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

DAVID V. DILLENBURG  
AND THOMAS G. SLADEK,

Appellants,

v.

**APPELLANTS'  
OPENING BRIEF**

MIDWEST REGIONAL DIRECTOR,  
BUREAU OF INDIAN AFFAIRS,

Appellee.

Docket Nos. IBIA 15-005  
15-006  
15-007  
15-008

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## I. INTRODUCTION

This is a consolidated appeal of four Notice of Decisions (“NODs”) of the Midwest Regional Director (“RD”) of the Bureau of Indian Affairs (“BIA”), three of which are dated August 19, 2014 (referred to as the “Former Berglin; Beyer-Riley; Bourdelais; Frelich; Gruber; Brusky; Fietz; Lemmen; Sigfred; and Smith Properties”), and one which is dated August 28, 2014 (referred to as the “Former Goral Property”), to accept into trust several parcels of land owned by the Oneida Indians of Wisconsin (“Tribe”). The land is located in the City of Green Bay, Brown County, Wisconsin (“Green Bay”), and consists of approximately 4.58 total acres. The Appellants are interested parties who have brought claims challenging this transfer to trust because it adversely affects their interests.

The decisions were purportedly based upon the Indian Reorganization Act (“IRA”), 25 U.S.C. § 461 et. seq. Pursuant to the IRA, the Secretary of the Interior may take land into trust “for the purpose of providing land for Indians.”<sup>1</sup> The IRA states “the term Indian as used in this act shall include members of any recognized Indian tribe now under federal jurisdiction . . . .”<sup>2</sup> The United States Supreme Court has held that in order for a tribe to be eligible to utilize the IRA, as a mechanism to have its lands placed into trust, it must have been a recognized tribe “under federal jurisdiction” as of June 18, 1934.<sup>3</sup>

Although the RD correctly acknowledges the limitations the *Carcieri* decision placed on the use of the IRA, she incorrectly determined that the Tribe was recognized and under federal jurisdiction as of June 18, 1934. The RD also wrongly suggests that the fact that the Tribe voted to accept the IRA confers rights unto the Tribe under the IRA, a standard not mentioned or

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<sup>1</sup> 25 U.S.C. § 465

<sup>2</sup> 25 U.S.C. § 479

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

supported in *Carcieri* or other case law. A review of the historical record clearly shows that the reservation was fully allotted pursuant to the Dawes Act,<sup>4</sup> a 1906 special provision, found at 34 Stat. 325, relating specifically to the Tribe, shows that excess federal property previously used for tribal schools was sold, and that two townships were created on what was the former reservation. This all resulted in state and local jurisdiction applying to the land and all its inhabitants well before 1934.

Additionally, even if the Tribe was otherwise eligible for the benefits of the IRA, the Act is unconstitutional if it is applied to deprive Brown County and Green Bay of the jurisdiction it previously enjoyed over the parcels to be placed into trust status. For over a century, the parcels were held in fee by tribal and then nontribal members and undisputedly subject to the jurisdiction of the state, Brown County and Green Bay. Congress does not have the authority to remove land from state jurisdiction or to restore or create tribal sovereignty over such land. Consequently, the IRA is unconstitutional as applied in this situation if the result is to extend tribal sovereignty over the parcels to be taken into trust.

## II. STANDARD OF REVIEW

### A. Standard of Review for Questions of Law.

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

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

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<sup>4</sup> 25 U.S.C. § 331

IRA].” *Charter Limousine, Inc. v. Dade County Board of Commissioners*, 678 F.2d 586, 588 (5th Cir. 1982).<sup>5</sup>

The Interior Board of Indian Appeals must review any “[l]egal determinations” made by the Regional Director “de novo.”<sup>6</sup>

Since the *Carciere* decision, the Department of the Interior has been actively promoting a *Carciere* “fix” to legislatively overturn the decision by removing the word “now” in § 479. In *Carciere*, because the Narragansett Tribe was not federally recognized until 1980, it could not have been under federal jurisdiction in 1934. There is no specific date that can be applied to the Oneida Tribe of Wisconsin to easily resolve this question. This is a case of first impression in interpreting the express language of § 479 to determine whether this Tribe is eligible for the benefits of the IRA.

**B. Standard of Review for agency decisions.**

The IBIA applies a “de novo” review to both questions of law and the sufficiency of the evidence.<sup>7</sup> Additionally, the IBIA “review[s] the Regional Director’s decision to determine whether it is arbitrary, capricious, or not in accordance with the law.”<sup>8</sup> If the RD properly follows all of the required standards, the IBIA will refrain from substituting its own judgment.<sup>9</sup> The burden is on the appellant to show the RD committed error.<sup>10</sup> However, on appeal, “any information available to the reviewing official may be used in reaching a decision whether part

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

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

<sup>7</sup> *James Birdtail III v. Rocky Mountain Regional Director, Bureau of Indian Affairs*, 45 IBIA 1, 5 (2007).

<sup>8</sup> *Id.*

<sup>9</sup> *Joseph La-Fauss Pappin III*, 50 IBIA at 242.

<sup>10</sup> *Id.*

of the record or not.”<sup>11</sup> Furthermore, the IBIA may consider documents not included in the record, provided the parties are given notice and an opportunity to comment.<sup>12</sup>

### III. STANDING<sup>13</sup>

The IBIA ordered Appellants to first address whether Appellants have standing to appeal the RD’s decision to allow certain property to be placed in trust under 25 U.S.C. § 465 and its implementing regulations.<sup>14</sup> The claims brought by Mr. David Dillenburg and Mr. Thomas Sladek (“Appellants”) satisfy not only Article III’s standing requirements (injury-in-fact, causation, and redress ability), but also the prudential standing requirement that those claims be “arguably within the zone of interests to be protected or regulated by the statute.”<sup>15</sup> In *Patchak*, the United States Supreme Court specifically stated that neighbors’ “interests, whether economic, environmental, or aesthetic, come within § 465’s regulatory ambit.”<sup>16</sup> Because the Appellants are interested parties who have brought claims that this illegal transfer to trust adversely affects their interests, they have standing to challenge this transfer.

#### A. Appellants meet the IBIA’s requirements for standing.

An Appellant may make a “written request for review of an action . . . of an official of the Bureau of Indian Affairs that is claimed to adversely affect the interested party making the

<sup>11</sup> 25 C.F.R. Part 2, § 2.21.

<sup>12</sup> *Id.*

<sup>13</sup> The bulk of this “standing argument” is based upon and supported by the Affidavits of Thomas G. Sladek and David V. Dillenburg of December 30 and 31, 2014, filed contemporaneously with this brief. The facts and arguments made within this section refer to those affidavits.

<sup>14</sup> See *Order Setting Briefing Schedule of 11/17/2014* (“*Order of 11/17/2014*”). The IBIA has requested Appellants to brief “standing” using *Lujan*-type judicial standing as the appropriate standard. Appellants do not agree that this is the correct standard. Under 43 C.F.R. § 4.330, an interested person is “any person whose interests could be adversely affected by a decision in an appeal,” which is a much less restrictive “standing” requirement. See *Preservation of Los Olivos v. U.S. Dept. of Interior*, 635 F.Supp.2d 1076 (C.D.Cal. 2008) (challenging the IBIA’s conclusion, without explanation, regarding the use of judicial standing principles.) Appellants recognize that the IBIA addressed this issue in *Preservation of Los Olivos and Preservation of Santa Ynez v. Pacific Regional Director*, 58 IBIA 278, 289—301 (2014), and are bound by the precedent of that case as it relates to arguing before this Board. However, Appellants reserve their right on appeal to argue the IBIA’s “standing” analysis is incorrect by using the wrong standard.

<sup>15</sup> See *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S.Ct. 2199, 2210 (2012) (omitting citation).

<sup>16</sup> *Patchak*, 132 S.Ct. at 2212.

request.”<sup>17</sup> An interested party is defined as “any person whose interests could be adversely affected by a decision in an appeal.”<sup>18</sup> In order to satisfy Article III standing, as required by the IBIA, an appellant must show that (1) he has suffered an actual or imminent, concrete and particularized injury to or invasion of a legally protected interest; (2) the injury is fairly traceable to the challenged action; and (3) the injury will likely be redressed by a favorable decision.<sup>19</sup> Additionally, a prudential standing test requires that Appellants’ interests be “arguably within the zone of interests to be protected or regulated by the statute.”<sup>20</sup> All of these elements of standing are met by Appellants. Indeed, even the RD correctly considered Appellants as “interested parties” in making her decision.<sup>21</sup>

**B. Appellants will be harmed by this transfer.**

The IBIA requests Appellants to provide evidence of imminent injury:

it is not clear what concrete and particularized injury Appellants claim they will suffer to their own legally protected interests—as opposed to the community at large or the state and local government—and whether any such injury is “actual or imminent” or is too speculative to provide the basis for standing to challenge the trust acquisitions.<sup>22</sup>

Appellants are part of this ‘community at large,’ and are affected as community members in a concrete and particularized way, singularly, as much as the ‘community at large’ is affected communally. Appellants’ financial and community rights are adversely affected by this transfer to trust. Moreover, these financial and community rights will be adversely affected due to an *illegal* transfer. As noted above, the IRA only confers the right to place land in trust for tribes recognized by June 18, 1934. As supported below, this does not include the Tribe. And while

<sup>17</sup> 43 C.F.R. § 4.330 (incorporating definitions of 25 C.F.R. § 2.2).

<sup>18</sup> *Id.*

<sup>19</sup> *DuBray v. Great Plains Regional Director*, 48 IBIA 1, 19 (2008) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

<sup>20</sup> *Patchak*, 132 S.Ct. at 2210.

<sup>21</sup> *NODs of 8/19/2014* at 3 or 4 (“which we have considered as interested parties”).

<sup>22</sup> *Order of 11/17/2014*.

illegality is not itself sufficient to confer standing, Appellants' imminent injuries resulting from this illegal transfer does confer standing.

The Appellants are tax-payers for the City of Green Bay, Brown County, the Green Bay Area Public School District, the State of Wisconsin, and the Northeast Wisconsin Technical College District. The transfer of these parcels of land to trust will remove these properties from the tax base of the City of Green Bay, Brown County, the Green Bay Area Public School District, the State of Wisconsin, and the Northeast Wisconsin Technical College District. Consequently, the amount of taxes that will be lost will either be collected from the remaining citizens, such as Appellants, or the services paid for with those taxes will be reduced.

As noted within Mr. Sladek's affidavit, the fact that an agreement exists between Green Bay and the Tribe, which includes a formula in which the Tribe pays certain amounts of money to Green Bay for lands held in trust, does not affect this "harm" analysis. Offsetting credits given to the Tribe and the failure to keep current and accurate property values on those properties means less revenue for Green Bay than otherwise would be received through property taxes. For example, the agreement requires annual meetings to reconcile things such as property value influxes or decreases, but no such meeting was held from 2009 to 2013, and the meeting in 2014 ended with no agreement about seemingly undervalued properties. In short, the revenue created through property taxes is much greater than the revenue given through the agreement, and equally important, the property tax revenue is non-negotiable. Moreover, the agreement can be terminated at certain points by simply requesting an amendment to which the other side would not agree. Whereas property taxes are perpetual, consistent, and provide more money to Green Bay's coffers, this agreement is subject to negotiation, termination, and provides less money to Green Bay.

The gradual reduction of the tax base adversely affects Appellants. Notably, in *Preservation of Los Olivos and Preservation of Santa Ynez v. Pacific Regional Director*, the IBIA found that the removal of property from the tax base—characterized as the “sole” legal effect of that decision—was sufficient to confer standing on the Appellants’ declarants, but just not for the Appellant organizations because Appellants’ declarants’ harm was not germane to the organizations’ harm:

it is undisputed that if the Parcel is accepted in trust, it will no longer be subject to property taxes. Thus, the economic injuries and causation alleged by Bowen and Hamer (assuming they are not overly speculative) would be traceable to the Decision because, but for taking the Parcel into trust, it will remain subject to property taxes, the exemption from which is the source of the alleged economic injury

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We nevertheless conclude that Appellants have failed to demonstrate Appellants’ standing because at no time have they produced evidence to show that the interests Bowen and Hamer assert are germane to either Appellant organization, which is an additional element for standing when an organization claims to have standing to sue on behalf of its members.<sup>23</sup>

Here, we do not have organizations appealing, but actual individuals claiming adverse effects by transferring these properties away from the tax base, so the germaneness issue does not affect standing. And that is not the only harm here.

As noted within Mr. Dillenburg’s affidavit, he is additionally harmed by the removal of some of those applicant parcels from the tax base, which are rental properties. Mr. Dillenburg owns two rental properties in the very near vicinity of some of the parcels being transferred to trust, which he rents out to tenants for income. At least one of the applicant parcels only two and one-half blocks away is a duplex that likely has at least one rental unit. In fact, there is one existing rental property in trust right across the street from Mr. Dillenburg’s property. Rental

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<sup>23</sup> *Preservation of Los Olivos and Preservation of Santa Ynez v. Pacific Regional Director*, 58 IBIA at 304-05.

units in trust can afford to charge lower rents because they no longer have the large overhead of property taxes. Whereas Mr. Dillenburg pays property taxes of \$5,031.33 and \$4,564.40 a year for his two rental properties, which is the single largest cost for the property, the Tribe will be able to rent those comparable units for a lower amount of rent because they are not burdened with that overhead. Placing these parcels in trust will give those rental properties in trust a decided rental advantage due to the Tribe's lower overhead and ability to charge lower rent, to the detriment of Mr. Dillenburg, who will receive a lower income as a result of trying to competitively rent out his properties.

Equally important, Appellants are community members seeking peace, safety, order and security within their community through the implementation and enforcement of uniform ordinances, which address matters such as zoning, land use, maintenance of lands and buildings, animal control, criminal conduct, sanitation, nuisance of noise and odor, and traffic control, to name but a few. These ordinances do not apply to land in trust. The checkerboard developing in the subject area results in ordinances applying to the residents of one property, but not the residents of the property right next door, which is in trust. This lack of uniformity disrupts community cohesion and creates confusion. The community cannot effectively manage itself without uniform rules that guide the community at large, and community members, such as Appellants, cannot expect peace, safety, order and security without uniform enforcement.

The IBIA notes that Appellants "appear to define the 'local community' as the local non-Indian community."<sup>24</sup> This is not the case. Community members include both Indian and non-Indian members that are guided by and forced to conform to the same ordinances, *i.e.* those that live on non-Indian property. This illegal transfer to trust divides Appellants' community and places certain land and community members outside the bounds and restrictions agreed upon by

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<sup>24</sup> Order of 11/17/2014.

the rest of the community members, such as Appellants. This affects Appellants directly as neighbors and community members. For example, Mr. Dillenburg owns property only 300 feet from one of the parcels, and that parcel of land and the people who own that land will not be required to comply with the ordinances that bind all of the other neighbors. Further, as these transfers to trust continue, as the Tribe has promised, the harm will be compounded.

In the lower court, Mr. Patchak had standing where he alleged “the rural character of the area would be destroyed, that the value of his property would be diminished and that he would lose the enjoyment of the agricultural land surrounding the casino site.”<sup>25</sup> Likewise, Appellants have standing because they are financially harmed and the community environment will be negatively affected by this patchwork of community members, some of which are bound by ordinances and others that are not. Notably, neither the DC Circuit nor the Supreme Court doubted Mr. Patchak had Article III standing. The same should be true here, just as the RD acknowledged by treating Appellants as interested parties.<sup>26</sup>

Lastly, Appellants are also harmed by the abridging of their privileges and immunities guaranteed by the 14th Amendment. As noted in section B(6), this transfer violates Appellants’ constitutional right and ability to participate in their governments over the trust parcels.

**C. This transfer will be the cause of that harm.**

The IBIA also requests Appellants to provide evidence of causation:

In addition, it is unclear what injury or injuries asserted are traceable to—i.e., caused by—the Regional Director’s decision.<sup>27</sup>

The decision by the RD will place the disputed property in trust, which will cause the aforementioned injuries. The financial and community interests mentioned above are a direct

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<sup>25</sup> *Patchak v. Salazar*, 632 F.3d 702, 706 (D.C. Cir. 2011).

<sup>26</sup> *NODs 8/19/2014* at 3 or 4.

<sup>27</sup> *Order of 11/17/2014*.

result of land being placed in trust. If the land is not put in trust, the tax base will not be affected, and the property and the people living upon that property will continue to be subject to the same ordinances and property taxes as everyone else.

**D. Vacating the Regional Director's decision will protect Appellants from being harmed.**

Reversing the illegal decision of the Regional Director will halt the transfer of the property to trust and will prevent the injury to Appellants' financial and community interests. This will fully remedy the harm that will be caused by placing this land in trust.

**E. Appellants meet the prudential standing requirement.**

Appellants "must satisfy not only Article III's standing requirements, but an additional test: The interest he asserts must be 'arguably within the zone of interests to be protected or regulated by the statute' that he says was violated."<sup>28</sup> "The prudential standing test . . . is not meant to be especially demanding."<sup>29</sup> "The benefit of any doubt goes to the plaintiff."<sup>30</sup> "The test forecloses suit only when a plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit."<sup>31</sup>

In *Patchak*, the Supreme Court specifically stated that neighbors' "interests, whether economic, environmental, or aesthetic, come within § 465's regulatory ambit."<sup>32</sup> Similarly, Appellants' financial and community interests rise well above this very low bar for prudential standing. As summed up by the Supreme Court: "If the Government had violated a statute specifically addressing how federal land can be used, no one would doubt that a neighboring

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<sup>28</sup> *Patchak*, 132 S.Ct. at 2210 (omitting citation).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Patchak*, 132 S.Ct. at 2212.

landowner would have prudential standing to bring suit to enforce the statute's limits."<sup>33</sup> That is precisely the case here. As neighbors and community members, they have a right to object to an illegal transfer that adversely affects them.

As noted by Justice Sotomayor in her lone dissent, "[a]fter today, any person may sue under the Administrative Procedure Act (APA) to divest the Federal Government of title to and possession of land held in trust for Indian tribes—relief expressly forbidden by the QTA—so long as the complaint does not assert a personal interest in the land."<sup>34</sup> While Appellants would suggest that will not always be the case, the majority decision does clearly give a neighbor and a community member standing when their economic, environmental, or aesthetic interests are adversely affected. Here, the Appellant's financial interests and community interests are adversely affected by this transfer, and thus are within the zone of interests.

#### IV. ARGUMENT

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

In erroneously determining the Tribe was under federal jurisdiction as of June, 1934, the RD noted a "long standing relationship with the federal government," "which culminated in the fact the Oneida tribe voted to accept the IRA, and in 1936 the Constitution and Bylaws for the Oneida Tribe of Indians of Wisconsin were approved."<sup>35</sup> Obviously concerned with the implications of the *Carcieri* decision, the BIA also noted that the Tribe eventually submitted, and the BIA considered, "treaties, statutes, congressional acts and reports that show a continual tribal

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<sup>33</sup> *Patchak*, 132 S.Ct. at 2211.

<sup>34</sup> *Patchak*, 132 S.Ct. at 2212 (dissent).

<sup>35</sup> NODs dated August 19 and 28, 2014, pp. 2 and 3.

existence and federal relationship with the United States government since approximately 1784.”<sup>36</sup> Nothing more was said.

What is most telling is what the NOD does not contain. It does not explain why such extremely limited contact equates to being under federal jurisdiction, and it does not discuss the true history of the Tribe, which clearly shows they were not under federal jurisdiction in 1934. A review of the implementation of the allotment process for this Tribe and the record that follows leads to the inescapable conclusion already reached by the Secretary of the Interior, the Commissioner of Indian Affairs and at least two federal courts. The Tribe and its members were not under federal jurisdiction as of 1934.

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

The Tribe immigrated to Wisconsin from New York. A treaty was signed between the United States and the First Orchard and First Christian parties, of the Oneidas of New York, on February 3, 1838.<sup>37</sup> This treaty was made pursuant to the Removal Act of 1830.<sup>38</sup> The Removal Act set the terms and limited the inherent sovereignty of the Tribes relocated to federal public lands in the West. Pursuant to this treaty, 65,400 acres were set aside for these parties in Wisconsin. By the mid to late 1800s, federal Indian policy shifted. The segregation caused by the establishment of reservations was no longer favored. Consequently, on February 8, 1887, the General Allotment Act,<sup>39</sup> generally known as the Dawes Act, was passed.

Under the Dawes Act, land then held in trust by the federal government for the collective benefit of a tribe was divided into parcels, called allotments. These allotments were then

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<sup>36</sup> NODs dated August 19 and 28, 2014, pp. 2 and 3. The submission from the Tribe, which apparently led to this conclusion, was not shared originally with the Appellants.

<sup>37</sup> Treaty with the Oneida, February 3, 1838. Appendix Exhibit 1.

<sup>38</sup> 21st Congress Sess. 1, ch. 184, 411 (May 28, 1830.)

<sup>39</sup> 24 Stat. 388, ch. 119, 25 U.S.C. 331.

assigned to individual tribal members for their use, management, and ownership. After a 25-year waiting period, the individuals were then issued patents in fee, a final act signaling the termination of federal responsibility for both the lands and the persons involved.

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

The United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee, discharged of said trust and free of all charges or encumbrances whatsoever.<sup>40</sup>

Section 6 of the Dawes Act states:

That upon the completion of said allotments, and the patenting of the land to said allottees, each and every number of the respective bands or tribes or Indians to whom allotments have been made shall have the benefit of and **be subject to the laws, both civil and criminal, of the state or territory in which they may reside....**<sup>41</sup>

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

I fail to comprehend the full import of the allotment act if it was not the purpose of Congress which passed it and the Executive whose signature made it a law ultimately to **dissolve all tribal relations** and to place each adult Indian on the broad platform of American citizenship.<sup>42</sup> (emp. added.)

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

That the emancipation of the Indian from further federal control was the purpose of Congress is so plain from the language of the act of 1887 that no argument could make it plainer. . . . The jurisdiction has been distinctly renounced by the United States, and is now clearly vested in the states.<sup>43</sup>

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<sup>40</sup> 25 U.S.C. § 5.

<sup>41</sup> 25 U.S.C. § 6.

<sup>42</sup> 1887 Annual Report of the Commissioner of Indian Affairs. Appendix Exhibit 2.

<sup>43</sup> *U.S. v. Hall*, 171 F. 214, 218 (1909). Appendix Exhibit 3.

The allotment process was advanced to its intended conclusion for the Tribe and its reservation in Wisconsin, perhaps more so than anywhere else in the country. In the 1891 annual report of the Commissioner of Indian Affairs, the Commissioner reported as follows:

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

Allotment trust patents are dated June 13, 1892. **Oneida reservation fully allotted except for 85 acres held for future Indian allotments if/as needed.**<sup>44</sup>

Federal policy supporting individual ownership of land and making Indians full citizens, subject to state and local jurisdiction, continued to progress. The 25-year waiting period, contained in the Dawes Act, was shortened by the Burke Act, for those Indians deemed “competent” by the Secretary of the Interior.<sup>45</sup> The Burke Act resulted in many fee patents being issued sooner than would have otherwise been allowed under the Dawes Act. Yet another Act, dealing specifically with the Oneida Tribe, was enacted on June 20, 1906, and authorized the Secretary of Interior to immediately issue fee patents to certain individuals who previously received trust allotments as well as to “any Indian of the Oneida reservation in Wisconsin.”<sup>46</sup>

Consequently, pursuant to the Dawes Act of 1887, the Burke Act of 1906, and the Oneida special provision of 1906, the reservation was fully allotted in fee. Consistent with this elimination of the reservation and federal jurisdiction, the Towns of Oneida and Hobart were

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<sup>44</sup> 1891 Annual Report of the Commissioner of Indian Affairs. Appendix Exhibit 4.

<sup>45</sup> 25 U.S.C. § 349, 34 Stat. 182 (1906).

<sup>46</sup> 34 Stat. 325, 380-381. The Oneida special provision was part of a larger Act, 34 Stat. 325, which also references the Stockbridge-Munsee tribe in Shawano County, Wisconsin. The portion relating to the Stockbridge-Munsees and the Oneidas are the same in that they both authorized the immediate issuance of fee patents of the former reservations to individual tribal members. In interpreting that Act, as it applied to the Stockbridge-Munsee, the 7th Circuit Court of Appeals noted that “the circumstances surrounding the Act show that Congress wanted to extinguish what remained of the reservation when it passed the Act.” *State of Wisconsin v. The Stockbridge-Munsee Community, et al.*, 554 F.3d 657, 664 (7th Cir. 2009). It distinguished the 1906 Act from other allotment Acts that required the patents to be held in trust for a period of time. When interpreting that part of the Act requiring “immediate issuance of fee patents,” the court stated “[w]hy include this peculiar provision? Because the reservation could only be abolished if the tribal members held their allotments in fee simple.” *Id.*

created, without limitation of their authority, over the former reservation lands, including those that are the subject of this appeal

## 2. The Creation of the Towns of Hobart and Oneida.

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

In their reports for the year 1903, two federal officials of the Department of the Interior reported to the Commissioner of Indian Affairs and the Secretary of the Interior that the State of Wisconsin was preparing legislation to establish the towns of Hobart and Oneida, and they did so approvingly.<sup>47</sup> These officials were J. Franklin House, the Superintendent of Indian Schools, and Joseph C. Hart, Superintendent of the Oneida School and *ex officio* sub-agent for the Oneida Indians. Both officials indicated that this development was within existing Department of the Interior policy and, in fact, Sub-Agent Hart actively worked in cooperation with state and local officials to forward the implementation of the state law creating the towns.<sup>48</sup> The Commissioner of Indian Affairs and the Secretary of the Interior, in their annual reports to the Congress, duly reported these facts without further comment and without a hint of opposition or the slightest suggestion that federal jurisdiction was being violated in any fashion.<sup>49</sup>

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

### CHAPTER 339:

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<sup>47</sup> 1903 Annual Report of the Department of the Interior. Appendix Exhibit 5.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

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

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

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

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

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

Approved May 20, 1903.<sup>50</sup>

After the law was passed allowing for the creation of towns, but before the process was finalized, in his annual report for 1904, Sub-Agent Hart reported that there was “strong feeling among the Oneida that all restrictions on the alienation of the [allotted] land should be removed, and they be **wholly relieved from [federal] government control.**”<sup>51</sup>

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

<sup>50</sup> Chapter 339, Wisconsin Laws of 1903 (May 20, 1903).

<sup>51</sup> 1904 Annual Report of the Department of the Interior. Appendix Exhibit 6.

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

This paved the way for the formal creation of the town of Hobart on March 13, 1908.<sup>52</sup> The rights of the towns were in no way limited by federal or state law because of the existence of a reservation or the presence of Oneida Indians. This was because by this time the reservation had been allotted and the tribal members were subject to the laws of the state and its local subdivisions. This complete allotment of the reservation effectively disestablished the Oneida Indian reservation in Wisconsin, as well as any federal jurisdiction.

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

The first Wisconsin federal district court case to confirm that allotments removed federal jurisdiction, on what was the Oneida Reservation, was *United States v. Hall*.<sup>53</sup> *Hall* involved an attempted federal prosecution of members of the Tribe for carrying liquor onto the Reservation in violation of federal law, prohibiting the presence of liquor on a reservation.<sup>54</sup> The defendant tribal members owned allotted land, in fee, within the original boundaries of the Oneida Reservation. The defendant tribal members challenged the jurisdiction of the federal authorities to prosecute them because they were allottees. The court agreed with the tribal members, relying primarily on the allotment policy which made tribal members subject to state law.<sup>55</sup> The court stated the following:

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

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<sup>52</sup> Incorporation of the Village of Hobart, March 13, 1908. Appendix Exhibit 7.

<sup>53</sup> 171 F. 214 (E.D. Wis. 1909).

<sup>54</sup> See generally, 25 U.S.C. § 241.

<sup>55</sup> 171 F. at 215-16.

receiving protection from the laws of the state, and being amenable thereto. Here the color line fades out.<sup>56</sup>

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

Furthermore, it is conceded in argument that a large fraction of the territory formerly known as the Oneida Reservation is owned and occupied by white men. It is conceded that the state has complete and exclusive jurisdiction over such white men. If the theory of the government here presented were to be adopted, we should have this anomalous situation: a quarter section occupied by a white man would be under the jurisdiction of the state, while the next quarter section, occupied by an allottee, would fall under the federal jurisdiction. There would be two rules of conduct, which might be entirely different, operating at the same time upon the same township, according to the complexion of the inhabitants. This amounts to a *reductio ad absurdum*.<sup>57</sup>

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

The Indian allottees are citizens of the state of Wisconsin upon an even footing with all other citizens. It is the exclusive prerogative of the state to pass and enforce laws relating to the liquor traffic which is wholly separate and apart from the jurisdiction which the federal government retains to protect and regulate the allotted [but still held in trust] lands. This jurisdiction of the state extends to all its citizens without regard to color, race, or former condition.<sup>58</sup>

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

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<sup>56</sup> 171 F. at 217.

<sup>57</sup> 171 F. at 218.

<sup>58</sup> *Id.*

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

The historical record goes on to support the conclusion the Tribe and its members were no longer under federal jurisdiction in 1934. In 1911, Henry Doxtator of West De Pere, Wisconsin, wrote a letter to Congressman Thomas F. Konop regarding his citizenship rights and asking whether or not the state had the right to tax his personal property. More specifically, he inquired into whether or not he was "still a ward of the government and exempt from personal property taxes."<sup>59</sup> Congressman Konop forwarded that inquiry to the Office of Indian Affairs. C.F. Hauke, the Second Assistant Commissioner responded by stating the following:

In the opinion of the office, any personal property acquired by Mr. Doxtator as a result of his own efforts and industry, or **any property** acquired by him from the government which has passed out of the control and supervision of the government and **over which the government asserts no jurisdiction, is taxable the same as the property of any other person situated in the state of Wisconsin.** (emphasis added.)<sup>60</sup>

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

**The Oneida Reservation has been divided into two townships with a full set of officers in each, and there is no longer any need for agency employees, except the one police private to secure attendance of witnesses at hearings and probate cases, and such other purposes as may be required.**

**The maintenance of order now devolves upon the township and county officers, and require only the cooperation of this Office.**<sup>61</sup>

The report goes on to state there are no social functions which require the supervision of the United States Indian Services, but all marriages and divorces are conducted under state law, religious work is conducted by four societies and that the Federal officers take practically no part

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<sup>59</sup> Henry Doxtator Letter to Congressman Thomas F. Konop, April 30, 1911. Appendix Exhibit 8.

<sup>60</sup> C.F. Hauke's Letter to Congressman Thomas F. Konop, May 6, 1911. Appendix Exhibit 9.

<sup>61</sup> 1912 Annual Report of the Department of the Interior. Appendix Exhibit 10.

in the supervision of the liquor traffic. "The Oneidas are all allotted citizens, and federal laws apply only to lands still in trust."<sup>62</sup> For the allotted land of the Oneida Reservation, the 25-year trust protection period, provided in the Dawes Act, ended in 1917. Therefore there could not have been any land or Indians "now under federal jurisdiction" as of 1934.

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

These laws were soon applied to this Tribe. On October 2, 1924, a warranty deed was issued from the United States to Murphy Land and Investment Company for the Oneida school, which pursuant to language contained in the deed itself, was sold pursuant to 41 Stat. 408-415.<sup>63</sup> Additionally, some farm land used in conjunction with the schools was sold pursuant to 39 Stat. 969-973, as referenced in the same deed. More specifically, the deed reads as follows:

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

a. 80 acres, being Claim 145 in Sections 2 and 4, Township 23 North, Range 19 East, 4<sup>th</sup>. P.M., in Wisconsin unceded and retained and set apart for tribal school purposes, said tract being the site of all the buildings;

b. Three tracts aggregating 38.71 acres, hereinafter more particularly described, lying within the boundaries of Oneida allotment No. 1 made to George Doxtator, acquired by the United States for farm use in connection with the said Oneida School, by purchase from the allottee; purchase and title being equivalent by deed executed by the allottee and his wife on March 20, 1903.

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<sup>62</sup> *Id.*

<sup>63</sup> Warranty Deed, October 2, 1924, United States of America to Murphy Land and Investment Company. Appendix Exhibit 11.

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

- a. Claim 145; under the Act of February 14, 1920.<sup>64</sup>
- b. 38.71 acres; under the Act of March 2, 1917.<sup>65</sup>

On October 31, 1924, the Murphy Land and Investment Company sold the 80 acres identified as Claim 145 to the Catholic Diocese of Green Bay.<sup>66</sup>

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

While the present poverty of such Oneidas is a matter of great regret, no remedy is available from the United States government. Where they are imposed upon and defrauded the office will give them such advice as it can through the Keshena superintendent, but it cannot undertake the prosecution of their cases **where the property is wholly within state jurisdiction**. The office retains an interest in the general welfare of the tribe and its individual members and appeals from them individually will always have careful attention and reply. It will always be gratified to learn that the **Indians generally and individually** are profiting by their first unfortunate experience as **citizens released from government supervision**.

Sincerely yours,  
Chas. H. Burke, Commissioner.<sup>67</sup>

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

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<sup>64</sup> 41 Stat. 408-415.

<sup>65</sup> 39 Stat. 969-973.

<sup>66</sup> Warranty Deed, October 31, 1924, Murphy Land and Investment Company to Catholic Diocese of Green Bay. Appendix Exhibit 12.

<sup>67</sup> House Congressional Record, p. 5877, March 3, 1927. Appendix Exhibit 13.

Oneidas have severed their relationship with the agency with the exception of annuity payments.”<sup>68</sup> It does not get any clearer than that.

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

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

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

As a general rule, the state game laws apply to the Indians, except when exercising their hunting or fishing privileges within their reservation on restricted tribal or allotted land [still held in trust]. There are only a few scattered tracts of tribal land on the Oneida reservation and you have no allotment of your own. **You should, therefore, obtain a license and comply with the state regulations as to season, quantity, etc., just the same as any other citizen.**<sup>69</sup>

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

Generally speaking the state game laws apply to the Indians except when exercising their hunting and fishing privileges on tribal Indian land within their

<sup>68</sup> Report of Commissioner of Indian Affairs, June 30, 1929. Appendix Exhibit 14.

<sup>69</sup> C.J. Rhoads Letter to Oscar Archiquette, November 13, 1931. Appendix Exhibit 15.

reservation or, if allotted, within the limits of their own allotments still held in trust or under restricted patents.

There are only a few small tracts of tribal Indian lands within the limits of what was formerly the Oneida Indian reservation. The ceded land to which the Indian title has been extinguished no longer belongs to the Indians, and as you have received a fee patent to your land and **the Oneida reservation has been broken up**, you would have no special hunting or fishing privileges thereon because of the fact that you are an Indian. **Under the circumstances, you should comply with the state laws and regulations as to season, license, etc.**<sup>70</sup>

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

The town has petitioned the Federal Indian Bureau at Washington DC, for \$5,000 with which to meet the emergency but the Bureau has denied the request pointing out that it is impossible to grant it because **the Oneidas are no longer government charges and therefore cannot be aided through the regular channels.**<sup>71</sup>

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

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

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

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

The report goes on to state:

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<sup>70</sup> C.J. Rhoads Letter to Chauncey Doxtator, November 19, 1931. Appendix Exhibit 16.

<sup>71</sup> De Pere Journal Article, January 8, 1931. Appendix Exhibit 17.

The Oneida Indians were listed for allotment and the roll closed May 21, 1889. Allotting followed during the next three years and the trust patents bear the date of June 13, 1892. The 25 year trust period was thus due to expire June 13, 1917.<sup>72</sup>

In 1933, William Skenadore, wrote to the Commissioner of Indian Affairs seeking assistance for Samson Cornelius Stevens, who brought suit against Brown and Outagamie Counties relating to taxation of his property. William Zimmerman, Jr., the Assistant Commissioner of Indian Affairs, wrote back noting that "Mr. Stevens was issued a fee patent for his allotment after the trust period expired in 1918 and therefore, it is our view that the **jurisdiction of the Department (Dept. of Interior) over the allotment in question terminated on the expiration of the trust period.**"<sup>73</sup>

On October 26, 1933, the Superintendent of the Keshena Indian Agency wrote to the Commissioner of Indian Affairs in Washington D.C. He stated that a non-ward Indian of Oneida blood asked to lease a piece of unallotted land on the "former Oneida reservation." The Superintendent stated "your office understands that **we have no field employee in Oneida country, neither do we have any clerk to handle Oneida affairs.**"<sup>74</sup> The fact the Keshena Agency, which previously monitored the Oneida reservation, no longer had any field agents or clerks handling Oneida affairs confirms there was nothing under federal jurisdiction in 1933.

In 1933, the Eastern District again addressed the impact of the Dawes Act. In *Stevens v. County of Brown*,<sup>75</sup> Samson Stevens, an Oneida tribal member, on behalf of himself and others, challenged the right of local governments, that had been established by the state of Wisconsin and that were within the boundaries of the original Oneida Reservation, to tax land owned by

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<sup>72</sup> Some Observations on the Results of the Allotment System Among the Oneidas of Wisconsin," dated January 24, 1933. Appendix Exhibit 18.

<sup>73</sup> William Zimmerman Letter to William Skenadore, July 24, 1933. Appendix Exhibit 19.

<sup>74</sup> Letter to Commissioner of Indian Affairs, October 26, 1933. Appendix Exhibit 20.

<sup>75</sup> (C.A. No. 307) (E.D. Wis. 10 November 3, 1933).

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

Even if it be assumed that in a treaty with the Oneida Indians many years ago, language was used which supports the contention that there was a purpose to assure the Indians perpetual immunity against the incorporation of the lands into any state or governmental subdivision of a state, **the uniform judicial recognition of the efficacy of the Dawes Act since its passage is entirely repugnant to the right of the Indians, after congressional action, to insist upon the treaty provision;** and likewise against the existence of judicial power to enforce the treaty stipulation . . . . That is to say, the congressional power is recognized as 'plenary', and not subject to review or control by the judicial department of the Government . . . . **Therefore, there is no escape from the proposition that the Government, in passing and applying the Dawes Act, but conceived itself in duty bound to carry out its provisions in the interest of the tribe and its members. Plainly, this resulted in a discontinuance of the reservation, and a recognition of the power of the state to incorporate the lands in the towns in question.**<sup>76</sup>

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

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

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<sup>76</sup> *Id.*

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

The author of the memo informed solicitor Margold that:

The foregoing section (the Burke Act of May 8, 1906, 34 Stat. 182) provides in clear and unequivocal language that when the trust period expires and when the lands have been conveyed to the Indians by patent in fee, each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the state and territory in which they reside. The fee patent divests the United States of the legal title. **The jurisdiction and authority theretofore exercised by the Secretary of the Interior by reason of the prior trust and restriction come to an end.**<sup>77</sup>

The memorandum then goes on to state:

That **the government is under no constitutional obligation to perpetually continue the relationship of guardian and ward**; that it may at any time abandon it and leave the ward to assume and be subject to all the privileges and burdens of one sui juris, and that it is for Congress to determine when and how the relationship of the guardian and ward shall be terminated. Citing *United States v. Celestine*.<sup>78</sup> Under these principles, **the power of Congress to subject the lands of the Oneidas, through the issuance of fee simple patents or otherwise, to taxation and otherwise bring these Indians within the jurisdiction of the state and its legal subdivisions, cannot be successfully challenged.**

The author of the memo then concluded that **"in the light of the facts now at hand, therefore, I am aware of no basis for intervention by the United States in the pending suit."**<sup>79</sup>

On January 31, 1934, Walter Watkins, of West De Pere, wrote to the Department of the Interior about what could be done to reclaim "the old Oneida reservation" given that "the conclusion has been reached that they are not under direct control of the gov't . . ." <sup>80</sup> Prior to responding, Harold L. Ickes, the Secretary of the Interior sent a memo to Commissioner Collier asking "what is the answer to this." Commissioner Collier responded as follows:

<sup>77</sup> Citing *Larkin v. Paugh*, 276 U.S. 431.

<sup>78</sup> 215 U.S. 279.

<sup>79</sup> Memorandum for Mr. Margold, January 16, 1934. Appendix Exhibit 21.

<sup>80</sup> January 31, 1934 correspondence of Mr. Watkins. Appendix Exhibit 22.

## MEMORANDUM FOR SECRETARY ICKES

The attached became mislaid and has just reached me. The answer to it is that the Oneidas were allotted, and through fee patenting and other allotment procedures they lost all of their land. And they are living practically unprotected and **not in any real way under Federal jurisdiction**. They are one of the groups that ought to be brought into new land as an organized community.<sup>81</sup>

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

In 1892 the usual 25 year trust patents were issued to approximately 1500 members of the Oneida tribe, embracing about 70,000 acres. Through the sales and issuance of fee patents to allottees and heirs, **practically all of these allotted lands have passed from government supervision**. Only about 20 allotments or parts of allotments, containing between 500 and 600 acres, remain under trust. In view of the unrestricted condition of these Indians' individually owned property **efforts on our part at this time to assist them in their local activities would necessarily be very limited**.

**It is reasoned that these Indians would welcome federal supervision and guidance of their affairs.**<sup>82</sup>

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

Just as conclusive as the Secretary of Interior's comments, Commissioner Collier himself confirmed, less than four months before the enactment of the IRA, that this Tribe was "**not in any real way under Federal Jurisdiction**." In *Carciere*, the court relied upon a similar letter from Commissioner Collier in which he commented on the lack of federal jurisdiction over the Narragansett Tribe. The court noted that:

<sup>81</sup> Memo dated February 26, 1934 from Commissioner Collier to Secretary Ickes. Appendix Exhibit 23.

<sup>82</sup> March 13, 1934 correspondence from Secretary Ickes to Mr. Watkins. Appendix Exhibit 24.

Commissioner Collier's responsibilities related to implementing the IRA make him an unusually persuasive source as to the meaning of the relevant statutory language and the Tribe's status under it.<sup>83</sup>

In a June 4, 1934 letter from Commissioner Collier, to Henry Doxtator, the Commissioner also stated the following:

These Indians were allotted in accordance with the provisions of the general allotment act of February 8, 1887 (24 Stat. 388), under authority of the then President issued October 16, 1889. Approximately 1500 individual selections appear on the schedule approved October 25, 1891, for which the usual 24-year trust parcels were issued in 1892. According to this schedule, these allotments embraced about 65,440.49 acres. It also further shows that around 100 acres were reserved for school, mission, and other purposes, and have since been disposed of. Practically all of this allotted land has passed from government supervision through sale and the issuance of fee patents. **For this reason, nothing could be gained through resurvey of the exterior boundary of the reservation lands. There is no way by which these lands could be restored to their former restricted status.** However, you are no doubt aware of proposed legislation now before Congress. This legislation, if enacted will permit the acquisition of lands upon which to establish Indian communities or colonies and other activities for Indian benefit.

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

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

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

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<sup>83</sup> *Carcieri v. Salazar*, 129 S.Ct. 1058, 1065 (2009).

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

Later, ... some Oneidas ... brought suit in their own names in the United States District Court, Eastern District of Wisconsin, to contest the legality of tax assessments against their lands. By letter of May 8, 1933, Skenandore requested the United States intervene in the suit on behalf of the Oneida Indians. By letter of July 24, 1933 this office advised him that **the United States did not have such an interest in the subject matter of the suit as would enable it to maintain a bill or petition for intervention.**<sup>84</sup>

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

Stadler King, a resident of the former reservation, gave this account of the problems involved in getting relief from the local authorities before the New Deal took on that task. Relief had been the obligation of the federal government through the Bureau of Indian Affairs, but from 1910 Oneida was no longer considered a reservation and the bureau had abandoned most operations and services there. By the early years of the depression the township government of Oneida was largely in the control of whites.<sup>85</sup>

In 1937, Commissioner Collier provided a list of "Indian Tribes Under the I.R.A." Notably, while the list references Oneida under the column for "Reservation or Rancheria," it is not listed as a "tribe." If there was no Oneida tribe it could not have been under federal

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<sup>84</sup> Memorandum for Mr. Daiker, August 17, 1934. Appendix Exhibit 25.

<sup>85</sup> *Oneida Lives...Long-Lost Voices of the Wisconsin Oneidas*, edited by Herbert S. Lewis, with assistance of L. Gordon McLester III, with a forward by Gerald L. Hill. Published 2005 by the University of Nebraska Press, ISBN 13: 978-0-8032-2943-3; pgs. 132-137 - "Account of Stadler King." Appendix Exhibit 26.

jurisdiction as of 1937.<sup>86</sup> Similarly, there is a reference to Stockbridge under the reservation column but not in the "tribe" column. That is because these two reservations were disestablished and the land and its occupants were no longer under federal jurisdiction. This fact was recently confirmed for the Stockbridge by the 7th Circuit Court of Appeals, which determined that reservation was abolished by the allotment process.<sup>87</sup> Unlike the Oneida and the Stockbridge, the other six Wisconsin reservations listed on the list all have a corresponding "tribe" reference. That is because those tribes still existed.

In 1937, Commissioner Collier, the principal author of the IRA, wrote to U.S. Senator Duffy about concerns the Oneida Town Board had with the IRA. In his correspondence Commissioner Collier noted the fact that, in the past, the local government, felt that it bore a disproportionate share in the cost of supporting public schools. Commissioner Collier responded as follows:

I should like to point out that the reason why the federal government did not participate to a greater extent in meeting the cost of educating Indian children, was the fact the **Oneida Indians had largely passed out of government supervision** by reason of their having been granted fee patents and having alienated the greater part of their land holdings . . . .<sup>88</sup>

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

At the time of passage of the IRA, certain Oneida Indians, realized there was no longer a tribal organization, let alone one officially recognized and under federal jurisdiction. Consequently, certain individuals took steps to artificially recreate a tribe. On September 24, 1934, a few months **after** the IRA was enacted, these individuals filed State of Wisconsin

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<sup>86</sup> Commissioner of Indian Affairs List of Indian Tribes Under the I.R.A., 1937. Appendix Exhibit 27.

<sup>87</sup> *State of Wisconsin v. The Stockbridge-Munsee Community*, No. 04-3834, 14.

<sup>88</sup> John Collier Letter to U.S. Senator F. Ryan Duffy, May 10, 1937. Appendix Exhibit 28.

Articles of Incorporation to create Oneida Indians Incorporated.<sup>89</sup> This was done for the sole purpose of creating an organization that could thereafter be recognized by the federal government as one eligible to utilize the provisions of the IRA. A review of the historical record confirms this scheme.

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

As we understand the situation **no formal recognition of the Oneida Indians, Inc. has been extended by the Department.** May we venture to suggest at this time that such formal recognition be given so that there may be no longer any question as to the character of this organization?<sup>90</sup>

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

As I read the Wheeler Howard Act a federal charter of incorporation issued by the Secretary of the Interior to the group so recognized and it seems to me that it would be only necessary to issue such a charter to the Oneida Indians Inc., recognizing their present organization as being a compliance therewith and that it would then be incumbent upon them to surrender their state charter, it having fulfilled its purpose [creating something that could be recognized] and to thereafter operate under the direction of your bureau.<sup>91</sup>

It was not only the corporation's legal counsel that believed the Tribe was not recognized or eligible to use the IRA at the time of its adoption. On November 12, 1934, Ralph Fredenberg, the Superintendent of the Keshena Indian Agency in Wisconsin, wrote a letter to the Commissioner of Indian Affairs. In that correspondence, Mr. Fredenberg references the State of

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<sup>89</sup> State of Wisconsin Articles of Incorporation. Appendix Exhibit 29.

<sup>90</sup> Attorney L. D. Jaseph to John Collier, January 7, 1935. Appendix Exhibit 30.

<sup>91</sup> *Id.*

Wisconsin's bylaws for the corporation and its State Articles of Incorporation. He stated that the Oneidas were "industriously bringing together the remnants of the Oneida tribe into some semblance of organization which is a credit to their people."<sup>92</sup> The only logical inference which can be drawn from such a statement is that prior to the IRA, there was no semblance of an organization relating to the Oneidas of Wisconsin.

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

Under date of November 12, 1934, I forwarded to your office articles of incorporation of the Oneida Indians Incorporated. I have had no acknowledgement of these articles and it seems highly desirable that the office take some action to recognize the organization as a group representing the Oneida Indians. . . .

I suggest that the Office acknowledge the existence of the Oneida Indians Incorporated, and in some definite manner make it known that the recognized group of the Oneida Indians is a group having filed papers of incorporation. It is desired at this point to call the attention of the office to the interest which is being taken by the Oneida Indians Incorporated in holding a series of meetings for the purpose of explaining the privileges which might be obtained by the Oneidas by the adoption of the Indian Reorganization Act . . . .<sup>93</sup>

On September 17, 1935, the president of the Oneida Indian state corporation, also wrote to Commissioner Collier. He indicated that "**the purpose of organizing [the tribe] under the state law is to come under the new Indian Reorganization Act at the earliest date possible.**"<sup>94</sup>

It cannot legitimately be disputed that the purpose of the state incorporation was to make the tribe appear to be an organized group, for, first, recognition, and thereafter, use of the IRA. However, even if the state incorporation process truly resulted in some sort of organization, that was eventually recognized, it all occurred well after June 18, 1934. The state incorporation did

<sup>92</sup> Ralph Fredenberg Letter to Commissioner of Indian Affairs, November 12, 1934. Appendix Exhibit 31.

<sup>93</sup> Ralph Fredenberg Letter to Commission of Indian Affairs, February 8, 1935. Appendix Exhibit 32.

<sup>94</sup> President of Oneida Nation State Corporation Letter to John Collier, September 17, 1935. Appendix Exhibit 33.

not occur until September 24, 1934.<sup>95</sup> The Tribe's federal corporate charter was not approved until April 14, 1937.<sup>96</sup>

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

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

The RD states in her decisions:

Additionally, by letter, dated April 28, 2009, and email, dated July 20, 2009, the Tribe provided supplemental information in support of their federal status through 1934. The tribal materials were reviewed, considered and made part of the record, which included copies of treaties, statutes, congressional acts and reports that show a continual tribal existence and federal relationship with the U.S. government since approximately 1784.

This was done because of concern over the *Carcieri* ruling in previous fee to trust applications. In response, the Tribe cited the 1933-1934 Annual Report of the Commissioner of Indian Affairs.<sup>97</sup>

This report estimates the number of Indians in the country. More specifically, under the Keshena Agency for Wisconsin, there is a reference to the Oneida Reservation and an estimated "Indian population" of 2,992. The Tribe argues that the introduction to the appendix "described

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<sup>95</sup> State of Wisconsin Articles of Incorporation. Appendix Exhibit 29.

<sup>96</sup> Federal Corporate Charter of the Oneida Tribe of Indians of Wisconsin, Ratified May 1, 1937. Appendix Exhibit 34.

<sup>97</sup> Administrative Record (A.R.), *Carcieri*, Vol. 2 of 2, Tab 14.

the Indians and Tribes who fell under federal jurisdiction.”<sup>98</sup> The Tribe also describes the appendix as a tabulation of the Indian population that was “at that time subject to the jurisdiction of various field agencies.”<sup>99</sup>

In reality, neither the introduction nor the appendix itself say anything whatsoever about jurisdiction. The introduction defines an Indian and the appendix lists the number of Indians. Appellants have never argued that there was no such thing as an Indian of Oneida descent in Wisconsin in 1934. It is the Appellants’ position that there was no “Tribe now under federal jurisdiction” as defined by § 479 of the IRA as interpreted by the *Carcieri* court. The fact that the appendix references a number for Oneidas in Wisconsin does not suggest the Tribe itself was under federal jurisdiction in 1934.

The Tribe then argues that the Oneida Indians referenced in the 1933-1934 Annual Report resided in the same Oneida Reservation established by the Treaty of 1838, 7 Stat. 566.<sup>100</sup> It appears the Tribe felt the need to establish a link between the Indians counted in the 1933-1934 report and the physical location of the reservation they allegedly occupied. Specifically, the Tribe references an 1891 annual report of the Commissioner of Indian Affairs which states as follows:

The Oneida Reservation, situated between the counties of Brown and Outagamie, about 45 or 50 miles in the southeasterly direction from this office, contains a little less than three townships, 65,540 acres, allotted in severalty by special agent land, which allotment was completed a little more than a year ago.<sup>101</sup>

It is not clear why the Tribe would cite the 1891 annual report given that it clearly states that the reservation was “allotted in severalty” and further states “which allotment was

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* (citing 1891 Annual Report of the Commissioner of Indian Affairs. Appendix Exhibit 4).

completed a little more than a year ago.”<sup>102</sup> This language supports the Appellants’ position that there was nothing “under federal jurisdiction” in 1934. Therefore, the Tribe’s reference to this report, which merely showed the historic boundaries of the allotted reservation, undermines its position.

The Tribe also notes that in 1934, the BIA expended Civilian Conservation Corps appropriations on the Oneida Reservation.<sup>103</sup> The Tribe’s position appears to be that the CCC appropriations could not have occurred unless the Oneida Reservation was a recognized governmental reservation “under federal jurisdiction as of 1934.” That position is unfounded. There is no basis to claim CCC funds could only be expended in an area where a Tribe under federal jurisdiction existed. CCC funds were expended across the entirety of Brown County, including areas never included in the former Oneida Indian reservation. Additionally, the Tribe did not supply any supporting documents relating to the CCC argument.

The Tribe next argues they were under federal jurisdiction because they continued to receive annuity payments pursuant to the Treaty of Canandaigua. Obviously, the Oneidas of Wisconsin did not exist in 1794 and this treaty was with the Oneidas of New York. In order for this argument to succeed, the Oneidas of Wisconsin would have to be considered one and the same with the Oneidas of New York. The Tribe cites a 2001 affidavit from Sharon Blackwell as Deputy Commissioner of the BIA in which she says the Oneidas of New York and Wisconsin are successors in interest to the 1794 treaty. However, she also says these two tribes are “distinct and separate.”<sup>104</sup>

Additionally, even if the Oneidas of Wisconsin are entitled to and are receiving annuity payments, that does not mean they were “Indians now under federal jurisdiction” pursuant to §

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<sup>102</sup> *Id.*

<sup>103</sup> A.R. Carcieri, Vol. 2, Tab 14.

<sup>104</sup> Affidavit of M. Sharon Blackwell, June 14, 2001. Appendix Exhibit 35.

479. The mere fact that the federal government could trace someone's ancestry, and potentially owed them money, does not mean that person had the sufficient blood quantum as of June 1, 1934. Because there was no existing tribal entity in June 1, 1934, the definition of Indian applies directly. The Oneida descendants were married with non-Indians before they ever left New York in 1838. If there had been a group of Indians with sufficient blood quantum as of June 1934, it would not have been necessary to create a state tribal corporation to attempt to apply the IRA to these individuals. Furthermore, the RD did not attempt to justify the use of the IRA because of any certain blood question.

The Tribe also states that in order to adopt a constitution under the IRA, "the Tribe must either be recognized and in residence on a reservation or be adult Indians unaffiliated with a recognized tribe but in residence on a reservation."<sup>105</sup> They then state that since they were eligible to organize under the IRA, they were obviously a recognized tribe in occupation of a reservation which according to their logic equates to being under federal jurisdiction.

First, this argument fails to even consider what "under federal jurisdiction" means after *Carcieri*. Second, the fact the Tribe had to organize, **after** the passage of the IRA, so it could thereafter attempt to utilize the IRA, undermines the RD's position that the Tribe was recognized and "under federal jurisdiction" by June of 1934. Additionally, the limited documentation showing that the federal government had some level of contact with the Tribe does not satisfy the requirement that the Tribe actually be under "federal jurisdiction" in 1934. The RD wrongfully equates the extremely limited "contact" with being "under federal jurisdiction."<sup>106</sup> Before 1934,

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<sup>105</sup> *Id.*

<sup>106</sup> In *Carcieri*, it was noted that the "Narragansett community and its predecessors ... existed autonomously since first contact . . ." and that at least two acres of the reservation were never relinquished, *Carcieri v. Salazar*, S.Ct. 1058, 1062 (2009). The BIA referred to the Tribe's "documented history dating from 1614" and noted that "all of the current membership are believed to be able to trace to at least one ancestor on the membership lists of the Narragansett community prepared after the 1880 Rhode Island 'detrribalization' act." *Id.* Despite these facts, it was undisputed the Narragansett Tribe was not under federal jurisdiction in 1934.

the Tribe's reservation was allotted and had ceased to exist, as did any meaningful involvement with the federal government. The 1906 Act, 34 Stat. 325, disestablished the Oneida reservation just as the 7th Circuit confirmed it did for the Stockbridge-Munsee. See *supra*, p. 7. Therefore, no one could have been "in residence on a reservation" in 1934.

In sum, Appellants do not contend there were no persons of Oneida descent living in Wisconsin in 1934. Appellants do not contend that those individuals had absolutely no contact with the federal government. What Appellants do contend, and the Secretary of Interior, the Commissioner of Indian Affairs and at least two federal judges have confirmed, is that there was no reservation or recognized tribal organization under federal jurisdiction as of 1934.

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

**...[the Oneida Tribe] is not in any real way under Federal Jurisdiction.**

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

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

**The Oneida Reservation has been divided into two townships with a full set of officers in each, and there is no longer any need for agency employees...**

**...the property is wholly within state jurisdiction...**

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

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

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

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

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

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

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

**1. Constitutional Concerns in General.**

Land taken into trust according to current regulation and case law becomes "Indian country" and is not subject to state and local taxation. Nevertheless, the local government is still required to provide services to the trust land as a result of activity on that land. Additionally, federal regulations attempt to exempt trust land from state and local land use regulation.<sup>107</sup> In addition to lost revenue and diminished control over land use, the state's civil and criminal jurisdiction may be significantly compromised where tribal land or members are involved.<sup>108</sup> Moreover, under certain conditions, tribes may conduct gaming on trust land under IGRA, an activity that creates several other significant problems.<sup>109</sup>

There are over 562 federally-recognized Indian tribes.<sup>110</sup> Several tribal acknowledgment petitions are pending at the BIA.<sup>111</sup> The number of tribes seeking to secure trust land for whatever purpose makes the issue of creating new Indian reservation or trust lands a growing and highly-controversial issue. In fact, as recently as March 2009, the United States Supreme Court weighed in on this issue. In *Hawaii v. Office of Hawaiian Affairs*, 129 S.Ct. 1436 (2009),

<sup>107</sup> 25 C.F.R. § 1.4 (2003).

<sup>108</sup> Compare *U.S. v. Stands*, 105 F.3d 1565 (8th Cir. 1997) with *U.S. v. Roberts*, 185 F.3d 1125, 1131-32 (10th Cir. 1999)

<sup>109</sup> 25 C.F.R. § 2703(4).

<sup>110</sup> Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs; Notice, 73 F.R. 18,553 (2008).

<sup>111</sup> Department of Interior, Bureau of Indian Affairs Report, *Status Summary of Acknowledgement Cases* (September 22, 2008), <[www.doi.gov/bia/docs/ofa/admin\\_docs/Status\\_Summary\\_092208.pdf](http://www.doi.gov/bia/docs/ofa/admin_docs/Status_Summary_092208.pdf)> [Last visited May 30, 2009].

the Supreme Court reviewed a Congressional Act which purported to strip the State of Hawaii of its authority to alienate its sovereign territory by passing a joint resolution to apologize for the role the United States played in overthrowing the Hawaiian Monarchy in the late nineteenth century. Relying on the Congress' joint resolution, the Supreme Court of Hawaii permanently enjoined the State from alienating certain lands pending resolution of native Hawaiian land claims that the court described as un-relinquished.<sup>112</sup> The United States Supreme Court, in reversing the Hawaii State Supreme Court, indicated this resolution would raise grave constitutional concerns if it purported to cloud Hawaii's title to its sovereign lands more than three decades after the State's admission to the union. The Court went on to state that "we have emphasized that Congress cannot, after statehood, receive or convey submerged lands that have already been bestowed upon a state."<sup>113</sup> The fact the Court invoked this fundamental interpretation of the structure of the Constitution indicates the seriousness of the constitutional question presented by the federal government asserting that land can be withdrawn from state jurisdiction and somehow converted back into federal territorial land subject to the Property Clause, Art. IV, Sec. 3, Cl. 2. As the Supreme Court unanimously concluded in *Hawaii*, once Congress has disposed of territorial land and created the new state, its exclusive power over that land ceases. To conclude otherwise would allow the Congress to potentially remove any land from state jurisdiction, effectively cancelling the creation of the state.

The loss of the State's, County's, and City's jurisdiction over the parcels more than a century after they undisputedly had jurisdiction over the land, allotted in fee and owned by non-tribal members, raises grave constitutional concerns.

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<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

It should also be noted that the Enabling Act that created the State of Wisconsin contains absolutely no limitation of the State's authority over this former reservation. There is no indication that Brown County or Green Bay's should likewise be limited.<sup>114</sup>

**2. The 10<sup>th</sup> Amendment to the United States Constitution Prohibits the Placement of Land Into Trust at the Expense of State Jurisdiction.**

The Constitution created a federal government with only specifically enumerated powers.<sup>115</sup> This constitutional structure was then further limited by the adoption of the Bill of Rights, which includes the Tenth Amendment. Under the Tenth Amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.<sup>116</sup>

The powers delegated to the federal government and those reserved to the states are mutually exclusive.<sup>117</sup> Therefore, all federal statutes must be grounded upon a power enumerated in Article I of the Constitution.<sup>118</sup> If a Congressional act lacks Article I authority, then the federal government has invaded the province of the states' reserved powers.<sup>119</sup>

James Madison wrote during the process by which the various states ratified the Constitution, that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite."<sup>120</sup> The United States Supreme Court has also stated:

Just as the separation and independence of the coordinate branches of the federal Government serves to prevent the accumulation of excessive power in any one branch, *a healthy balance of power between the States*

<sup>114</sup> In fact, the creation of the Towns of Hobart and Oneida, which are entirely within the reservation area, expressly state that they are created out of what used to be the reservation, rather than limiting local jurisdiction.

<sup>115</sup> U.S. Const., art. I, § 8.

<sup>116</sup> U.S. Const., amend. X.

<sup>117</sup> See *New York v. U.S.*, 505 U.S. 144 (1992) ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States....")

<sup>118</sup> *Id.* at 155.

<sup>119</sup> *Id.*

<sup>120</sup> THE FEDERALIST NO. 45, pp. 292 - 293 (J. Madison)(C. Rossiter, ed. 1961).

*and the Federal Government will reduce the risk of tyranny and abuse from either front.*<sup>121</sup>

It is axiomatic that Congress cannot unilaterally expand its authority, or the authority of any other branch of the federal government, with respect to the states. As the Supreme Court noted, “[s]tates are not mere political subdivisions of the United States . . . The Constitution instead leaves to the several States a residuary and inviolable sovereignty, reserved explicitly to the States by the Tenth Amendment.”<sup>122</sup> Congress cannot infringe upon the rights retained by the states under the Tenth Amendment.

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

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

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<sup>121</sup> *U.S. v. Lopez*, 514 U.S. 549, 552 (1995), quoting *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)[emphasis added].

<sup>122</sup> *New York*, 505 U.S. at 156-57 (“The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power. The benefits of this federal structure have been extensively cataloged elsewhere, but they need not concern us here. Our task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution. “The question is not what power the Federal Government ought to have but what powers in fact have been given by the people.” [citations omitted.]

The Constitution provides the federal government only limited ability to reduce the land under control of the states. Under the Enclave Clause,<sup>123</sup> congressional power is limited to establishing a federal “enclave,” land over which the federal government exercises “exclusive jurisdiction,” to that needed for “the erection of forts, magazines, arsenals, dock-yards, and other needful Buildings . . . .”<sup>124</sup> Even then, the land cannot be taken into federal jurisdiction without first obtaining the affected State’s consent.<sup>125</sup> No other provision of the Constitution provides the federal government the authority to take land from state jurisdiction.<sup>126</sup>

Various courts, including the Supreme Court, have described “Indian country” and Indian reservations as federal enclaves.<sup>127</sup> The creation of these enclaves requires the consent of the affected state. Our federal system was created upon the premise of the dual state and federal sovereignty. The lack of Constitutional authority to reduce state jurisdiction reflects the founders’ respect for the territorial jurisdiction and integrity of the states as a fundamental aspect

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<sup>123</sup> U.S. Const. art. I, § 8 (“To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings . . . .”)

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> See also U.S. Const. art. IV, § 3 (expressly prohibiting the “involuntary reduction” of the State’s sovereign territory in the creation of the new state.)

<sup>127</sup> See *U.S. v. Antelope*, 430 U.S. 641, 648 n.9 (1977); *U.S. v. Goodface*, 835 F.2d 1233, 1237, n. 5 (8th Cir. 1987)(stating that the phrase “within the exclusive jurisdiction of the United States’ in 18 U.S.C. 1153 refers to the law in force in federal enclaves, including Indian country.”); *U.S. v. Marcyes*, 557 F.2d 1361, 1364 (9th Cir. 1997); *U.S. v. Sloan*, 939 F.2d 499, 501(7th Cir. 1991), *cert denied*, 502 U.S. 1060 (1992)(tax code imposes taxes upon U.S. citizens through the nation not just in federal enclaves “such as . . . Indian reservations”). Notwithstanding this fact, the First Circuit rejected an argument that taking trust lands for Indian tribes violates the Enclave Clause. *Carcieri v. Kempthorne*, 497 F.3d 15, 40 (1st Cir. 2007), *rev. on other grounds*, *Carcieri v. Salazar*, 129 S.Ct. 1058 (2009). That Court found that the Enclave Clause is inapplicable because the taking of land into trust by the federal government for the benefit of an Indian tribe is not one of the Clauses’s enumerated permissible actions. The court also dismissed the assertion that taking land into trust by the federal government is an Enclave Clause violation because there is some sharing of jurisdictional authority between state and federal governments. *Id.* citing *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651 (1930)(“[Th]e Supreme Court offered an Indian reservation as a “typical illustration” of federally owned land that is not a federal enclave because state civil and criminal laws may still have partial application thereon.”). The First Circuit reliance on *Surplus Trading* is a gross error. That case was decided well before the Indian Reorganization Act of 1934, which created the notion of Indian trust lands, and presented other facts rendering the court’s premises unsupportable. And, the fact that States retain some jurisdiction over some matters in “Indian country” does eliminate the protection that the Enclave Clause provides to the territorial integrity of the states.

of their sovereignty. As the annals of the Constitutional convention reflect, delegates proposed and eventually adopted the Enclave Clause in the interest of safeguarding our nation's then-unique system of federalism.<sup>128</sup> To this end, the Enclave Clause grants Congress the right of exclusive legislative power over federal enclaves as prophylactic against undue state interference with the affairs of the federal government.<sup>129</sup> Yet, ever sensitive to the risk of granting the federal government unchecked power, the founders limited and balanced this grant of power by requiring state consent to the federal acquisition of land for an enclave.<sup>130</sup>

The federal government simply lacks Constitutional authority to take land from the states without the state's consent. This would include taking land into trust for Indian tribes in the area of a former reservation where representatives of the Department of Interior and, in at least two federal court cases, courts have confirmed that more than a century ago this reservation was fully allotted and under state and local jurisdiction.<sup>131</sup> The pending acquisitions would transform the land into "Indian country" under federal law and divest the state of its rightful sovereignty over the land.<sup>132</sup> Such a result is unconstitutional.

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<sup>128</sup> *Commonwealth of Va. v. Reno*, 955 F.Supp. 571, 577 (E.D. Va. 1997) *vacated on other grounds*, *Commonwealth of Va. v. Reno*, 122 F.3d 1060 (4th Cir. 1997).

<sup>129</sup> *Id.*

<sup>130</sup> As James Madison noted, many delegates expressed concern that Congress' exclusive legislation over federal enclaves would provide it with the means to "enslave any particular state by buying up its territory, and that the strongholds proposed would be a means of awing the State into an undue obedience to the [national] government." James Madison, 2 Debates in the Federal Convention, 513 (quoting Elbridge Gerry of Massachusetts). Ultimately, the delegates' apprehension about excessive federal power was allayed by requiring the national government to obtain the states' express consent to acquire and employ state property for federal purposes. *Id.*

<sup>131</sup> See the history of Tribe and the allotment process discussed *supra*.

<sup>132</sup> *U.S. v. Roberts*, 185 F.3d 1125, 1131 *cert. denied*, 529 U.S. 1108 (2000) (Tenth Cir. 1999); *U.S. v. John*, 437 U.S. 634, 648-649 (1978); *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991). Federal property acquired under the powers found in the Constitution's Property Clause, U.S. Const. art. IV, § 3, are generally subject to state laws except to the extent they are contrary to federal law. See, e.g., *Kleppe v. New Mexico*, 426 U.S. 529 (1976). When acquisitions are made by taking land into trust for Indian tribes, thereby creating "Indian country," the federal government's position is that state jurisdiction is preempted. This is based on the notion of "'semi-independent position' of Indian tribes [which gives] rise to two independent but related barriers to the assertion of state regulatory authority over tribal reservations and members." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142-143 (1980). In *White Mountain Apache*, the Supreme Court explained the two barriers are that such authority may be pre-empted by federal law and such authority may infringe upon the "right of reservation Indians to make their own laws and be ruled by them." *Id.* While the court

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

The Indian Commerce Clause<sup>133</sup> is often cited as the authority for Congressional actions with respect to Indian tribes.<sup>134</sup> Federal courts deciding Tenth Amendment challenges have often based their opinions on the false assumption that Article I provides Congress with plenary authority over all matters involving Indians, no matter how remote, indirect, or tenuous the facts of the case related to the notion of “commerce,” which is the only Constitutional authority actually granted the federal government.<sup>135</sup> Although lower courts have interpreted the Indian Commerce Clause to give Congress “plenary power . . . to deal with the special problems of Indians,” the Supreme Court has limited this assertion of plenary power.<sup>136</sup>

That limitation is appropriate. The language of the Constitution does not support the assertion of plenary authority under the Indian Commerce Clause. That clause grants the federal government authority “to regulate commerce with . . . the Indian tribes.”<sup>137</sup> In the legal and

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was referring to Indian reservations and not trust land, the federal government would expand that to all Indian Country such that the preemption is a profound displacement of state authority. The application of this federal preemption and related barriers to state regulation on any newly-acquired land for Indians has significant and immediate ramifications for a state’s authority over that land. One of the earliest Supreme Court cases stated that “the laws of [a state] can have no force” within reservation boundaries. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *See also Williams v. Lee*, 358 U.S. 217, 219 (1959). Recent Supreme Court cases continue to presume that state jurisdiction over Indian country is automatically diminished. *Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520 (“Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States”); *McClanahan v. Arizona State Tax Commission*, 411 U.S. 164, 172 (1973). Generally, absent the tribe’s consent or an express congressional authorization, a state cannot exercise certain criminal or civil jurisdiction in Indian country. *See* 25 U.S.C. §§ 1321, 1322; *McClanahan*, 411 U.S. at 171-72, (1973). As to regulatory matters, the federal courts apply a complex balancing test to determine if the state’s interests in regulating a matter outweigh the federal government’s interest in tribal self-government. *White Mountain Apache Tribe v. Bracker*, 448 U.S. at 144-5; *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973).

<sup>133</sup> U.S. Const. art I, § 8, cl. 3. “The Congress shall have the power...to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.”

<sup>134</sup> *See e.g. Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191-92 (1989); *Morton v. Mancari*, 417 U.S. 535, 551-552 (1974).

<sup>135</sup> *See e.g.*, Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENVER UNI. L. REV. 201, 217 (2007)(“Natelson”)(“When eighteenth-century English speakers wished to describe interaction with the Indians of all kinds, they referred not to Indian commerce but to Indian ‘affairs.’”).

<sup>136</sup> *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 45 (1996).

<sup>137</sup> U.S. Const. art I, § 8, cl. 3.

constitutional context, however, “commerce” means only mercantile trade.<sup>138</sup> The phrase “to regulate commerce” has long meant to administer the *lex mercatoria* (law merchant) governing purchase and sale of goods, navigation, marine insurance, commercial paper, money, and banking.<sup>139</sup> The common use of the phrase “to regulate commerce,” and similar phrases, at the time of the Constitutional Convention “almost invariably meant ‘trade with the Indians’ and nothing more . . . It was generally understood that such phrases referred to legal structures by which lawmakers governed the conduct of the merchants engaged in the Indian trade, the nature of the goods they sold, the prices charged, and similar matters.”<sup>140</sup>

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

“When eighteenth-century English speakers wished to describe interaction with the Indians of all kinds, they referred not to Indian commerce but to Indian ‘affairs.’”<sup>141</sup>

Federal documents treated “affairs” as a much broader term than “trade” or “commerce.”<sup>142</sup> An academic study of the Indian Commerce Clause states:

A 1786 congressional committee report proposed reorganization of the Department of Indian Affairs....Their report showed the department’s responsibilities as including military measures, diplomacy, and other aspects of foreign relations, as well as trade. The congressional instructions to Superintendents of Indian Affairs...clearly distinguished ‘commerce with the Indians’ from other, sometimes overlapping,

<sup>138</sup> Natelson, *supra* n. 189, at 214.

<sup>139</sup> *Id.* (“Thus, ‘commerce’ did not include manufacturing, agriculture, hunting, fishing, other land use, property ownership, religion, education, or domestic family life. This conclusion can be a surprise to no one who has read the representations of the Constitution’s advocates during the ratification debates. They explicitly maintained that all of the latter activities would be outside the sphere of federal control.”)

<sup>140</sup> *Id.* at 215-16.

<sup>141</sup> *Id.* at 216-17 (“Contemporaneous dictionaries show how different were the meanings of ‘commerce’ and ‘affairs.’ The first definition of ‘commerce’ in Francis Allen’s 1765 dictionary was ‘the exchange of commodities.’ The first definition of ‘affair’ was “[s]omething done or to be done.” Samuel Johnson’s dictionary defined “commerce” merely as “[e]xchange of one thing for another; trade; traffick.’ It described ‘affair’ as ‘[b]usiness; something to be managed or transacted.’ The 1783 edition of Nathan Bailey’s dictionary defined “commerce” as “trade or traffic; also converse, correspondence, but it defined ‘affair’ as ‘business, concern, matter, thing.’”)[citations omitted.]

<sup>142</sup> *Id.*

responsibilities. Another 1787 congressional committee report listed within the category of Indian affairs: 'making war and peace, purchasing certain tracts of their lands, fixing the boundaries between them and our people, and preventing the latter settling on lands left in possession of the former.'<sup>143</sup>

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

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

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

Congress has authority, under the Property Clause, over lands ceded by treaty or through war to the United States. This power has been interpreted as remaining in Congress until the lands are disposed of and placed under the jurisdiction of a state.<sup>144</sup> This authority to reserve federal public lands from application of state law at statehood has been consistently upheld. But the lands for the Oneida Reservation were not reserved when Wisconsin became a state.<sup>145</sup> This leads to the conclusion that § 465 of the IRA, when combined with 25 C.F.R. § 1.4, is unconstitutional. Because the RD's decision rests solely on the RD's exercise of unconstitutional authority, the Secretary cannot take the land into trust as requested by the Tribe.

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<sup>143</sup> *Id.* at 217-18.

<sup>144</sup> *Winters v. U.S.*, 207 U.S. 564 (1908)

<sup>145</sup> Federal Enabling Act for the State of Wisconsin. Appendix Exhibit 36.

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

Section 1 of the Fourteenth Amendment reads as follows:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction of the equal protection of the laws.<sup>146</sup>

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

The equality of the rights of citizens is a principle of Republicanism. Every Republican government is in duty bound to protect all of its citizens in the enjoyment of this principle, if within its powers. That duty was originally assumed by the states; and it still remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guarantees, but no more. The power of the National Government is limited to the enforcement of this guarantee.<sup>147</sup>

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

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<sup>146</sup> Fourteenth Amendment of the United States Constitution.

<sup>147</sup> *U.S. v. Cruikshank*, 92 U.S. 542, 555 (1875).

## V. CONCLUSION

The historical record could not be more clear. The Oneida Tribe was not under federal jurisdiction in 1934, as required to have land placed into trust under the IRA, as interpreted by *Carciari*. This fact has been confirmed by no less than Commissioner Collier, instrumental in the creation of the IRA, the 1934 Secretary of the Interior, Harold Ickes, and two federal judges. Additionally, even if the Tribe was eligible to utilize the IRA, it is unconstitutional as applied in this case. Placing the land into trust is impermissible in that it removes state and local jurisdiction. Because the Appellants are interested parties who have brought claims that this illegal transfer to trust adversely affects their interests, they have standing to challenge this transfer.

Based upon the foregoing, the RD's decisions to accept the land into trust must be vacated.

Dated: December 31, 2014.

Respectfully submitted,



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