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. MIDWEST REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	Docket Nos. IBIA 15-005 15-006 15-007 15-008

MOTION TO DISMISS APPEALS AND ANSWER BRIEF OF ONEIDA TRIBE OF INDIANS OF WISCONSIN

Respectfully submitted this 20th day of March, 2015.

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INTRODUCTION

This Motion to Dismiss and Answer Brief is filed by the Oneida Tribe of Indians of Wisconsin ("Tribe"), on whose behalf the Midwest Regional Director ("Regional Director") proposed to place into trust eleven (11) properties located within the exterior boundaries of the Tribe's Reservation and the City of Green Bay, Wisconsin ("properties"). Appellants David V. Dillenburg and Thomas G. Sladek are property owners within the City of Green Bay.

The Tribe moves to dismiss the appeals for Appellants' lack of standing. Appellants have the burden of proving their standing and both fail to articulate any particularized injuries or harm that would support their standing. The consolidated appeals should be dismissed for that reason and the Board need not reach Appellants' arguments on the merits.

Should the Board reach the merits, Appellants' arguments can be readily rejected because of controlling precedent which Appellants ignore. Appellants make two challenges to the Regional Director's trust decisions. First, Appellants deny that the Secretary of the Interior (and the Regional Director as her delagatee) has authority to accept land into trust for the Tribe under the Indian Reorganization Act ("IRA").[1] Citing a number of historical events and out-of-date legal precedent, Appellants argue that the Tribe was not under federal jurisdiction in 1934 within the meaning of the IRA, as construed in *Carcieri v. Salazar,* 555 U.S. 379 (2009). (Appellant's Opening Brief ("App. Opening Br.") at 9-38). Second, Appellants assert that the IRA is unconstitutional for various reasons. (App. Opening Br. at 38-48).

[1] This is the first of the eight (8) factors that the Part 151 regulations require the Secretary to consider in exercising her discretionary authority to place land in trust for an Indian tribe. 25 C.F.R. § 151.10(a). Appellants do not challenge the Secretary's decision on the other regulatory factors. They complain about the alleged impact of the proposed trust acquisitions on the local tax base and local governance, but raise these issues only in support of their alleged standing.

Appellants' first challenge fails as a matter of law. Appellants completely disregard two recent decisions that are dispositive of their arguments on this issue: first, in *Village of Hobart, Wisconsin v. Midwest Regional Director,* 57 IBIA 4 (2013), this Board ruled that the Regional Director's determination in earlier trust acquisition decisions that the Tribe was under federal jurisdiction in 1934 is correct; and second, in *Confederated Tribes of the Grand Ronde Community of Oregon v. Jewell,* ___ F.Supp.3d ___, 2014 WL 7012707 (D.D.C. 2014), the federal district court ruled that such determinations are entitled to deference. Rather than address these precedents, Appellants distort limited excerpts from the historical record, which are either legally irrelevant or insufficient to disestablish the Reservation. As a result, Appellants' arguments fail to establish that the Tribe was not under federal jurisdiction in 1934.

Appellants' second challenge regarding the constitutionality of the IRA also fails on authority of the Board's decision in *Village of Hobart.* There, the Board ruled in response to the very same arguments that those arguments are beyond the jurisdiction of the Board.[2] The Tribe responds to those arguments briefly here.

In summary, Appellants lack standing to present arguments that have, in any event, already been rejected by the Board and federal courts. The consolidated appeals should be summarily dismissed for lack of standing or rejected in short order for lack of merit.

BACKGROUND OF THE APPEALS

In 2007 and 2008, the Tribe filed applications with the Midwest Regional Office of the Bureau of Indian Affairs for the trust acquisition of eleven residential properties located within

[2] It should be noted that every challenge made here was also made in *Village of Hobart* and through the same counsel in both cases.

the boundaries of the Tribe's Reservation and in the City of Green Bay and Brown County, Wisconsin. (Administrative Record ("AR") Vol. 1, Binder 1, Tab 2; Vol. 1, Binder 2, Tab 2; Vol. 1, Binder 3, Tab 1; Vol. 1, Binder 4, Tab 6; Vol. 1, Binder 5, Tab 2; Vol. 1, Binder 6, Tab 2; Vol. 1, Binder 7, Tab 3; Vol. 1, Binder 8, Tab 2; Vol. 1, Binder 9, Tab 4; Vol. 1, Binder 10, Tab 3; Vol. 1, Binder 11, Tab 5). The Tribe owns fee title to the properties, which are referred to as the Berglin, Breyer-Riley, Bourdelais, Frelich, Gruber, Brusky, Fietz, Lemmen, Sigfred, Smith and Goral properties. The total combined acreage of the properties is 4.58 acres.[3]

As set forth in the applications, the Tribe will continue the residential uses of the properties.[4] The Berglin, Bourdelais, Gruber, Brusky, Lemmen, Sigfred and Smith properties are subject to long-term leases with tribal members. The leases are for terms of 25 years, with 25-year automatic renewal periods, and have a rental rate of $1.00 per year. (AR Vol. 1, Binder 1, Tab 2; Vol. 1, Binder 3, Tab 1; Vol. 1, Binder 8, Tab 2; Vol. 1, Binder 4, Tab 5; Vol. 1, Binder 9, Tab 11; Vol. 1, Binder 10, Tab 11; Vol. 1, Binder 11, Tab 12). The Frelich and Goral properties are rental units managed by the Tribe's Division of Land Management ("DOLM"), and are leased to tribal members. (AR Vol. 1, Binder 6, Tab 34; Vol. 1, Binder 7, Tab 31).

The Tribe has service agreements with both the City of Green Bay and Brown County. (AR Vol. 2, Tabs 3, 5). One purpose of the service agreements is to compensate the

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[3] The Berglin property contains 0.293 acres, the Beyer-Riley property contains 0.263 acres, the Bourdelais property contains 0.323 acres, the Frelich property contains 0.375 acres, the Gruber property contains 0.27 acres, the Brusky property contains 0.35 acres, the Fietz property contains 0.246 acres, the Lemmen property contains 0.68 acres, the Sigfred property contains 0.22 acres, the Smith property contains 0.36 acres, and the Goral property contains 1.20 acres.

[4] Like the applications for the other properties, the applications for the Fietz and Beyer-Riley properties reflect that the Tribe will use the properties for residential purposes, but the applications do not identify which tribal housing program will manage the properties. See discussion under Motion to Dismiss Appeals, part II.B., below.

municipalities for the cost of governmental services which they provide to trust properties, while at the same time recognizing the value of the governmental services provided by the Tribe. The service agreements accomplish this goal by utilizing a payment formula which takes into account the value of trust properties in relation to the total tax levy, and awards credits to the Tribe for services provided by the Tribe. Another purpose of the service agreements is to address jurisdictional issues relating to zoning, building, nuisance and land use regulations, and to provide a mechanism to resolve any disputes which may arise.

The Tribe sent consultation letters to the City of Green Bay, Brown County, and the State of Wisconsin regarding each property. (*See, e.g.,* AR Vol. 1, Binder 5, Tabs 7, 12). In response to these letters, the City provided relevant tax information, and stated that the "City does not foresee any zoning or land use problems or conflicts with Oneida's current use of the property." (*See, e.g.,* AR Vol. 1, Binder 3, Tabs 9, 14). Brown County did not respond to the consultation letters for the Berglin, Beyer-Riley, Bourdelais, Frelich, Gruber, Brusky, Fietz, or Goral properties. In response to consultation letters regarding the Lemmen, Sigfred and Smith properties, the County noted, "Brown County has a service agreement with Oneida for payments in lieu of taxes for real estate property. Removal of the land from the tax role [sic] does not have a fiscal impact on Brown County in regard to real estate taxes collected." (AR Vol. 1, Binder 9, Tab 7; Vol. 1, Binder 10, Tab 6; Vol. 1, Binder 11, Tab 8). With respect to municipal services and zoning, the County noted, "Any services to the lands in question are provided either by Brown County or Oneida according to the service agreements entered between Brown County and Oneida. The agreements cover services including, but not limited to, health, safety, and

welfare issues, certain zoning issues, licensing and child support services." (AR Vol. 1, Binder 9, Tab 7; Vol. 1, Binder 10, Tab 6; Vol. 1, Binder 11, Tab 8). The State did not respond to the consultation letters.

Appellants Dillenburg and Sladek sent letters to the Midwest Regional Office objecting to the proposed trust acquisitions.[5] (*See, e.g.,* AR Vol. 1, Binder 3, Tab 15; Vol. 1, Binder 9, Tab 9). They claimed standing on the basis of *Match-e-be-nash-she-wish Band of Potowatomi Indians v. Patchak*, 132 S.Ct. 2199 (2012), and asserted the Tribe was not under federal jurisdiction in 1934, and the Secretary therefore lacks authority to take land into trust for the Tribe under *Carcieri*. They also generally complained that removal of the properties from the tax rolls would increase the burden on other taxpayers, and that lack of municipal jurisdiction over the properties would lead to disputes and lower property values.

The Regional Director issued four decisions to approve the trust acquisition of the eleven properties. (AR Vol. 1, Binder 1, Tab 31; Vol. 1, Binder 8, Tab 37; Vol. 1, Binder 9, Tab 25; Vol. 1, Binder 7, Tab 49). In these decisions, she considered all of the relevant criteria under 25 C.F.R. Part 151. With respect to Appellants' objections, she determined:

1) The Tribe was under federal jurisdiction in 1934, as evidenced by its "long-standing relationship with the federal government, which culminated in the fact that the Oneida Tribe voted to accept the IRA..." (*See, e.g.,* AR Vol. 1, Binder 1, Tab 31);

[5] Appellant Dillenburg sent a letter objecting to trust acquisition of the Berglin, Beyer-Riley, Bourdelais, Frelich, Gruber, Brusky, Fietz, and Goral properties, but did not object to trust acquisition of the Lemmen, Sigfred and Smith properties. Appellant Sladek objected to all of the proposed trust acquisitions.

2) The loss of tax revenue for the City and County will be offset by payments received by them under their service agreements with the Tribe, and, as to each decision, the potential loss of tax revenue will be minimal;[6] and

3) The service agreements between the Tribe and the City and County, and the cross-deputization agreement between the Tribe and the County, address jurisdictional issues and reflect the mutual understanding of the Tribe and the City and County regarding these issues; the City does not foresee any zoning or land use problems; and trust acquisition of the properties will not alter the applicability of state criminal/prohibitory laws under Public Law 280.

MOTION TO DISMISS APPEALS

In its Order setting the briefing schedule for these consolidated appeals, the Board directed Appellants "to address the basis upon which they contend they have standing to appeal from the Regional Director's decisions." (Nov. 17, 2014 Order at 2). Appellants offer two affidavits to bolster their standing. But Appellants' claimed injuries as stated in their affidavits are too general and speculative, or unsubstantiated by the facts, and therefore fail to meet the standard set out in the Board's Order. For these reasons, the Tribe moves to dismiss the consolidated appeals.

In further support of its motion, the Tribe submits affidavits from three tribal employees who are familiar with tribal laws and practices governing its fee and trust land.[7] The Tribe's

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[6] The Berglin, Breyer-Riley, Bourdelais and Frelich properties constitute .0019% of the total tax levy; the Gruber, Brusky and Fietz properties constitute .0014% of the total tax levy; the Lemmen, Sigfred and Smith properties constitute .0015% of the total tax levy; and the Goral property constitutes .0036% of the total tax levy.

[7] The three employees are: Rebecca M. Webster, Senior Staff Attorney in the Oneida Law Office, who works with the Tribe's administrative agencies that manage the Tribe's trust and fee lands ("Webster Affidavit"); Diane Wilson, Property Manager for DOLM, who is familiar with the Tribe's policies regarding housing for tribal members on trust and fee lands ("Wilson Affidavit"); and Scott Denny, Operations Manager for the Oneida Housing Authority, who oversees the tribal housing assistance programs funded by the United States Department of Housing and Urban Development ("Denny Affidavit").

affidavits establish that the injuries Appellants claim to suffer as a result of the Regional Director's trust acquisition decisions are simply non-existent. As a result, Appellants cannot establish injury-in-fact and lack standing to challenge the Regional Director's decisions.

I. The Governing Standard Requires That Appellants Prove Actual, Particularized Injury.

The Board articulated the standard to be applied for determining whether Appellants have standing in *Preservation of Los Olivos and Preservation of Santa Ynez v. Pacific Regional Director,* 58 IBIA 278 (2014) *("POLO").* *POLO* sets out two tests, both of which Appellants must satisfy to establish standing. *Id.* at 298. First, Appellants must satisfy the three-part constitutional test for standing, i.e., a concrete and particularized injury-in-fact that is not conjectural, a causal connection between the injury and the conduct complained of, and redressability. *Id.* at 282, 292 (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992)). Second, and in addition to these "irreducible" elements of constitutional standing, *Lujan,* 504 U.S. at 560, Appellants must establish prudential standing, i.e., that their claimed injuries fall within the zone of interests of the IRA and governing regulations. *Patchak,* at 2210.

On the constitutional test for standing, this Board has been very clear that an appellant's injury must be concrete "in a personal and individual way," not one shared with the general public or community. *Friends of East Willits Valley v. Acting Pacific Regional Director,* 37 IBIA 213, 216-217 (2002). The injury must be actual and particularized to the appellant, not a third party. *DuBray v. Great Plains Regional Director,* 48 IBIA 1, 19 (2008). Further, when the appellant him or herself is not the subject of the BIA's action, standing is ordinarily more difficult to establish because any injury may depend upon the independent choices of a third

party. *POLO,* at 297. Under such circumstances, the injury cannot be redressed by the IBIA "and it makes little sense to permit an appeal or to expend the Board's limited resources." *Id.*

On the prudential standing test, the burden of proof upon the appellant is admittedly low. As the Supreme Court recently concluded, a party challenging a land-into-trust decision must only establish that his or her economic, environmental, or aesthetic interest lies within the zone protected or regulated by the statute in question. *Patchak,* at 2210. The Supreme Court held that these interests fall within the IRA zone of protection and are sufficient to support prudential standing. *Id.* at 2211-12. The parties there did not dispute the existence of such interests on the part of the plaintiff — a difficult proposition to dispute where the plaintiff was a nearby property owner to the proposed trust property which, if placed into trust, would dramatically change in use from residential to commercial, casino use. Nothing in *Patchak* suggests, though, that a plaintiff would have prudential standing where there is no change in use of the proposed trust property.

Appellants must establish both the constitutional test and prudential standing to proceed with these consolidate appeals. They cannot do so.

II. Appellants Lack Particularized, Non-speculative Injuries to Support Standing.

In their Notices of Appeal, Appellants identified themselves as "property owners within the City of Green Bay whose interests are impacted by the placing of these parcels into trust." (Notices of Appeal at 1). They also complain of "serious detrimental, social, economic and environmental effects on the local community" by placing the land into trust and the resulting "checkerboard patchwork" of governing ordinances, zoning regulations, and other laws. (Notices of Appeal at 2). In other words, the Notices of Appeal do not claim any particularized injuries

suffered by Appellants, but only allege general injury to the community as a whole. Appellants' affidavits also fail to establish particularized injuries, asserting only general and speculative injuries with one exception. The single exception, Dillenburg's claimed competitive disadvantage as a landlord, is wrong on the facts. These claimed injuries are insufficient to establish standing, particularly in light of the more substantial burden Appellants carry as third parties whose properties are not the subject of the BIA's decision. *See POLO,* at 296.[8]

A. General and Speculative Injuries

The two affidavits are, in large measure, only more elaborate statements of the general complaints made in the Notices of Appeal. Sladek and Dillenburg both attest that they bring the appeals as community members, taxpayers, and citizens who are "aggrieved by the transfer of the applicant parcels into trust." (Sladek Aff. ¶ 2; Dllenburg Aff. ¶ 2). They complain of the loss of tax revenues from the trust land, "to the detriment of myself and the rest of the community." (Sladek Aff. ¶ 5; Dllenburg Aff. ¶ 5).[9] Sladek further complains about the terms of the service agreement between the Tribe and the City of Green Bay, which in his view are inadequate to ameliorate the loss of tax revenues — a restatement of his interests as a community member and

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[8] This principle is especially important here since Appellants' complaints will not necessarily result from the Regional Director's decisions. For example, the claims regarding increase in taxes depend upon local governments taking steps to increase taxes, even in the face of service agreements that are intended to offset the loss of tax revenues from the proposed trust parcels. (Webster Aff. ¶ 7).

[9] Appellants suggest that the removal of the properties from local tax rolls alone is sufficient to provide standing to other taxpayers, citing *POLO.* (App. Opening Br. at 7). This is incorrect for two reasons. First, the Board was very clear in *POLO* that standing requires particularized injury. Simple speculation that the plaintiff *might* face higher taxes as a result of the trust acquisition is insufficient. *POLO,* at 284. Second, the Board pointed out in *POLO* that individuals there claimed an economic injury arising from direct competition with tribal trust properties in the commercial rental market, thus establishing injury-in-fact. *Id.* at 285. Nothing in *POLO* supports the notion that removal of trust land from the local tax rolls alone supports standing for Appellants here, who claim only general and purely speculative injuries.

property owner.[10] (Sladek Aff. ¶ 6). Finally, appellants complain about the inability of local governments to enforce ordinances on trust lands, which allegedly adversely affects each of them "as a community member and property owner." (Sladek Aff. ¶ 8; Dillenburg Aff. ¶ 9). In short, Appellants' affidavits assert general injuries to the community, not particularized injuries of their own. The affidavits therefore add nothing to the general injuries that the Board has already suggested are insufficient. *See POLO,* at 292; *Friends of East Willets Valley,* at 216-17.[11]

The Webster Affidavit establishes that these general injuries are also defective as purely speculative. For example, the Tribe has current service agreements with the City of Green Bay and Brown County, where the properties are located. (Webster Aff. ¶ 6). These agreements are intended to compensate the City and County for services which they provide to the Tribe's trust land, and the payment for services is calculated, in part, based upon the valuation of the trust land and the value of services provided by the Tribe. (Webster Aff. ¶ 7). The service agreements include a mechanism for adjustments so that, in the event the properties are placed into trust, the Tribe's payments under the agreements are adjusted. (Webster Aff. ¶¶ 8, 9). These facts disprove Appellants' speculation that trust acquisition of the properties will necessarily result in increased taxes upon them as taxpayers. Similarly, the Webster Affidavit establishes that there are mechanisms in the service agreement that disprove the speculation about jurisdictional

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[10] Presumably, the City of Green Bay deems the terms of the service agreement sufficient to offset the loss of tax revenues from trust acquisition of the parcels. In any event, the Board cannot alter the terms of that agreement.

[11] In an interesting bit of logic, Appellants insist that they have particularized injuries as members of the public simply because they are individual members of the community and can assert the same injuries held by the community at large: "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." (App. Opening Br. at 5). Under this view, every member of the community has particularized injury, thus eliminating altogether the need for individualized injury.

conflict due to checkerboarding. The agreements confirm the Tribe's regulatory control over trust land (including issues such as zoning, health and land use) and establish processes to resolve any disputes that may arise. (Webster Aff. ¶¶ 10, 11, 12). As a result, Appellants' interests in these regards are speculative and insufficient to support standing. *POLO,* at 283.[12]

B. Dillenburg's Alleged Injury as a Landlord

The single, particularized injury claimed in Appellants' affidavits is Dillenburg's alleged competitive disadvantage as a landlord in the vicinity of the properties. He claims that because the properties will be tax exempt if placed into trust, the Tribe will be able to charge lower rents than he can on his taxed rental properties. (Dillenburg Aff. ¶¶ 6, 7). The Wilson and Denny Affidavits submitted by the Tribe prove that Dillenburg's claimed competitive disadvantage is factually wrong.

The Denny Affidavit addresses the Beyer-Riley property. Denny establishes that this property is a low-income rental unit managed by the Oneida Housing Authority, and is subject to regulations of the United States Department of Housing and Urban Development. (Denny Aff. ¶ 11). These regulations cap the rent for the property at below market values and apply whether or not the property is held in trust. As a result, the rent for the property will not change if it is placed into trust. (Denny Aff. ¶¶ 5, 6). Dillenburg's unsubstantiated claims about negative effects on his ability to compete in the event this property is placed into trust are just incorrect.

The Wilson Affidavit addresses the other properties. The Goral and Frelich properties are managed by DOLM. (Wilson Aff. ¶ 9). They are subject to tribal law and policy that make the

[12] In the end, Appellants' claimed general injuries are more in the nature of disagreement with federal law and policy that provide for the placement of land into trust, not specific injuries caused by the trust acquisition of these specific properties. Of course, these objections are not redressable by the Board.

properties available for rent to tribal members only on a subsidized basis. The fee or trust status has no bearing on the rental rate for the properties, which will not be reduced in the event the properties are placed into trust. (Wilson Aff. ¶¶ 4, 5). The Berglin, Bourdelais, Gruber, Brusky, Fietz, Lemmen, Sigfried and Smith properties are single family homes which are part of the Tribe's Direct Real Estate and Mortgage ("DREAM") Home loan program. (Wilson Aff. ¶¶ 6, 10). Under this program, the Tribe leases fee and trust lands to tribal members for one-dollar ($1.00) per year and loans funds to the tribal member to purchase or construct improvements on the land. The leases are for terms of twenty-five (25) years, with twenty-five (25) year automatic renewal periods. These rental terms apply regardless of whether the properties are fee or trust land. (Wilson Aff. ¶ 6). The Fietz property is currently vacant and is being prepared for use as a DREAM Home. (Wilson Aff. ¶ 10).

In short, the Denny and Wilson Affidavits establish that the properties are in a wholly different market than Dillenburg's rental units. The rent for the properties is fixed by federal or tribal law below market, without regard to whether the properties are held in trust. The properties are not now, and will not be if placed into trust, in the profit-making rental market in which Dillenburg competes. Both Appellants are left, then, with nothing more than the interests of the general public, which the Board has already indicated are insufficient to support their constitutional standing.[13] For these reasons, the Tribe urges the Board to dismiss these consolidated appeals.

[13] Further, the absence of a particularized injury by either Appellant belies even prudential standing. Appellants have no economic, environmental, or aesthetic interest actually at stake here that might fall within the zone of interest regulated by the IRA. *See Patchak,* at 2210. Thus, the interests of Appellants are starkly different situation from that considered by the Court in *Patchak.* There, the Court considered

ARGUMENT ON THE MERITS

I. Standard of Review

Should the Board consider Appellants' arguments on the merits (notwithstanding Appellants' failure to demonstrate particularized injury), the applicable standard of review is not that urged by Appellants. Appellants wrongly argue that they present a legal issue, one of statutory construction, that is subject to *de novo* review. (App. Opening Br. at 2-3). Appellants suggest that, because the Department of the Interior has advocated for what Appellants call a *Carcieri* "fix," i.e., legislation that would overturn the *Carcieri* decision, the Department's determination that the Tribe meets the *Carcieri* standard is somehow a question of statutory construction subject to *de novo* review.[14]

In *Carcieri,* the Supreme Court did *not* consider the standard to be applied in determining whether a tribe was under federal jurisdiction under section 479 of the IRA. *Shawano County, Wisconsin v. Acting Midwest Regional Director,* 53 IBIA 62, 70 (2011). Rather, the Court simply held that a tribe must be under federal jurisdiction, whatever that may mean, as of 1934 rather than at the time of the trust application. *Carcieri*, at 395. As a result, the Solicitor's Office determined that the phrase under federal jurisdiction was ambiguous and adopted a two-

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a dramatic change in use — from residential use to a casino — as compared to the absence of any change in use here.

[14] This suggestion is obviously a *non sequitur.* The Department has been very clear that it supports a "fix" for *Carcieri* because it disfavors the two categories of tribes created by that decision, i.e., one category of recognized tribes that is eligible for land-into-trust and a second category of recognized tribes that is not eligible for land-into-trust, not because it now lacks authority to place land into trust for the Tribe absent some statutory 'fix.' Indeed, the Assistant Secretary – Indian Affairs specifically identified the Tribe as one under federal jurisdiction, that nonetheless faces challenges to proposed trust acquisitions under *Carcieri*, even though such challenges are "clearly unsupported by the historical record." Carcieri: Bringing Certainty to Trust Land Acquisitions, Hearing Before the Sen. Comm. on Indian Affairs, S. Hrg. 113-214 (2013) (statement of Hon. Kevin Washburn, Assistant Secretary–Indian Affairs).

part test to be used in making that determination. Cowlitz ROD, 76 Fed. Reg. 377 (Jan. 4, 2011). This two-part test has been employed by the Department in every trust application since, including to the Tribe here, and was formally adopted in the form of a Solicitor's Opinion. Sol. Op. M-37029 (March 12, 2014), 2014 WL 988828. This M-Opinion is binding upon the Board. *State of New York v. Acting Eastern Regional Director,* 58 IBIA 323, 334 n.17 (2014), citing *Chemehuevi Indian Tribe v. Western Regional Director,* 52 IBIA 192, 209 n.15 (2010) ("The Solicitor's 'M-Opinions' are binding on the Board.").[15] This standard, adopted in the Department's discretion, is also entitled to deference by courts. *Confederated Tribes of the Grand Ronde Community v. Jewell,* ___ F.3d ___, 2014 WL 7012707 (D. D.C.).[16]

This inquiry, then, is no different from the other regulatory factors that the Regional Director considers under 25 CFR Part 151 in reviewing trust acquisition requests. As the Board has repeatedly held, it is well-established those decisions are discretionary ones and the Board does not substitute its judgment for them. *Desert Water Agency v. Acting Pacific Regional Director,* 59 IBIA 119, 123 (2014); *Village of Hobart,* at 12; *Shawano County,* at 68-69; *Arizona State Land Department v. Western Regional Director,* 43 IBIA 158, 159-160 (2006). The Board only inquires whether the Regional Director gave proper consideration to all legal prerequisites, and Appellants bear the burden of proof that the Regional Director failed to do so. *See Desert Water Agency,* at 123, and cases cited therein.

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[15] In *State of New York,* the Board rejected arguments that the M-Opinion on the *Carcieri* standard was distinguishable from others and, therefore, not binding on the Board. 58 IBIA at 334 n.17.

[16] After extending deference to the Department's standard, the court in *Confederated Tribes* also examined whether the totality of evidence tipped in favor of the Department's conclusion. *Id.* at 13. This review of the historical record is not necessary here since the Tribe, unlike the Cowlitz Indian Tribe in *Confederated Tribes,* meets the bright line test of federal jurisdiction. *See* discussion below.

Even were this particular regulatory factor normally deemed a question of law subject to *de novo* review, it is not under the circumstances here. *See James Birdtail III v. Rocky Mountain Regional Director,* 45 IBIA 1, 5 (2007). As noted above, the Solicitor's Office has set out the standard to make the *Cariceri* inquiry in a formal M-Opinion, which is binding on the Board. *State of New York,* at 334 n.17. This M-Opinion concluded, among other things, that the conduct of a vote on whether to opt out of the IRA is conclusive as to the existence of federal jurisdiction over a tribe. Sol. Op. M-37029 (March 12, 2014), 2014 WL 988828, at *16. Because the Tribe meets this standard, the question raised here is not subject to *de novo* review.[17]

Should the Board find it necessary or appropriate to consider the merits, Appellants' arguments need not give the Board serious pause. The first issue — whether the Secretary has authority under the IRA to place land into trust for the Tribe — has already been addressed and decided by the Board in the Tribe's favor. The second issue — whether the IRA is unconstitutional — is beyond the Board's jurisdiction. The Regional Director's decisions to accept the properties into trust should be upheld.

II. The Board Has Already Determined That the Tribe Was Under Federal Jurisdiction in 1934 Within the Meaning of the IRA and That Decision Was Correct.

The Secretary's (and her delagatee's) authority to place land into trust for the Tribe under the IRA is the principal issue raised by Appellants; indeed, it is the *only* issue raised by them over which the Board has jurisdiction. The Board has already addressed this issue and concluded

[17] In those cases where the Department of the Interior did not conduct an opt-out vote on application of the IRA, the "brightline" test is not established and other indicia of federal jurisdiction must be examined. *State of New York,* at 331. Such cases might present mixed questions of law and fact, allowing the Board to determine whether the Department's conclusion on the under federal jurisdiction issue is supported by substantial evidence. *Id.* at 330. But Appellants essentially concede that the Tribe

that the Secretary does have authority under the IRA to place land into trust for the Tribe. *See Village of Hobart,* at 11-12. Developments in the law since the Board's decision in that case confirm the correctness of that decision. Appellants make no attempt to distinguish, or even address, this precedent. Instead, Appellants make arguments that are either legally irrelevant or insufficient to undermine the Board's earlier ruling.

A. Appellants ignore conclusive precedent holding that the Secretary has authority to place land into trust for the Tribe.

In *Village of Hobart,* the Board considered precisely the same challenge made now by Appellants. There, the Village of Hobart appealed from six trust acquisition decisions made by the BIA and consolidated on appeal, disputing (among other bases for appeal) whether the Tribe was under federal jurisdiction. Indeed, the Village made the identical arguments made by Appellants here through the same counsel. (*Compare* Appellant's Opening Brief, Docket Nos. IBIA 10-107, 10-091 and 10-092, Argument A *with* Appellants' Opening Brief, Docket Nos. IBIA 15-005, 15-006, 15-007 and 15-008, Argument A). Thus, the Board's disposition in *Village of Hobart* controls the disposition of those arguments here.

The Board there rejected the appellant's challenge to the Secretary's authority to place land into trust for the Tribe under the IRA. Citing *Shawano County,* the Board found that the following determinative events had occurred at Oneida: in 1934, a federal election was held on whether the Tribe would reject the application of the IRA; the Tribe voted not to reject the application of the IRA; in 1936, the Tribe adopted an IRA constitution which was approved by the Secretary; and the Tribe was included on the Commissioner's 1937 list of tribes that had

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meets the "brightline" standard, which makes the Regional Director's decision on that point conclusive. (App. Opening Br. at 11-12).

organized under the IRA. *Village of Hobart*, at 20-22. As the Board explained in some detail, these events were necessarily premised upon a determination by the Secretary at the time that the Tribe was then under federal jurisdiction. *Id.* at 22-24. As a result, the Board concluded that "the Tribe was under Federal jurisdiction at the time the IRA was enacted and that the Regional Director is authorized pursuant to 25 U.S.C. § 465 to take land into trust for the Tribe." *Id.* at 22.

Once this "brightline" test for determining whether a tribe was under federal jurisdiction is established, that is the end of the inquiry. *Id.* at 21. Citing *Shawano County* again, the Board observed that, even though the selectively excerpted historic record presented by Appellants confirmed the correctness of the determination, an examination of the historic record was not necessary. *Id.* at 24. This conclusive determination is binding on the Board and nothing more need be considered.[18]

B. Even Were it Necessary or Appropriate to Examine the Broader Historical Record, That Record Confirms the Correctness of the Regional Director's Decision on the Statutory Authority Factor.

The Tribe has a long and rich history of dealings with the United States, one that includes treaty relations since 1784, continuous annuity payments under the 1794 Treaty of Canandaigua, 7 Stat. 44, the exercise of supervision by BIA agents over the Tribe since its relocation to Wisconsin in the 1820's,[19] and the creation of the Tribe's Reservation in 1838. Nonetheless, Appellants insist that specific events and statements, most focused on the continued existence of

[18] Appellants do not simply ignore this earlier, conclusive decision, they go even further and insist that 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." (App. Opening Br. at 3). This is obviously wrong and it is puzzling, at the very least, since their counsel represented the appellant in *Village of Hobart* as well.

[19] In 1934, the Tribe was under the jurisdiction of the Keshena Agency of the BIA, which dutifully reported on it supervision over the Tribe for the 1933-1934 Annual Report of the Commissioner of Indian Affairs, Keshena Agency, p. 153. *See Village of Hobart,* at 20.

the Tribe's Reservation, indicate that the Tribe was not under federal jurisdiction in 1934. The fact of and circumstances surrounding allotment of the Tribe's Reservation cited by Appellants do not prove disestablishment of the Reservation, even if existence of a reservation were relevant to the existence of federal jurisdiction.[20]

First, counsel for Appellants presented precisely the same circumstances and statements on behalf of the appellant in *Village of Hobart.* (*Compare* Appellant's Opening Brief, IBIA Docket Nos. 10-091, 10-092 and 10-107, arguments A, 1-5, *with* Appellants' Opening Brief, Docket Numbers 15-005, 15-006, 15-007, and 15-008, arguments A, 1-5). The Board's analysis there, and its conclusion that these arguments were insufficient, establishes the insufficiency of the same arguments here. *Id.* at 24-25.

Second, Appellants do not really deny the existence of any federal relationship with the Tribe in 1934; any such assertion would be absurd on its face. Rather, Appellants complain about the quality of the relationship. According to Appellants, the relationship was "extremely limited" or "very limited" as of 1934, with only a "few remaining loose ends" and no remaining field agents at Oneida. (App. Opening Br. at 12, 27, 20, 24). Of course, the reduced level of federal supervision at Oneida was wholly consistent with the assimilation policy applied throughout Indian country, but this policy alone did not accomplish termination of a tribe or its reservation. *Mattz v. Arnette,* 412 U.S. 481, 496 (1973); *Seymour v. Superintendent,* 368 U.S. 351 (1962); *Donnelly v. U.S.,* 228 U.S. 243 (1913); *U.S. v. Celestine,* 215 U.S. 278 (1909). And

[20] As the Board observed in *Village of Hobart,* it is not necessary for Tribe to be in occupation of a reservation to be under federal jurisdiction. There are three categories of Indians eligible under the IRA. The existence of a reservation is necessary only for the second, not for the first category. It was the first category, i.e., those under federal jurisdiction, that was construed by the Supreme Court in *Carcieri* to

nothing in the IRA or the *Carcieri* decision requires any particular level of federal jurisdiction, only that such jurisdiction exist. As a result, Appellants' emphasis on selective snippets out of a much broader historical record is simply insufficient to carry their burden.[21]

Third, the fundamental premise of Appellants' argument, that the Oneida Reservation was wholly allotted and thereby dissolved, is factually incorrect. Appellants argue that the end of the 25-year trust period for allotments under the General Allotment Act signaled the termination of federal responsibility for a tribe and its lands. In Appellants' words, "Once the trust protection of the allotted lands did expire, the federal government lost all jurisdiction." (App. Opening Br. at 19). Appellants' own historic documents and the broader historical record demonstrate that this necessary event (under Appellants' theory) never took place at Oneida. Appellants' own documents show that at least 85 acres of the Reservation were unallotted in 1891. (*See* App. Opening Br. at 14).[22] The historical record ignored by Appellants shows that the 25-year trust period for 35 allotments on the Reservation was extended by executive orders so that the allotments remained in trust when the IRA was enacted. *See* Executive Order of President Wilson, May 19, 1917; Executive Order of President Wilson, May 4, 1918; Executive Order of President Coolidge, March 1, 1927. *Village of Hobart,* at 18. As a result, between 500 and 600 acres remained in trust for the Tribe in 1934. (App. Opening Br. at p. 27 (quoting Memorandum

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require that status as of 1934. *Id.* at 24 n.27. As a result, the existence of a reservation is not relevant to the determination of whether a tribe was under federal jurisdiction in 1934.

[21] Appellants complain that the Regional Director "does not explain why such extremely limited contact equates to being under federal jurisdiction..." (App. Opening Br. at 12). But that is not the standard on review. Simple disagreement with the Regional Director's reasoning is insufficient to carry Appellants' burden of proof. *State of New York,* at 329.

[22] There were other lands on the Reservation that were not allotted, as well. Forty acres used as an Episcopal mission were not allotted and 130 acres subject to a railroad right-of-way granted by Congress were not allotted. Act of March 3, 1871, 16 Stat. 588.

for Secretary Ickes, dated March 13, 1934)). Even were the existence of a reservation necessary, and even were the Secretary's decision to conduct an election on rejection of the IRA not sufficient on its own, the triggering event under Appellants' theory never occurred at Oneida.

Finally, upon examination, none of Appellants' other arguments on termination of the Oneida Reservation supports Appellants' conclusion. For example, the creation of the towns was not intended to take the place of the Reservation. (App. Opening Br. at 15). To the contrary, the state legislation simply provided for the creation of two townships "from the territory now embraced within the Oneida Reservation." (App. Opening Br. at 16). In addition, the old case law cited by Appellants is out-of-date and unreliable.[23] And the correspondence and other excerpted historical record cited by Appellants merely indicate diminished federal activity, not a termination of federal jurisdiction.[24]

The Regional Director took all these historical events and documents into account and concluded that the Tribe was under federal jurisdiction in 1934. The Regional Director's conclusion is the only reasonable one in light of the historical record. *Village of Hobart,* at 22-25.

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[23] In *United States v. Hall,* 171 F. 214 (E.D. Wis. 1909), the court relied on *In Re Heff,* 107 U.S. 488 (1905) and *State v. Doxtator,* 47 Wis. 278 (1879). Both these cases have been expressly overturned so that *United States v. Hall* can no longer be deemed authoritative. *See United States v. Nice,* 241 U.S. 591, 601 (1916) (expressly overruling *In Re Heff*); *State v. Rufus,* 237 N.W. 67, 75 (Wis. 1931) (indicating that *State v. Doxtator* "should no longer continue as authority"). And the holding of *Stevens v. County of Brown,* (E.D. Wis., unpublished Decision and Order dated Nov. 3, 1933), that the General Allotment Act itself terminated reservations, was flatly rejected by the Supreme Court in *Mattz* and *Seymour.*

[24] For example, Appellants make much of a statement that the Tribe was "not in any real way under Federal jurisdiction" in 1934. (App. Opening Br. at 27). As the Board has already observed regarding this document, this same language can be read to imply recognition that the Tribe was under federal jurisdiction, albeit diminished jurisdiction. *Village of Hobart,* at 25.

III. The Board Lacks Jurisdiction Over Appellants' Frivolous Constitutional Arguments.

The second issue that Appellants raise is the alleged unconstitutionality of the IRA, for various reasons. (App. Opening Br. at 38-48). Appellants identify four constitutional provisions at issue: the Tenth Amendment, the Federal Enclave provision, the Indian Commerce Clause, and the guarantee of a republican form of government.

The Board lacks authority to address these issues. It is well settled that the Board cannot adjudicate the constitutionality of statutes and regulations. *See Village of Hobart,* at 18, and cases cited therein. As a result, the Tribe does not address these issues at length.

There is no precedent in support of any of Appellants' constitutional challenges to the IRA, even in the cases cited by Appellants.[25] To the contrary, every court to consider the claimed violation of the Tenth Amendment has rejected it. *See Carcieri v. Kempthorne,* 497 F.3d 15, 39-40 (1st Cir. 2007), rev'd on other grounds, 555 U.S. 479; and *City of Rosedale v. Norton,* 219 F. Supp. 2d 130, 154 (D. D.C. 2002). Indian lands do not constitute federal enclaves, as even the cases cited by Appellants indicate.[26] Because of the distinction between Indian lands and federal enclaves, "Congress also has the power to create tribal rights within a State without the State's consent." *Kansas v. United States,* 249 F.3d 1213, 1229 (10th Cir. 2001); *City of Rosedale,* at 150. And the setting aside of Indian lands neither exceeds Congress' authority under the Indian

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[25] Appellants cite *Hawaii v. Office of Hawaiian Affairs,* 556 U.S. 163 (2009), in support of the proposition that Congress cannot deprive states and local governments of jurisdiction over trust land. (App. Opening Br. at 38). But that decision has nothing to do with the IRA or trust land. Instead, it was a statutory construction case involving another statute and is simply irrelevant here.

[26] For example, in *United States v. Antelope,* 430 U.S. 641 (1977), the Supreme Court indicated that federal criminal statutes apply to Indian country, just as they do in federal enclaves. But the Court also went on to point out that Indian reservations differ in certain respects from federal enclaves. 430 U.S. at 648 n.9.

Commerce Clause nor violates the guarantee of a republican form of government for the states. *Seminole Tribe of Florida v. Florida,* 517 U.S. 44, 62 (1996) ("This is clear enough from the fact that the States still exercise some authority over interstate trade but have been divested of virtually all authority over Indian commerce and Indian tribes."); *City of Lincoln City v. U.S. Dept. of Interior,* 229 F.Supp.2d 1109, 1117 (D. Ore. 2002) (trust lands do not violate states' republican form of government). In short, there is no merit to Appellants' constitutional challenges to the IRA.

CONCLUSION

The Tribe urges the Board to immediately dismiss these consolidated appeals because Appellants lack standing. On the merits of their appeals, Appellants present nothing new or substantive for the Board's consideration. Every issue they raise has either already been rejected by the Board or is beyond the Board's jurisdiction. The Regional Director's decisions to place the subject land into trust should be affirmed.

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