



INTERIOR BOARD OF INDIAN APPEALS

State of South Dakota and Moody County, South Dakota v.
Acting Great Plains Regional Director, Bureau of Indian Affairs

39 IBIA 283 (04/06/2004)

Judicial review of this case:

Affirmed, *South Dakota v. U.S. Department of the Interior*, 401 F.Supp.2d 1000 (D.S.D. 2005), *aff'd*, 487 F.3d 548 (8th Cir. 2007) (replacing 475 F.3d 993).



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ARLINGTON, VA 22203

STATE OF SOUTH DAKOTA and	:	Order Affirming Decision
MOODY COUNTY, SOUTH	:	
DAKOTA,	:	
Appellants	:	
v.	:	Docket No. IBIA 02-99-A
ACTING GREAT PLAINS REGIONAL	:	
DIRECTOR, BUREAU OF	:	
INDIAN AFFAIRS,	:	
Appellee	:	April 6, 2004

Appellants State of South Dakota (State) and Moody County (County) seek review of a March 15, 2002, decision of the Acting Great Plains Regional Director, Bureau of Indian Affairs, (Regional Director; BIA), as supplemented by an October 16, 2002, decision, approving a proposed trust acquisition for the Flandreau Santee Sioux Tribe (Tribe). 1/ For the reasons discussed below, the Board of Indian Appeals (Board) affirms the Regional Director's decision.

On December 21, 2000, the Tribe purchased a 310-acre tract of land contiguous to its existing reservation trust lands. The lands are more particularly described as the S½, sec. 16,

1/ In a prior appeal by the same Appellants, the Board vacated and remanded an initial May 3, 2001, decision approving the same trust acquisition, to permit the Regional Director to cure procedural errors. State of South Dakota and Moody County, South Dakota v. Acting Great Plains Regional Director, 37 IBIA 4 (2001). Subsequently, the Regional Director again approved the trust acquisition in her Mar. 15, 2002, decision. During this appeal, the Regional Director requested another remand to consider additional comments. The Board granted the request, but this time retained jurisdiction over the appeal. The Regional Director's Oct. 16, 2002, decision considered comments previously submitted by the Flandreau Public School District, but found that they did not provide any new information not previously considered. The Oct. 16 decision reaffirmed, without repeating, the substantive analysis and conclusions in the Mar. 15 decision, and therefore the Board will refer to the Mar. 15 decision as the substantive decision under review here.

T. 107 N., R. 48 W., Moody County, South Dakota, except Lot H-1 located in the SE¼ of the section. The Tribe submitted an application to BIA on December 27, 2000, to accept the 310-acre parcel in trust pursuant to section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. § 465, 2/ and proclaim it part of the reservation pursuant to 25 U.S.C. § 467. 3/

The application indicates that the Tribe's Reservation currently consists of a total of approximately 2,100 hundred acres of land held in trust, and that the most recent trust acquisition for the Tribe occurred in 1972. The 310-acre parcel that is the subject of the Tribe's present trust application borders the tribal trust lands acquired in 1972. The Tribe's lands are within an area that it has occupied since at least 1869. According to the Tribe, about 300 of its approximately 700 members currently live on the reservation, and its reservation population has doubled since 1990.

Under the Tribe's Gaming Revenue Allocation Ordinance, the Tribe sets aside one percent of its net gaming revenues to help fund local government projects such as law enforcement, fire protection, sirens, and school projects. The Tribe's application indicates that the Tribe has contributed substantial amounts from its gaming revenues over the last 10 years to local units of government and the public school.

According to the Tribe, it has joined with the City of Flandreau (City) to form a City/Tribal Police Department which will provide law enforcement services to trust lands. The Police Department will enter into mutual aid and backup agreements with the Sheriff's Office to provide assistance in times of disaster, crisis, or emergency. The City and the Tribe also apparently have entered into a cooperative agreement for fire protection services.

The Tribe's initial application indicated that the proposed acquisition would be used primarily for economic development and future housing needs. By Resolution No. 01-01 dated January 17, 2001, the Tribe revised its intended use to continue the existing use for agricultural purposes. The Tribe's revised application notes that the land will also be available in the future for possible housing development, if such a need should arise.

2/ Section 465 authorizes the Secretary of the Interior to "acquire * * * any interest in lands * * * within or without existing reservations, * * * for the purpose of providing land for Indians."

3/ Section 467 provides in pertinent part that, "[t]he Secretary of the Interior is hereby authorized to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by section[] * * * 465, * * * of this title, or to add such lands to existing reservations * * * ."

On January 23, 2001, the Regional Director gave notice of the Tribe's application to the State and County. The Regional Director requested comments about the annual amount of taxes assessed on the proposed trust acquisition, special assessments against the property, governmental services provided to the property, zoning, the County's annual tax base, and the amount of taxes paid annually by the Tribe for other fee property it owns in the County.

The State responded on February 20, 2001. It argued that (1) section 465 is unconstitutional; (2) the acquisition would not comply with the IRA because the Tribe is not landless; (3) the Tribe is competent to handle its own affairs and has a profitable gaming operation so there is no justifiable need to take the lands in trust; (4) the Tribe's analysis of the tax impact is inadequate because it ignores the cumulative impact of the removal of all trust lands from the tax rolls; (5) conflicts would occur over civil and criminal jurisdiction, sales tax, and land use if the land is taken in trust; (6) the Tribe did not comply with the National Environmental Policy Act (NEPA), 516 DM 6; and (7) the State is entitled to an evidentiary hearing on the matter.

The County also provided comments on February 21, 2001. It stated that the proposed trust acquisition was currently zoned for agriculture and that the taxes were \$4,119 in 2000. The estimated tax for 2001 was \$7,812 as non-agricultural use. According to the County, its tax loss attributable to the Tribe's other trust properties and this proposed trust acquisition combined, would be approximately \$25,000. The County reported that the Tribe paid \$11,411 in taxes annually for fee property it owns. The County asserted it provides fire protection, highway and bridge maintenance, law enforcement, court services, prisoner care, poor relief, ambulance, library, senior citizen, extension, weed and many more services to the property. It stated that the total collected for all taxing entities in the County was over \$5.69 million, with \$1.968 million coming from real property taxes. The Flandreau Township (Township) is responsible to maintain the roads bordering the proposed trust acquisition, its only source of revenue is real property taxes, and it had an annual budget for road maintenance of \$21,000. The County stated that the Flandreau Public School District (School District) is making plans to replace a grade school and needs the tax dollars to do so. The County objected to the proposed trust acquisition, and argued that removal of this land from the tax rolls would result in an adverse financial impact on the County, School District, and Township through loss of tax revenues to sustain their services. It argued that such a loss would create unfair hardships and financial burdens on other taxpayers in the County.

Neither the State nor the County disputed the Tribe's assertions concerning its past and current contributions to local units of government and to the public school.

At the Regional Director's request, the Tribe responded to the State on March 15, 2001, and to the County on March 23, 2001. On May 3, 2001, the Regional Director issued a decision approving the proposed trust acquisition. The State and County filed separate appeals with the Board on May 31, 2001. The Board docketed the appeals as Docket Nos.

IBIA 01-133-A and 01-134-A and consolidated them. At the request of the Regional Director on October 9, 2001, the Board vacated the May 3 decision and remanded the cases to allow the Regional Director to cure procedural errors when she discovered that she had failed to provide notice of the trust acquisition proposal to the City and the Township. 37 IBIA 4 (2001).

The Regional Director provided notice of the trust acquisition proposal to the City and Township on September 10, 2001, and to the School District on November 5, 2001. The administrative record contains no responses from the City or Township.

The School District responded on November 21, 2001, providing information regarding the 310-acre parcel, but not taking any position on the trust application. The School District reported that the amount of taxes payable for 2002 would be \$4,324, as agricultural property; and would be \$7,974 in 2003 when the property would be reclassified as non-agricultural. ^{4/} The School District noted that it was unaware of any increased funding it might receive based on the number of students in the school district if the property were placed in trust.

On March 15, 2002, the Regional Director issued a decision approving the Tribe's request to take the land in trust. In doing so, she specifically stated that the School District had not responded to the request for comments.

The Board received Appellants' joint notice of appeal on April 22, 2002. The Regional Director advised the Board on June 6, 2002, that she had discovered that the School District had, in fact, responded to the request for comments; and she had inadvertently overlooked the response. She requested the Board to remand the matter so that she could consider the School District's comments. On June 10, 2002, the Board stayed this appeal and authorized the Regional Director to consider the additional comments and issue a new decision.

On October 16, 2002, the Regional Director amended her March 15, 2002, decision approving the trust acquisition, to incorporate her consideration of the School District's comments. Her October 16 decision found that the School District's comments did not provide new information not previously considered, and reaffirmed the substantive analysis and conclusions in the March 15 decision. Upon receiving the October 16 decision, the Board notified the parties that the record had been supplemented by the School District's November 21, 2001, letter and the Regional Director's October 16, 2002, decision. The Board lifted the stay and reinstated briefing.

^{4/} This statement implies that the County had not yet reclassified the property in 2001, contrary to information the County submitted. It is possible that the years are typographical errors or that there was a delay in changing the zoning.

Appellants raise most of the same issues before the Board as they did before the Regional Director, some of which are legal objections to the Regional Director's decision and others which challenge the Regional Director's exercise of her discretion. Appellants also raise for the first time on appeal a threshold procedural issue.

The standard of review and burden of proof in trust acquisition cases is now well-established. The Board has described these in City of Lincoln City, Oregon v. Portland Area Director, 33 IBIA 102, 104 (1999), aff'd, City of Lincoln City v. U.S. Department of the Interior, Civil No. 99-330-AS (D. Ore. 2001), where it stated:

[D]ecisions as to whether or not to take land into trust are discretionary. The Board does not substitute its judgment for BIA's in decisions based upon an exercise of discretion. Rather, the Board reviews such decisions 'to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of its discretionary authority, including any limitations on its discretion established in regulations.'

In City of Isabel, South Dakota v. Great Plains Regional Director, 38 IBIA 263, 264 (2002), the Board added:

[W]hen an appellant challenges BIA's exercise of discretion, it 'bears the burden of proving that the [Regional] Director did not properly exercise his discretion.' [City of Eagle Butte, 17 IBIA at 196; 96 I.D. at 330]. However, when an appellant challenges legal determinations that BIA may have made in connection with a trust acquisition decision, it 'bears the burden of proving that the [Regional] Director's decision was in error or not supported by substantial evidence.' Id. See also County of Mille Lacs, Minnesota v. Midwest Regional Director, 37 IBIA 169, 170 (2002); Town of Ignacio, Colorado v. Albuquerque Area Director, 34 IBIA 37, 38-9 (1999).

See also State of Iowa and Board of Supervisors of Pottawattamie County, Iowa v. Great Plains Regional Director (Iowa), 38 IBIA 42, 45 (2002).

The Board first addresses the threshold procedural issue. Appellants contend for the first time on appeal that this matter should be referred to the Assistant Secretary – Indian Affairs (Assistant Secretary) because the Regional Director is biased. As support, Appellants characterize statements made in the Regional Director's decision as questioning the motive behind the County's reclassification of zoning where the proposed trust acquisition is located, which resulted in the taxes being raised from \$4,119 to \$7,812. Appellants argue that the facts here are nearly identical to those which led the Board to refer another case to the Assistant Se-

cretary. See Rio Arriba, New Mexico, Board of County Commissioners v. Acting Southwest Regional Director, 38 IBIA 18 (2002).

Here, the Regional Director said:

There is no information as to what has prompted the change of classification of the land with increased tax revenues due on this property when the usage has remained the same for years (agricultural land). Without a written justification of the change of land classification and increased tax base, one wonders if the change was only made to provide a further justification of taxes lost by the County to oppose this fee to trust transaction.

Regional Director's Mar. 15, 2002, Decision at 6.

Normally the Board does not consider new issues raised on appeal. Here, however, Appellants request the Board to consider the argument because the Rio Arriba case was not available to them earlier. The Board presumes Appellants are referring to their difficulty in obtaining access to Board decisions because the Board's Internet website is still off-line due to a court order. Under the circumstances, the Board will consider Appellants' argument that the Regional Director is biased.

The Board held in Rio Arriba that statements concerning an increase in valuation of a proposed trust acquisition did not show bias, but that statements to a newspaper were more susceptible to a charge of bias. Because of the Board's limited review authority over trust acquisition decisions, the Board referred the matter to the Assistant Secretary for exercise of his discretionary authority and issuance of a new decision.

In this case the Board finds that the Regional Director's statement about the increased valuation of the proposed trust acquisition, although perhaps ill-advised, does not rise to a level that would raise a reasonable inference of bias, such that the matter should be referred to the Assistant Secretary. Accordingly, the Board denies Appellants' request to refer this case to the Assistant Secretary.

The Board next addresses the constitutional and legal challenges raised by Appellants. Appellants first contend that 25 U.S.C. § 465 is unconstitutional. In support of their argument, they cite South Dakota v. U.S. Department of the Interior (South Dakota), 69 F.3d 878 (8th Cir. 1995), vacated and remanded, 519 U.S. 919 (1996). Appellants concede that the Board has previously held that it lacks authority to declare an act of Congress unconstitutional, Town of Charlestown, Rhode Island v. Eastern Area Director, 35 IBIA 93 (2000), aff'd, Carcieri v. Norton, C.A. No. 00-375 ML (D.R.I. 2003) (Town of Charlestown II), but nevertheless urge the Board to reconsider its prior decisions.

In Iowa, the Board stated:

South Dakota was vacated by the United States Supreme Court. 519 U.S. 919 (1996). Therefore, the Eighth Circuit's decision in South Dakota is not precedential. See United States v. Roberts, 185 F.3d 1125, 1136 (10th Cir. 1999). Furthermore, since the Supreme Court issued its order in South Dakota, the Tenth Circuit has explicitly rejected the reasoning in South Dakota, and has found 25 U.S.C. § 465 constitutional. Roberts, *supra*. The Supreme Court declined to review Roberts. 529 U.S. 1108 (2000). See also the opinion of the United States District Court for the District of Oregon in City of Lincoln City, *supra*, slip op. at 23 (following Roberts). Thus the only precedential Federal court cases have held section 465 constitutional.

The State asks the Board to declare section 465 unconstitutional despite the fact that it has been held constitutional in Federal court. The Board has consistently held that, as part of the Executive Branch of government, it does not have the authority to declare an act of Congress unconstitutional. See, e.g., County of Mille Lacs, *supra*, 37 IBIA at 171; Oklahoma Petroleum Marketers Ass'n, et al. v. Acting Muskogee Area Director, 35 IBIA 285, 287 (2000), and cases cited there. The Board continues to hold that it lacks authority to declare an act of Congress unconstitutional.

38 IBIA at 45-46. See also Estate of Nora Angeline Earth, 38 IBIA 225, 226 (2002) (deciding officials in the Office of Hearings and Appeals, U.S. Department of the Interior, lack authority to declare an act of Congress unconstitutional). The Board considers this a settled area of law, and declines to reconsider its prior decisions that it lacks authority to declare an act of Congress unconstitutional.

Appellants next argue that 25 U.S.C. § 465 does not provide authority for the proposed trust acquisition because the acquisition is inconsistent with the purposes of section 465 in that the Tribe is not "landless." Appellants acknowledge that the Board has previously addressed this same argument and held that Indians need not be landless for the Secretary to acquire land for them under the authority of section 465. See State of Kansas v. Acting Southern Plains Regional Director (Kansas), 36 IBIA 152 (2001); see also, County of Mille Lacs, 37 IBIA at 171-72. Appellants, however, ask the Board to reconsider its decision in Kansas.

As was the case in Kansas, most of Appellants' arguments rely on the legislative history of the IRA, rather than statutory language. Appellants contend that the legislative history shows that Congress intended to limit trust acquisitions to landless Indians. In Kansas, the Board both rejected the State of Kansas' reliance on the legislative history of the IRA and found that the argument that the IRA authorized trust acquisitions only for landless Indians had been

explicitly rejected by Federal courts at least four times. 36 IBIA at 155 (citing United States v. 29 Acres of Land, 809 F.2d 544, 545 (8th Cir. 1987); Chase v. McMasters, 573 F.2d 1011, 1015-16 (8th Cir.), cert. denied, 439 U.S. 965 (1978); City of Sault Ste. Marie v. Andrus, 532 F. Supp. 157, 162 (D.D.C. 1980); City of Tacoma v. Andrus, 457 F. Supp. 342, 345-46 (D.D.C. 1978)).

Despite Appellants' extensive discussion and disagreement with the Board's prior interpretation of these Federal court decisions, the Board finds that Appellants raise nothing that causes it to reconsider its decision in Kansas or disregard Federal court decisions on this issue.

Alternatively, Appellants ask the Board to find that the Tribe's application is far beyond the scope of section 465 because the Tribe already owns trust lands and generates substantial revenue from gaming. In other words, according to Appellants, even if section 465 is not literally limited to "landless Indians" or those in "dire need," it requires at least some showing of need that cannot be shown under the facts of this case. Appellants request that the Board define the parameters of section 465 and limit its scope to those characteristics of the applicants in City of Tacoma. ^{5/}

The Board has previously rejected an argument that a tribe's casino income disqualified it from further acquisition of land in trust. County of Mille Lacs, 37 IBIA at 172. The Board has also held that a tribe need not be suffering financial difficulties to "need" more land. "A financially secure tribe might well need additional land in order to maintain or improve its economic condition if its existing land is already fully developed." Avoyelles Parish, Louisiana, Police Jury v. Eastern Area Director (Avoyelles Parish), 34 IBIA 149, 153 (1999).

Nor did the court in City of Tacoma suggest that section 465 is limited along the lines advocated by Appellants. In City of Tacoma, the Court stated that the facts of that case did "not even approach the periphery of the Secretary's discretionary power." 457 F. Supp. at 346. The Court discussed both the statutory language and legislative history of section 465.

The goal of the [IRA] was said to be 'to build up Indian landholdings until there is sufficient land for all Indians who will beneficially use it.' Id. [78 Cong. Rec. 11727 (1934)] at 11732. See S. Rep. No. 1080, 73d Cong., 2d Sess. 2 (1934). Repeatedly courts have approved trust takings in favor of Indians in no sense incapable of self-support. E.g., Mescalero Apache Tribe v.

^{5/} The applicants in City of Tacoma were three individuals and an Indian tribe. None of the proposed trust acquisitions were over 5 acres. The court stated that the tribe was on the verge of extinction with meager resources. The Board presumes it is these types of characteristics Appellants wish the Board to consider in limiting the eligibility of applicants for trust acquisitions.

Jones, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973) (lease under § 5 [of IRA] to Tribe already in possession of 460,000 acres (BIA, Annual Report of Indian Lands 8 (1974)); Stevens v. Commissioner, 452 F.2d 741, 743 n.3 (9th Cir. 1971).

Id. at 345.

Here, Appellants invite the Board to decide that the Tribe's economic success completely divests the Secretary of any discretion to accept this property in trust under section 465, regardless of all other considerations. The Board is not convinced that section 465 creates any such rigid limits. See Avoyelles Parish, 34 IBIA at 153; City of Tacoma, 457 F. Supp. at 345-46. Accordingly, the Board rejects Appellants' argument that this proposed trust acquisition is outside the scope of the Secretary's discretionary authority under section 465.

The Board now turns to Appellants' arguments in regard to the Regional Director's exercise of discretion to take the property in trust. The Board has previously explained that in reviewing the criteria set forth in 25 C.F.R. § 151.10, no single factor is determinative of the outcome. Rather, the BIA's decision should be reasonable in its overall analysis of the factors. Town of Charlestown, Rhode Island v. Eastern Area Director (Town of Charlestown I), 18 IBIA 67, 72 (1989) .

In challenging BIA discretionary decisions, the appellant bears the burden of proving that BIA did not properly exercise its discretion. Rio Arriba, New Mexico, Board of County Commissioners v. Acting Southwest Regional Director, 36 IBIA 14, 18 (2001); Ziebach County, South Dakota v. Aberdeen Area Director, 33 IBIA 239, 240 (1999). Simple disagreement with or bare assertions concerning BIA's decision are insufficient to carry the appellant's burden of proof. Ziebach County, South Dakota v. Acting Great Plains Regional Director, 38 IBIA 227, 231 (2002); Miami Tribe of Oklahoma v. Muskogee Area Director, 27 IBIA 123 (1995). Further, an appellant must show how BIA erred in addressing the arguments made before it. Dewey County, South Dakota v. Acting Aberdeen Area Director, 36 IBIA 107 (2001); Thurston County Board of Supervisors v. Aberdeen Area Director, 34 IBIA 249 (2000).

Appellants first argue that the Regional Director erred as a matter of law in evaluating the Tribe's need for the 310-acre parcel under 25 C.F.R. § 151.10(b). Appellants argue that the Regional Director erred by rejecting the State's contention that she must separately analyze why the land specifically needs to be in trust rather than fee status. According to Appellants, the Tribe's intended agricultural use of the property can still be accomplished even if the land is retained in fee, the Tribe's application does not state that economic development would be enhanced by placing the lands in trust, the Tribe is competent to handle its own affairs, and the Tribe has not shown that it needs to be protected from its own improvidence.

With respect to Appellants' argument that BIA may not approve this trust acquisition because the Tribe is competent to handle its own affairs and has not shown that it needs to be protected from its own improvidence, the Board has previously rejected such an interpretation of subsection 151.10(b). County of Mille Lac, 37 IBIA at 173. Appellants have not convinced the Board to reconsider its precedent with respect to this issue.

The Board now turns to Appellants' contention that subsection 151.10(b) requires the Tribe to demonstrate in particular why the land needs to be in trust status, and not merely why the Tribe needs the land.

In her March 15, 2002, decision, the Regional Director stated that the Tribe's membership has increased by 22 percent between 1990 and 2000, many tribal members have returned to the reservation, and the Tribe's trust land base has not increased to meet the needs of the growing Tribal population. She found that

[w]ith this land set aside for agricultural uses and possible future needs, the Tribe has an opportunity to utilize any of their existing land for other cultural, governmental or social needs of the Tribe instead of reserving their existing land for housing purposes which they know they will need in the future.

Regional Director's Mar. 15, 2002, Decision at 3. She also found that income from leasing the land will be used to support the Tribe's Natural Resource Program. Id. Separately in her decision, the Regional Director noted that trust status would protect the land from alienation, "and the Tribe wants to ensure that the needs of future generations are taken care of and secure." Id. at 2. She noted that the Tribe recognizes that gaming may not always be a viable source of income, and that it "wants to have this acreage in trust for [its] future members as needs arise." Id.

In response to Appellants' comments that she had not adequately considered the need for the land to be in trust status, the Regional Director stated: "The factor at 25 CFR Part 151.10(b) states we must evaluate the Tribe's 'need for additional land' and not the Tribe's 'need for additional trust land.' We have done so." Id. at 5.

Section 151.10(b) of 25 C.F.R. provides in relevant part: "The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status * * * (b) The need of the individual Indian or the tribe for additional land."

Appellants argue that because 25 C.F.R. Part 151 applies only to trust acquisitions, and because it has become common for lands subject to trust applications to already be owned by tribal applicants, subsection 151.10(b)'s reference to a need for "additional land" can only mean that the applicant must demonstrate a need for "additional trust land," as distinct from simply

showing a need for the land which it already owns in fee. Appellants refer the Board to guidelines issued by the Assistant Secretary – Indian Affairs in 1994, which instructed BIA to consider an applicant’s need for additional land in trust status. ^{6/}

The Board rejects Appellants’ proffered interpretation of subsection 151.10(b). The Board has not construed subsection (b) as requiring BIA to do more than consider the Tribe’s need for the land. See, e.g., County of Mille Lac, 37 IBIA at 173 (Band showed that it “needs additional land”); Ziebach County, South Dakota v. Aberdeen Area Director, 33 IBIA 239, 242-43 (1999) (“subsection 151.10(b) relates to the ‘need’ for land”). In 1980, when BIA promulgated the language now codified in subsection 151.10(b), the preamble simply described the language as requiring consideration of “the need for the land,” Final Rule, 45 Fed. Reg. 62034, 62035 col. 3 (1980), even though the regulatory language then – as now – was worded as “[t]he need * * * for additional land.” Id. at 62037 col. 2. At the time, as Appellants note, BIA anticipated that lands subject to trust applications might already be owned in fee by tribal applicants. See, e.g., Proposed Rulemaking, 43 Fed. Reg. 32311, 32313 col. 1 (July 26, 1978) (proposed § 120a.3(a)(2)). Had BIA intended the language now in subsection 151.10(b) to require distinct consideration of the applicant’s need for the land *in trust status*, it could easily have drafted the regulatory language to clearly say so.

On the other hand, the language of subsection 151.10(b) does not preclude BIA from considering the applicant’s need for having additional land held in trust. As indicated by the introductory clause in section 151.10, all of the listed factors are relevant to the ultimate decision whether the Department will accept land in trust status. Certainly in the context of BIA’s evaluation of those factors, including subsection 151.10(b), and a discretionary decision whether to accept title in trust, BIA is well within its authority to consider and weigh the extent to which an applicant has shown a need for having the specific property held in trust.

Based on the language of the regulation, the contemporaneous description in the preamble and prior Board decisions, the Board concludes that subsection 151.10(b) only requires BIA to consider the applicant’s need for the additional land that is subject to the trust application. Section 151.10 as a whole permits, but does not require, separate consideration of an

^{6/} The Board has previously expressed uncertainty whether the Guidelines are still in effect. See Village of Ruidoso v. Albuquerque Area Director, 32 IBIA 130, 134-35 (1998). The Board assumes, for purposes of this appeal, that the 1994 Guidelines are still in effect as internal guidance. The policy set forth in the 1994 Guidelines instructs BIA to explain the need of the applicant “for additional land in trust status.” The narrower issue before the Board, however, is whether subsection 151.10(b) itself requires BIA to separately consider and evaluate the Tribe’s need for the land to be held in trust status, when an applicant already owns the subject land in fee.

applicant's demonstrated need to have the land held in trust as opposed to being retained in fee. Therefore, the Regional Director did not err by stating that subsection (b) required her to consider the Tribe's need for the land, and not its need for the land in trust status.

The Regional Director considered the Tribe's need for the 310-acre parcel. In addition, the Regional Director's decision indicates that in fact she gave at least some consideration to the Tribe's need for additional land in trust status, despite her response to the State that she need not do so under subsection 151.10(b). Appellants have not met their burden of proof to demonstrate that the Regional Director erred in her interpretation of subsection 151.10(b), or that she failed to consider the Tribe's need for the land.

Appellants next argue that the Regional Director erred as a matter of law because she did not consider the cumulative impact of removing all of the Tribe's trust lands from the tax rolls. The Board has previously rejected this exact argument, and stated:

The Board also rejects [Ziebach County's] apparent argument that BIA was required to consider the cumulative impact on [Ziebach County] of all existing trust land within [Ziebach County]. The Board has previously rejected a similar contention, noting that an analysis of cumulative impact is not required by the language of 25 C.F.R. § 151.10(e). [7/]

Ziebach County, 38 IBIA at 230 (citing County of Mille Lacs, 37 IBIA at 172). 8/

Appellants contend that the IRA was not intended to "decimate" city and county governments. The facts in the record do not come close to establishing that this 310-acre trust

7/ Section 151.10(e) of 25 C.F.R. provides that one of the evaluation criteria to take lands into trust is "[i]f the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls."

8/ Although the regulations do not require a "cumulative impact analysis," the information supplied by the County concerning the effect of removing a particular fee parcel from the tax rolls presumably would already reflect the County's "baseline condition" (e.g., its current total real property tax revenues). The baseline condition would take into account properties in the County that presently are not taxed, Indian and non-Indian, and for whatever reason. That baseline might also reflect the economic benefit brought to the County by the Tribe's gaming operation. See Argus Leader, Sioux Falls, South Dakota, at 4A (Sept. 1, 2000) ("State and tribal officials agree the nine casinos in South Dakota have brought jobs and economic development to the rural areas in which they operate;" Flandreau Santee Sioux casino operations "pump \$10 million a year into the local economy.") (Copy included with State's Feb. 20, 2001, comments).

acquisition – the first for the Tribe in over 30 years – will “decimate” the City and County governments. The City did not even respond to the proposed trust acquisition, and the School District – while providing factual information – took no position on the merits of the proposal. In that respect, while Appellants argue that there must be “some limits” on the Secretary’s discretion under section 465, and that the “challenge here is to discover the limits,” the Board is unconvinced that Appellants have demonstrated that this case presents the facts for discerning the outer limits to section 465. Here, Appellants have not shown error in the Board’s prior decisions, or otherwise presented arguments that convince the Board to reconsider those decisions. Thus, the Board continues to hold that subsection 151.10(e) does not require an analysis of cumulative impact on the public entity.

Appellants also argue that the Regional Director made an erroneous finding that the School District would automatically receive additional impact aid when the lands are taken in trust. The Regional Director found that:

The [School District] currently receives funds through * * * the Impact Aid Program, to compensate for any loss of taxes due to trust lands. The amount of money received by the schools is based on a formula derived in part through the total amount of trust lands in Moody County. Therefore, the local school district should start receiving more impact aid monies. In addition, the Tribe contributes 1% of their total net gaming revenue to fund local government projects. Through this annual contribution, the Tribe contributes additional dollars for law enforcement, fire protection, sirens, and school projects. Therefore, the impact on the County will be minimal. (Emphasis omitted).

Regional Director’s Mar. 15, 2002, Decision at 3.

On appeal, the Regional Director admits error in finding that the School District would receive additional payments in lieu of County taxes based on the total amount of trust land in the County rather than on the number of children living on the trust land. She argues, however, that the error is harmless and would not have changed the outcome.

Although the Board is not convinced that the Regional Director’s erroneous statement concerning impact aid constitutes “harmless error,” as that term is normally used, the Board concludes on the facts of this case and in light of the Regional Director’s overall analysis under subsection 151.10(e), that the Regional Director’s erroneous statement in her decision does not constitute reversible error. The Board notes that the same statement was included in the Regional Director’s initial May 3, 2001, decision on this same trust application. In their appeal of that decision prior to the Board’s remand on procedural grounds, Appellants’ opening brief on the merits failed to challenge the Regional Director’s erroneous statement as grounds for reversal. In her re-issued March 15, 2002, decision, the Regional Director essentially treated

Appellants' brief from the previous appeal as additional comments on the proposed trust acquisition, and included a section in her re-issued decision responding to arguments made in that brief. This issue was not among them. Under these circumstances, including Appellants' failure to previously raise the issue, the Board is reluctant to treat this uncorrected error – which the Regional Director now contends did not affect the outcome – as sufficient grounds for remand.

Appellants next argue that the Regional Director erred when she miscalculated the percentage of the Tribe's financial contribution to the County's road maintenance budget. According to Appellants, the Regional Director mistakenly treated the Township's \$21,000 annual road maintenance budget as though it were the County's road budget, and failed to consider the County's actual road maintenance budget of \$1.29 million. Because of the mistake, the Regional Director characterized the Tribe's continuing real property tax payments as representing a significant percentage of the County's annual road maintenance budget, rather than only a small fraction. Appellants assert that they advised the Regional Director of this mistake in their July 31, 2001, brief (in their previous appeal on this trust application), and provided her with the correct \$1.29 million figure for the County's road maintenance budget.

In her March 15, 2002, decision, the Regional Director obviously was aware of this corrected information because she acknowledged Appellants' arguments in their July 31, 2001, brief. The Regional Director summarized Appellants' assertions as follows:

The actual [C]ounty annual road maintenance budget is \$1,290,000. Thus the [T]ribe will not pay 35% of the [C]ounty's annual road maintenance budget – it will pay about 0.56% of the budget. The Regional Director is mistaken by a factor of over 60. Moreover, the [C]ounty has needs beyond road maintenance. (Emphasis omitted).

Regional Director's Mar. 15, 2002, Decision at 9. In response to the above contention, the Regional Director stated:

This analysis by the Regional Director was based on information received from Moody County in their official comment letter dated February 21, 2001. In this letter, Moody County stated under item number 2 that “**The annual budget for road maintenance is approximately \$21,000.**” Consequently, that is the data we used. We were not informed that the County's total annual road maintenance budget is \$1,290,000. We can only use data submitted to us through the comment letters and should not be required to use data submitted by the County and State after the May 3, 2001, decision was made.

Id.

The Regional Director was incorrect in presuming that she was not required to use Appellants' additional information concerning the County's annual road maintenance budget. ^{9/} In making a trust acquisition decision, BIA must consider all information provided to it or which it discovers independently. The Regional Director should have considered the additional information that she received after her initial May 3, 2001, decision, because that decision was vacated and remanded, and she was required to issue a new decision.

The Board disapproves the Regional Director's failure to directly address Appellants' corrected information in her March 15, 2002, decision, and failure to correct the mistaken percentage figures concerning the Tribe's real property tax payments in relation to the County's road maintenance budget. Although it is arguable based on Board precedent that this case should be returned yet again to the Regional Director, the Board is not convinced that a remand is required. The Regional Director's bottom line, in evaluating the impact of removing the property from the tax rolls, was that the tax loss attributable to taking the property into trust would amount to only a fraction of 1 percent of the County's real property tax revenues, and as such the impact would be minimal. That bottom line would not be affected by the corrected information concerning the County's road maintenance budget and corrected percentage figures for the Tribe's continuing real property tax contributions. The Regional Director clearly understood, when she made her March 15, 2002, decision, that the County's annual road maintenance budget was \$1.29 million and not merely \$21,000. The Regional Director also considered the contributions that the Tribe is making from its gaming revenue to local government projects, a fact that is unaffected by the erroneous percentage figures concerning tribal real property tax payments and County or Township road budgets. In addition, although the Board concludes that the Regional Director erred, the Board notes that the Regional Director has stated that her conclusion would not have changed based on considering the corrected information. Under these circumstances, the Board concludes that little or no useful purpose would be served in another remand, and that a remand would not change the Regional Director's overall analysis or conclusion.

Appellants also contend that the Regional Director erred by disregarding evidence that the County's tax base of \$5,690,650 pertains not just to the County, but to the County, 16 townships, 5 towns, and 8 districts, and that the impact of the tax loss "will vary" with regard to each entity. In particular, Appellants contended during their prior appeal of this matter that the proposed conveyance would cost the Township of Flandreau 3 percent of its tax base. Appellants do not cite any other specific "evidence," concerning the "varying" impact of the trust acquisition on local jurisdictional entities.

^{9/} The Board notes that the Regional Director corrected the error in the use of the County's total real property tax, but declined to do so here.

Subsequent to the Board's remand of the Regional Director's initial May 3, 2001, decision in this matter, the Regional Director did notify the Township, the City, and the School District. In her March 15, 2002, decision, the Regional Director noted that the State and County had stressed the importance of the tax loss to the Township, acknowledging the apparent 3 percent tax base loss that would result to the Township. She also noted that the Township itself had not commented on the proposed trust acquisition. She concluded that if the Township believed it would be strongly affected by the trust acquisition, it would likely have submitted comments.

The Regional Director considered the limited evidence that Appellants submitted to her with respect to the impact on local jurisdictional entities, and also considered the fact that the Township itself had not commented on or objected to the acquisition. Appellants have not satisfied their burden to prove that the Regional Director committed error.

Appellants next spend a great deal of time arguing whether the proposed trust lands will be treated as Indian country, for purposes of evaluating the Regional Director's consideration of subsection 151.10(f). Subsection 151.10(f) requires consideration of "[j]urisdictional problems and potential conflicts of land use which may arise," in connection with a proposed trust land acquisition. Appellants argue that the proposed trust land will not be Indian country, based on United States v. Stands, 105 F.3d 1565 (8th Cir. 1997), cert. denied, 522 U.S. 841 (1998). ^{10/} With respect to practical jurisdictional considerations, Appellants do not dispute the Regional Director's findings that the Tribe has a good relationship with the City and has entered into both law enforcement and fire protection agreements to address common interests and concerns between the two jurisdictions. Nor do Appellants dispute that the intended use of the property – agriculture – is consistent with County zoning.

As was the case in County of Mille Lac, 37 IBIA at 176, Appellants here place far too much emphasis on knowing with certainty whether the 310-acre parcel, once taken into trust, would become "Indian country" within the meaning of 18 U.S.C. § 1151, as determinative of whether the Regional Director adequately considered jurisdictional issues. The Regional Director's assumption that the land would become subject to Federal and Tribal jurisdiction certainly was not unreasonable in light of existing case law. See, e.g., Oklahoma Tax Comm'n v. Potawatomi Indian Tribe, 498 U.S. 505, 511 (1991); Buzzard v. Oklahoma Tax Commission, 992 F.2d 1073, 1076 (10th Cir. 1993), cert. denied, 510 U.S. 994; United States v. Azure,

^{10/} Stands was a criminal case that held an individual allotment was Indian country for purposes of Federal jurisdiction. In dicta, the court stated that "tribal trust land beyond the boundaries of a reservation is not ordinarily Indian country," 105 F.3d at 1572, although it cited no case law for that proposition. In a footnote to the same dicta, id. n.3, the court cited United States v. Azure, 801 F.2d 336 (8th Cir. 1986), but in that case off-reservation tribal trust land *was* considered Indian country.

801 F.2d 336 (8th Cir. 1986). In addition, the Regional Director considered the fact that this land was adjacent to existing Tribal reservation lands, and that once the property is placed in trust, the Tribe plans to request that it be formally proclaimed part of the Tribe's reservation, which would resolve any jurisdictional uncertainties. And the Regional Director specifically considered the fact that the Tribe was addressing practical jurisdictional issues through cooperative agreements with the City, as was the case in County of Mille Lac.

Appellants continue their argument about potential jurisdictional conflicts, contending that the Regional Director erred in her analysis of zoning issues. According to Appellants, the Regional Director admitted that conflicts of land use are inevitable if the trust acquisition does not proceed, but concluded that zoning conflicts would be avoided if the land is taken into trust, because the Tribe would prevail in litigation if its land use is challenged. Appellants argue that the point of 25 C.F.R. § 151.20(f) is not who wins the lawsuit, but that the regulation "require[s] an independent analysis of the effect on the local community if the tribal regulation were followed and to balance it against the effect on the local community if the county regulation were followed." Appellants' Amended Opening Brief at 33.

The Regional Director found that:

The County currently has this property zoned for agricultural use and that's the way the land will be used until the time comes when the Tribe may have need to use the land for homesites. If the land were to remain in fee status, the County would only allow one house per 40 acres of land. This clearly would cause jurisdictional problems if the land remained in fee status and if the Tribe should ever desire to use the land for housing needs.

Regional Director's Mar. 15, 2002, Decision at 4.

The Tribe plans to continue the existing use of the property for agriculture, which is consistent with the County's zoning at the time of the Tribe's application. ^{11/} Appellants read too much into the Regional Director's statements about what might happen if the Tribe ever changed its use of the property. The Regional Director properly considered whether the Tribe's intended use of the property for agriculture was in conflict with the way the property was zoned by the County. She found no conflict, and Appellants do not dispute that. The Regional Director also considered the possibility of a conflict if in the future the Tribe wants to change its use of the property to housing, and if the property is still held in fee and subject

^{11/} There is a discrepancy between the County and School District as to whether the zoning was to be changed in 2001 or 2003. See infra, n.4.

to County zoning. While the Regional Director did not explicitly say so, it is apparent that she believed that taking the property into trust would likely reduce the potential that County zoning would be a barrier to tribal use of the property for housing.

Although Appellants would have the Regional Director do more analysis of potential land use conflicts, they have not shown that the Regional Director did not consider this issue, and in particular did not consider the Tribe's present intended use of the property in relation to current zoning. Subsection 151.10(f) requires BIA to consider jurisdictional problems and potential conflicts of land use that may arise. The regulations do not require the Regional Director to resolve all possible jurisdictional conflicts prior to acquisition, nor to consider potential future zoning conflicts if the land use changes. The fact that the Regional Director here discussed the possibility of a future housing use does not mean she was then required to consider additional future use issues and associated variations. The Board concludes that Appellants have not met their burden of proof to demonstrate that the Regional Director did not consider jurisdictional issues or potential conflicts of land use that might arise. Appellants disagree with the Regional Director's conclusion, but they have not shown that the Regional Director improperly exercised her discretion. Appellants have not demonstrated that the Regional Director did not consider subsection 151.10(f).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Regional Director's March 15, 2002, decision, as amended and supplemented by her October 16, 2002, decision, is affirmed, although the Board strongly disapproves the Regional Director's refusal in her decision to make appropriate corrections, based on the additional information contained in Appellants' brief filed in the earlier appeal concerning this trust acquisition. 12/

// original signed
Kathleen R. Supernaw
Acting Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

12/ Any arguments not specifically addressed were considered and rejected.