

No. 11-2217

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

—————
COUNTY OF CHARLES MIX,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,
Defendants-Appellees.

—————
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

—————
BRIEF FOR THE APPELLEES

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SUMMARY OF CASE AND REQUEST FOR ORAL ARGUMENT

This case arises out of a decision by the Secretary of the Interior (“Secretary” or “Interior”) to accept into trust status a parcel of tribally-owned fee land, known as the “Travel Plaza,” for the benefit of the Yankton Sioux Tribe (“the Tribe”) pursuant to § 5 of the Indian Reorganization Act (“IRA”), 25 U.S.C. § 465. The Bureau of Indian Affairs (“BIA”) granted the Tribe’s request that the Travel Plaza be taken into trust, and the BIA’s decision was affirmed by the Interior Board of Indian Appeals (“IBIA”). The IBIA’s decision is the final decision of the Secretary. The County of Charles Mix (“the County”) then challenged the IBIA’s decision in a perfunctory manner on numerous constitutional and other grounds in the district court, all of which were rejected.

On appeal, the County principally contends, again in a perfunctory fashion, that § 5 of the IRA is unconstitutional on various grounds; that the Tribal committee which submitted the trust request for the Travel Plaza lacked authority to do so under Tribal law; and that the Secretary’s decision to take the Travel Plaza into trust was arbitrary and capricious under the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2)(A). We also request oral argument and believe that 15 minutes per side should be sufficient to answer any questions the Court may have.

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STATEMENT OF JURISDICTION

The district court possessed jurisdiction of this action under 28 U.S.C. § 1331 (federal question). The district court entered final judgment on April 4, 2011. Appellant's Appendix ("A") 17. The County filed a timely notice of appeal on June 1, 2011. A 4 (doc. 18). Fed. R. App. P. 4(a)(1)(B). This Court's jurisdiction rests on 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

In 2004, an acting superintendent of the BIA approved a request by the Tribe that the Secretary take the Travel Plaza into trust for the Tribe under § 5 of the IRA, 25 U.S.C. § 465. In 2007, the BIA's acting Regional Director affirmed the superintendent's decision. In 2009, the IBIA affirmed the acting Regional Director's decision. In 2011, the district court upheld the IBIA's decision, rejecting numerous perfunctory constitutional and other arguments raised by the County.

The issues are:

I. Whether the County has waived its principal issues on appeal by presenting them in a perfunctory and undeveloped manner in its opening brief. *United States v. McAdory*, 501 F.3d 868 (8th Cir. 2007); *Watson v. O'Neill*, 365 F.3d 609 (8th Cir. 2004).

II. Whether § 5 of the IRA, 25 U.S.C. § 465, is unconstitutional under the nondelegation doctrine – a contention that this Court has already squarely rejected. *South Dakota v. U.S. Dep’t of the Interior*, 423 F.3d 790 (8th Cir. 2005) (“*South Dakota II*”), cert. denied, 549 U.S. 813 (2006); *South Dakota v. U.S. Dep’t of the Interior*, 487 F.3d 548 (8th Cir. 2007) (“*South Dakota IV*”).

III. If this case actually presents the question, whether § 5 of the IRA is unconstitutional under the Tenth Amendment as applied “in an off-reservation area.” U.S. Const. amend. X; *United States v. Lara*, 541 U.S. 193 (2004); *Worcester v. Georgia*, 31 U.S. 515 (1832); *Means v. Wilson*, 522 F.2d 833 (8th Cir. 1975).

IV. If the question is justiciable, whether § 5 of the IRA is unconstitutional under the Guarantee Clause as applied to the Travel Plaza trust acquisition. U.S. Const. art. IV, § 4; *Baker v. Carr*, 369 U.S. 186 (1962); *Duncan v. McCall*, 139 U.S. 449 (1891).

V. If the County possesses prudential standing to challenge a Tribal committee’s authority under the Tribe’s bylaws, whether the district court had jurisdiction to decide a question of tribal law, *i.e.*, the Tribal committee’s authority under the Tribe’s bylaws to request that the Secretary take the Travel Plaza into trust. *In re Sac & Fox Tribe of Miss. Casino Litig.*, 340 F.3d 749 (8th Cir. 2003); *Runs After v. United States*, 766 F.2d 347 (8th Cir. 1985).

VI. Whether the Secretary's decision to take the Travel Plaza into trust was arbitrary and capricious under the APA. 5 U.S.C. § 706(2)(A); *South Dakota II*, 423 F.3d 790; *Voyageurs Nat. Park Ass'n v. Norton*, 381 F.3d 759 (8th Cir. 2004).

STATEMENT OF THE CASE

A. Nature of the case and proceedings below

Before the district court, the County raised numerous constitutional challenges to § 5 of the IRA, 25 U.S.C. § 465, and also contended, *inter alia*, that the Secretary's decision to accept the Travel Plaza into trust for the Tribe was arbitrary and capricious under the APA, 5 U.S.C. § 706(2)(A). A 18-33 (complaint). Ruling on cross-motions for summary judgment, the district court rejected all of the County's claims in a comprehensive opinion, and entered summary judgment in favor of the Secretary. A 5-16.

At the outset of its opinion, the district court found – with evident dissatisfaction – that the County's brief in support of its motion for summary judgment was “seven pages in length, and outlined Plaintiff's arguments in a very conclusory manner without directing the Court to specific facts to support the Plaintiff's assertions.” A 6. This appeal followed.

In this Court, the County continues the same “very conclusory manner” of briefing that was noted with palpable disfavor by the district court. On appeal, the

County's opening brief nominally presents the following principal contentions: that § 5 of the IRA is unconstitutional under the nondelegation doctrine, under the Tenth Amendment as applied "in an off-reservation area," and under the Guarantee Clause as applied to the Travel Plaza trust acquisition (Brief 7-10); that the Tribal committee which requested the Secretary to take the Travel Plaza into trust lacked authority under the Tribe's bylaws to do so (*id.* at 14-15); and that the Secretary's decision in this case was arbitrary and capricious under the APA, 5 U.S.C. § 706(2)(A) (*id.* at 15-16). On this basis, the County asks the Court to award it summary judgment or, alternatively, to remand the matter to the Secretary for further consideration. *Id.* at 16-17.

B. Statutory and regulatory background

In this section, we provide a synopsis of the statutory and regulatory principles applicable to decisions by the Secretary to take land into trust on behalf of Indian tribes under § 5 of the IRA. This synopsis will provide background for our discussion of the County's various perfunctory constitutional and other claims.

1. Indian Reorganization Act

Section 5 of the IRA, 25 U.S.C. § 465, authorizes the Secretary of the Interior, "in his discretion, to acquire * * * any interest in lands * * * for the purpose of providing land for Indians." Section 5 further provides that any such lands acquired

by the Secretary “shall be taken in the name of the United States in trust for the Indian tribe or individual Indian,” and “shall be exempt from State and local taxation.” *Id.* See generally *South Dakota II*, 423 F.3d at 797-99; *Chase v. McMasters*, 573 F.2d 1011, 1014, 1016 (8th Cir. 1978). It is well settled in this Court that § 5 of the IRA does not violate the nondelegation doctrine. *South Dakota IV*, 487 F.3d at 551; *South Dakota II*, 423 F.3d at 799.

Congress enacted the IRA in 1934 in response to the “failure” of its earlier allotment policy, reflected in the General Allotment Act, 24 Stat. 388 (1887). *Hodel v. Irving*, 481 U.S. 704, 708 (1987). “The objectives of allotment were simple and clear cut: to extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large.” *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 254 (1992).

The allotment policy “proved disastrous for the Indians.” *Hodel*, 481 U.S. at 707; see *Hagen v. Utah*, 510 U.S. 399, 425 n.5 (1994) (Blackmun, J., dissenting) (noting, *inter alia*, that “[t]he 138 million acres held exclusively by Indians in 1887 when the General Allotment Act was passed had been reduced to 52 million acres by 1934”). That policy came to an “abrupt end” in 1934 with the passage of the IRA, which marked a return to “the principles of tribal self-determination and self-

governance” that had characterized the pre-General Allotment Act era. *County of Yakima*, 502 U.S. at 255.

The “overriding purpose” of the IRA is to “establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically.” *Morton v. Mancari*, 417 U.S. 535, 542 (1974). The IRA seeks “to rehabilitate the Indian’s economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism.” *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quoting H.R. Rep. No. 1804, at 6 (1934)). *See id.* at 151 (IRA is “aimed to put a halt to the loss of tribal lands through allotment”). *See also South Dakota II*, 423 F.3d at 799 (noting the “statutory aims of providing lands sufficient to enable Indians to achieve self-support and ameliorating the damage resulting from the prior allotment policy”).

The IRA has two central goals: first, “to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes’ acquisition of additional acreage and repurchase of former tribal domains”; and second, “to enable the tribe to interact with and adapt to modern society as a governmental unit.” Felix Cohen, *Handbook of Federal Indian Law* 86 (2005 ed.). Accordingly, among other things, the IRA expressly discontinued the allotment program (IRA § 1, 25 U.S.C. § 461), and extended indefinitely the periods of the federal government’s

trust with respect to Indian lands (IRA § 2, 25 U.S.C. § 462). *See Chase*, 573 F.2d at 1016. As noted above, IRA § 5, 25 U.S.C. § 465, authorizes the Secretary, in his discretion, to acquire land in trust on behalf of Indian tribes or individual Indians. By authorizing new trust acquisitions, § 5 allows the Secretary to restore or replace the lands and related economic opportunities that were lost through the allotment and other governmental policies. *See Mescalero Apache Tribe*, 411 U.S. at 151; *South Dakota IV*, 487 F.3d at 552; *South Dakota II*, 423 F.3d at 798.

2. Interior's Part 151 regulations

Interior's regulations at 25 C.F.R. Part 151 establish procedures and substantive criteria to govern the Secretary's exercise of discretionary authority to acquire land in trust for Indian tribes and individual Indians. 25 C.F.R. § 151.1. A tribe wishing to have land taken into trust must file a written request with the Secretary that sets forth certain information. *Id.* § 151.9. The Secretary then notifies the state and local governments having regulatory jurisdiction over the land proposed to be acquired in trust and provides them with a 30-day comment period. *Id.* § 151.10.

The Part 151 regulations state a general policy regarding trust acquisitions (*id.* § 151.3) and specify particular factors that guide the Secretary's review of land acquisition requests (*id.* § 151.10(a)-(h)). Those factors include (*inter alia*): the need

for additional land; the purposes for which the land will be used; the impact on the state and its political subdivisions resulting from removal of the land from the tax rolls; and jurisdictional problems and potential conflicts of land use which may arise. *Id.* § 151.10(b), (c), (e), (f).¹

After reviewing a request, the Secretary notifies the applicant of his decision in writing. *Id.* § 151.12(a). The Secretary provides public notice of a final administrative decision to acquire land into trust at least thirty days before the formal transfer of title to the United States. *Id.* § 151.12(b). This procedure permits judicial review of the Secretary's decision before transfer of title to the United States. *See* 61 Fed. Reg. 18,082, 18,082 (Apr. 24, 1996).

3. Secretary's delegation of authority; administrative appeals

With exceptions not relevant here, generally speaking, the Secretary has delegated his authority to take land into trust for Indian tribes to BIA's Regional Directors. *See Choctaw Nation of Florida*, 50 I.B.I.A. 335, 337 (2009). In BIA's Great Plains Region, where this case arose, the Regional Director has delegated that authority to the superintendents. A 219; *see* 3 Indian Affairs Manual, Great Plains

¹ The provisions in 25 C.F.R. § 151.10 apply to on-reservation acquisitions. Partially overlapping but distinct provisions applicable to off-reservation acquisitions are in 25 C.F.R. § 151.11. In this case, Interior treated the Tribe's trust request as an on-reservation acquisition. A 44-45.

Regional Addendum 4.4, § 3.1(O)(4)(a)(8) (Regional Director’s delegation of authority to Agency Superintendents to approve “on reservation fee to trust transactions”).²

Interior’s appeal regulations permit an interested party claiming to be adversely affected by the decision of a BIA official (such as a superintendent) to appeal that decision to a Regional Director. 25 C.F.R. §§ 2.2, 2.4(a).³ On appeal, the Regional Director affords plenary review of a tribe’s application that land be taken into trust. *See Jackson County, Oregon*, 31 I.B.I.A. 126, 133 (1997) (Regional Director “has full authority to reverse the subordinate’s decision”).

Interior’s regulations also permit an appeal of a Regional Director’s decision to the IBIA. 25 C.F.R. § 2.4(e); *see* 43 C.F.R. § 4.331. With exceptions not relevant here, the IBIA issues the final decision for the Secretary on appeals of administrative actions of BIA officials. 43 C.F.R. § 4.1(b)(2).

² BIA’s Great Plains Region consists of North Dakota, South Dakota, and Nebraska.

³ Some of Interior’s appeal regulations refer to “Area Director.” The title of that position has since been changed to “Regional Director.” *California Valley Miwok Tribe*, 51 I.B.I.A. 103, 118 n.11 (2010).

C. Statement of facts

1. **Historical background.** “At the outset of the 19th century, the Yankton Sioux Tribe held exclusive dominion over 13 million acres of land between the Des Moines and Missouri Rivers, near the boundary that currently divides North and South Dakota. In 1858, the Yanktons entered into a treaty with the United States renouncing their claim to more than 11 million acres of their aboriginal lands in the north-central plains.” *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 333-34 (1998) (citation omitted).⁴ As this Court has explained, over the next 150 years, “the 11,000,000 acre domain once assigned to the tribe was successively fragmented and dramatically reduced in size: first to roughly 430,400 acres in 1858 and then to 262,300 acres in 1894.” *Yankton Sioux Tribe v. Podhradsky*, 606 F.3d 994, 1002 (8th Cir. 2010), *cert. denied*, 131 S. Ct. 3024 (2011).

Today, the Tribe’s lands have been reduced to approximately 37,000 acres, which are held in trust by the United States. A 53. *See Podhradsky*, 606 F.3d at 1002. Between 1997 and 2007, no additional land was brought into trust to meet the Tribe’s needs, notwithstanding that the Tribe’s population increased by 15% during that period. A 83. As this Court has noted, “[w]hatever the size of the remaining

⁴ The Tribe is federally recognized. 74 Fed. Reg. 40,218, 40,222 (Aug. 11, 2009) (col. 1).

reservation lands, * * * they have continuing relevance and importance to the Yankton Sioux Tribe as a touchstone linking tribal members with each other and with their common culture, history, and heritage.” *Podhradsky*, 606 F.3d at 1002.⁵

2. The Tribe’s trust request. The subject parcel of land, known as the Travel Plaza, is located in County of Charles Mix, South Dakota. A 6. This parcel is 39 acres in size and was purchased by the Tribe from private parties in 1992. A 43 n.1. The Tribe currently uses the Travel Plaza for a gas station, a convenience store, and agricultural leasing. A 6, A 43. On March 1, 2004, the Tribe’s Business & Claims Committee (hereafter, “Committee”) enacted a resolution requesting the BIA to accept the Travel Plaza property into trust for the Tribe. A 6. The resolution stated that the Committee was responsible for providing economic development for the Tribe and its members, and that the uses of the Travel Plaza would remain the same should the BIA take the property into trust status. *Id.*

In compliance with 25 C.F.R. § 151.10 (*supra* at 7), on March 19, 2004, BIA superintendent Timothy Lake sent a letter to the County, the State of South Dakota,

⁵ Although irrelevant to this appeal, the County erroneously contends that in *Podhradsky*, this Court made a ruling to the effect that the Tribe’s reservation has been “disestablished.” Brief 5. At the outset of its opinion in *Podhradsky*, the Court explained that “[i]n an earlier stage of the case we held that the Tribe’s 1894 cession of certain land to the United States had diminished, *rather than disestablished*, the reservation and that some land retained reservation status.” 606 F.3d at 997 (emphasis added).

White Swan Township, and the Wagner Community School District notifying them that the BIA had received the Tribe's trust request for the Travel Plaza and was considering it. A 6, A 218-219. Lake's letter invited comments on the proposed trust acquisition and identified five specific matters on which the BIA sought input. A 218. The County and the State submitted comments opposing the Tribe's request. A 6.

D. Agency proceedings

1. **The acting superintendent's decision.** On August 26, 2004, acting superintendent Donalene Orozco issued a decision letter addressing the Tribe's trust request for the Travel Plaza. Applying the regulatory factors in 25 C.F.R. § 151.10, Orozco concluded that "it is my intent to take the land into trust for the benefit of the Tribe." A 250. For example, she found that: (a) "[t]he need for this acquisition is to assist the Tribe in maintaining its cultural, social and health programs through economic development"; (b) "[t]his business will enhance job opportunities to both tribal members and non-tribal members"; and (c) "[w]e foresee no potential conflicts in land use, as the land will continue to be utilized as a convenience store and/or business site by the Tribe." A 249-250. As permitted by Interior's regulations (*supra* at 9), the County and the State appealed Orozco's decision to the Regional Director. A 6.

2. The acting Regional Director's decision. On February 16, 2005, before ruling on the appeal, the Regional Director requested certain additional information from the County, the State, and the superintendent. A 48-49. After receiving and considering that information, acting Regional Director Roy A. Pulfrey issued a decision letter on May 22, 2007 upholding acting superintendent Orozco's decision to take the Travel Plaza into trust on behalf of the Tribe. A 6, A 82-93. Pulfrey concluded that "this trust acquisition meets the requirements" of 25 C.F.R. § 151.10. A 93. For example, he found that: (a) "[t]his trust land will provide for business economic development and self-determination for the Tribe and its members in association with the convenience mart"; (b) "this trust acquisition will promote tribal self-determination by allowing the Tribe to operate its own tribally-owned business on the subject lands"; and (c) "removal of this property from the County tax base will have a minimal affect [sic] on the County, City and State governments." A 92-93. As permitted by Interior's regulations (*supra* at 9), the County and the State appealed Pulfrey's decision to the IBIA. A 6.

3. The IBIA's decision. On April 30, 2009, the IBIA issued a comprehensive opinion affirming the acting Regional Director's decision. A 43-60. The IBIA concluded that the acting Regional Director "considered each of the relevant factors

in 25 C.F.R. § 151.10,” and that “his decision represents a reasonable exercise of his discretion.” A 59.

E. The District Court’s decision

The County (but not the State) then sought judicial review of the Secretary’s final decision (*i.e.*, the IBIA’s decision) in the United States District Court for the District of South Dakota. A 18-33 (complaint). Ruling on cross-motions for summary judgment, the district court rejected the County’s challenges to the Secretary’s decision to take the Travel Plaza into trust for the Tribe, and granted summary judgment in favor of the Secretary. A 5-16.

First, the district court rejected the County’s various perfunctory challenges to the constitutionality of § 5 of the IRA, 25 U.S.C. § 465. A 7-10. As relevant here, the court held that § 5 is “not an unconstitutional delegation of legislative authority.” A 8. Judge Lange noted that this Court had “specifically addressed this argument” in *South Dakota II*, 423 F.3d 790, which rejected the contention that IRA § 5 “failed to delineate any boundaries governing the Secretary’s trust acquisition decisions.” A 7. The district court also held that “[b]ecause the Secretary’s authority to accept land into trust for Indians flows from power delegated to Congress by the Constitution, Section 5 of the IRA does not violate the Tenth Amendment.” A 8. The court further held that the County’s Guarantee Clause challenge to IRA § 5

“presents a non-justiciable political question”; and that, even if the claim were justiciable, IRA § 5 “does not violate the Guarantee Clause,” which guarantees to every State “a republican form of government.” A 9.

Next, the district court rejected the County’s various perfunctory challenges to the Secretary’s decision to take the Travel Plaza into trust on behalf of the Tribe. A 10-16. As relevant here, the court held that whether the Committee had authority under tribal law to request that the Travel Plaza be taken into trust is “a question for the Tribe and not for this Court to resolve.” A 11. In this regard, the court noted that the applicable Part 151 regulation, 25 C.F.R. § 151.9, “contains no mention of any requirement that the Tribe in a Tribal Council of all members, as opposed to the Committee, be the entity requesting that land be taken into trust.” A 11. Finally, the court held that “[t]he BIA’s analysis of the Part 151 factors was not arbitrary, capricious, or an abuse of discretion” under the APA. A 16. The County’s appeal followed.⁶

⁶ As the County notes, on July 29, 2011, after it had filed its notice of appeal, the BIA prematurely approved a deed conveying the Travel Plaza to the United States in trust for the Tribe. Brief 4. However, Interior subsequently corrected that inadvertent error. Interior’s general policy is to await the outcome of judicial review before formally transferring title of land in trust to the United States on behalf of an Indian tribe. *See supra* at 8. As documents included in the addendum to this brief indicate, Interior withdrew its premature approval of the Travel Plaza deed on September 12, 2011, and the BIA faxed a copy of the withdrawal to the County’s register of deeds
(continued...)

STANDARD OF REVIEW

A grant of summary judgment is reviewed *de novo*. *Kaufmann v. Siemens Medical Solutions USA, Inc.*, 638 F.3d 840, 843 (8th Cir. 2011). Questions of federal constitutional law are reviewed *de novo*. *United States v. Nash*, 627 F.3d 693, 696 (8th Cir. 2010). Courts apply a presumption that an act of Congress is constitutional. *Fairbank v. United States*, 181 U.S. 283, 285 (1901).

Under the APA, 5 U.S.C. § 706(2)(A), judicial review of an agency’s decision is “limited”; courts are “only permitted to set aside agency action that is ‘arbitrary, capricious, * * * an abuse of discretion, or otherwise not in accordance with law.’” *Voyageurs*, 381 F.3d at 763. That standard of review “requires that [this Court] give ‘agency decisions a high degree of deference.’” *Id.* (quoting *Sierra Club v. EPA*, 252 F.3d 943, 947 (8th Cir. 2001)). The Court asks “whether the agency articulate[d] a rational connection between the facts found and the choice made.” *South Dakota II*, 423 F.3d at 799 (internal quotation marks omitted). “If an agency’s determination is supportable on any rational basis, [this Court] must uphold it.” *Voyageurs*, 381 F.3d at 763. And “[t]his is especially true when an agency is acting within its own sphere of expertise.” *Id.* In addition, when applying an agency regulation, this Court affords

⁶(...continued)
on September 20, 2011. A copy of these documents was provided to counsel for the County on September 23, 2011.

“substantial deference to an agency’s interpretation of its own regulation.” *South Dakota II*, 423 F.3d at 799.

SUMMARY OF ARGUMENT

I. The County has waived the principal issues nominally presented in its opening brief by addressing them in an undeveloped and perfunctory manner in that brief with no citation to legal authority. To the extent that the County’s opening brief preserves issues for appeal, the County’s arguments wholly lack merit.

II. In *South Dakota II*, a panel of this Court rejected the claim that IRA § 5, 25 U.S.C. § 465, is unconstitutional under the nondelegation doctrine. Absent intervening Supreme Court precedent that otherwise may justify revisiting the prior panel’s holding in *South Dakota II* – and the County cites none – this panel is bound by *South Dakota II*. Inexplicably, the County does not address (or even acknowledge) *South Dakota II*’s holding that IRA § 5 does not violate the nondelegation doctrine.

III. This case does not present the question of whether IRA § 5 violates the Tenth Amendment “in an off-reservation area” because the Secretary treated the Travel Plaza trust acquisition as an *on-reservation* acquisition under Interior’s Part 151 regulations, 25 C.F.R. § 151.10. The County does not argue that the Secretary erred in treating the Travel Plaza as an on-reservation acquisition, as

distinguished from an off-reservation acquisition, which is governed by distinct Part 151 regulations. In any event, as to either type of trust acquisition, IRA § 5 does not contravene the Tenth Amendment because the Indian Commerce Clause is a plenary constitutional delegation of power to Congress to legislate in the field of Indian affairs. The County provides no contrary authority.

IV. Under settled law, whether IRA § 5 violates the Guarantee Clause is not a justiciable question. Even if the question were justiciable, § 5 does not violate the Guarantee Clause as applied to the Travel Plaza trust acquisition. That acquisition has no effect on the distinguishing feature of a “republican form of government” – that is, the right of the people to choose their own officers for governmental administration and to pass their own laws. Again, the County provides no contrary authority.

V. The County lacks prudential standing to assert a claim that, under a particular Tribal bylaw, the Committee did not have authority to enact the March 1, 2004 resolution requesting the Secretary to take the Travel Plaza into trust for the Tribe. Moreover, the district court properly followed precedent of this Court in holding that it lacked jurisdiction to decide that question of Tribal law. The County does not acknowledge or address the district court’s jurisdictional ruling, thus effectively conceding the point.

VI. The Secretary's decision to take the Travel Plaza into trust for the Tribe was not arbitrary and capricious under the APA. Although the County argues that the Secretary improperly evaluated four of the regulatory factors in 25 C.F.R. § 151.10, that argument is thoroughly discredited by the administrative record, as the district court correctly concluded. Again, the County provides no meaningful argument in support of its APA claim, and instead merely offers an unexplained smattering of citations to the administrative record.

ARGUMENT

I. THE COUNTY HAS WAIVED ITS PRINCIPAL ISSUES ON APPEAL BY PRESENTING THEM IN AN UNDEVELOPED, PERFUNCTORY MANNER WITH NO CITATION TO LEGAL AUTHORITY IN ITS OPENING BRIEF.

This Court “regularly decline[s] to consider cursory or summary arguments that are unsupported by citations to legal authorities.” *Watson*, 365 F.3d at 615. Indeed, the Court considers parties to have “waived” undeveloped issues that are only perfunctorily adverted to in an appellate brief. *McAdory*, 501 F.3d at 870. *See United States v. Pizano*, 421 F.3d 707, 720-21 (8th Cir. 2005). By these standards, the County has waived its principal issues on appeal by presenting them in an undeveloped and perfunctory manner in its opening brief, with no citations to legal authority in support of its bald arguments.

In its opening brief, the County provides no authority for its perfunctory contention that IRA § 5 is unconstitutional under the nondelegation doctrine – an argument that this Court already rejected in *South Dakota II*. Brief 7-8. Inexplicably, the County does not acknowledge or address *South Dakota II*'s holding that IRA § 5 does not violate the nondelegation doctrine. Likewise, the County provides no authority for its undeveloped contentions that § 5 violates the Tenth Amendment “in an off-reservation area,” and violates the Guarantee Clause “as applied to this case.” *Id.* at 9-10.

Similarly, with regard to its non-constitutional arguments, the County provides no authority for its undeveloped argument that the Committee lacked authority under Tribal law to request that the Secretary take the Travel Plaza into trust. *Id.* at 14-15. Indeed, the County does not even acknowledge the district court's ruling that the court lacked jurisdiction to decide that question of Tribal law. Nor does the County offer authority for its cursory argument that the Secretary's decision to take the Travel Plaza into trust was arbitrary and capricious under the APA. *Id.* at 15-16. Instead, the County merely offers a smattering of unexplained citations to the administrative record.

Under *Watson*, *McAdory*, and similar cases, the Court should deem the County to have waived these contentions on appeal. A litigant cannot nominally present

issues in an opening brief in this sort of perfunctory, undeveloped fashion, without citation to authority, and expect the Court to address those issues on the merits.⁷

To the extent that the County's opening brief preserves issues for appeal, the County's arguments wholly lack merit for the reasons discussed below.

II. *SOUTH DAKOTA II* REJECTED THE CONTENTION THAT IRA § 5 VIOLATES THE NONDELEGATION DOCTRINE, AND THIS PANEL IS BOUND BY *SOUTH DAKOTA II*.

The County contends that IRA § 5, 25 U.S.C. § 465, is unconstitutional under the nondelegation doctrine. Brief 7-8. Although the County rather coyly states that “previous panels have rejected similar arguments” (*id.* at 7), the County inexplicably does not acknowledge or discuss this Court's prior rejection of the *exact same* nondelegation challenge to IRA § 5 in *South Dakota II*, 423 F.3d 790. It is a “cardinal rule” of this Court that “one panel is bound by the decision of a prior panel.” *Owsley v. Luebbers*, 281 F.3d 687, 690 (8th Cir. 2002) (*per curiam*). The

⁷ The County's opening brief also makes vague allegations that “the RD was biased,” and that the County “was not given adequate opportunity to review certain documents and to present evidence in response.” Brief 5. The County, however, does not include such claims in its statement of the issues presented, nor does the opening brief develop such claims. These nominal claims are therefore waived. *McAdory*, 501 F.3d at 870 n.3; *Watson*, 365 F.3d at 615. *See also United States v. Darden*, 70 F.3d 1507, 1549 n.18 (8th Cir. 1995); *Giove v. Stanko*, 49 F.3d 1338, 1344 n.4 (8th Cir. 1995). Moreover, the district court carefully considered and correctly rejected these “due process” claims. A 11-13.

County offers no reason whatever for a departure from that “cardinal rule” in this case.

As the *South Dakota II* panel explained, “Congress may delegate its legislative power if it ‘lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.’” 423 F.3d at 795 (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928)) (bracketed material added by *South Dakota II*). After a thorough analysis, the *South Dakota II* panel rejected a nondelegation challenge to IRA § 5, holding:

[A]n intelligible principle exists in the statutory phrase “for the purpose of providing land for Indians” when it is viewed in the statutory and historical context of the IRA. The statutory aims of providing lands sufficient to enable Indians to achieve self-support and ameliorating the damage resulting from the prior allotment policy sufficiently narrow the discretionary authority granted to the Department [of the Interior].

423 F.3d at 799.

Subsequently, in *South Dakota IV*, the appellants challenged IRA § 5 under the nondelegation doctrine and asked the panel to reconsider *South Dakota II*. 487 F.3d at 551. The Court declined to do so, however. The *South Dakota IV* panel explained that, in *South Dakota II*, “a panel of this Court held that § 5 of the IRA, 25 U.S.C. § 465, does not violate the nondelegation doctrine,” and observed further that it “may not overrule another panel’s decision.” *Id.*

This panel is bound by *South Dakota II*. See *Owsley*, 281 F.3d at 690; *United States v. Riza*, 267 F.3d 757, 760 (8th Cir. 2001) (explaining that “[o]nly the court en banc may overrule these prior panel opinions”); *Planned Parenthood, Sioux Falls Clinic v. Miller*, 63 F.3d 1452, 1467 (8th Cir. 1995) (observing that “[u]nder our long-standing practice, only the en banc Court can overrule a prior panel opinion”). The County points to no intervening Supreme Court precedent, and the Secretary is aware of none, that otherwise may justify revisiting the prior panel’s holding in *South Dakota II*.

Moreover, *South Dakota II* was correctly decided and is consistent with nondelegation jurisprudence and with the decisions of every other court of appeals to have addressed a nondelegation challenge to IRA § 5. Again, the County cites no contrary authority.

The Supreme Court has held it constitutionally sufficient for Congress to delegate its legislative authority under U.S. Const. art. I, § 1 “if Congress ‘clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.’” *Mistretta v. United States*, 488 U.S. 361, 372-73 (1989) (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)). The Supreme Court has consistently upheld delegations of legislative power by Congress to another branch of government; indeed, as noted in *Whitman v.*

American Trucking Ass’n, 531 U.S. 457 (2001), the Supreme Court has “found the requisite ‘intelligible principle’ lacking in only two statutes” – which occurred in two decisions rendered in 1935. *Id.* at 474.

Thus, the Supreme Court has “‘almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.’” *Id.* at 474-75 (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)). In fact, since striking down two delegations in 1935, the Court has “upheld, without exception, delegations under standards phrased in sweeping terms.” *Loving v. United States*, 517 U.S. 748, 771 (1996). *See, e.g., Whitman*, 531 U.S. at 474 (citing examples); *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212, 218-19 (1989) (citing examples).

In addition, like this Court in *South Dakota II*, each of the other courts of appeals that has considered a constitutional challenge to IRA § 5 on nondelegation grounds has upheld the statute’s constitutionality. *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 30-33 (D.C. Cir. 2008) (per curiam); *Carcieri v. Kempthorne*, 497 F.3d 15, 41-43 (1st Cir. 2007) (en banc), *rev’d on other grounds*, 555 U.S. 379 (2009); *Shivwits Band of Paiute Indians v. Utah*, 428 F.3d 966, 972-74 (10th Cir. 2005), *cert. denied*, 549 U.S. 809 (2006); *United States v. Roberts*, 185 F.3d 1125, 1137 (10th Cir. 1999), *cert. denied*, 529 U.S. 1108 (2000).

In short, this Court's decision in *South Dakota II* upholding the constitutionality of IRA § 5 remains consistent with settled nondelegation jurisprudence and should be followed as valid and binding precedent in this case.

III. THIS CASE DOES NOT PRESENT THE QUESTION OF WHETHER IRA § 5 VIOLATES THE TENTH AMENDMENT AS APPLIED “IN AN OFF-RESERVATION AREA”; AND IN ANY EVENT, § 5 DOES NOT VIOLATE THAT AMENDMENT.

The County contends that “at least in an off-reservation area,” IRA § 5 is “unconstitutional as in conflict with the Tenth Amendment.” Brief 9. This case, however, does not actually present that question because it does not involve an “off-reservation” trust acquisition. Rather, because the tract to be acquired in trust is within the boundaries of the original 1858 reservation, the Secretary treated the Tribe's trust request as an *on-reservation* trust acquisition and applied Interior's Part 151 regulations, 25 C.F.R. § 151.10, governing on-reservation acquisitions. A 44-45, 46 n.5; *see supra* at 7-8. The County does not argue that the Secretary erred in treating the Travel Plaza acquisition as an on-reservation acquisition, as distinguished from an off-reservation acquisition (which is governed by distinct Part 151 regulations, 25 C.F.R. § 151.11, *see supra* at 8 n.1). Accordingly, there is no need for the Court to decide in this case whether, if the Secretary had treated the Travel

Plaza as an off-reservation acquisition, his exercise of authority under IRA § 5 would have contravened the Tenth Amendment.

In any event, as to either type of trust acquisition, IRA § 5 is not unconstitutional under the Tenth Amendment. U.S. Const. amend. X (“The powers not delegated to the United States by the Constitution, * * * are reserved to the States[.]”). As this Court has explained, “[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States.” *United States v. Crawford*, 115 F.3d 1397, 1401 (8th Cir. 1997) (quoting *New York v. United States*, 505 U.S. 144, 156 (1992)). IRA § 5 does not implicate the Tenth Amendment because the Indian Commerce Clause is a plenary constitutional delegation of power to Congress to legislate in the field of Indian affairs. U.S. Const. art. I, § 8, cl. 3 (“The Congress shall have Power * * * * To regulate Commerce * * * with the Indian Tribes.”). *See Carcieri*, 497 F.3d at 39-40 (holding that “[b]ecause Congress has plenary authority to regulate Indian affairs, section 465 of the IRA does not offend the Tenth Amendment”).

The Supreme Court has consistently held that the Indian Commerce Clause grants Congress broad and exclusive authority to legislate in the field of Indian affairs. As long ago as *Worcester v. Georgia*, 31 U.S. 515 (1832), the Court concluded that the regulation of relations between the United States and Indian tribes,

“according to the settled principles of our constitution, [is] committed exclusively to the government of the union.” *Id.* at 561. More recently, the Supreme Court likewise explained that the Constitution “grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as ‘plenary and exclusive.’” *Lara*, 541 U.S. at 200. Likewise, citing *Worcester*, this Court has concluded that “[u]nder the Indian Commerce Clause, Congress has plenary authority over Indians.” *Means*, 522 F.2d at 839 (footnote omitted). *See Chase*, 573 F.2d at 1017 (explaining that “Congress has the plenary and exclusive power to deal with Indian tribes”).⁸

Under the Supreme Court’s expansive interpretation of the Indian Commerce Clause, it is plain that Congress possessed authority to enact IRA § 5. The County does not seriously contend otherwise. Because the Secretary’s authority to take land into trust on behalf of Indian tribes flows from power expressly delegated to Congress

⁸ *See also, e.g., City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 204 n.2 (2005) (“[W]ith the adoption of the Constitution, Indian relations became the exclusive province of federal law.”); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 62 (1996) (“If anything, the Indian Commerce Clause accomplishes a greater transfer of power from the States to the Federal Government than does the Interstate Commerce Clause.”); *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) (“[T]he central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs[.]”).

by the Constitution, IRA § 5 does not contravene the Tenth Amendment. *See New York*, 505 U.S. at 156; *Crawford*, 115 F.3d at 1401; *Carciari*, 497 F.3d at 39-40.

Against this clear and longstanding Indian Commerce Clause jurisprudence, the County cites only one case in support of its argument that IRA § 5 violates the Tenth Amendment – *United States v. Hubbard*, 474 F. Supp. 64 (D.D.C. 1979) (cited at Brief 9). *Hubbard*, however, is irrelevant because the court in that case did not address the constitutionality of IRA § 5. Indeed, to the extent that *Hubbard* has any bearing on this case at all, it undermines the County’s Tenth Amendment argument: the *Hubbard* court *rejected* the contention that a particular provision of the federal criminal code “exceeds the authority of Congress to legislate.” *Id.* at 73.

In short, the County advances no legal basis for a conclusion that IRA § 5 is unconstitutional under the Tenth Amendment as applied to “off-reservation areas” or otherwise. Brief 9. Put differently, the County has entirely failed to rebut the presumption that § 5 is constitutional. *Fairbank*, 181 U.S. at 285.

IV. WHETHER IRA § 5 VIOLATES THE GUARANTEE CLAUSE IS NOT A JUSTICIABLE QUESTION; AND EVEN IF THE QUESTION WERE JUSTICIABLE, § 5 DOES NOT VIOLATE THAT CLAUSE AS APPLIED TO THE TRAVEL PLAZA TRUST ACQUISITION.

The Guarantee (or Guaranty) Clause provides: “The United States shall guarantee to every State in this Union a Republican Form of Government[.]” U.S.

Const. art. IV, § 4. The Supreme Court “has consistently held * * * that challenges to congressional action on the ground of inconsistency with [the Guaranty] clause present no justiciable question.” *Baker*, 369 U.S. at 224. Rather, “Guaranty Clause claims involve those elements which define a ‘political question,’ and for that reason * * *, they are nonjusticiable.” *Id.* at 218. *Cf. New York*, 505 U.S. at 184-85. As a leading treatise likewise states: “For a long time, at least, it has been well established that political questions are presented by challenges to either congressional or state action grounded on the constitutional mandate in Article IV, § 4, that the United States shall guarantee every state a ‘Republican Form of Government.’” 13C Charles Alan Wright *et al.*, *Federal Practice & Procedure* § 3534.1 at 727-28 (3rd ed. 2008). *See also id.* § 3534.1 at 730 (noting that “[l]ower courts have generally followed the traditional view that questions under the Guaranty Clause are not justiciable”).

Applying these principles here, the district court correctly held that the County’s Guarantee Clause challenge to IRA § 5 presented a nonjusticiable political question. A 9. On appeal, the County’s opening brief does not acknowledge the district court’s ruling on this threshold issue, much less does the County demonstrate that the district court’s ruling was error. In effect, therefore, the County has conceded that its Guarantee Clause claim is nonjusticiable.

Although this Court need not address the issue, the district court correctly held in the alternative that, if the claim were justiciable, IRA § 5 does not violate the Guarantee Clause. A 9. In *Duncan*, 139 U.S. 449, the Supreme Court explained that the “distinguishing feature” of a “Republican Form of Government” is “the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves.” *Id.* at 461.

Here, the County does not explain how this “distinguishing feature” of a republican form of government is trampled on by IRA § 5. Rather, the County baldly argues that, as applied to this case, § 5 violates the Guarantee Clause because the Secretary’s decision to take the Travel Plaza into trust deprives the County (and South Dakota) of authority to tax the Travel Plaza property, to regulate uses of the property, and to assert criminal jurisdiction over the property. Brief 10.

The County, however, cites no legal authority in support of its as-applied Guarantee Clause challenge to § 5. And in any event, the argument wholly lacks merit. As the district court correctly concluded, “[t]he fact that [the County] will no longer be able to exercise jurisdiction and authority over the Travel Plaza does not pose a ‘realistic risk of altering the form or the method of functioning of [the County’s] government.’” A 9 (quoting *New York*, 505 U.S. at 186). Nor does the

Secretary's decision to take the Travel Plaza into trust have any effect on the ability of County residents (or anyone else) "to choose their own officers for governmental administration" or to "pass their own laws" – which is the "distinguishing feature" of a republican form of government. *Duncan*, 139 U.S. at 461.

As the Fifth Circuit aptly observed after finding a Guarantee Clause challenge to a federal tax statute nonjusticiable, "at least as of today, [the state] is governed by a freely elected legislature and executive, not a monarchy, military dictatorship, or any other type of government which would offend the Guarantee Clause." *Deer Park Indep. Sch. Dist. v. Harris Cty. Appraisal Dist.*, 132 F.3d 1095, 1099-1100 (5th Cir. 1998) (per curiam). The same is true today in respect to South Dakota and the County. Accordingly, should the Court determine that the County's Guarantee Clause claim is justiciable (and it is not), the Court should firmly reject it.

V. THE DISTRICT COURT LACKED JURISDICTION TO DECIDE THE QUESTION OF TRIBAL LAW RAISED BY THE COUNTY.

The County contends – again without citation to any legal authority – that, under a particular Tribal bylaw, the Committee did not have authority to enact the March 1, 2004 resolution requesting that the Secretary take the Travel Plaza into trust for the Tribe; thus, according to the County, "[t]his lack of authority deprived

[Interior] of jurisdiction to consider the application.” Brief 14. The district court correctly rejected this contention. A 11.

The County’s argument rests on its interpretation of Article IV, § 1 of the Tribe’s amended bylaws, which states:

The Committee shall have the authority to investigate and transact all Tribal business of a routine nature and Indian legislation, including Industry, Sanitation, Housing, Redevelopment and etc., and shall also act in the capacity of a liaison delegation between the Tribe and Federal, State and local governments, and such other agencies or parties that may offer opportunities for the Tribe.

A 11. In the County’s view, this amended bylaw “does not provide that questions of this magnitude can be decided by the [Committee].” Brief 14.

However, the County cites no Tribal law materials holding that this amended bylaw does not confer authority on the Committee to enact resolutions requesting that the Secretary take particular parcels of tribal land into trust. The County does not even offer its own construction of the bylaw; rather, it simply references the bare allegation of its complaint on this point. Brief 14. Again, because “[n]otice pleadings do not suffice for appellate briefs,” the Court should “consider these alleged errors waived.” *McAdory*, 501 F.3d at 870 n.3 (internal quotation marks omitted).

Moreover, the district court correctly concluded that whether the County's interpretation of this particular Tribal bylaw is correct "is a question for the Tribe and not for this Court to resolve." A 11. This Court has consistently concluded that jurisdiction to interpret tribal constitutions and laws "lies with Indian tribes and not in the district courts." *In re Sac & Fox Tribe*, 340 F.3d at 763 (discussing cases). *See, e.g., Runs After*, 766 F.2d at 352 (holding that resolution of disputes "involving questions of interpretation of the tribal constitution and tribal law is not within the jurisdiction of the district court"). Here, the district court applied *In re Sac & Fox Tribe* and *Runs After* in declining to address the Tribal law issue raised by the County. A 11. The district court surely did not err in following this Court's precedent, and the County does not contend otherwise.⁹

Insofar as the Secretary's "jurisdiction" to consider the Tribe's trust request for the Travel Plaza is concerned (Brief 14), that question is not governed by Tribal law, as the district court correctly concluded. A11. Again, the County offers no contrary argument. Rather, to invoke the Secretary's authority to entertain requests for trust

⁹ The district court indicated that it is "questionable" whether the County has standing to assert a claim that the Committee exceeded its authority under the Tribal bylaw. A 11. In our view, at a minimum, the County lacks prudential standing to raise this claim because the County is not within the "zone of interests" protected by the Tribal bylaw. *See, e.g., Davis v. U.S. Bancorp*, 383 F.3d 761, 767 (8th Cir. 2004).

acquisitions under IRA § 5, a Tribe is required to follow 25 C.F.R. § 151.9, which states:

An individual Indian or tribe desiring to acquire land in trust status shall file a written request for approval of such acquisition with the Secretary. The request need not be in any special form but shall set out the identity of the parties, a description of the land to be acquired, and other information which would show that the acquisition comes within the terms of this part.

The County does not argue that the Committee's March 1, 2004 resolution regarding the Travel Plaza fails to satisfy this regulation. And, as the district court correctly noted, § 151.9 "contains no mention of any requirement that the Tribe in a Tribal Council of all members, as opposed to the Committee, be the entity requesting that land be taken into trust." A 11.

In short, the district court correctly concluded that it lacked jurisdiction to address the validity of the County's proffered interpretation of this particular Tribal bylaw. And irrespective of whether the County's proffered interpretation of the Tribal bylaw is correct, the Tribe properly invoked the Secretary's authority to consider its request that the Travel Plaza be taken into trust by following the relevant Part 151 regulation.

VI. THE SECRETARY'S DECISION TO TAKE THE TRAVEL PLAZA INTO TRUST WAS NOT ARBITRARY AND CAPRICIOUS UNDER THE APA.

Finally, the County contends that the Secretary's decision to take the Travel Plaza into trust for the Tribe was arbitrary and capricious under the APA, 5 U.S.C. § 706(2)(A), because the Secretary "improperly evaluated five of the factors set forth in 25 C.F.R. § 151." Brief 15. The district court correctly rejected this claim, holding instead that the Secretary's analysis of Interior's Part 151 factors "was not arbitrary, capricious, or an abuse of discretion." A 16.

Although the County asserts that the Secretary improperly evaluated five of Interior's Part 151 factors here, the County nominally addresses only *four* of those factors, namely, 25 C.F.R. § 151.10(b), (e), (f), and (g). Brief 15-16. We address the County's very cursory APA arguments *seriatim* below.

First, the County without elaboration contends that the Secretary did not consider the Tribe's "need for land." Brief 15. The County is flatly wrong. Section 151.10(b), 25 C.F.R § 151.10(b), requires the Secretary to consider "[t]he need of * * * the tribe for additional land." The district court correctly concluded that the acting Regional Director "adequately addressed the Tribe's need for the Travel Plaza land," explaining:

The [acting Regional Director] found that accepting the land into trust would “help the Tribe to maintain economic growth on the reservation by providing job opportunities to both tribal members and non-tribal members, as well as providing a service to the public.” [He] stressed the importance of economic development in Indian country, noted that the acquisition would aid in the Tribe’s land consolidation efforts, and explained that accepting the land into trust “may qualify the Tribe for additional federal funding for important social or economic programs or benefits that may not be available to the Tribe if the land is in fee status.”

A 14 (citations omitted). The County cites nothing in the administrative record to support its argument on this point, and indeed offers no analysis to the contrary.

Second, the County summarily argues that the Secretary did not properly consider “the impact of removal from the tax base on local governments, including the County.” Brief 15. Again, the County is simply wrong. Section 151.10(e), 25 C.F.R. § 151.10(e), requires the Secretary to consider “the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls.”

The district court correctly concluded that the acting Regional Director’s analysis of § 151.10(e) was “sufficient and supported by a rational basis,” observing:

[T]he [acting Regional Director] explained that Charles Mix County would lose \$6,260.10 in annual property taxes if the BIA accepted the Travel Plaza into trust. [He] then explained that the removal of the Travel Plaza from the tax rolls would be offset by the County no longer having to provide certain services to the Travel Plaza once the property was in trust. [He] also found that

the County's loss of \$6,260.10 was insignificant when compared to the County's \$2,744,755.00 total annual tax budget.

A 14 (citations omitted). Again, the County cites nothing in the administrative record to support its argument on this point, and indeed offers no analysis to the contrary.

Although not expressed as such, the County also seems to be reprising a related argument; namely, that under § 151.10(e), the Secretary was required to consider the cumulative effect of the removal of the Travel Plaza property from the tax rolls – that is, as added to tax revenue lost from “acres of land already in trust in this County.” Brief 16. If that is the County's argument, it was correctly rejected by the district court. A 14-15.

The plain text of § 151.10(e) requires the Secretary to consider the impact “resulting from the removal *of the land* from the tax rolls.” 25 C.F.R. § 151.10(e) (emphasis added). The express focus of the regulatory language is on the impact resulting from the removal from the tax rolls of the particular land for which trust status is sought – *not* on the impact resulting from the removal of the particular land for which trust status is sought, *together with* the impact of other land already taken into trust by the Secretary in the relevant jurisdiction.

As the district court correctly concluded, the regulatory text “contains no requirement” that the Secretary consider a hypothetical “cumulative analysis of tax

loss from all land in tax free trust status.” A 14-15. Indeed, the IBIA has consistently held that § 151.10(e) does *not* require the Secretary to engage in this sort of “cumulative effects” analysis.¹⁰ Because the IBIA’s interpretation of § 151.10(e) is neither plainly erroneous nor inconsistent with the regulation, the district court properly afforded the agency’s interpretation substantial deference. A 15. *See South Dakota IV*, 487 F.3d at 551. Indeed, the County does not argue otherwise.

Third, citing 25 C.F.R. § 151.10(f), the County summarily contends that “the Acting RD mischaracterized the jurisdictional disputes at issue, misstated the relevant law . . . and failed to adequately consider the political, social and economic effect on the County.” Brief 16 (ellipsis in original). However, the County offers no supporting argument or citation to authority, but rather, provides merely an unexplained smattering of citations to the administrative record. In any event, the County is wrong.

¹⁰ *See, e.g., South Dakota v. U.S. Dep’t of the Interior*, 401 F. Supp. 2d 1000, 1008 (D.S.D. 2005) (affording deference to IBIA’s interpretation of § 151.10(e) and explaining that IBIA “has stated repeatedly that § 151.10(e) does not require the Secretary to consider the cumulative impact of all trust land on the tax rolls”), *aff’d on other issues, South Dakota IV*, 487 F.3d 548; *South Dakota v. Acting Great Plains Regional Director*, 49 I.B.I.A. 84, 106 (2009) (“Relying on the plain language of this subsection [§ 151.10(e)], the Board has consistently rejected the argument that analysis of the cumulative effects of all tax revenue losses on all lands within Appellants’ jurisdictional boundaries is required.”), *vacated and remanded on other grounds sub nom. South Dakota v. U.S. Dep’t of the Interior*, 2011 WL 1303022 (D.S.D. Mar. 31, 2011).

Section 151.10(f) requires the Secretary to consider “[j]urisdictional problems and potential conflicts of lands use which may arise.” 25 C.F.R. § 151.10(f). The regulatory text does *not* require the Secretary to consider “the political, social and economic effect” of the proposed trust acquisition, as the County erroneously contends. Brief 16. Moreover, the district court correctly concluded that the acting Regional Director “properly considered Section 151.10(f) and there exists a rational basis for [his] decision”:

[T]he [acting Regional Director] stated that the “County, City, and Tribe must already work together on agreements to function jointly on the reservation, with scattered trust lands. This requirement is there now, and will not change with this land going into trust status. Therefore, the jurisdictional issues will not increase.” [He] further stated that he saw no potential conflicts in land use, because “[t]he land will continue to be used as a convenience store and/or business site by the Tribe.”

A 15 (citations omitted). The County does not argue otherwise.

Fourth, and finally, citing 25 C.F.R. § 151.10(g), the County contends that the Secretary’s determination “regarding the BIA’s capacity to administer the Travel Plaza” is “without support in the record.” Brief 16. But again, the County offers no supporting argument or authority, but rather, provides simply a smattering of unexplained citations to the administrative record. In any event, the County is wrong.

Section 151.10(g) requires the Secretary to consider “whether the [BIA] is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.” 25 C.F.R. § 151.10(g). The district court correctly concluded that the acting Regional Director “had a rational basis for his determination under Section 151.10(g), and * * * adequately considered [the County’s] argument,” explaining, *inter alia*, that:

[T]he [acting Regional Director] noted that the BIA already provided administrative services on trust land in Charles Mix County, and that the acceptance of 39 more acres into trust would have a minimal impact on the BIA’s ability to discharge its responsibilities. [He] explained that the Travel Plaza is located within a 10-minute response time of both the BIA’s Law Enforcement Services headquarters and the Indian Health Service hospital, and that the BIA police staff regularly patrol the Travel Plaza area.

A 15 (citations omitted).

As the district court also found, the acting Regional Director “further noted that the BIA had cost reimbursement agreements with the Wagner/Lake Andes Ambulance Service and the Wagner Fire Department whereby these agencies would provide ambulance services and fire protection to the Travel Plaza area.” *Id.* Although the County states that “[t]he presence of law enforcement services and a hospital in the general area does not meet the requirements of this regulation”

(Brief 16), those considerations obviously were not the sole basis for the Secretary's § 151.10(g) finding, as the district court's opinion makes abundantly clear.

In short, the County has entirely failed to carry its burden of demonstrating that the Secretary's decision to take the Travel Plaza into trust on behalf of the Tribe under Interior's Part 151 regulations was arbitrary and capricious under the APA. *See South Dakota II*, 423 F.3d at 800 ("The burden is on the plaintiff to prove that the agency's action was arbitrary and capricious."). By any fair measure, the Secretary's decision in this case is considerably more than "supportable on any rational basis"; accordingly, this Court "must uphold it" (*Voyageurs*, 381 F.3d at 763) – particularly where, as here, Interior is "acting within its own sphere of expertise," *i.e.*, acting under its Part 151 regulations to decide a trust acquisition request submitted by an Indian tribe. *Id.*¹¹

¹¹ With no citation to authority, the County argues that "[t]he action at issue is beyond the authority delegated to the agency by 25 U.S.C. § 465." Brief 11. This argument is puzzling, given that the Secretary acted reasonably in concluding that, under 25 C.F.R. § 151.10, the Travel Plaza should be taken into trust on behalf of the Tribe. In any event, the County's argument appears to be that "[t]he original goal of the IRA was to provide land for only landless and impoverished Indians," but that the Tribe is "not landless"; therefore, the Secretary allegedly lacked authority under IRA § 5 to take the Travel Plaza into trust for the Tribe. Brief 11-12. It suffices to say that the County's crabbed view of the IRA's "original goal" – as limited only to providing land for landless Indians – is completely inconsistent with the purposes of the IRA as enunciated by the Supreme Court, by this Court, and by the preeminent treatise in the field of federal Indian law. *See supra* at 5-7.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief for the Appellees is printed in proportionately spaced typeface (Times New Roman) of 14 points and, according to WordPerfect X3, contains 9,709 words. I also certify that this brief was scanned for viruses and, according to the scanning program, is virus free.

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2011, I electronically filed the foregoing Brief for the Appellees with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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