kind of scary." She stated, unequivocally, that she would not have left her home in [redacted], and her Full Time Equivalent (FTE) BIA position, in order to move to California if she had known the about the FTT consortium position's risky funding structure. She is [redacted] and is worried about her financial stability.

Upon learning about the duties of the position, [redacted] realized that her sole responsibility would be to work on processing FTT applications. She was disappointed about this because she already had extensive experience processing FTT applications in [redacted] and was hoping to gain experience "in all areas of realty – not just FTT applications." She accepted the job, however, due to the grade jump.

[redacted] has been [redacted] BIA-PRO since [redacted]. She went on [redacted]. She is planning on [redacted] her FTT consortium position at BIA-PRO; however, she is actively looking for a new job back in [redacted] in order to be close to her [redacted]. She has "been completely upfront" with her consortium supervisors at BIA-PRO about her interest in relocating back to [redacted].

Reporting Official/Title	Signature
[redacted], Special Agent	

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[redacted] is aware the all-tribal consortium committee has the final word on the duties and responsibilities of the BIA consortium staff under the MOU. She has been told by her former supervisor, [redacted] that the committee also has the final word on applicant selection of the consortium staff. [redacted] explained to [redacted] that she was hired in the following manner:

-BIA received a certification list of top three applicants based upon the job announcement,
-BIA supervisor ([redacted] selected her from this certification list,
-[redacted] then had to receive approval from the all-tribal committee of his selection.

[redacted] was told by [redacted] that the committee's approval was "the final word," which BIA did not overrule. In fact, [redacted] had told her that the committee recently did not approve one of his applicant selections for an environmental specialist consortium position; as a result, [redacted] had to re-announce the position. Upon [redacted] presenting another selected applicant to the committee for an office automation position, the committee determined that the consortium did not need to hire such a position; this resulted in BIA cancelling the announcement without hiring the selected applicant.

[redacted] is regularly told by her supervisors at BIA that "we work for the tribes" and that the tribes "pay our salaries and expect results." This mantra has made [redacted] feel as if the consortium tribes "are breathing down her neck" to get the FTT applications processed and approved. In fact, she often receives direct telephone calls from consortium tribal attorneys, sometimes on a daily basis [redacted]), to monitor her processing of the tribes' applications. In consideration that her salary is "being paid by the tribes," she feels beholden to these tribal attorneys to do exactly what they direct her to do.

The morning prior to this interview, [redacted] received a telephone call from her current supervisor, [redacted], questioning when [redacted] planned on returning to work at BIA-PRO. During this conversation, [redacted] told [redacted] that "if we don't produce, we will lose our jobs" and that [redacted] absence from work is resulting in a negative impact on the consortium staff's productivity. [redacted] told [redacted] she would be back to work as soon as she could after she [redacted].

The tribes that donate higher amounts of money to the program "definitely receive more attention" than tribes that donates less money to the program. The FTT applications from the tribes that make high donations to the program "are worked on immediately by [redacted]," while other applications are "put on the back burner." [redacted] works assiduously on these applications because she knows the successful processing of these applications will result in more gifts and award recommendations; [redacted] has received performance awards every year. Whereas, the applications from the tribes that only donate the minimum are directed to lower level consortium staff, such as [redacted]. [redacted] stated that the [redacted] tribe is an example of a tribe that makes high donations and receives premium service by [redacted]. The [redacted] tribe was cited as an example of a tribe that makes minimum donations and thus their applications are given short shrift and directed to [redacted] for processing.

During a recent July 2005 consortium meeting, [redacted], [redacted] and [redacted] received gifts from the tribes because "a lot of land was recently placed in trust." All three of these BIA employees received ceremonial blankets from the tribes for their help in having these lands placed into trust.

According to [redacted] BIA-PRO does not complete the proper processing procedure for FTT applications. In approximately 90 percent of BIA-PRO's processed applications, Certificates of Inspection and Possession (CIP) were not properly completed. Due to her past experience processing

FTT applications in [redacted], [redacted] questioned [redacted] as to why these CIPs were not being completed; [redacted] informed [redacted] that "they didn't have time."

While working for BIA in [redacted], [redacted] was instructed that the completion of the CIP was very important. She stated they were important because they certified that status of the land (e.g., the presence of new buildings, businesses, livestock) had not changed since the tribes' original application; otherwise, the government may be subject to certain liabilities (e.g., liens, environmental issues) when the land is taken into trust on behalf of the tribes. [redacted] completed several of these CIPs while working in [redacted] and was required to sign an affidavit certifying the property's condition as of the day she inspected it.

Since [redacted] has been working for the FTT consortium, she is unaware of BIA making an unfavorable recommendation regarding any FTT consortium application.

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Program Integrity Division
U.S. Department of the Interior

Investigative Activity Report

Case Title	Case Number
California Fee to Trust Consortium MOU	PI-PI-06-0091-I Related File(s)
Case Location Sacramento, California	**Report Date** February 14, 2006
Report Subject [redacted] Interview	

DETAILS

On February 14, 2006, Special Agent [redacted] telephonically interviewed [redacted], Bureau of Indian Affairs (BIA), Pacific Regional Office (PRO), from 1015 to 1045 hours regarding the California Fee to Trust Consortium Memorandum of Understanding (MOU). [redacted] offered the following information:

[redacted] is the selecting official for the environmental specialists that work for the consortium. Since the inception of the consortium MOU, [redacted] has hired three environmental specialists: [redacted], [redacted], and [redacted].

In the MOU's nascency, [redacted] selected [redacted] after a panel, including non-federal Committee members, reviewed applications of candidates listed on the certification list.

[redacted] selected [redacted] after reviewing his application with the assistance of an all-federal employee panel; as opposed to the panel that reviewed [redacted] application, no Committee members were present on the panel that reviewed [redacted] application. After [redacted] was selected by [redacted] his selection was put forward to the Committee for their recommendation.

In 2005, [redacted] selected [redacted] after reviewing his application with an all-federal employee panel. [redacted] selection was provided to the Committee for their recommendation during a consortium meeting. [redacted] was not present at the consortium meeting and is not certain whether the Committee was provided [redacted] application for review.

The Committee has never made an unfavorable recommendation regarding [redacted] selection of an environmental specialist for the consortium. [redacted] was asked what would happen if the Committee were to make an unfavorable recommendation regarding one of the applicants [redacted] selected. [redacted] stated that BIA would consider the Committee's input; however, BIA would make it clear to the Committee that this is a federal position.

Reporting Official/Title	Signature
[redacted], Special Agent	

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[redacted] granted a performance award to [redacted] in 2005, which was paid out of [redacted] environmental program funding.

There is currently one vacant GS-11 environmental specialist position within the consortium. [redacted] will be contacting the BIA human resource office shortly in order to have the position advertised.

[redacted] does not believe the prior announcements for consortium environmental specialist positions indicated the positions were to be funded with Tribal Priority Allocation funds. [redacted] stated, however, that he informed his most recent hire, [redacted], of the position's funding structure during the interview process, along with the cost of living in Sacramento and housing opportunities. [redacted] believes that the prospective candidate should have all such pertinent information prior to accepting a new position.

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Investigative Activity Report

Case Title	Case Number
California Fee to Trust Consortium MOU	PI-PI-06-0091-I Related File(s)
Case Location Sacramento, California	**Report Date** February 3, 2006
Report Subject [redacted] Interview	

DETAILS

On January 25, 2006, Special Agent [redacted] telephonically interviewed [redacted], Bureau of Indian Affairs (BIA), Pacific Regional Office (PRO), from 1000 to 1045 hours, regarding the California Fee to Trust Consortium Memorandum of Understanding (MOU). [redacted] offered the following information:

Prior to accepting her current position, [redacted] was employed as a [redacted] with [redacted] in [redacted]. In [redacted], she was hired as a [redacted] for the Fee to Trust (FTT) Consortium.

At the time [redacted] was hired as consortium staff, BIA did not notify her that her new position's salary would be funded by Tribal Priority Allocation (TPA) monies; she assumed that she would be "working for BIA, not for the tribes." A few months after being hired, she discovered how her position was funded by reviewing consortium documentation. Upon learning how her position was being funded, she asked her supervisor, [redacted], what would happen if the tribes decided to stop re-directing TPA funds to the program; [redacted] told her "we will be out of a job."

Once [redacted] learned the nature of her job's funding, she started looking for another [redacted] position within BIA; she learned, however, that she was incapable of transferring to another position due to the nature of the TPA funding.

Upon starting her work for the FTT consortium, [redacted] was assigned to complete a backlog of older applications. Apparently, after the lands identified in these applications had been placed into trust ("acceptance of conveyance"), work on the applications had "stopped." One stage of the process that needs to be completed after the "acceptance of conveyance" occurs is the completion of a Certificate Inspection of Possession (CIP). This certificate certifies that the signor made an on-site, visual inspection of the property in order to ensure the condition of the property remains as described in the initial application with respect to development and nature of use.

Reporting Official/Title	Signature
[redacted], Special Agent	

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According to [redacted] asked her to sign eight of these CIPs without making an on-site inspection of the concerned property; [redacted] refused to do so because she felt it was "illegal." [redacted] was also advised by [redacted], a consortium staff co-worker who has extensive FTT experience, that she should not sign the CIP without physically inspecting the property. [redacted] eventually prepared the CIPs; however, they were signed by [redacted] or another person in the realty division.

On [redacted] wrote a letter to [redacted] informing him that "all the Certificate of Inspection and Possessions that I have done for the last six months are all falsely signed." [redacted] did not receive a response from [redacted], or anyone from BIA, about her letter to [redacted]. However, [redacted] claims that she began to be treated differently by her supervisors at BIA after she sent the letter to [redacted], leading her to believe [redacted] informed her BIA supervisors about the letter's contents.

[redacted]

[redacted] was unaware that the MOU provides for the all-tribal consortium committee to review BIA's award proposals for consortium staff. She stated that had she known this, it would affect her decision making in processing consortium FTT applications.

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U.S. Department of the Interior

Investigative Activity Report

Case Title	Case Number
California Fee to Trust Consortium MOU	PI-PI-06-0091-I Related File(s)
Case Location Sacramento, California	**Report Date** February 1, 2006
Report Subject [redacted] Interview	

DETAILS

On January 18, 2006, Special Agents [redacted] and [redacted] interviewed [redacted], [redacted] for Fee to Trust Consortium Tribes, Bureau of Indian Affairs (BIA), Pacific Regional Office (PRO), in BIA offices in Sacramento, California, from 1345 to 1530 hours regarding the California Fee to Trust Consortium Memorandum of Understanding (MOU). [redacted] offered the following information:

[redacted] started working for BIA in [redacted]. Prior to accepting this position, she worked for [redacted], a private contracting company hired by BIA to help organize BIA's Lands Records Information Systems. She possesses a Bachelors in Business Administration has and worked as a loan officer with the Small Business Administration, and thus, is familiar with the "legal framework related to land titles."

Her initial position with BIA was as a [redacted] with the Fee to Trust Consortium as a [redacted]. She later applied for a [redacted] position under a competitive announcement and was selected for the position. She has since applied, and was selected for the [redacted] position at the [redacted]. All of these positions have been under the Fee to Trust Consortium MOU.

[redacted] was not informed about the funding structure of her job working for the Consortium prior to her acceptance of the position. A few months after starting with BIA, she learned by reviewing certain "documentation" that her salary was being paid by re-directed Tribal Priority Allocation (TPA) funds. Once she discovered this fact, she was a little nervous about the nature of funding used to pay her salary until former BIA [redacted] announced at a meeting that, if the tribes decided to stop re-directing their TPA funds to the program, the region "would absorb the consortium staff." This assurance from the [redacted] assuaged her fears of losing her job if the TPA funds became unavailable to pay her salary.

The initial 3-year period of the program's life, as set forth in the MOU, ended in 2002 (2000-2002). At this time, there was "talk" of a potential Reduction in Force (RIF) of the consortium staff if the tribes

Reporting Official/Title	Signature
[redacted], Special Agent	

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decided to not renew their membership in the consortium; this talk made [redacted] "nervous" about her job stability. Accordingly, she performed personal research on RIF rules and regulations in order to familiarize herself with the process. At the time of this interview, [redacted] is now less anxious about her job stability because she now understands that her seniority will be taken into account in any RIF process, along with the fact that the MOU has already been successfully extended two times since its inception in 2000.

The all-tribal Consortium Oversight Committee (hereinafter referred to as "Committee") does not, as a practical matter, participate in employee evaluations. The Committee is consulted regarding proposed awards for consortium staff; however, [redacted] does not believe this represents a conflict of interest because "the Committee members are professionals."

The purpose of the MOU is to expedite the handling of the consortium tribes' Fee to Trust (FTT) applications. [redacted] main responsibility is to monitor the overall status of all applications and complete/maintain budget reports.

If an FTT application is incomplete (i.e., it does not address specific criteria required under 25 USC 151), consortium staff contact the tribe, inform them about the deficiency, and work closely with the tribe in deciding what is necessary to overcome this deficiency. If an FTT application is lacking in one area, it is not automatically declined by BIA. [redacted] often researches the Interior Board of Indian Appeals decisions in order to guide her in making recommendations concerning these applications. The consortium staff do not "look for a reason" to deny an application, but rather they consider the application with respect to the 25 USC 151 criteria and decide as "favorably as possible on behalf of the tribe."

Consortium staff are not the adjudicating officials regarding these FTT applications, they simply make recommendations to the adjudicating official whether or not they believe the land should be placed into trust. [redacted] confirmed, however, that a favorable recommendation by the consortium staff has never been overturned by the adjudicating official.

Consortium staff handle all FTT applications on a first-in-first-out (FIFO) basis. There is a current backlog of 112 applications pending. [redacted] has never been given orders to prioritize one application over another.

The Committee has been non-existent until only the past 2 years. The Committee makes recommendations on selections of employees and helps develop agendas for consortium meetings. These meetings generally concern the status of applications and budgets.

[redacted] stated that the tribes donating higher TPA funds to the consortium do not receive "better treatment" than tribes that donate only the minimum amount ($3,000/yr). She also stated that Committee members' tribes do not receive "better treatment" than those tribes that do not have representation on the Committee.

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Program Integrity Division
U.S. Department of the Interior

Investigative Activity Report

Case Title	Case Number
California Fee to Trust Consortium MOU	PI-PI-06-0091-I Related File(s)
Case Location Sacramento, California	**Report Date** February 27, 2006
Report Subject [redacted] Interview	

DETAILS

On February 24, 2006, Special Agent [redacted] telephonically interviewed [redacted], [redacted] for the [redacted], from 1600 to 1630 hours regarding the California Fee to Trust Consortium Memorandum of Understanding (MOU). [redacted] offered the following information:

Prior to retiring from the Bureau of Indian Affairs (BIA), [redacted] worked as the [redacted] for the Fee to Trust Consortium (FTT) at the BIA Pacific Regional Office (PRO) from [redacted]. [redacted] was hired as the [redacted] after applying for the position under a competitive announcement. She does not recall whether the announcement indicated the position's salary was dependent on Tribal Priority Allocation (TPA) funds. She does remember, however, that she was informed of this funding structure when she telephoned BIA to inquire about the position. [redacted] was not concerned about the funding structure of the position at the time she applied for the position because she "already had [redacted] with the government" and she "was looking for a promotion." Prior to accepting the [redacted] position, [redacted] was working for BIA as a [redacted].

[redacted] stated that she decided to leave the [redacted] position and retire in 2002 because the funding for the MOU became very "uncertain." Several of the tribes that donated generous amounts of TPA funds to the original MOU had had their FTT applications approved between 2000 and 2002. Thus, [redacted] was not confident they would renew their pledge of TPA funds to the program in 2002. [redacted] worked assiduously in securing the necessary funding to renew the MOU and was ultimately successful in having it renewed. After this experience, however, she concluded that it was too stressful for her to be obligated with the responsibility to obtain this funding; she was particularly worried about the consortium employees being subject to a Reduction in Force if she failed to obtain the necessary funding. Accordingly, after she was successful in obtaining the funding to renew the MOU in 2002, she retired.

Reporting Official/Title	Signature
[redacted], Special Agent	

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Investigative Activity Report

Case Title	Case Number
California Fee to Trust Consortium MOU	PI-PI-06-0091-I Related File(s)
Case Location Sacramento, California	**Report Date** February 2, 2006
Report Subject [redacted] Interview	

DETAILS

On January 20, 2006, Special Agent [redacted] interviewed [redacted], Bureau of Indian Affairs (BIA), Pacific Regional Office (PRO), at BIA offices in Sacramento, CA from 0830 to 1000 hours regarding the California Fee to Trust Consortium Memorandum of Understanding (MOU). [redacted] offered the following information:

Prior to the establishment of the program under the MOU, there was a large backlog of Fee to Trust (FTT) applications. At that time, [redacted] and one other realty specialist processed these applications as a collateral duty; she estimates that there were 30 backlogged cases at BIA-PRO and approximately 100 backlogged cases statewide. Processing these applications was at the bottom of [redacted] priority list. The top priority for the realty office was leasing issues because they are "money-generating" projects. Next in the priority line were litigation issues, and then right-of-way issues; FTT application processing was clearly the lowest priority for BIA's Realty Office. Conversely, the tribes felt their FTT applications to be a very high priority.

[redacted] was a proponent of the MOU because of the large backlog of applications. Her only concern about the creation of the program was that BIA would be incapable of attracting qualified applicants for the consortium staff positions.

The first [redacted] hired by BIA was [redacted] After [redacted] retired, [redacted] was elevated to the [redacted] position. [redacted] has since transferred to BIA Midwest Regional Office [redacted]. [redacted] became the [redacted] after [redacted] transferred, and [redacted] currently serves in this capacity to this day.

[redacted] is unsure whether all consortium staff employees know their salaries are dependent on Tribal Priority Allocation (TPA) funds. [redacted] acknowledged that if these funds are re-directed elsewhere by the tribes, a Reduction in Force (RIF) will need to occur. She mentioned, however, that BIA had a large RIF in 1996 that affected many appropriated fund positions; accordingly, there is always anxiety related to possible reorganizations throughout the agency, not just amongst the consortium staff.

Reporting Official/Title	Signature
[redacted], Special Agent	

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[redacted] is the only person assigned to process non-consortium FTT applications, which she still handles as a "low-priority" collateral duty. She processes the applications on a first-in-first-out (FIFO) basis; however, some applications may move ahead of others if there are delays with certain applications (i.e., waiting for information from title companies). She does not maintain a database of the non-consortium FTT applications. She stated there is a current backlog of non-consortium applications and provided one example where she has had one gaming FTT application on her desk for [redacted]).

Regardless of the fact that she is not consortium staff, due to her extensive experience and knowledge in handling FTT applications, [redacted] is called upon to review all finalized consortium applications prior to their submission to the regional director for adjudication. [redacted] reviews the application and plays devils advocate in order to ensure the applications will be thorough, complete and "pass muster" when put forward to the public.

[redacted] explained that tribes do not join the FTT consortium for different reasons. One reason she articulated was that many "on-reservation" FTT applications are handled at the field office level and thus do not need the regional-level consortium staff to process their applications; however, all applications are forwarded to the regional level if there is any controversy with the application. The other reason some tribes do not join the consortium is that they may not currently be interested in having lands placed into trust.

Since the inception of the MOU, the processing time for consortium FTT applications has improved. Concomitantly, the processing time for non-consortium FTT applications has also improved due to [redacted] diminished workload. [redacted] is unaware of any complaints about the MOU originating from either consortium tribes or non-consortium tribes.

The goal of [redacted] as with all of the consortium staff, is to reach a favorable recommendation for each FTT application. [redacted] often tells the tribes that she "doesn't like to lose," and that BIA needs their sedulous cooperation when she requests information necessary to the successful processing of their applications. If a tribe refuses to respond to an inquiry from her two times, their application is returned.

No FTT application that has received a favorable recommendation from [redacted] has been denied by the regional director. If it appears that an FTT application will not meet all the needed criteria, the tribe will usually withdraw their application prior to it being denied by the regional director. Generally, once an FTT application reaches the desk of the regional director, the merits of the application, and any potential issues involving the application, have already been considered by the directorate.

Once the regional director issues his Notice of Decision, this decision may be appealed to the Interior Board of Indian Appeals (IBIA). If such an appeal occurs, all BIA action on the application is stayed until IBIA issues its decision on the matter. If IBIA confirms the regional director's decision, the opposing party may bring suit in federal court; however, if IBIA overturns the regional director's decision, the case will be remanded to BIA to address the deficiency.

Overall, [redacted] believes the program has worked very well for both BIA and the tribes. Regarding the consortium staff, [redacted] has not noticed any problems; however, a recently hired consortium staffer, [redacted], has had some [redacted] Another recently hired consortium staffer, [redacted] was a very good employee, yet has [redacted].

Office of Inspector General
Office of Investigations
U.S. Department of the Interior

Investigative Activity Report

Case Title	Case Number
California Fee To Trust Consortium	PI-06-0091-I Related File(s)
Case Location Washington, DC	**Report Date** December 14, 2005
Report Subject Interview of [redacted]	

On December 14, 2005 [redacted] of the Bureau of Indian Affair's (BIA) Midwest Regional Office, was interviewed by Special Agent [redacted], Department of the Interior (DOI), Office of Inspector General. [redacted] was told that the interview pertained to his role in reviewing/approving a Memorandum of Understanding (MOU) between the BIA and the Midwest Fee-to-Trust Consortium Tribes. Additionally, [redacted] was asked what, if anything, he knew about a similar MOU between the Bureau of Indian Affairs (BIA) and the California Fee-to-Trust Tribes.

[redacted] has been employed with the BIA for nearly [redacted] He became the [redacted] in [redacted] and [redacted] an estimated 200 BIA employees. Prior to that, he was BIA's [redacted], Washington, D.C., for approximately [redacted]

In the spring of 2004, while meeting with the Midwest Region's tribal representatives, [redacted] found that a majority of them thought the BIA was not processing their fee-to-trust applications fast enough. [redacted] also found that the Midwest Region's real estate office, which is supposed to process the applications, was staffed by only one real estate officer. This helped create a backlog of approximately 400 applications, which were not being processed in a timely manner, if at all. After listening to the tribes' concerns, he proposed using the *fee-to-trust consortium* concept currently in use in BIA's Pacific Regional Office (PRO) in an attempt to fix the problem. [redacted] first heard about PRO's MOU during his tenure in Washington. He opined that the MOU had a "positive" effect because of a measurable increase in California lands placed into trust.

After the meetings, he sent each Midwest Region tribal representative a letter in which he wrote:

[redacted]

Reporting Official/Title	Signature
[redacted], Special Agent	

Distribution: Original – Case File Copy - SAC/SIU Office Copy – HQ Other:

Some tribal representatives were initially concerned that the fee-to-trust applications would not be processed for tribes that chose not to participate in the consortium. [redacted] said they "felt better" after he explained that his real estate staff would have more time to work on non-participant applications because consortium employees would handle the applications from participating tribes.

PRO's MOU cited a single reference for its authority (25 U.S.C. 123c), but the Midwest Region's cited multiple references. [redacted] did not recall who added the legal references to the Midwest Region's MOU; he believed it was done either by tribal attorneys or [redacted], DOI Office of the Solicitor, located in [redacted].

[redacted] said the Midwest Region's MOU was edited multiple times by tribal attorneys. In December 2004, he sent it to [redacted] for a final review. He said he usually solicits [redacted] advice in matters that he is unfamiliar with, such as the MOU, particularly when they involve documents that require his signature. Among other recommendations, he said he particularly appreciated [redacted] suggestion regarding Title 5. Her suggestion was incorporated in the Midwest Region's MOU in the following manner:

> Federal employees['] personnel rights are governed by title 5 of U.S.C.A. Statutory rights and obligations will not be superceded by this agreement.

[redacted] said some of the tribes were also "adamant" that the Title 5 change be made to the MOU. They did not want the possibility of a claim being made that they improperly influenced a consortium employee and affected a fee-to-trust decision. After [redacted] completed her review, [redacted] implemented all of her changes and signed the MOU.

[redacted] stated that the tribes have the authority to use their federal Tribal Priority Allocated funds, as mentioned in the MOU, to buy back services (e.g., the processing fee-to-trust applications) from the BIA. He is not aware of any BIA or DOI procedure used to implement an MOU such as the Midwest Region's. Since PRO was the first BIA region to use the fee-to-trust consortium concept, [redacted] assumed that PRO *must* have done the initial checks/work.

[redacted] later said that the MOU does not cover fee-to-trust applications for casinos because the Indian Gaming Regulatory Act requires that those applications be sent to BIA's central office in Washington, D.C.

Currently, two Midwest Regional tribes have signed an MOU, and both paid approximately $150,000 to fund the consortium for FY 2005. A budget projection for FY 2005, shows that each tribe will pay approximately $209,867. The previous dollar amounts involve an estimated budget for four consortium employees.

[redacted] said the Midwest Region's consortium was just recently "fully staffed." The four consortium employees were hired "under competitive status," and three of them were given *Indian Preference* in the hiring process.

Office of Inspector General
Office of Investigations
U.S. Department of the Interior

Investigative Activity Report

Case Title	Case Number
California Fee To Trust Consortium	PI-06-0091-I Related File(s)
Case Location Sacramento, California	**Report Date** December 13, 2005
Report Subject Interview of [redacted]	

On December 13, 2005 [redacted] for the Department of the Interior's (DOI) Office of the Solicitor (SOL), [redacted], was interviewed by Special Agent [redacted] DOI, Office of Inspector General. [redacted] was told that the interview pertained to her role in reviewing/approving a Memorandum of Understanding (MOU) between the Bureau of Indian Affairs (BIA) and the Midwest Fee-to-Trust Consortium Tribes. Additionally, [redacted] was asked what, if anything, she knew about a similar MOU between BIA and the California Fee-to-Trust Tribes.

[redacted] has [redacted] of experience as a DOI attorney. In [redacted] she became the [redacted] in charge of the [redacted] DOI attorneys. Her office is responsible for providing legal support to 11 north central states. [redacted] reports to [redacted], her supervisor and the SOL attorney in charge of the [redacted]. Because she and her attorneys mainly work with the BIA, and [redacted] office does not, she does not regularly seek [redacted] advice or approval on legal reviews/matters such as the proposed MOU between the BIA and the Midwest Fee-to-Trust Consortium Tribes. However, because the MOU had the possibility of affecting a number of issues related to the management of her office (i.e., man-hours), she told [redacted] about the MOU.

[redacted] said she first received the Midwest Fee-to-Trust Consortium MOU from [redacted] of BIA's Midwest Regional Office (MRO), on December 2, 2004. She said she might have discussed the MOU with [redacted] a couple of days prior to receiving it, but she was not certain; it probably was more of a *notification* from [redacted] that he was going to send it to her for review. She became aware of a similar MOU, signed by BIA's Pacific Regional Office (PRO), sometime before December 2004, but she did not recall any details. Additionally, she had discussed PRO's MOU with [redacted] MRO's [redacted] (prior to taking his current position, [redacted] was a member of the consortium created by PRO's MOU). [redacted] said she and [redacted] discussed what consortium employees actually do, and because [redacted] is not an attorney, they did not talk about the underlying authority for the MOU.

Shortly after receiving MRO's MOU, she contacted [redacted] an SOL attorney in Sacramento, CA, and asked him for a copy PRO's MOU. She also sent [redacted] an e-mail, dated December 3, 2004, in which she asked:

Reporting Official/Title	Signature
[redacted], Special Agent	

Distribution: Original – Case File Copy - SAC/SIU Office Copy – HQ Other:

- Did you or has your office reviewed the Sacramento agreement and if so would you share your comments with me? If you haven't reviewed it, do you know of any problems or pitfalls that have developed under the agreement that I should be wary of and perhaps try to add language in the agreement to avoid?

In her e-mail, [redacted] told [redacted] that MRO had modeled its MOU after PRO's. [redacted] in turn sent her a facsimile of the MOU, signed by PRO's [redacted] on December 3, 2002. [redacted] later talked with [redacted] on the telephone; he told her that he had not previously seen the MOU. She did not recall anything further regarding her interactions with [redacted]

MRO's MOU raised no "red flags" for [redacted] She said, "My level of discomfort was: This was new." Because the MOU contained proposals she had not previously encountered, she read each of the underlying authorities referenced in it. She did not recall who added the *authorities* beyond the single reference in PRO's original MOU. [redacted] did all of the legal review work for MRO's MOU; some of the problems she noted were:

- The need to add BIA employees to the consortium committee
- The need for consortium employees to be covered under Title 5 and work for the BIA as a federal employee
- The need to limit the consortium committee's authority to tribal issues

She addressed her concerns in a three-page memorandum that she eventually forwarded to [redacted] But, before that, on December 7, 2004, she contacted her supervisor ([redacted]) because she thought the MOU, if signed by [redacted] might "have an impact" on her office. After approximately four e-mail exchanges among various SOL employees, including the Department's [redacted], [redacted] received an e-mail response from [redacted] on December 8, 2004. [redacted] had asked [redacted]: "If you don't think the cited authority works for this, please let me know. I was planning on giving my comments to [redacted] today." [redacted] said [redacted] was not definitive in her response, and as a result, [redacted] "carried on"; she gave her review memorandum to [redacted] after she received [redacted] e-mail. She did not take [redacted] response as a "No," or an advisement to stop the process. Because of [redacted] personal and working relationship with [redacted], [redacted] knew that if [redacted] did not want [redacted] to proceed further, [redacted] would have made that clear in her e-mail.

[redacted] said the BIA is instructed to promote *self-governance* and to do so in a way that involves "thinking outside of the box." The policy is clear she said, "Give the tribes as much autonomy as possible." On the other hand, she acknowledges that realty programs should involve a "stay in the box" approach because of the "rules of government procurement." [redacted] said that when she speaks at realty-program classes, she advises the students to stay within the defined parameters of government procurement rules. However, when the BIA tries to make decisions that encompass both *self-governance* and realty programs, such as what was outlined in MRO's MOU, the lines get "blurred." In these situations, the BIA is in a difficult position having to balance the "tension" between *self-governance/self-determination* and federal procurement rules. Additionally, Public Law (PL) 93-638 is of little help on this point. [redacted] said, "It's a well established rule of law that when a statute is passed for Indian benefit, it should be construed to operate in their benefit when there is ambiguity in the statute."

From her years of experience as a DOI attorney working with the BIA on its legal issues, she has learned to recognize when the BIA presents her with something that is problematic. Other than what she included in her review, she had no inherent sense that there were problems with the MOU. [redacted] opined that the MOU would allow consortium employees to *only* do what a tribe is already allowed to do for itself under PL 93-638—tribes are permitted to reprogram and use their federal funds to facilitate the fee-to-trust process. She viewed the MOU as a self-governance decision by any tribe that signed one. *Agent's Note: Each tribe is supposed to sign a separate MOU, indicating that it voluntarily entered into an agreement with the BIA.* [redacted] said the MOU could essentially be looked upon as a redesign of a tribe's real-estate program. Additionally, the MOU would help both the BIA and her office with the growing backlog of fee-to-trust applications, a problem complained about by most MRO tribes. The more controversial fee-to-trust applications (e.g., applications for casinos) are not covered by the agreement, and as a result, they will not be submitted through the fee-to-trust consortium established by the MOU.

EXHIBIT F

Conversation Contents
Thanks!

"Baker, Russell" <russell.baker@bia.gov>

From:	"Baker, Russell" <russell.baker@bia.gov>
Sent:	Fri Dec 06 2013 13:53:54 GMT-0700 (MST)
To:	Holly Hunt <holly.hunt@bia.gov>, Joyce Coleman <joyce.coleman@bia.gov>, Jonah Walker <jonah.walker@bia.gov>, Dawn Blanchard <dawn.blanchard@bia.gov>
Subject:	Thanks!

All:

Thanks for your work this week. We were able to get several decisions and reservation proclamations completed.

I will be out of the office on Thursday for a budget meeting. I believe upper management will be out Wednesday-Friday. All of the program managers will be out on Thursday. Let's try and get as many NOD's completed by Wednesday.

For the second half of December we will need to complete new Employee Performance Appraisal Plans and new Individual Development Plans. I would also like to get some training approved and scheduled for everyone.

I also need to get a memo to the Field Solicitor regarding the Hobart cases and bias.

It also sounds like we may be receiving a new handbook in December. As soon as we receive guidance on the new regulations, we should send a notification to the consortium of the new changes (regulations, handbook, appeals over 200 acres, etc). I'd also like to work on a Q1 accomplishments report in an easy-to-read narrative format. I think the report should discuss staff changes, policy changes, challenges, appeals, accomplishments, proclamations, etc.

If we get time, we should also start looking ahead to our goals for Q2. Weather permitting, site inspections may need to be performed in March. In the future, I would like title inspections to be performed by realty specialists and environmental inspections to be performed by the environmental protection specialist.

Have a good weekend!

Russell

"Walker, Jonah" <jonah.walker@bia.gov>

From:	"Walker, Jonah" <jonah.walker@bia.gov>
Sent:	Fri Dec 06 2013 13:56:50 GMT-0700 (MST)
To:	"Baker, Russell" <russell.baker@bia.gov>
Subject:	Re: Thanks!

Sounds good Russell. Yes, I agree...very productive weekend! Feels good to be getting that (NOD-Monkey) off my back. I know Lauren has been very patient w/ us. Just a reminder, I will be out of the office, Monday (RDO). But, I will have Vandenberg and Rentmeester ready for your review on

Tuesday.

Same to you...enjoy your weekend...I'll try to do the same!

On Fri, Dec 6, 2013 at 2:53 PM, Baker, Russell <russell.baker@bia.gov> wrote:

> All:
>
> Thanks for your work this week. We were able to get several decisions and reservation proclamations completed.
>
> I will be out of the office on Thursday for a budget meeting. I believe upper management will be out Wednesday-Friday. All of the program managers will be out on Thursday. Let's try and get as many NOD's completed by Wednesday.
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> If we get time, we should also start looking ahead to our goals for Q2. Weather permitting, site inspections may need to be performed in March. In the future, I would like title inspections to be performed by realty specialists and environmental inspections to be performed by the environmental protection specialist.
>
> Have a good weekend!
>
> Russell

"Walker, Jonah" <jonah.walker@bia.gov>

From:	"Walker, Jonah" <jonah.walker@bia.gov>
Sent:	Fri Dec 06 2013 13:57:10 GMT-0700 (MST)
To:	"Baker, Russell" <russell.baker@bia.gov>
Subject:	Re: Thanks!

lol...I meant *week

On Fri, Dec 6, 2013 at 2:56 PM, Walker, Jonah <jonah.walker@bia.gov> wrote:

> Sounds good Russell. Yes, I agree...very productive weekend! Feels good to be getting that (NOD-Monkey) off my back. I know Lauren has been very patient w/ us. Just a reminder, I will be out of the office, Monday (RDO). But, I will have Vandenberg and Rentmeester ready for your review on Tuesday.
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> On Fri, Dec 6, 2013 at 2:53 PM, Baker, Russell <russell.baker@bia.gov> wrote:

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Have a good weekend!

Russell

Conversation Contents

Request for Site Visit

Attachments:

/30. Request for Site Visit/1.1 2016_05_18 Priority cases.xlsx
/30. Request for Site Visit/3.1 2016_05_18 Priority cases.xlsx

"Butterfield, Pamela" <pamela.butterfield@bia.gov>

From:	"Butterfield, Pamela" <pamela.butterfield@bia.gov>
Sent:	Thu May 19 2016 07:33:13 GMT-0600 (MDT)
To:	Michelle Dufek <michelle.dufek@bia.gov>
Subject:	Request for Site Visit
Attachments:	2016_05_18 Priority cases.xlsx

Lauren,

Several of my cases need CIP site visits and updated phase 1's completed in order to move forward. Please see attached spreadsheet, those highlighted yellow in the site visit column will need CIP's.

There are a few that are still pending initial CIP's, but the PTO's have already been issued to the tribe for clearance of objections.

Once those objections are cleared, provided we have an updated phase 1 the case will be ready for decision and others are beyond decision waiting on acceptance.

There area few that are pre-PTO stage, but even they seem to be coming much quicker now that there is a dedicated Solicitor working on fee to trust cases.

With Oneida's larger caseload it might be too much for Environmental Services to meet the time frames, so I will be doing the CIP's.

However, I spoke with Michelle Dufek at Great Lakes and she has agreed to assist me in completing them.

The list may actually be less, as I haven't heard back from Environmental Services on which cases CIP's may have already been updated.

We would like to come out sooner than the 30 day notice period that the tribe has requested and we're hoping the week of June 6th works with your schedule.

Please let me know if this will work for you.

Thank you,

Pamela Butterfield

Realty Specialist
Division of Fee to Trust
Bureau of Indian Affairs
Midwest Regional Office
Norman Pointe II
5600 West American Boulevard, Suite 500
Bloomington, MN 55437
612-725-4536 (Work)
612-713-4401 (Fax)

pamela.butterfield@bia.gov

"Butterfield, Pamela" <pamela.butterfield@bia.gov>

From:	"Butterfield, Pamela" <pamela.butterfield@bia.gov>
Sent:	Thu May 19 2016 07:38:16 GMT-0600 (MDT)
To:	Thomas Wilkins <thomas.wilkins@bia.gov>
Subject:	Re: Request for Site Visit

Pamela Butterfield
Realty Specialist
Division of Fee to Trust
Bureau of Indian Affairs
Midwest Regional Office
Norman Pointe II
5600 West American Boulevard, Suite 500
Bloomington, MN 55437
612-725-4536 (Work)
612-713-4401 (Fax)

pamela.butterfield@bia.gov

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On Thu, May 19, 2016 at 8:33 AM, Butterfield, Pamela <pamela.butterfield@bia.gov> wrote:

> Lauren,
>
> Several of my cases need CIP site visits and updated phase 1's completed in order to move forward. Please see attached spreadsheet, those highlighted yellow in the site visit column will need CIP's.
>
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>
> *Pamela Butterfield*
>
> *Realty Specialist*
> *Division of Fee to Trust*
> *Bureau of Indian Affairs*
> *Midwest Regional Office*
> *Norman Pointe II*
> *5600 West American Boulevard, Suite 500*
> *Bloomington, MN 55437*
> *612-725-4536 (Work)*
> *612-713-4401 (Fax)*
>
> *pamela.butterfield@bia.gov*
>
>

"Butterfield, Pamela" <pamela.butterfield@bia.gov>

From:	"Butterfield, Pamela" <pamela.butterfield@bia.gov>
Sent:	Thu May 19 2016 07:51:22 GMT-0600 (MDT)
To:	"Lauren N. Hartman" <lhartman@oneidanation.org>
Subject:	Request for Site Visit
Attachments:	2016_05_18 Priority cases.xlsx

Lauren,

Several of my cases need CIP site visits and updated phase 1's completed in order to move forward. Please see attached spreadsheet, those highlighted yellow in the site visit column will need CIP's.

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5600 West American Boulevard, Suite 500

Bloomington, MN 55437
612-725-4536 (Work)
612-713-4401 (Fax)

pamela.butterfield@bia.gov

		PAM & MICHELLE WILL COMPLETE CIP'S			
Property Name	Priority	Initial CIP	Final CIP	CIP Expires (6 months)	Phase I Visit
interplan/West Mason Associates	1	12/9/2014	11/19/2015	5/19/2016	11/3/2015
Krueger, D & A	1	12/10/2014	11/19/2015	5/19/2016	4/13/2016
Krueger, S & J	1	12/10/2014	11/19/2015	5/19/2016	4/13/2016
Lahay	1	8/9/2010			2/10/2016
Berglin	1	4/23/2014		10/23/2014	4/23/2014
Beyer-Riley	1	4/23/2014		10/23/2014	4/23/2014
Brusky	1	4/23/2014		10/23/2014	4/23/2014
Gruber	1	4/23/2014		10/23/2014	4/23/2014
Lemmen	1	4/23/2014		10/23/2014	4/23/2014
Sigfred	1	4/23/2014		10/23/2014	4/23/2014
Smith, G & S	1	4/22/2014		10/22/2014	4/22/2014
Goral	1	4/23/2014		10/23/2014	4/23/2014
Frelich	1	4/23/2014		10/23/2014	4/23/2014
Fietz	1	4/23/2014		10/23/2014	4/23/2014
Bourdelais	1	4/23/2014		10/23/2014	4/23/2014
Boyea	2	10/27/2009			4/27/2016
Buck	2	2/2/2009			4/27/2016
Calaway	2	7/20/2010			4/27/2016
Catlin	2	7/20/2010			4/27/2016
Cornish	2	10/6/2009			4/27/2016
Deruyter	2	7/20/2010			4/27/2016
Gerber	2	1/22/2010			4/27/2016
Keuntjes	2	12/10/2014	11/19/2015	5/19/2016	7/27/2015
Nelson	2	12/10/2014	11/19/2015	5/19/2016	4/13/2016
West Mason Investors, Inc.	2	12/9/2014			5/12/2015
Ambrosius	3				10/20/2015
Baumgart	3				4/13/2016
Gilles	3				9/9/2015
Krueger D	3				11/4/2015
Peters	3				
Steen	3				9/9/2015
Beining	4				4/13/2016
Berglin D & C	4				10/20/2015
Cornelius	4				
Debenedetto	4				10/20/2015
DePetro J & C	4				4/13/2016
Gerrits	4				10/20/2015
O'Connell	4				4/14/2016
Orlando	4				4/15/2016
Selissen	4				9/9/2015

EXPIRED
City of Green Bay Appeals ready for Acceptance
Village of Hobart Remands ready for Decision

FELIX WILL COMPLETE
Phase 1 Expires (180 days)
5/1/2016
10/10/2016
10/10/2016
8/8/2016
10/20/2014
10/20/2014
10/20/2014
10/20/2014
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10/10/2016
3/7/2016
5/2/2016
3/7/2016
10/10/2016
4/17/2016
4/17/2016
10/10/2016
4/17/2016
10/11/2016
10/12/2016
3/7/2016

		PAM & MICHELLE WILL			
Property Name	Priority	Initial CIP	Final CIP	CIP Expires (6 months)	Phase I Visit
Berglin	1	4/23/2014		10/23/2014	4/23/2014
Beyer-Riley	1	4/23/2014		10/23/2014	4/23/2014
Bourdelais	1	4/23/2014		10/23/2014	4/23/2014
Brusky	1	4/23/2014		10/23/2014	4/23/2014
Fietz	1	4/23/2014		10/23/2014	4/23/2014
Frelich	1	4/23/2014		10/23/2014	4/23/2014
Goral	1	4/23/2014		10/23/2014	4/23/2014
Gruber	1	4/23/2014		10/23/2014	4/23/2014
Interplan/West Mason Associates	1	12/9/2014	11/19/2015	5/19/2016	11/3/2015
Lahay	1	8/9/2010			2/10/2016
Lemmen	1	4/23/2014		10/23/2014	4/23/2014
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Smith, G & S	1	4/22/2014		10/22/2014	4/22/2014
Boyea	2	10/27/2009			4/27/2016
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Gerber	2	1/22/2010			4/27/2016
Keuntjes	2	12/10/2014	11/19/2015	5/19/2016	7/27/2015
Nelson	2	12/10/2014	11/19/2015	5/19/2016	4/13/2016
West Mason Investors, Inc.	2	12/9/2014			5/12/2015
Ambrosius	3				10/20/2015
Baumgart	3				4/13/2016
Gilles	3				9/9/2015
Krueger D	3				11/4/2015
Peters	3				
Steen	3				9/9/2015
Beining	4				4/13/2016
Berglin D & C	4				10/20/2015
Cornelius	4				
Debenedetto	4				10/20/2015
DePetro J & C	4				4/13/2016
Gerrits	4				10/20/2015
O'Connell	4				4/14/2016
Orlando	4				4/15/2016
Selissen	4				9/9/2015

EXPIRED
City of Green Bay Appeals ready for Acceptance
Village of Hobart Remands ready for Decision

FELIX WILL COMPLETE
Phase 1 Expires (180 days)
10/20/2014
10/20/2014
10/20/2014
10/20/2014
10/20/2014
10/20/2014
10/20/2014
10/20/2014
5/1/2016
8/8/2016
10/20/2014
10/20/2014
10/19/2014
10/24/2016
10/24/2016
10/24/2016
10/24/2016
10/24/2016
10/24/2016
10/24/2016
1/23/2016
10/10/2016
11/8/2015
4/17/2016
10/10/2016
3/7/2016
5/2/2016
3/7/2016
10/10/2016
4/17/2016
4/17/2016
10/10/2016
4/17/2016
10/11/2016
10/12/2016
3/7/2016

Conversation Contents
List for spring FY14 site visits

"Hebner, Scott" <scott.hebner@bia.gov>

From:	"Hebner, Scott" <scott.hebner@bia.gov>
Sent:	Fri Mar 28 2014 12:31:54 GMT-0600 (MDT)
To:	Lauren Hartman <LHARTMAN@oneidanation.org>
Subject:	List for spring FY14 site visits

Here is the list. It appears there are now 2 Smiths. The first group under Phase V are very close to acceptance. The second group under Phase V beginning with Gruber are ones that Ken Roy will be doing the initial CIP as well as the Phase VI list. I included Catlin because if I have time I will look at this property and it has a residence on it.

FY13
Vanden Heuvel*
Vandenberg
Vande Voort W1000 Seymour Road
Wisconsin Building Commission
Van Wychen

Phase V
Smith
Stevenson
Theis
Utecht
Vander Heyden
Webster
CONOPCO
Russell
Mulloy
West Mason Investors
Wis Bldg Commission

Gruber
Bourdelais
Beyer-Riley -15
Brusky
Fietz
Frelich
Berglin
Goral
InterPlan/West Mason Assoc.
Karau Dev. LLC
Anderson

Phase 6?
Yunke
Black
La Mere
Lemmen
Sigfred
Smith

Phase IV
Catlin

Thanks Scott. See you 4/14/2014 weather permitting.
612 725 4597

"Baker, Russell" <russell.baker@bia.gov>

From:	"Baker, Russell" <russell.baker@bia.gov>
Sent:	Fri Mar 28 2014 12:46:13 GMT-0600 (MDT)
To:	"Hebner, Scott" <scott.hebner@bia.gov>
Subject:	Re: List for spring FY14 site visits

Thanks Scott! We actually just accepted Vanden Heuvel into trust status here in the DF2T so there is no need to revisit.

On Fri, Mar 28, 2014 at 1:31 PM, Hebner, Scott <scott.hebner@bia.gov> wrote:

> Here is the list. It appears there are now 2 Smiths. The first group under Phase V are very close to acceptance. The second group under Phase V beginning with Gruber are ones that Ken Roy will be doing the initial CIP as well as the Phase VI list. I included Catlin because if I have time I will look at this property and it has a residence on it.
>
> FY13
> Vanden Heuvel*
> Vandenberg
> Vande Voort W1000 Seymour Road
> Wisconsin Building Commission
> Van Wychen
>
> Phase V
> Smith
> Stevenson
> Theis
> Utecht
> Vander Heyden
> Webster
> CONOPCO
> Russell
> Mulloy
> West Mason Investors
> Wis Bldg Commission
>
> Gruber
> Bourdelais
> Beyer-Riley -15
> Brusky
> Fietz
> Frelich
> Berglin
> Goral
> InterPlan/West Mason Assoc.
> Karau Dev. LLC
> Anderson
>
> Phase 6?
> Yunke
> Black
> La Mere
> Lemmen
> Sigfred
> Smith
>
> Phase IV
> Catlin
>
> Thanks Scott. See you 4/14/2014 weather permitting.
> 612 725 4597

Kitto, Felix <felix.kitto@bia.gov>

Priority Environmental Updates Needed to reach GPRA goals

8 messages

Baker, Russell <russell.baker@bia.gov> Tue, Aug 2, 2016 at 4:21 PM
To: Scott Doig <scott.doig@bia.gov>, Felix Kitto <felix.kitto@bia.gov>
Cc: Thomas Wilkins <thomas.wilkins@bia.gov>, Andrew Nichols <andrew.nichols@bia.gov>, Pamela Butterfield <pamela.butterfield@bia.gov>, Tully O'leary <tully.o'leary@bia.gov>, Michelle Dufek <michelle.dufek@bia.gov>

Scott & Felix:

Thanks again for helping out the Division during PIA. Our annual Advisory Council meeting went very well!

Right now, we are short of our IA-PMS projections for this FY. We projected 23 decisions. To date, only 15 decisions have been issued.

Until our vacant EPS gets filled, we need your help. Would it be possible to get NEPA/Phase I updates for seven priority cases before the end of the FY? Here is the list of cases:

Oneida
Lahay
West Mason Investors
Gerrits

Ho-Chunk Nation
Wright 1
Wright 2
Mauston 40
Christenson

If you need any EDR reports, contact Tully and she can order them. Overtime is also available for you and Felix as well.

Thanks!

Russell

Kitto, Felix <felix.kitto@bia.gov> Wed, Aug 3, 2016 at 8:25 AM
To: Scott Doig <scott.doig@bia.gov>

I should be able to help Fee to Trust toward the end of the Month if that is OK with you. I believe I could schedule a day trip to the Ho-Chunk site(s) during the week of the 18th and schedule an overnight stay in Oneida the week of the 29th.

If nothing major comes up - I should be able to get them the update reports by mid-September.

[Quoted text hidden]

--
-
Felix Kitto, Environmental Protection Specialist
Bureau of Indian Affairs, Midwest Region Office
Norman Pointe II Building, Suite 500
Bloomington Minnesota 55437

Office: 612-725-4597
Cellular: 651-249-5829

Scott Doig <scott.doig@bia.gov> Wed, Aug 3, 2016 at 9:33 AM
To: Felix Kitto <felix.kitto@bia.gov>

Thanks for fitting that in Felix. If you can please let Russell know your schedule.

Scott Doig
Regional Environmental Scientist
DECRM Branch Chief
612-725-4514
5600 American Blvd West, Suite 500
Bloomington, MN. 55437

------ Original message ------
From: "Kitto, Felix" <felix.kitto@bia.gov>
Date: 8/3/16 8:25 AM (GMT-06:00)
To: Scott Doig <scott.doig@bia.gov>
Subject: Fwd: Priority Environmental Updates Needed to reach GPRA goals
[Quoted text hidden]

Kitto, Felix <felix.kitto@bia.gov> Wed, Aug 3, 2016 at 9:45 AM
To: "Baker, Russell" <russell.baker@bia.gov>
Cc: Scott Doig <scott.doig@bia.gov>, Thomas Wilkins <thomas.wilkins@bia.gov>, Andrew Nichols <andrew.nichols@bia.gov>, Pamela Butterfield <pamela.butterfield@bia.gov>, Tully O'leary <tully.o'leary@bia.gov>, Michelle Dufek <michelle.dufek@bia.gov>

Russell;

I will plan to work on the properties as requested using the following general schedule:

Week of August 15th (Plan for a day trip to visit all 4 properties if acceptable to Ho-Chunk):

Ho-Chunk Nation
Wright 1
Wright 2
Mauston 40
Christenson

Week of August 29th (Plan for an overnight stay if acceptable to Oneida - will try to schedule today):

Oneida
Lahay
West Mason Investors
Gerrits

Will attempt to have updated P1 ESA(s) for all properties to the Division by 9/16/16.

Please let me know if you have any questions or concerns.

[Quoted text hidden]

Felix Kitto, Environmental Protection Specialist
Bureau of Indian Affairs, Midwest Region Office
Norman Pointe II Building, Suite 500
Bloomington Minnesota 55437

Office: 612-725-4597
Cellular: 651-249-5829

Baker, Russell <russell.baker@bia.gov> Thu, Aug 4, 2016 at 9:35 AM
To: "Kitto, Felix" <felix.kitto@bia.gov>
Cc: Scott Doig <scott.doig@bia.gov>, Thomas Wilkins <thomas.wilkins@bia.gov>, Andrew Nichols <andrew.nichols@bia.gov>, Pamela Butterfield <pamela.butterfield@bia.gov>, Tully O'leary <tully.o'leary@bia.gov>, Michelle Dufek <michelle.dufek@bia.gov>

Thanks Felix! Sounds great.
[Quoted text hidden]

Baker, Russell <russell.baker@bia.gov> Tue, Sep 6, 2016 at 3:21 PM
To: "Kitto, Felix" <felix.kitto@bia.gov>
Cc: Scott Doig <scott.doig@bia.gov>, Thomas Wilkins <thomas.wilkins@bia.gov>, Andrew Nichols <andrew.nichols@bia.gov>, Pamela Butterfield <pamela.butterfield@bia.gov>, Tully O'leary <tully.o'leary@bia.gov>, Michelle Dufek <michelle.dufek@bia.gov>

Hi Felix,

Are we still on track to have our reports by 9/16/16? If you are unable to complete all reports by 9/16, can you please issue the Lahay report first? Lahay is our highest priority at the moment.

Thanks!

Russell

On Wed, Aug 3, 2016 at 9:45 AM, Kitto, Felix <felix.kitto@bia.gov> wrote:
[Quoted text hidden]

Kitto, Felix <felix.kitto@bia.gov> Tue, Sep 6, 2016 at 7:53 PM
To: Russell Baker <russell.baker@bia.gov>
Cc: Scott Doig <scott.doig@bia.gov>, Thomas Wilkins <thomas.wilkins@bia.gov>, Andrew Nichols <andrew.nichols@bia.gov>, Pamela Butterfield <pamela.butterfield@bia.gov>, Tully O'leary <tully.o'leary@bia.gov>, Michelle Dufek <michelle.dufek@bia.gov>

Russell;

Thank you for your email. I believe we are still on track to deliver most of the P1 ESAs to the Division by 9/16. I will be requesting additional OT hours this Friday (09/08) to support this goal.

I will work on LaHay first as you requested.

If I may I would like to request assistance in ensuring that the required signatures are obtained as I will be on training beginning 09/12. I plan to place the finalized P1 ESA's in the Regional Director's mailbox on 09/12 prior to leaving the

regional office.

If you have any questions or concerns please do not hesitate to contact me.

[Quoted text hidden]
[Quoted text hidden]
Cellular: 612-352-7238

Baker, Russell <russell.baker@bia.gov> Wed, Sep 7, 2016 at 9:12 AM
To: "Kitto, Felix" <felix.kitto@bia.gov>
Cc: Scott Doig <scott.doig@bia.gov>, Thomas Wilkins <thomas.wilkins@bia.gov>, Andrew Nichols <andrew.nichols@bia.gov>, Pamela Butterfield <pamela.butterfield@bia.gov>, Tully O'leary <tully.o'leary@bia.gov>, Michelle Dufek <michelle.dufek@bia.gov>

Thanks Felix! I will make sure they get routed and signed.
[Quoted text hidden]

Purvis, Lance <lance.purvis@sol.doi.gov>

Fwd: Oneida Tribe of Wisconsin

1 message

Cummings, Jody <jody.cummings@sol.doi.gov> Fri, Apr 17, 2015 at 4:36 PM
To: Maria Lurie <maria.lurie@sol.doi.gov>, Lance Purvis <lance.purvis@sol.doi.gov>

Hobart FOIA request
——— Forwarded message ———
From: **Scott Dacey** <sdacey@pacellp.com>
Date: Mon, Jan 26, 2015 at 5:09 PM
Subject: Re: Oneida Tribe of Wisconsin
To: "Warito, Ratana" <ratana.warito@bia.gov>
Cc: Kathryn Isom-Clause <Kathryn_Isom-Clause@ios.doi.gov>, Jody Cummings <jody.cummings@sol.doi.gov>, Ariana Wisniewski <ariana.wisniewski@sol.doi.gov>

Below find a brief summary of the issues we would like to discuss with the ASIA Staff.

Thank you.

Scott

The first issue involves the processing of fee-to-trust applications for parcels of land owned by the Oneida Tribe and located within the boundaries of the Oneida Reservation and the Village of Hobart, Wisconsin. Since 2007, the Village has objected to all fee-to-trust applications for parcels located within the Village. In 2010 and 2011, the Village appealed six Notices of Decision issued by the Midwest Regional Office for such parcels. In the context of these appeals, the Village alleged the Bureau of Indian Affairs is biased against the Village because the Tribe is a party to an MOU with the BIA regarding the processing of fee-to-trust applications. The Interior Board of Indian Appeals declined to address this issue, and instead remanded the Notices of Decision in May of 2013, and directed the Midwest Regional Office to address the Village's claims of bias in the first instance. The Midwest Regional Office has yet to act on the remanded Notices of Decisions, and we understand that all of the Tribe's fee-to-trust applications for parcels located in the Village are on hold pending formulation of a response to the Village's claims of bias. This has resulted in an unacceptable delay in the processing of the Tribe's fee-to-trust applications.

The second issue pertains to an abandoned railroad right-of-way which runs through the Oneida Reservation. In 1871, with the consent of the Tribe, Congress granted a limited fee interest in the right-of-way lands to the Green Bay and Lake Pepin Railway Company, with a right of reversion to the United States. In accordance with the law pertaining to such limited fee interests, the land thereafter was not available for allotment, and thus was not allotted when the Oneida Reservation was allotted in the early 1890's. In 2003, Fox Valley & Western Ltd., the successor in interest to the Green Bay and Lake Pepin Railway Company, abandoned the right-of-way for the entire length of the right-of-way

crossing the Oneida Reservation, with the exception of the easternmost mile. In 2011, Wisconsin Central Ltd., the successor in interest to the Fox Valley & Western Ltd., abandoned the easternmost mile of the right-of-way. Upon abandonment, title to the land underlying the right-of-way reverted to the United States, which holds the land in trust for the benefit of the Tribe pursuant to the 1838 Treaty with the Oneida. In the past year, the Village of Hobart changed the status of the land from exempt to non-exempt, assigned property values and issued property tax bills to the Tribe. The Village has also refused to remove storm water charges assessed against the land, despite the fact the land was identified as trust land in litigation between the Tribe and the Village regarding the propriety of the Village's assessment of storm water charges against trust land, and the courts ruled that the Village did not possess the authority to assess storm water charges against the land.

On Mon, Jan 26, 2015 at 11:12 AM, Warito, Ratana <ratana.warito@bia.gov> wrote:

> We are pleased to confirm Chief of Staff Harris will be able to meet with Councilman Stevens of the **Oneida Tribe of Wisconsin on Tuesday, January 27 at 11:00 a.m.** at the Main Interior Building, 1849 E Street, Washington, DC 20240. Please email additional list of attendees who will be attending.
>
> Meeting will be in the **ASIA Conference Room, 3624** within the federal building. **As a reminder we currently moved to the 3600 corridor**, entrance requires all guests to provide photo identification and subject to security screenings. Please arrive at the building at least 20 minutes prior to your meeting time with Ms. Harris.
>
> Any documentation on the meeting request, please send at your earliest convenience. If there is anything else that we might be able to assist you, please let us know.
>
> Thank you.
>
> Toye
>
> --
> Toye (Ratana) Warito
> Supervisory Program Analyst
> **Office of the Assistant Secretary- Indian Affairs**
> U.S. Department of the Interior
> ratana.warito@bia.gov
> 202.208.3878 direct
> 202.208.7163 office
> 202.536.8496 mobile

—
Jody Cummings
Senior Counselor to the Solicitor
U.S. Department of the Interior
1849 C Street, NW
Washington, D.C. 20240
(202) 208-4423

Conversation Contents

Green Bay AOCs

"Wilkins, Thomas" <thomas.wilkins@bia.gov>

From:	"Wilkins, Thomas" <thomas.wilkins@bia.gov>
Sent:	Fri Sep 30 2016 09:52:41 GMT-0600 (MDT)
To:	"Lauren N. Hartman" <lhartman@oneidanation.org>
Subject:	Green Bay AOCs

Hello Lauren. Pam is out today but I wanted to let you know that the Conveyances for the 11 Green Bay appeals have all been signed and will go out to you next week. We have not received anything on the Village of Hobart cases but I will let you know if they do come in today.

Thank you

Thomas Wilkins
Realty Specialist
Division of Fee to Trust
Bureau of Indian Affairs
Midwest Regional Office
5600 West American Blvd. Suite 500
Bloomington, MN 55437
Main: 612-713-4400
Direct: 612-725-4584

"Lauren N. Hartman" <lhartman@oneidanation.org>

From:	"Lauren N. Hartman" <lhartman@oneidanation.org>
Sent:	Fri Sep 30 2016 10:06:25 GMT-0600 (MDT)
To:	"Wilkins, Thomas" <thomas.wilkins@bia.gov>
Subject:	RE: Green Bay AOCs

Too cool, thank you everyone!

From: Wilkins, Thomas [mailto:thomas.wilkins@bia.gov]
Sent: Friday, September 30, 2016 10:53 AM
To: Lauren N. Hartman
Cc: Russell Baker; Pamela Butterfield; Michelle Dufek; Andrew Nichols
Subject: Green Bay AOCs

Hello Lauren. Pam is out today but I wanted to let you know that the Conveyances for the 11 Green Bay appeals have all been signed and will go out to you next week. We have not received anything on the Village of Hobart cases but I will let you know if they do come in today.

Thank you

Thomas Wilkins
Realty Specialist
Division of Fee to Trust
Bureau of Indian Affairs
Midwest Regional Office

Conversation Contents

NODS

Attachments:

/4. NODS/1.1 image001.jpg
/4. NODS/2.1 image001.jpg

"Lauren N. Hartman" <lhartman@oneidanation.org>

From:	"Lauren N. Hartman" <lhartman@oneidanation.org>
Sent:	Wed Jan 11 2017 07:21:51 GMT-0700 (MST)
To:	"russell.baker@bia.gov" <russell.baker@bia.gov>
Subject:	NODS
Attachments:	image001.jpg

Good Morning,
Have the NODS for the Hobart properties been signed and issued?

Thank you for your time.

Lauren Nicole Hartman
Realty Specialist Coordinator (Fee to Trust)
Division of Land Management

cid:image001.jpg@01D1D

office 920.869.1690
fax 920.869.1689

PO Box 365
Oneida, WI 54155-0365
Oneida-nsn.gov

"Baker, Russell" <russell.baker@bia.gov>

From:	"Baker, Russell" <russell.baker@bia.gov>
Sent:	Wed Jan 11 2017 09:06:45 GMT-0700 (MST)
To:	"Lauren N. Hartman" <lhartman@oneidanation.org>
Subject:	Re: NODS
Attachments:	image001.jpg

Hi Lauren,

Not yet but we are very close. Solicitors are taking a final look. But I will let you know as soon as we route for signature. Should be this week.

Russell

On Wed, Jan 11, 2017 at 8:21 AM, Lauren N. Hartman <lhartman@oneidanation.org> wrote:

> Good Morning,
> Have the NODS for the Hobart properties been signed and issued?
>
> Thank you for your time.
>
> **Lauren Nicole Hartman**
> Realty Specialist Coordinator (Fee to Trust)
> Division of Land Management
>
> cid:image001.jpg@01D1D
>
> office 920.869.1690
> fax 920.869.1689
>
> PO Box 365
> Oneida, WI 54155-0365
> Oneida-nsn.gov

Conversation Contents

MOU Discussion & Semi-annual Advisory Council Reminder

Attachments:

/6. MOU Discussion & Semi-annual Advisory Council Reminder/1.1 DFTTStatusReportACmeetingJan2017.pdf
/6. MOU Discussion & Semi-annual Advisory Council Reminder/1.2 FY17 ADVISORY COUNCIL AGENDA.docx

"O'leary, Tully" <tully.o'leary@bia.gov>

From:	"O'leary, Tully" <tully.o'leary@bia.gov>
Sent:	Thu Jan 19 2017 14:37:52 GMT-0700 (MST)
To:	Tdanfort@oneidanation.org, mdanforj@oneidanation.org, "Lauren N. Hartman" <lhartman@oneidanation.org>, laurie.tolzmann@shakopeedakota.org, "Stan Ellison (CC)" <Stan.Ellison@shakopeedakota.org>, victoria.ranua@shakopeedakota.org, bill.rudnicki@shakopeedakota.org, Susan Klapel <susan.klapel@millelacsband.com>, Wilfrid Cleveland <Wilfrid.Cleveland@ho-chunk.com>, "Matthew S. Carriaga" <Matthew.Carriaga@ho-chunk.com>, "Larry V. Garvin" <Larry.Garvin@ho-chunk.com>, Raymond.Leek@shakopeedakota.org, Bridgett Donahue <Bridgett.Donahue@millelacsband.com>, Andrew Nichols <andrew.nichols@bia.gov>, Martin Lorenzo <martin.lorenzo@bia.gov>, Michelle Dufek <michelle.dufek@bia.gov>, Pamela Butterfield <pamela.butterfield@bia.gov>, Russell Baker <russell.baker@bia.gov>, Thomas Wilkins <thomas.wilkins@bia.gov>, Tammie Poitra <tammie.poitra@bia.gov>
Subject:	MOU Discussion & Semi-annual Advisory Council Reminder
Attachments:	DFTTStatusReportACmeetingJan2017.pdf FY17 ADVISORY COUNCIL AGENDA.docx

Good afternoon everyone,

We are pleased to invite you to the Midwest Region Division of Fee-to-Trust Semi-Annual Advisory Council meeting to be held on January 26, 2017, at the Midwest Regional Office. The meeting is scheduled to begin at 1:30 P.M. and should end no later than 3:00 P.M. A draft agenda is enclosed. Feel free to contact the division with any topics you would like to discuss in this meeting.

Everyone is encouraged to hear Mathew Kelly, Attorney-Advisor with the Office of the Solicitor (Washington, DC), speak about the new MOU. The discussion is scheduled for 10:00 A.M. to 12:00 P.M. also at the Midwest Regional Office.

For those who are unable to travel, the conference call-in number for both sessions is:
Call-in number: (712) 432-1212
Meeting Access Code: 517-003-435

We look forward to another opportunity to meet with you and/or your representative(s). If you have any questions, please contact Russell Baker, Supervisory Realty Specialist, at (612) 725-4583.

--
Tully O'Leary
Program Analyst
Division of Fee to Trust
Bureau of Indian Affairs
Midwest Regional Office
Norman Pointe II
5600 West American Boulevard, Suite 500

Bloomington, MN 55437
612-725-4582 (Work)
612-713-4401 (Fax)

United States Department of the Interior
BUREAU OF INDIAN AFFAIRS
Midwest Regional Office
5600 West American Boulevard, Suite 500
Bloomington, Minnesota 55437

Division of Fee to Trust - FY2017 Accomplishments

Fee-to-Trust Casework

NODs	IA-PMS projection	FY 2016 (to date)	Acres
Total	**23**	4	288.38
Ho-Chunk		2	36.20
Mille Lacs		0	0
Oneida		1	2.28*
SMSC		1	249.90

*The Village of Hobart decision on remand is project for completion by 1/20/2017, adding an additional 499.022 acres.

AOCs	FY 2016 (to date)	Acres
Total	4	262.07
Ho-Chunk	3	12.27
Mille Lacs	0	0
Oneida	0	0
SMSC	1	249.90

Completions*	FY 2016 (to date)	Acres
Total	4	174.79
Ho-Chunk	0	0
Mille Lacs	0	0
Oneida	2	1.72
SMSC	2	173.07

	FY15	FY16	FY17
Step 1 (Encode)	32	9	10
Step 2 (Review)	41	9	10
Step 3 (Incomplete)	23	10	2
Step 4 (CIP)	28	34	1
Step 5 (PTO)	28	23	1
Step 6 (NOA)	26	22	10
Step 7 (Env. Review)	36	45	2
Step 8 (NOA Comments)	18	12	6
Step 9 (Clear Objections /NIM)	22	26	2
Step 10 (NOD)	23	15	4
Step 11 (Publication)	13	25	5
Step 12 (Final CIP)	4	48	4
Step 13 (Acceptance)	5	28	4
Step 14 (FTO)	7	23	2
Step 15 (Recording)	8	23	3
Step 16 (Complete App.)	9	19	4
Total Milestones	323	371	70
		Total Active Cases	97
		Average per case	0.72
		No milestone	147
		Inactive	81
		Net no milestone	66
		Percentage without milestone	68%

Expenditures

Recurring Fixed Expenses	FY2016 Projected	FY2016 Actual (to date)	FY2017 Projected
Common Support	$25,900.00	$16,800.00	$16,800.00
Verizon	$1,680.00	$976.51	$1,680.00
Westlaw	$6,804.22	$6,728.28	$6,532.32
Environmental Services	$5,000.00	$5,000.00	$5,000.00
Recurring Variable Expenses			
Salary & Benefits	$757,915.78	$598,662.61	$775,638.48
Travel (Site Visits & Training)*	$32,000.00	$11,629.71	$10,000.00
Supplies	$10,000.00	$4,679.71	$9,127.91
Notice of Publications	$3,000.00	$1,797.48	$2,000.00
Training Registration Fees	$7,787.00	$5,821.74	$7,721.29
Non-recurring Expenses			
Printing	$1,200.00	$0.00	$3,000.00
Relocation	$0.00	$0.00	$20,000.00
Background Check	$2,500.00	$0.00	$2,500.00
EDR reports (Phase I)	$9,000.00	$8,750.00	$0.00
Totals	**$862,787.00**	**$643,773.90**	**$860,000.00**

Division Contact Information

Name	Title	Email	Phone
Russell Baker	Supervisory Realty Specialist	Russell.Baker@BIA.GOV	612-725-4583
Tully O'Leary	Program Analyst	Tully.O'leary@BIA.GOV	612-725-4582
Pamela Butterfield	Realty Specialist	Pamela.Butterfield@BIA.GOV	612-725-4536
Michelle Dufek	Realty Specialist	Michelle.Dufek@BIA.GOV	715-685-2418
Andrew Nichols	Realty Specialist	Andrew.Nichols@BIA.GOV	612-725-4549
Thomas Wilkins	Realty Specialist	Thomas.Wilkins@BIA.GOV	612-725-4584
Martin Lorenzo	Environmental Protection Specialist	Martin.Lorenzo@BIA.GOV	612-725-4510

Conversation Contents

2016 Annual Advisory Council Meeting

Attachments:

/17. 2016 Annual Advisory Council Meeting/1.1 2016 Annual Advisory Council Meeting.pdf
/17. 2016 Annual Advisory Council Meeting/1.2 2016 END OF FY16 ADVISORY COUNCIL AGENDA.docx
/17. 2016 Annual Advisory Council Meeting/2.1 2016 END OF FY16 ADVISORY COUNCIL AGENDA 09_28_2016.pdf
/17. 2016 Annual Advisory Council Meeting/2.2 2016 END OF FY16 ADVISORY COUNCIL AGENDA 09_28_2016.pdf
/17. 2016 Annual Advisory Council Meeting/2.3 DFTT Status Report AC meeting 09_28_2016.pdf
/17. 2016 Annual Advisory Council Meeting/3.1 2016 END OF FY16 ADVISORY COUNCIL AGENDA 09_28_2016.pdf
/17. 2016 Annual Advisory Council Meeting/3.2 2016 END OF FY16 ADVISORY COUNCIL AGENDA 09_28_2016.pdf
/17. 2016 Annual Advisory Council Meeting/3.3 DFTT Status Report AC meeting 09_28_2016.pdf
/17. 2016 Annual Advisory Council Meeting/5.1 2016 DFTT Status Report AC meeting Update.pdf

"O'leary, Tully" <tully.o'leary@bia.gov>

From:	"O'leary, Tully" <tully.o'leary@bia.gov>
Sent:	Mon Sep 19 2016 13:12:35 GMT-0600 (MDT)
To:	Tdanfort@oneidanation.org, mdanforj@oneidanation.org, "Lauren N. Hartman" <lhartman@oneidanation.org>, laurie.tolzmann@shakopeedakota.org, "Stan Ellison (CC)" <Stan.Ellison@shakopeedakota.org>, victoria.ranua@shakopeedakota.org, bill.rudnicki@shakopeedakota.org, Susan Klapel <susan.klapel@millelacsband.com>, "lisa.johnson" <lisa.johnson@millelacsband.com>, Wilfrid Cleveland <Wilfrid.Cleveland@ho-chunk.com>, "Bettina G. Warner" <Bettina.Warner@ho-chunk.com>, "Matthew S. Carriaga" <Matthew.Carriaga@ho-chunk.com>, "Larry V. Garvin" <Larry.Garvin@ho-chunk.com>, "Cc: Baker, Russell" <Russell.Baker@bia.gov>, Tammie Poitra <tammie.poitra@bia.gov>, Andrew Nichols <andrew.nichols@bia.gov>, Michelle Dufek <michelle.dufek@bia.gov>, Thomas Wilkins <thomas.wilkins@bia.gov>, Pamela Butterfield <pamela.butterfield@bia.gov>
Subject:	2016 Annual Advisory Council Meeting
Attachments:	2016 Annual Advisory Council Meeting.pdf 2016 END OF FY16 ADVISORY COUNCIL AGENDA.docx

Good afternoon,

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The meeting is scheduled to begin at 1:30 pm and should end no later than 3:00.

Agenda is attached.

Here is the conference call-in number for those who are unable to travel.
Call-in number: (712) 432-1212
Meeting Access Code: 517-003-435

If you would like to have a breakout session to meet alone with the Division staff to discuss your applications or any other issues or concerns not on the agenda, we can arrange to meet either before or after the meeting.

--
Tully O'Leary
Program Analyst
Division of Fee to Trust
Bureau of Indian Affairs
Midwest Regional Office
Norman Pointe II
5600 West American Boulevard, Suite 500
Bloomington, MN 55437
612-725-4582 (Work)
612-713-4401 (Fax)

"O'leary, Tully" <tully.o'leary@bia.gov>

From:	"O'leary, Tully" <tully.o'leary@bia.gov>
Sent:	Tue Sep 27 2016 10:34:30 GMT-0600 (MDT)
To:	Tdanfort@oneidanation.org, mdanforj@oneidanation.org, "Lauren N. Hartman" <lhartman@oneidanation.org>, laurie.tolzmann@shakopeedakota.org, "Stan Ellison (CC)" <Stan.Ellison@shakopeedakota.org>, victoria.ranua@shakopeedakota.org, bill.rudnicki@shakopeedakota.org, Susan Klapel <susan.klapel@millelacsband.com>, "lisa.johnson" <lisa.johnson@millelacsband.com>, Wilfrid Cleveland <Wilfrid.Cleveland@ho-chunk.com>, "Matthew S. Carriaga" <Matthew.Carriaga@ho-chunk.com>, "Larry V. Garvin" <Larry.Garvin@ho-chunk.com>, Raymond.Leek@shakopeedakota.org
Subject:	Re: 2016 Annual Advisory Council Meeting
Attachments:	2016 END OF FY16 ADVISORY COUNCIL AGENDA 09_28_2016.pdf 2016 END OF FY16 ADVISORY COUNCIL AGENDA 09_28_2016.pdf DFTT Status Report AC meeting 09_28_2016.pdf

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> *Division of Fee to Trust*
> *Bureau of Indian Affairs*

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"Baker, Russell" <russell.baker@bia.gov>

From:	"Baker, Russell" <russell.baker@bia.gov>
Sent:	Tue Sep 27 2016 10:53:20 GMT-0600 (MDT)
To:	Pamela Butterfield <pamela.butterfield@bia.gov>
Subject:	Fwd: FW: 2016 Annual Advisory Council Meeting
Attachments:	2016 END OF FY16 ADVISORY COUNCIL AGENDA 09_28_2016.pdf 2016 END OF FY16 ADVISORY COUNCIL AGENDA 09_28_2016.pdf DFTT Status Report AC meeting 09_28_2016.pdf

Pam,

Can you check on this? Thanks.

---------- Forwarded message ----------
From: **Lauren N. Hartman** <lhartman@oneidanation.org>
Date: Tue, Sep 27, 2016 at 11:41 AM
Subject: FW: 2016 Annual Advisory Council Meeting
To: "russell.baker@bia.gov" <russell.baker@bia.gov>

I'm showing there were only 11 acceptances for FY16 for Oneida and I count that there are 14 from my tracking for FY16

From: O'leary, Tully [mailto:tully.o'leary@bia.gov]
Sent: Tuesday, September 27, 2016 11:35 AM
To: Cristina S. Danforth; Melinda J. Danforth; Lauren N. Hartman; laurie.tolzmann@shakopeedakota.org; Stan Ellison (CC); victoria.ranua@shakopeedakota.org; bill.rudnicki@shakopeedakota.org; Susan Klapel; lisa.johnson; Wilfrid Cleveland; Matthew S. Carriaga; Larry V. Garvin; Raymond.Leek@shakopeedakota.org
Cc: Diane Rosen; Kimberly Bouchard; Russell Baker; Pamela Butterfield; Andrew Nichols; Thomas Wilkins; Michelle Dufek; Felix Kitto
Subject: Re: 2016 Annual Advisory Council Meeting

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612-713-4401 (Fax)

"Butterfield, Pamela" <pamela.butterfield@bia.gov>

From:	"Butterfield, Pamela" <pamela.butterfield@bia.gov>
Sent:	Tue Sep 27 2016 12:40:42 GMT-0600 (MDT)
To:	"Lauren N. Hartman" <lhartman@oneidanation.org>
Subject:	Re: FW: 2016 Annual Advisory Council Meeting

You are right, I found the 3 that I was missing and updated the data in our share point.

Case	Acres	Date Accepted
Nelson	0.57	8/31/2016
Steen	0.24	8/31/2016
Selissen	0.21	8/31/2016

They were the last ones that I did, just before labor day.

Thanks,

Pamela Butterfield
Realty Specialist
Division of Fee to Trust
Bureau of Indian Affairs
Midwest Regional Office
Norman Pointe II
5600 West American Boulevard, Suite 500
Bloomington, MN 55437
612-725-4536 (Work)
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pamela.butterfield@bia.gov

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From: O'leary, Tully [mailto:tully.o'leary@bia.gov]
Sent: Tuesday, September 27, 2016 11:35 AM
To: Cristina S. Danforth; Melinda J. Danforth; Lauren N. Hartman; laurie.tolzmann@shakopeedakota.org; Stan Ellison (CC); victoria.ranua@shakopeedakota.org; bill.rudnicki@shakopeedakota.org; Susan Klapel; lisa.johnson; Wilfrid Cleveland; Matthew S. Carriaga; Larry V. Garvin; Raymond.Leek@shakopeedakota.org
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"O'leary, Tully" <tully.o'leary@bia.gov>

From:	"O'leary, Tully" <tully.o'leary@bia.gov>
Sent:	Wed Sep 28 2016 11:37:55 GMT-0600 (MDT)
To:	Tdanfort@oneidanation.org, mdanforj@oneidanation.org, "Lauren N. Hartman" <lhartman@oneidanation.org>, laurie.tolzmann@shakopeedakota.org, "Stan Ellison (CC)" <Stan.Ellison@shakopeedakota.org>, victoria.ranua@shakopeedakota.org, bill.rudnicki@shakopeedakota.org, Susan Klapel <susan.klapel@millelacsband.com>, "lisa.johnson" <lisa.johnson@millelacsband.com>, Wilfrid Cleveland <Wilfrid.Cleveland@ho-chunk.com>, "Matthew S. Carriaga" <Matthew.Carriaga@ho-chunk.com>, "Larry V. Garvin" <Larry.Garvin@ho-chunk.com>, Raymond.Leek@shakopeedakota.org
Subject:	Re: 2016 Annual Advisory Council Meeting
Attachments:	2016 DFTT Status Report AC meeting Update.pdf

Good afternoon everyone,

Attached is the updated status report for the division.

On Tue, Sep 27, 2016 at 11:34 AM, O'leary, Tully <tully.o'leary@bia.gov> wrote:

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United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Midwest Regional Office
Norman Pointe II
5600 West American Boulevard, Suite 500
Bloomington, MN 55437

SEP 19 2016

IN REPLY REFER TO:
Division of Fee to Trust

Honorable Cristina Danforth
Chairman, Oneida Tribe of Indians of Wisconsin
P.O. Box 365
Oneida, Wisconsin 54155

Honorable Melanie Benjamin
Chief Executive, Mille Lacs Band of Ojibwe Indians
43408 Oodena Drive
Onamia, Minnesota 56359

Honorable Charlie Vig
Chairman, Shakopee Mdewakanton Sioux Community
2330 Sioux Trail NW
Prior Lake, Minnesota 55372

Honorable Wilfrid Cleveland
President, Ho-Chunk Nation
W9814 Airport Road
P.O. Box 667
Black River Falls, WI 54615

Dear Chairwoman Danforth, Chairman Vig, Chief Executive Benjamin, and President Cleveland:

We are pleased to invite you to the Midwest Region Division of Fee-to-Trust Annual Advisory Council meeting to be held on Wednesday, September 28, 2016, at the Midwest Regional Office. The meeting is scheduled to begin at 1:30 pm and should end no later than 3:00. A tentative agenda is enclosed.

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If you would like to have a breakout session to meet alone with the Division staff to discuss your applications or any other issues or concerns not on the agenda, we can arrange to meet either before or after the meeting.

We look forward to another opportunity to meet with you and/or your representative(s). If you have any questions, you may contact Russell Baker, Supervisory Realty Specialist, directly at (612) 725-4583.

Sincerely,

Regional Director

Enclosure

cc: Lauren Hartman, Realty Specialist Coordinator/Division Rep., Oneida Tribe
Melinda Danforth, Vice-Chairwoman, Oneida Tribe
Lisa Johnson, Director of Real Estate/Division Rep., Mille Lacs Band
Susan Klapel, Commissioner DNR, Mille Lacs Band
Matthew Carriaga, Real Estate Director, Ho-Chunk Nation
Larry Garvin, Land Specialist, Ho-Chunk Nation
Bill Rudnicki, Tribal Administrator, Shakopee Mdewakanton Sioux Community
Stanley Ellison, Land Manager, Shakopee Mdewakanton Sioux Community
Victoria Ranua, Environmental/Realty Specialist, Shakopee Mdewakanton Sioux Community
Midwest Region Real Estate Services

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Midwest Regional Office
Norman Pointe II
5600 West American Boulevard, Suite 500
Bloomington, MN 55437

Division of Fee to Trust Advisory Council Meeting Agenda

Date:	Wednesday, September 28, 2016
Time:	1:30 PM
Location:	Midwest Regional Office

1:30	Welcome & Introductions	Diane Rosen
1:40	Staffing Update	Russell Baker
1:50	Budget/Expenditure Report	Tully O'Leary
2:00	Environmental Update	Felix Kitto
2:10	Program Accomplishments	Russell Baker
2:20	Group Discussion - MOU Renewal	
2:30	Group Discussion - PTO Review	
2:40	Closing Remarks	Diane Rosen

United States Department of the Interior

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Division of Fee to Trust - FY2016 Accomplishments

Fee-to-Trust Casework

NODs	IA-PMS projection	FY 2016 (to date)	Acres	FY 2016 (projected)	Acres
Total	**23**	15	201.68	*28	916.75
Ho-Chunk		3	12.27	7	146.16
Mille Lacs		1	12.70	1	12.70
Oneida		9	7.05	17	572.62
SMSC		2	169.66	3	277.16

*This projection includes 8 appealed Village of Hobart cases pending with Central Office.

AOCs	FY 2016 (to date)	Acres	FY 2016 (projected)	Acres
Total	23	1,779.45	39	1,961.87
Ho-Chunk	5	618.80	5	618.80
Mille Lacs	4	1,031.02	4	1,031.02
Oneida	11	12.34	25	21.70
SMSC	5	290.35	5	290.35

Completions*	FY 2016 (to date)	Acres	FY 2016 (projected)	Acres
Total	19	2,196.15	19	2,196.15
Ho-Chunk	4	195.40	4	195.40
Mille Lacs	0	0	0	0
Oneida	12	1,883.47	12	1,883.47
SMSC	3	117.28	3	117.28

	FY14	FY15	FY16
Step 1 (Encode)	22	32	9
Step 2 (Review)	22	41	9
Step 3 (Incomplete)	21	23	8
Step 4 (CIP)	18	28	34
Step 5 (PTO)	22	28	23
Step 6 (NOA)	20	26	22
Step 7 (Env. Review)	26	36	44
Step 8 (NOA Comments)	18	18	11
Step 9 (Clear Objections /NIM)	37	22	26
Step 10 (NOD)	37	23	15
Step 11 (Publication)	35	13	25
Step 12 (Final CIP)	28	4	48
Step 13 (Acceptance)	27	5	25
Step 14 (FTO)	22	7	23
Step 15 (Recording)	22	8	23
Step 16 (Complete App.)	22	9	19
Total Milestones	399	323	364
		Total Active Cases	87
		Average per case	4.18
		No milestone	92
		Inactive	89
		Net no milestone	3
		3/87=	3%

Reservation Proclamations

Ten SMSC proclamations (520.10 acres) have been processed and recorded at LTRO. There are no pending requests for Proclamation of Reservations.

Case Name	Published and Recorded
Petsch 77.00 acres	Published in the Federal register 03/28/2016; Recorded in TAAMS 04/23/2016.
Tessmer 104.4 acres	Published in Federal Register 10/02/2015; Recorded in TAAMS 02/01/2016
Dolan 80.00 acres	Published in the Federal register 03/28/2016; Recorded in TAAMS 05/25/2016.
McKenna 80.00 acres	Published in the Federal register 03/28/2016; Recorded in TAAMS 04/26/2016.
Carlson 20.00 acres	Published in the Federal register 03/17/2016; Recorded in TAAMS 03/31/2016.
Stemmer 2.79 acres	Published in the Federal register 03/28/2016; Recorded in TAAMS 04/23/2016.
Wilds 2.00 acres	Published in the Federal register 03/17/2016; Recorded in TAAMS 03/31/2016.
Wozupi 24.69 acres	Published in the Federal register 03/17/2016; Recorded in TAAMS 03/31/2016.
Eagle Creek Circle 0.92 acres	Published in the Federal register 03/28/2016; Recorded in TAAMS 04/26/2016.
Shutrop 128.30 acres	Published in the Federal register 06/22/2016; Recorded in TAAMS 06/30/2016.

FOIA Requests

Requested From	Received	Due Date	Final Response	Description
William E. Wallo	9/18/2015	**11/2/15**	11/16/15	Fee to Trust application from Ho-Chunk Nation Christenson Parcel - response to Notice of Application
Leslie Torgerson	10/9/2015	**11/23/25**	11/19/15	Fee to Trust Application Notice of Decision for Shakopee
Frank W. Kowalkowski	10/15/2015	**12/29/15**	1/8/16	Variety of F2T records on payroll, budget, meeting notes, etc.
Randy Thompson	1/28/2016	**2/25/16**	1/28/16	Betlach & Natural Habitat admin record on DVD
Randy Thompson	3/10/2016	**4/6/16**	3/23/16	Fee to Trust application from Mille Lacs Band on identified properties.
Deb Gruber	6/28/2016	**7/26/16**	7/25/2016	Mille Lacs Band's response to County comments on Willmus
William E. Wallo	08/19/2016	**Have not receive due date**		Fee to Trust application from Ho-Chunk Nation Christenson Parcel - response to revised Notice of Application
William E. Wallo	9/1/2016	**Have not receive due date**		Fee to Trust application from Ho-Chunk Nation Christenson Parcel - response to revised Notice of Application

Appeals

Administrative and judicial appeals have been a continuing issue for the Division's caseload. Recently, the IBIA has affirmed several key decisions for the Mille Lacs Band and Oneida Nation. Because the IBIA found no error in the handling of these cases, two additional appeals were subsequently withdrawn voluntarily by the appellant. The IBIA also upheld the decisions for 11 Oneida cases located in Green Bay. Currently, the Division has no active appeals.

Case Name	Tribe	Status	Status Date
Sher	Mille Lacs	IBIA Affirmed	January 26, 2016
Betlach	Mille Lacs	AS-IA Dismissed (voluntary)	March 11, 2016
Natural Habitat	Mille Lacs	AS-IA Dismissed (voluntary)	March 11, 2016
Goral*	Oneida	IBIA Affirmed	May 11, 2016
Frelich*	Oneida	IBIA Affirmed	May 11, 2016
Lemmen*	Oneida	IBIA Affirmed	May 11, 2016
Sigfred*	Oneida	IBIA Affirmed	May 11, 2016
Fietz*	Oneida	IBIA Affirmed	May 11, 2016
Gruber*	Oneida	IBIA Affirmed	May 11, 2016
Berglin*	Oneida	IBIA Affirmed	May 11, 2016
Beyer-Riley*	Oneida	IBIA Affirmed	May 11, 2016
Smith, G & S*	Oneida	IBIA Affirmed	May 11, 2016
Bourdelais*	Oneida	IBIA Affirmed	May 11, 2016
Brusky*	Oneida	IBIA Affirmed	May 11, 2016

*These properties will be conveyed to trust once the Phase I ESA is updated for each property.

Expenditures

Recurring Fixed Expenses	FY2015 Actual	FY2016 Projected	FY2016 Actual (to date)	FY2017 Projected
Common Support	$16,800.00	$25,900.00	$16,800.00	$16,800.00
Verizon	$1,527.13	$1,680.00	$836.98	$1,680.00
Westlaw	$7,900.00	$6,804.22	$6,532.32	$6,532.32
Environmental Services	$0.00	$5,000.00	$5,000.00	$5,000.00
Recurring Variable Expenses				
Salary & Benefits	$381,479.45	$757,915.78	$541,848.70	$775,638.48
Travel (Site Visits & Training)*	$19,063.20	$32,000.00	$8,380.90	$10,000.00
Supplies	$9,635.88	$10,000.00	$4,627.91	$9,127.91
Notice of Publications	$1,858.53	$3,000.00	$1,797.48	$2,000.00
Training Registration Fees	$3,328.00	$7,787.00	$5,821.74	$7,721.29
Non-recurring Expenses				
Printing	$4,012.68	$1,200.00	$0.00	$3,000.00
Relocation	$34,033.71	$0.00	$0.00	$20,000.00
Background Check	$3,786.26	$2,500.00	$0.00	$2,500.00
EDR reports (Phase I)	$7,900.00	$9,000.00	$8,750.00	$0.00
Totals	**$491,324.84**	**$862,787.00**	**$600,396.03**	**$860,000.00**

Division Contact Information

Name	Title	Email	Phone
Russell Baker	Supervisory Realty Specialist	Russell.Baker@BIA.GOV	612-725-4583
Tully O'Leary	Program Analyst	Tully.O'leary@BIA.GOV	612-725-4582
Pamela Butterfield	Realty Specialist	Pamela.Butterfield@BIA.GOV	612-725-4536
Michelle Dufek	Realty Specialist	Michelle.Dufek@BIA.GOV	715-685-2418
Andrew Nichols	Realty Specialist	Andrew.Nichols@BIA.GOV	612-725-4549
Thomas Wilkins	Realty Specialist	Thomas.Wilkins@BIA.GOV	612-725-4584
Vacant*	Environmental Protection Specialist	NA	NA

*Our previous Environmental Protection Specialist, Felix Kitto, accepted a promotion to be the Regional Environmental Protection Specialist for the Division of Environmental, Cultural Resources Management, and Safety here at the Midwest Region. A job announcement was posted on USAjobs.gov, but due to lack of applicants a second posting was needed. The second posting closed on September 6th, and results are pending.

Changes to the Handbook

Handbook Section	Summary of Changes
Index	Added sections 3.4, 5.4 and 5.7
3.4 [Reservation Proclamations]	A new section has been included in the Handbook to provide guidelines for the submittal of Reservation Proclamation requests. Proclamations can now be processed concurrently with fee-to-trust applications.
Step 2(2)(a) [Review of Written Request to Initiate Application Process]	Specifies that applicants must identify themselves as they are listed in the Federal Register, or with the name as it appears on an approved Constitution.
Step 2(5)(b)[Review of Written Request to Initiate Application Process]	Updated to reflect recent changes to 25 CFR 151, allowing for the use of title commitments and/or abstracts as title evidence in lieu of title policies.
Step 2(5)(e)[Review of Written Request to Initiate Application Process]	States the requirement for Legal Land Description Review (LDR). This may still be either submitted by a CFedS, or performed directly by BILS.
Step 4 [Conducting Site Inspection and Completing Initial Certificate of Inspection]	Clarifies the requirements for performing a CIP. Stipulates that Tribal employees should not perform CIPs for Tribal properties. CIPs may still be prepared by the Tribe and submitted for approval by a federal employee. (Using a CFedS, for example.)
Step 5 [Preparing the Preliminary Title Opinion (PTO)]	Clarifies the required documents to accompany a PTO request.
Step 9 [Clearance of PTO Objections before Notice of Decision (NOD)]	Added a note that the Solicitor may require elimination of liens, encumbrances, or infirmities prior to acceptance if it is determined that they make the land unmarketable.
Step 11 [Providing Notice of the Decision]	Added a detailed explanation for calculation of appeal periods.
Step 12 [Preparing Final Certificate of Inspection and Possession (CIP)]	Added language addressing inconsistencies in the Initial CIP and the Final CIP, including suggestions on steps to cure.
Step 14 [Final Title Opinion and Recordation]	Amends language to reflect updated policy on title requirements.

*http://www.bia.gov/cs/groups/xraca/documents/text/idc1-024504.pdf [online Fee-to-Trust Handbook, Version IV, (rev. 1) issued 06/28/2016]

JS 44 (Rev. 10/20)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)*

Place an "X" in the appropriate box (required): ☒ Green Bay Division ☐ Milwaukee Division

I. (a) PLAINTIFFS

Village of Hobart, Wisconsin

(b) County of Residence of First Listed Plaintiff _____
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys *(Firm Name, Address, and Telephone Number)*
Frank W. Kowalkowski, von Briesen & Roper, s.c.
300 N. Broadway, Suite 2B, Green Bay, WI 54303

Derek J. Waterstreet, von Briesen & Roper, s.c.
411 E. Wisconsin Avenue, Suite 1000, Milwaukee, WI 53202

DEFENDANTS

United States Department of the Interior, Deb Haaland, in her official capacity as United States Secretary of the Interior, Bureau of Indian Affairs, Tammie Poitra, in her official capacity as the Midwest Regional Director, Bureau of Indian Affairs, Acting Midwest Regional Director, Bureau of Indian Affairs, and Interior Board of Indian Appeals

County of Residence of First Listed Defendant _____
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys *(If Known)*

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

☐ 1 U.S. Government Plaintiff
☐ 3 Federal Question *(U.S. Government Not a Party)*
☒ 2 U.S. Government Defendant
☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☐ 4
Citizen of Another State	☐ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions.

CONTRACT
☐ 110 Insurance
☐ 120 Marine
☐ 130 Miller Act
☐ 140 Negotiable Instrument
☐ 150 Recovery of Overpayment & Enforcement of Judgment
☐ 151 Medicare Act
☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans)
☐ 153 Recovery of Overpayment of Veteran's Benefits
☐ 160 Stockholders' Suits
☐ 190 Other Contract
☐ 195 Contract Product Liability
☐ 196 Franchise

REAL PROPERTY
☐ 210 Land Condemnation
☐ 220 Foreclosure
☐ 230 Rent Lease & Ejectment
☐ 240 Torts to Land
☐ 245 Tort Product Liability
☐ 290 All Other Real Property

TORTS

PERSONAL INJURY
☐ 310 Airplane
☐ 315 Airplane Product Liability
☐ 320 Assault, Libel & Slander
☐ 330 Federal Employers' Liability
☐ 340 Marine
☐ 345 Marine Product Liability
☐ 350 Motor Vehicle
☐ 355 Motor Vehicle Product Liability
☐ 360 Other Personal Injury
☐ 362 Personal Injury - Medical Malpractice

PERSONAL INJURY
☐ 365 Personal Injury - Product Liability
☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
☐ 370 Other Fraud
☐ 371 Truth in Lending
☐ 380 Other Personal Property Damage
☐ 385 Property Damage Product Liability

CIVIL RIGHTS
☐ 440 Other Civil Rights
☐ 441 Voting
☐ 442 Employment
☐ 443 Housing/ Accommodations
☐ 445 Amer. w/Disabilities - Employment
☐ 446 Amer. w/Disabilities - Other
☐ 448 Education

PRISONER PETITIONS
Habeas Corpus:
☐ 463 Alien Detainee
☐ 510 Motions to Vacate Sentence
☐ 530 General
☐ 535 Death Penalty
Other:
☐ 540 Mandamus & Other
☐ 550 Civil Rights
☐ 555 Prison Condition
☐ 560 Civil Detainee - Conditions of Confinement

FORFEITURE/PENALTY
☐ 625 Drug Related Seizure of Property 21 USC 881
☐ 690 Other

LABOR
☐ 710 Fair Labor Standards Act
☐ 720 Labor/Management Relations
☐ 740 Railway Labor Act
☐ 751 Family and Medical Leave Act
☐ 790 Other Labor Litigation
☐ 791 Employee Retirement Income Security Act

IMMIGRATION
☐ 462 Naturalization Application
☐ 465 Other Immigration Actions

BANKRUPTCY
☐ 422 Appeal 28 USC 158
☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
☐ 820 Copyrights
☐ 830 Patent
☐ 835 Patent - Abbreviated New Drug Application
☐ 840 Trademark
☐ 880 Defend Trade Secrets Act of 2016

SOCIAL SECURITY
☐ 861 HIA (1395ff)
☐ 862 Black Lung (923)
☐ 863 DIWC/DIWW (405(g))
☐ 864 SSID Title XVI
☐ 865 RSI (405(g))

FEDERAL TAX SUITS
☐ 870 Taxes (U.S. Plaintiff or Defendant)
☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
☐ 375 False Claims Act
☐ 376 Qui Tam (31 USC 3729(a))
☐ 400 State Reapportionment
☐ 410 Antitrust
☐ 430 Banks and Banking
☐ 450 Commerce
☐ 460 Deportation
☐ 470 Racketeer Influenced and Corrupt Organizations
☐ 480 Consumer Credit (15 USC 1681 or 1692)
☐ 485 Telephone Consumer Protection Act
☐ 490 Cable/Sat TV
☐ 850 Securities/Commodities/ Exchange
☐ 890 Other Statutory Actions
☐ 891 Agricultural Acts
☐ 893 Environmental Matters
☐ 895 Freedom of Information Act
☐ 896 Arbitration
☒ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
☐ 950 Constitutionality of State Statutes

V. ORIGIN *(Place an "X" in One Box Only)*

☐ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from Another District *(specify)* ☐ 6 Multidistrict Litigation - Transfer ☐ 8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing ***(Do not cite jurisdictional statutes unless diversity)***:
The Administrative Procedure Act, 5 U.S.C. s 701, et seq.

Brief description of cause:
Judicial review under the Administrative Procedure Act of a decision of the Interior Board of Indian Appeals

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A **CLASS ACTION** UNDER RULE 23, F.R.Cv.P.

DEMAND $

CHECK YES only if demanded in complaint:
JURY DEMAND: ☐ Yes ☒ No

VIII. RELATED CASE(S) IF ANY

(See updated instructions):
JUDGE _____ DOCKET NUMBER _____

DATE
11/10/2023

SIGNATURE OF ATTORNEY OF RECORD
/s/ Frank W. Kowalkowski

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I.(a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) **County of Residence.** For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) **Attorneys.** Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. **Jurisdiction.** The basis of jurisdiction is set forth under Rule 8(a), F.R.Cv.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.
United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.
United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.
Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked.
Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked**.** (See Section III below**; NOTE: federal question actions take precedence over diversity cases.**)

III. **Residence (citizenship) of Principal Parties.** This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. **Nature of Suit.** Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: Nature of Suit Code Descriptions.

V. **Origin.** Place an "X" in one of the seven boxes.
Original Proceedings. (1) Cases which originate in the United States district courts.
Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441.
Remanded from Appellate Court. (3) Check this box for cases remanded to the district court for further action. Use the date of remand as the filing date.
Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.
Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.
Multidistrict Litigation – Transfer. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407.
Multidistrict Litigation – Direct File. (8) Check this box when a multidistrict case is filed in the same district as the Master MDL docket. **PLEASE NOTE THAT THERE IS NOT AN ORIGIN CODE 7.** Origin Code 7 was used for historical records and is no longer relevant due to changes in statue.

VI. **Cause of Action.** Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553 Brief Description: Unauthorized reception of cable service.

VII. **Requested in Complaint.** Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.
Demand. In this space enter the actual dollar amount being demanded or indicate other demand, such as a preliminary injunction.
Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

VIII. **Related Cases.** This section of the JS 44 is used to reference related pending and previously filed cases, if any. If there are related cases, insert the docket numbers and the corresponding judge names for such cases and file a Notice of Related Action pursuant to Civil L.R. 3(b).

Date and Attorney Signature. Date and sign the civil cover sheet.