



## INTERIOR BOARD OF INDIAN APPEALS

Voices for Rural Living v. Acting Pacific Regional Director, Bureau of Indian Affairs

49 IBIA 222 (06/16/2009)



# United States Department of the Interior

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

VOICES FOR RURAL LIVING,	)	Order Affirming Decision
Appellant,	)	
	)	
v.	)	
	)	Docket No. IBIA 07-34-A
ACTING PACIFIC REGIONAL	)	
DIRECTOR, BUREAU OF INDIAN	)	
AFFAIRS,	)	
Appellee.	)	June 16, 2009

Appellant Voices for Rural Living, a citizens group in El Dorado County, California, challenges a decision by the Pacific Regional Director (Regional Director), Bureau of Indian Affairs (BIA), dated September 8, 2006 (September 8 Decision), to accept two parcels, consisting of approximately 77.03 acres, into trust status on behalf of the Shingle Springs Band of Miwok Indians (Tribe).<sup>1</sup> In making her decision, the Regional Director declined to prepare an Environmental Impact Statement (EIS) pursuant to the National

<sup>1</sup> The two parcels are described as follows:

Parcel 1: A portion of Sections 29, 30, 31 & 32, Township 10 North, Range 10 East, M.D.B. & M., and a portion of Section 6, Township 9 North, Range 10 East, M.D.B. & M., more particularly described as Parcel 9, as shown on the parcel map filed August 31, 1972, in Book 1 of Parcel Maps, at page 163, El Dorado County Records. Assessor's Parcel Numbers: 319-210-18, 319-230-48, and 319-230-49.

Parcel 2: Parcel 13, as said Parcel is shown on that certain Parcel Map entitled "Portion of Sections 29, 30, 31, and 32, Township 10 North, Range 10 East, and Portion of Section 6, Township 9 North, Range 10 East, M.D.M.," filed August 31, 1972, in Book 1 of Parcel Maps, at page 163, El Dorado County Records. Assessor's Parcel Number: 319-220-18.

Parcel 1 consists of approximately 42.40 acres (33.77, 4.63, and 4.0 acres for Assessor's Parcel Numbers 319-210-18, 319-230-48, and 319-230-49, respectively). Parcel 2 consists of approximately 34.63 acres.

Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 *et seq.*, relying instead on an Environmental Assessment (EA) and a subsequent Finding of No Significant Impact (FONSI), which she issued on February 12, 2004, in preparation for her decision on the Tribe's fee-to-trust application. Appellant contends that the FONSI overlooks significant environmental effects that will result from taking the land into trust, and therefore the FONSI and the decision to take the land into trust must both be set aside, and BIA must be ordered to prepare an EIS. In addition, Appellant argues that the conveyance of the fee land to trust status violates the Indian Land Consolidation Act (ILCA), 25 U.S.C. §§ 2201 *et seq.*, because the Tribe is ineligible to have land taken into trust on its behalf under ILCA.

As part of the parties' briefing on the merits of Appellant's claims, the Board requested briefing from the parties on Appellant's standing. Contrary to arguments made by the Regional Director and the Tribe, we conclude that Appellant has standing to pursue its NEPA claims. With the exception of its claims concerning waste disposal and the effect of the Tribe's proposed construction on the water supply, Appellant has met the minimum requirements for showing injury, causation, and redressability. The record in this case demonstrates that the Tribe's proposal to construct a health clinic and residential housing on the property, which is the source of the injuries alleged by Appellant, is not likely to proceed in the absence of BIA's decision to accept the land in trust.<sup>2</sup> On the merits, we conclude that the EA, on which the FONSI is based, considered each of the arguments raised by Appellant in its comments to BIA, and the EA justified the conclusion that there are no significant impacts from the project or that anticipated impacts can be reduced to insignificance through mitigation.

With respect to Appellant's ILCA claim, we conclude that Appellant lacks standing to challenge the trust acquisition as violative of ILCA because Appellant is not within the zone of interests that ILCA protects. Even assuming Appellant had standing, Appellant offers, at best, speculation that the Tribe lacks existing tribal trust land that would enable it, according to Appellant, to be eligible for additional lands to be taken into trust under ILCA. Such speculation is insufficient to support its arguments, for which reason which we would reject Appellant's argument on its merits.

Therefore, we affirm the Regional Director's decision to accept the two parcels into trust.

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<sup>2</sup> Appellant's alleged procedural injury — that an EIS should have been prepared for the acquisition of these two parcels into trust status — would be redressed if Appellant were to prevail on the merits of its NEPA claims.

## Background

The Tribe is a Federally-recognized tribe located in or near the unincorporated community of Shingle Springs in El Dorado County, California, on 160 acres of land (Rancheria) purchased in 1920 by the United States “for the use and occupancy of the Sacramento-Verona Band of Homeless Indians.” September 8 Decision at 4-5.<sup>3</sup> In 2000, the Tribe presented an application to BIA to accept 7 parcels of land — owned in fee by the Tribe — into trust for the Tribe pursuant to 25 C.F.R. § 151.11; the number of parcels subsequently was increased to 9 parcels, totaling of 104.14 acres, in April 2002; and finally, in June 2002, the number was pared down to the two parcels at issue in this appeal.<sup>4</sup> The parcels that are the subject of this appeal are adjacent to each other in an east-west line, bound on the north by U. S. Route 50 (Highway 50) and on the south by abandoned railroad tracks. The two parcels are bisected by Shingle Springs Drive. The Tribe’s Rancheria is located approximately one mile away, on the north side of Highway 50.

The Tribe proposes to construct a 14,335 square foot health clinic on that portion of Parcel 1 that corresponds to Assessor Parcel Number 319-210-18. The project will alter approximately three acres of the site, which presently is undeveloped. The Tribe currently leases 4,800 square feet of commercial fee property for its tribal clinic, and represents that the proposed clinic will enable the Tribe to offer expanded services to a larger population. The Tribe proposes to construct 6 single family homes (“clustered units”) on approximately 12 acres in the southwest portion of Parcel 2. The County concluded that the Tribe’s proposed construction (Proposed Action) generally is consistent with the County’s land use designation and zoning for the two parcels. *See* Letter from El Dorado County Planning

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<sup>3</sup> This tract of land is adjacent to the former El Dorado Rancheria, an 80-acre tract of land purchased in 1916 by the United States for the “El Dorado Band of landless California Indians.” September 8 Decision at 4. The El Dorado Rancheria ultimately passed out of trust and into individual fee ownership.

<sup>4</sup> The September 8 Decision refers to the proposed acquisitions as comprising two parcels, but the EA and FONSI describe the same lands as comprising four parcels. *Comp.* EA at 1-3 and FONSI at 2 (four parcels) *with* September 8 Decision at 1-2 (two parcels). Apparently, the County Assessor’s office assigned three assessor’s parcel numbers to that parcel referred to as “Parcel 1” in the September 8 Decision, even though these same three parcels comprise a single parcel (“Parcel 9”) on the County parcel map. *See* n.1. For convenience sake, we will refer to the proposed acquisition as two parcels, Parcel 1 and Parcel 2.

Department to BIA, Apr. 22, 2003, at 1-2. The Tribe has no plans to develop the remainder of the land.

A private contractor prepared an EA

to analyze and document the environmental consequences associated with:

1) the proposed transfer of 77.03 acres of fee land into federal trust status for the [Tribe], 2) the development and use of a health clinic south of Highway 50, and 3) the development and use of residential units south of Highway 50.

EA at 1-7. The EA was prepared for several “direct and indirect approvals and actions [that] may occur as a result of the Proposed Action,” including the acceptance into trust of the two parcels of land; issuance of a general permit for stormwater discharges by the U.S. Environmental Protection Agency (EPA), approval of permits by the U.S. Army Corps of Engineers for the filling of jurisdictional waters; Section 7 Consultation by U.S. Fish and Wildlife Service, if endangered species may be affected by the project;<sup>5</sup> and consultation by the State Historic Preservation Office, if cultural resources are impacted by the project. *Id.* at 1-8.

In examining the environmental consequences of the Proposed Action, the EA addressed the temporary impact on air quality and noise levels, resulting from the construction activity associated with the proposed health clinic and housing, *id.* at 4-5 to 4-6, 4-24; implications to air quality and traffic resulting from any increased vehicle emissions and activity, *id.* at 3-30 to 3-37, 4-5 to 4-6, 4-11 to 4-18, 4-22 to 4-24, and Appendix H; impact on local wildlife, *id.* at 3-17 to 3-23; the availability of water, *id.* at 3-39 to 3-40, 4-2 to 4-5, and Appendix A; and waste (including medical waste) and wastewater disposal, *id.* at 3-40, 4-18 to 4-19, 4-24, and Appendices A, B.

According to the EA, consultation during the preparation of the EA occurred with BIA, U.S. Army Corps of Engineers, U.S. Fish and Wildlife Service, and U.S. Department of Agriculture. In addition, the El Dorado Irrigation District and the El Dorado County Fire Protection District were consulted. Further, on March 26, 2003, the EA was submitted to California’s State Clearinghouse for a 30-day comment period. The State Clearinghouse circulated the EA to a number of State and local agencies. Notices of Availability of the EA were published in a local newspaper on April 4, 7, and 9, 2003, announcing that BIA would accept comments until April 25, 2003. Comments on the

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<sup>5</sup> See 16 U.S.C. § 1536, which sets out the Section 7 consultation requirements of the Endangered Species Act.

Proposed Action were received from the El Dorado County Counsel's Office, the El Dorado County Planning Department, the State Department of Fish and Game, the El Dorado Irrigation District, and from a number of individuals. On April 22, 2003, Appellant requested an extension of time from BIA to submit comments, and was granted a 1-week extension.

Appellant submitted comments in a 20-page, single-spaced response to the EA. *See* Letter from Appellant to BIA, May 2, 2003, at AR Tab15. Appellant raised the following concerns with respect to the EA:

- Casino – “It is believed” that the sole purpose for the trust acquisition is related to the Tribe’s proposed casino and that the parcels “will eventually be used for one of the two casinos the [Tribe] has already stated [it plans] to build.” *Id.* at 2.<sup>6</sup>
- County’s General Plan – The parcel on which the clinic is proposed to be built is not zoned “commercial” per the El Dorado County General Plan because the General Plan “was thrown out by court action three years ago.” *Id.* Prior to the General Plan, the property was zoned “RE5 residential . . . with a Planned Development Overlay.” *Id.*; *see also id.* at 7.
- Public Consultation – No public consultation meetings, scoping sessions, or public hearings were held. No “Notice of Availability” was disseminated concerning the Proposed Action. Certain local agencies, including the County Planning Department, were not included in the agency consultation process. *Id.* at 3-4.
- Other Development – The EA fails to analyze any uses for the acreage that allegedly will be left vacant. *Id.* at 5.
- Alternative Plans – Inadequate consideration is given to alternatives, and no justification is provided for the chosen alternative. *Id.* at 7, 16.

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<sup>6</sup> Appellant purported to incorporate “by reference” earlier comments it had submitted on the Tribe’s proposal for a casino, but Appellant did not attach a copy of its comments. *See* EA at 3-12. In its comments on the subject acquisitions, Appellant did not explain how its former comments were relevant, except in relation to Appellant’s asserted belief that the proposed acquisition would be used for casino purposes.

- Availability of Existing Tribal Land – Consideration of the purpose and need for the Proposed Action is inadequate because no consideration is given to the construction of the proposed clinic and housing on the Tribe’s existing [R.]ancheria, because the clinic and housing can be constructed on the proposed site without the land being taken into trust, and because the construction of six homes is not likely to “fulfill[] a housing need of the Tribe.” *Id.* at 5-6.
- Traffic – The traffic analysis underestimated the impact of the Proposed Action on the intersection of Buckeye Road and Mother Lode Drive opposite Holiday Lake Drive. *Id.* at 7-8.
- Impact on Flora and Fauna – The EA failed to consider an oak woodland corridor that exists at and near Shingle Springs Drive and Highway 50 “and the potentially significant flora and fauna that inhabit it;” failed to consider a tracking study of wildlife migration through Shingle Springs Drive under Highway 50; and contains contradictory statements concerning the impact on elderberry shrubs on the parcels, which are considered potential habitat for the “[F]ederally threatened” valley elderberry longhorn beetle. *Id.* at 8-10.
- Additional Studies – Because an earlier biological assessment, *see* EA at Appendix A, suggested that additional studies should be conducted for several plant and animal species, the EA should be withdrawn until such time as the additional studies are completed and made available for public comment. *Id.* at 10.
- Water Supply – The EA does not document a ready and viable source of water for the proposed development on the parcels. *Id.* at 11-13.
- Wasterwater and Medical Waste Disposal – The EA contains an inadequate analysis of the impact of utilizing septic systems for the proposed clinic and housing as well as inadequate consideration of the disposal of medical waste. *Id.* at 13-15.

In its comments, Appellant did not raise any concerns regarding air quality as a result of any increase to traffic as a consequence of the Proposed Action.

Following the close of the public comment period on the EA and the consideration of the comments received, detailed responses were drafted by the contractor to address the

concerns expressed in each comment letter. Appellant's concerns were addressed in a 12-page response that also incorporated additional detailed responses made to similar comments submitted by others. *See* Responses to Comments (RC) at 3-12 to 3-24, Sept. 2003. In particular, the EA contained following responses to specific comments submitted by Appellant:

- Casino – The parcels on which casino or casino-related activity were proposed are not part of the present trust acquisition decision. There appears to be no relevance to the comments submitted earlier to the proposed casino project on the north side of Highway 50. The response to Appellant's comments on the earlier project are incorporated by reference (a final EA was issued by the National Indian Gaming Commission for this earlier acquisition in December 2001). *See* RC at Attachment 4.
- County's General Plan – To the extent that Appellant maintains that the County's General Plan, including its land use designations, was discarded as the result of legal action in 2000, the EA observes that the County has a separate zoning ordinance, and the Tribe's proposed construction is consistent with that ordinance.
- Public Consultation – A "Notice of Availability [of EA]" was published in the local newspaper and submitted to the State Clearinghouse for circulation to state agencies.<sup>7</sup>
- Other Development on the Parcels – The project objectives call for the construction of six houses and a health clinic. "[N]o development will occur" on two of the subparcels of Parcel 1<sup>8</sup> or on the westerly portion of Parcel 2. RC at 3-14.
- Availability of Existing Tribal Trust Land – The Tribe's land use plan has allocated all of the land on the Tribe's existing trust land for various purposes. Even assuming the Tribe's land use plan would permit the construction of the health clinic and housing, the current restrictions imposed by court action on the access road to the Rancheria would prohibit access to a health clinic.

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<sup>7</sup> The RC did not address Appellant's concern that public hearings were not held.

<sup>8</sup> As explained in n.1 *supra*, Parcel 1 consists of 3 subparcels, each with its own Assessor's Parcel Number.

- Alternative Plans – Alternatives to the proposed plan were analyzed in the EA and the chosen plan was deemed to best meet the Tribe’s needs while providing the least impact to the environment as compared to each of the alternative plans.
- Traffic – The EA included a traffic analysis in which the proposed development was predicted to generate approximately 450 additional daily weekday trips. In particular, the traffic analysis addressed the intersection of Buckeye Road at Mother Lode Drive opposite Holiday Lake Drive and concluded that there would be “an expected 2 percent trip distribution in the direction of the intersection in question, [generating] 9 daily trips . . . , 1 trip in the AM peak hour, and 1 trip in the PM peak hour. The effects of the Proposed Action [on this intersection] do not warrant an intersection-level analysis.” EA at 3-16.
- Impact on Flora and Fauna – The impact of the development on the oak woodland corridor was examined and will be minimal. The oak trees will be entirely preserved on Parcel 2 and, as to Parcel 1, the removal of a small number of trees will be necessary to provide access from Shingle Springs Road to Parcel 1 to reach the proposed health clinic. With respect to the alleged tracking study of migration, the contractor is not aware of the study and Appellant neither included a copy of the study nor identified its authors or where a copy could be located. The EA listed possible Federally identified species that could be impacted by the proposed development, consulted with the Fish and Wildlife Service, and concluded that there was not likely to be an adverse impact.<sup>9</sup>
- Additional Studies – The suggestion for additional studies came in a report dated March 2002 that is attached to the EA as Appendix B. A supplemental report was prepared, also in March 2002 and prior to the completion of the

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<sup>9</sup> The State Fish and Game Department also submitted comments, but did not identify any adverse impacts to protected species. The State recommended that care should be taken to avoid any impact to nesting trees, if any. The response to this suggestion noted that during an environmental survey of the parcels, no resident or migratory bird species were identified. The response also stated that no later than 1 month prior to construction activities, the Tribe will hire a qualified biological consultant to conduct pre-construction surveys for migratory or nesting birds and report the findings to the appropriate U.S. Fish and Wildlife Service office.

EA, that addressed those species identified in Appendix B as Federally listed special status species: the California red legged frog, the valley elderberry longhorn beetle, and Layne's butterweed. Construction was not anticipated to affect the California red legged frog, and Layne's Butterweed was not identified on either of the subject parcels.<sup>10</sup>

- Water Supply – “The EA provides detailed analysis of pre-project, post-project, as well as cumulative analysis of the effects the Proposed Action will have on water resources” and identifies each of the sections in the report that address water availability. RC at 3-18.
- Wastewater and Medical Waste Disposal – The EA details the mitigation measures that the Tribe intends to take with respect to the installation of septic systems. The installation of the septic systems “will be designed and constructed to conform to [County] standards.” RC at 3-20. The disposal of medical waste likewise is addressed in the EA.

The written comments and responses were submitted to the Regional Director in September 2003. On February 12, 2004, the Regional Director issued a FONSI for the Proposed Action. She addressed the comments received from Appellant and others. In particular, the Regional Director elaborated on the use of septic systems for the proposed construction, explaining that “the maximum loading rate for the project site is 0.02 gallons per day (gpd)/square foot (ft<sup>2</sup>), which is less than the lowest US EPA prescribed loading rate.” FONSI at 5. The Regional Director also explained that the combined use of septic tanks with the conservative loading rate assures that “a significant effect to water quality does not occur.” *Id.* With respect to water availability, the Regional Director explained that an additional pump test was performed to determine the extent of groundwater resources and found that the existing on-site well was capable of yielding 5 gallons per minute, which is equivalent to 7,200 gpd. While the water/wastewater feasibility report at Appendix A of the EA recommended water capacity of 15,000 gpd, the same report also estimated the average water demand to be 6,300 gpd<sup>11</sup> and, thus, below the anticipated output of the onsite well. Notwithstanding the anticipated output, the Regional Director

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<sup>10</sup> The response did not address the valley elderberry longhorn beetle. However, a separate report, dated March 2002 and found at Appendix M, addressed the impact to the valley elderberry shrub and the valley elderberry longhorn beetle.

<sup>11</sup> The EA estimated that the average daily water use would be 4,200 gpd, and peak day demand could be as high as 8,300 gpd.

stated that the Tribe intended to utilize an on-site water storage tank to supplement the well water and would enter into contracts for supplemental water delivery to the site. The well water complied with Federal safe drinking water standards, as set by the EPA.

The Regional Director identified numerous mitigation measures that would be taken to reduce the impact on the environment during construction as well as to mitigate any longer lasting effects from the finished construction. For example, she noted that during construction, dust levels will be controlled by periodic watering, and a 100-foot fence will be placed around elderberry shrubs found on Parcel 1 to create a buffer area within which no disturbance will occur; the water supply for the finished construction will derive from an on-site well not to exceed 5 gpm; supplemental water will be delivered pursuant to a contract with a water delivery company, “Aeropure;” and the septic tanks and leach fields will conform to County ordinance. FONSI at 7. The Regional Director concluded that

[t]he impact on the quality of the human environment is judged to be of minor impact and significant beneficial socioeconomic impact to [the Tribe] and El Dorado [C]ounty. There is no significant unmitigated impact on public health and safety. The proposed land use will not involve an irreversible or irretrievable commitment of resources, and will result in improved socioeconomic benefit to the Tribe and to the surrounding communities.

*Id.* at 8.

The Regional Director completed his review of the proposed trust acquisition and, on September 8, 2006, issued her decision to accept the two parcels into trust on behalf of the Tribe.<sup>12</sup>

This appeal followed. The Board’s order setting a briefing schedule for this appeal included an order to Appellant to brief the issue of its standing to pursue this appeal. Briefs, including supplemental (surreply) briefs, were received from Appellant, the Regional Director, and the Tribe.

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<sup>12</sup> The Regional Director considered the proposed acquisition as an off-reservation acquisition pursuant to 25 C.F.R. § 151.11. Appellant does not attempt to challenge the Regional Director’s analysis of the acquisition under section 151.11, but only under NEPA and ILCA.

## Discussion

On the record before us, we conclude that Appellant has standing to challenge the NEPA analysis conducted for the proposed trust acquisition. However, on the merits, we either reject Appellant's claims or decline to consider them because Appellant seeks to assert interests for which no injury is alleged. With respect to ILCA, Appellant is not within the zone of interests to be protected by ILCA. Therefore, Appellant lacks standing to challenge the Tribe's eligibility to have land taken into trust for it under ILCA. However, even if we were to consider this claim, we would reject it on the merits because, contrary to Appellant's assertion, the Tribe is not landless, and therefore is a "tribe" within the meaning of ILCA, and the Secretary may therefore take land into trust on behalf of the Tribe pursuant to 25 U.S.C. §§ 465 and 2202.

### A. Standing

In assessing standing before the Board, the Board applies the principles of standing that guide the Federal courts, as set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992): A plaintiff (i.e., an appellant before the Board) must show that (1) he or she has suffered an actual or imminent, concrete and particularized injury to or invasion of a legally protected interest; (2) the injury is fairly traceable to the challenged action; and (3) the injury will likely be redressed by a favorable decision. *Northern Cheyenne Livestock Ass'n v. Acting Rocky Mountain Regional Director*, 48 IBIA 131, 136 (2008); *Evitt v. Acting Pacific Regional Director*, 38 IBIA 77, 79-81 (2002). In asserting a procedural injury under NEPA, the foregoing standards are relaxed: Appellants may prosecute their claims "without meeting all the normal standards for redressability and immediacy." *Arizona State Land Dep't. v. Western Regional Director*, 43 IBIA 158, 169 n.14 (2006) (quoting *Lujan*, 504 U.S. at 572 n.8).

In addition to the above constitutional elements of standing, the Board also adheres to principles of prudential standing, as articulated in *Ass'n of Data Processing Serv. Orgs. Inc. v. Camp*, 396 U.S. 150, 153 (1970): Appellants must show that the interest sought to be protected is arguably within the zone of interests to be protected or regulated by the statute (or regulation) in question. See *Wadena v. Midwest Regional Director*, 47 IBIA 21, 27 (2008); *Evitt*, 38 IBIA at 79.

Finally, the Board has held that an organization may pursue appeals before the Board where "(1) its members would have standing to sue in their own right, (2) appellant's stated purposes as an association make it a suitable proponent of its members' interests, and (3) the issues to be resolved do not require the individual participation of the members."

*Hawley Lake Homeowners' Ass'n v. Deputy Assistant Secretary - Indian Affairs (Operations)*, 13 IBIA 276, 285 (1985).

The burden of establishing standing to bring an appeal rests with appellants. *Skagit County v. Northwest Regional Director*, 43 IBIA 62, 70 (2006). We examine each of these elements as applied to Appellant and conclude, on the basis of this record, that Appellant has met its burden of showing standing as to its NEPA claims, with the exception of its claims as to waste disposal and the effect of the Proposed Action on the water supply. However, as to its ILCA claim, we conclude that Appellant lacks prudential standing.

### 1. Injury

At least with respect to certain claims raised by Appellant, we conclude that Appellant satisfies the first prong of standing — concrete and imminent injury to a protected interest — through the declarations of three of its members. The declarants each assert that “they enjoy observing wildlife” as they pass by the parcels while traveling on Highway 50 and the adjacent road. Declaration of Brad Pearson (Pearson Declaration) at ¶ 4; Declaration of Charles Hummer (Hummer Declaration) at ¶¶ 3, 5 (“natural beauty of the site”); *see also* Declaration of Chrysan Dosh (Dosh Declaration) at ¶ 7 (enjoys seeing, hearing and studying wildlife on the subject parcels as she travels on roads and walkways adjacent and near the parcels). The declarants also assert that they will be injured by the “aesthetic and biological impact” to the oak woodland habitat on the subject parcels as a result of the proposed construction and development. Pearson Declaration at ¶ 4; *see also* Dosh Declaration at ¶ 7 (development on the parcels would injure unidentified wildlife habitat on the subject parcels which would harm declarant’s “interest in wildlife observation and study”); Hummer Declaration at ¶ 4. In addition, the declarants assert that they travel local roads adjacent to the site, including the intersection of Buckeye Road and Holiday Lake near Mother Lode Drive, and that they will be harmed by the traffic impacts of the Proposed Action.<sup>13</sup> Finally, the declarants assert generally that they will suffer from air, water, noise, and aesthetic pollution resulting from the project construction and from “urban development . . . likely to be induced by new growth on and around the fee-to-trust property.” Hummer Declaration at ¶ 5; *see also* Dosh Declaration at ¶ 5; Pearson Declaration at ¶ 5. With respect to these latter averments, the declarants do not distinguish between injuries related to the proposed health clinic/housing and injuries relating to future “development” that is not further described or identified by the declarants. None of the declarants, however, asserts any injury with respect to the adequacy of the water supply or

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<sup>13</sup> Two of the declarants, Dosh and Hummer, refer to “Holiday Lane.” We presume they mean to refer to “Holiday Lake Drive,” which intersects with Buckeye Road.

waste disposal for the Proposed Action. As to any claims concerning waste disposal or the effect of the Proposed Action on the existing water supply, we conclude that Appellants may not raise these claims because none of the declarants has asserted any anticipated injury that might result from these two concerns.

## 2. Causation

In this appeal, Appellant does not allege that any of the declarants' injuries will result directly from the Regional Director's decision to accept the two parcels into trust.<sup>14</sup> Instead, Appellant argues that the Tribe will not proceed with the construction of a health clinic and housing unless the land is taken into trust, and because the Tribe's development is made possible by BIA's decision, the declarants' injuries are causally connected, or fairly traceable, to the September 8 Decision. We agree with Appellant's position.

The Supreme Court has recognized that when a plaintiff's asserted injury arises from governmental action directed at an individual or entity other than the plaintiff, "much more is needed" to show causation and redressability because those elements "ordinarily hinge on the response of the . . . third party to the government action," which in turn "depends on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Defenders of Wildlife*, 504 U.S. at 562 (internal citations omitted). In such circumstances, "it becomes the burden of the plaintiff to adduce facts showing that those choices *have been or will be made* in such a manner as to produce causation and permit redressability of injury." *Id.* (emphasis added); *see also National Audubon Society v. Davis*, 307 F.3d 835, 849 (9th Cir. 2002) (the chain of causation may have more than one link, provided that the links are not "hypothetical or tenuous," citing *Autolog Corp. v. Regan*,

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<sup>14</sup> The bare decision to accept land into trust status does not, of itself, adversely affect Appellant nor does it, of itself, offend any environmental concerns: The decision effects a change of title from the Tribe to the United States, as trustee for the Tribe. *See, e.g., United States v. 0.95 Acres of Land*, 994 F.2d 696, 699 (9th Cir. 1993) ("The filing of the condemnation action and the subsequent transfer of legal title are not 'major Federal actions' significantly affecting the environment."); *Ono v. Harper*, 592 F. Supp. 698, 700-01 (D. Haw. 1983) ("Mere transfer of title does not directly" implicate either the Coastal Zone Management Act or NEPA); *see also Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1114 (9th Cir. 2002) ("NEPA procedures do not apply to federal actions that maintain the environmental status quo."). Thus, the bare decision to take land into trust where no change in the use of the property is planned ordinarily does not implicate environmental concerns or NEPA and is categorically excluded. *See* 516 DM 10.5(I) (2004).

731 F.2d 25, 31 (D.C. Cir. 1984)); *Citizens for Better Forestry v. U.S. Department of Agriculture*, 341 F.3d 961, 975 (9th Cir. 2003) (“The causation question concerns only whether plaintiffs’ injury is dependent upon the agency’s policy, or is instead the result of independent incentives governing [a] third part[y’s] decisionmaking process,” quoting *Idaho Conservation v. Mumma*, 956 F.2d 1508, 1518 (9th Cir. 1992)).” Injuries resulting from a third party’s response to government action (or inaction) does not mean that standing is precluded, “but it is ordinarily substantially more difficult to establish.” *Defenders of Wildlife*, 504 U.S. at 562. (citation omitted).<sup>15</sup>

When a third party’s action upon which alleged injury is premised is legally dependent upon the challenged government action, the requirement of causation is easily satisfied. See *TOMAC v. Norton*, 193 F. Supp. 2d 182, 188 (D.D.C. 2002) (tribe’s casino plans could not move forward until land was taken into trust), *aff’d*, 433 F.3d 852 (D.C. Cir. 2006). On the other hand, when a third party’s action is legally independent of the challenged government action, the inquiry becomes fact-specific in determining whether the alleged injury is fairly traceable to that action, and the burden on an appellant is substantial. Here, the Tribe and the Regional Director both contend, and the record supports the contention, that the proposed health clinic and housing development are generally consistent with the County’s land use designation and zoning for the subject properties. Thus, it cannot be said that the Tribe’s proposed construction is *legally* dependent upon the land being held in trust because the Tribe’s plans are consistent with local law applicable to fee lands, although the Tribe would still be required to obtain necessary permits and approvals if the Tribe were to proceed with its Proposed Action while the land remained in fee status.

However and notwithstanding the substantial burden that falls on Appellant, we conclude that the record demonstrates that the Tribe, although an independent third party, has made or will make its decision contingent upon the trust acquisition such that the proposed construction is *factually* dependent upon the land being in trust. First, the FONSI states that “[the Tribe] believes, and the BIA tends to concur, given the stated opposition to the project and the law suits filed against the [Tribe] by El Dorado County and local citizen groups, that it would be *impossible* to construct a clinic and housing on land under local civil jurisdiction.” FONSI at 1 (emphasis added). The FONSI goes on to say that “the single greatest practical effect of the proposed trust acquisition is removal of the subject properties from the local civil jurisdiction and taxation, effectively allowing the project to be completed.” *Id.* at 2. Second, we note that the EA does not separately

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<sup>15</sup> In *Skagit County*, 43 IBIA at 71, we concluded that the County could not show that the tribe’s marina project was not likely to proceed without approval of the trust acquisition.

consider the trust acquisition independent of either the health clinic, housing, or both: The “no action alternative” in the EA posits that the land would not be placed in trust, that no construction would occur, and that “[i]n the long term, *it is likely that the properties would be sold* by the Tribe.” EA at 2-8 (emphasis added). Third, the Tribe’s own trust application variously states that acceptance of the land into trust will “facilitate,” or “enabl[e],” or “allow[.]” the Tribe’s development of housing and a tribally-owned clinic, Trust Application at 2-4, 9, a characterization that is picked up in the September 8 Decision. *See* September 8 Decision at 5 (trust acquisition will “enable” the Tribe to expand health care services and provide additional housing). While such language — facilitate, enable, allow — standing alone would not satisfy Appellant’s burden, the cumulative weight of evidence in the record does suffice in this appeal.

The Tribe argues that because the health clinic and housing “is possible” without trust status, it cannot be said that development of the property is “dependent on the [September 8] Decision.” Tribe’s Surreply at 6. But neither the Regional Director nor the Tribe dispute Appellant’s assertion that the Tribe’s projects will not proceed unless the fee-to-trust transfer is approved. Nor does the Tribe offer any affidavits of its own to counter the cumulative evidence in the administrative record demonstrating that, whether it had to or not, the Tribe made the choice to treat the trust acquisition as a contingency to its proposed development. *See* Tribal Resolution 2004-07 (Feb. 6, 2004) (approval of plan for Tribe to enter into water delivery contract *after* favorable BIA trust acquisition decision becomes final). The ultimate burden, of course, remains with Appellant to show that the proposed construction is contingent on the land being taken into trust, i.e., contingent on the Federal action. But, in the absence of refuting evidence from the Tribe that it has reconsidered its earlier apparent decision not to go forward with its plans in the absence of approval of its trust application, the administrative record is sufficient to establish causation.

### 3. Redressability

We agree with Appellant that if the Board were to vacate the September 8 Decision and remand this matter to the Regional Director for preparation of another EA or an EIS, the procedural injury of which Appellant complains under NEPA would be redressed. Moreover, because a remand could lead to a decision that would avoid the injuries of which Appellant complains, the relaxed redressability element for Appellant’s procedural claim is satisfied. Therefore, the third element of standing is met as to Appellant’s NEPA claims. As to its claim under ILCA, the redressability element is satisfied because if we were to conclude that the Regional Director lacks authority to accept the land into trust on behalf of the Tribe, the Tribe’s projects are not likely to proceed and Appellant’s alleged injuries would be redressed.

#### 4. Prudential Concerns

Even though an appellant may satisfy the constitutional elements of standing, standing to bring a claim may still be dependent on whether an appellant's claims fall within the zone of interests to be protected or regulated by a statute (or regulation). The zone-of-interest requirement is not intended to be an onerous test. *Clarke v. Sec. Indus. Assoc.*, 479 U.S. 388, 399 (1987). If the asserted interests are "so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit," appellant's claims will not be within the zone of interests and the appellant will lack prudential standing. *Id.* "Even if a particular litigant is outside the class for whose benefit the statute was enacted, that litigant retains prudential standing so long as its interests are sufficiently congruent with those of the intended beneficiaries that the litigant[ is] not more likely to frustrate than to further . . . statutory objectives." *In re Vitamins Antitrust Class Actions*, 215 F.3d 26, 29 (D.C. Cir. 2000) (internal quotation marks omitted).

Appellant has asserted specific claims that fall well within the zone of interests that NEPA intends to protect. *See County of Sauk, Wisconsin v. Midwest Regional Director*, 45 IBIA 201, 218 (2007). Therefore, Appellant establishes prudential standing under NEPA.

However, as to ILCA, we conclude that Appellant lacks prudential standing. First, Appellant makes no argument, nor could it, that it is an intended beneficiary of ILCA. Second, Appellant's interests are not "congruent with" the purposes of ILCA. Appellant's interests in challenging the fee-to-trust acquisition are (1) to prevent the land from transferring into trust status in order (2) to avoid "significant negative impacts [on neighboring property owners] through uncontrolled development of lands that are not properly held in trust." Reply Brief to Tribe's Answer Brief at 5; *see also* Appellant's Opening Brief at 3 (same). In contrast, 25 U.S.C. § 2202, on which BIA relied to take the subject parcels into trust, specifically extends the provisions of 25 U.S.C. § 465 to certain tribes to which section 465 did not otherwise apply. Section 465 specifically authorizes, *inter alia*, the acquisition of land in trust on behalf of tribes "for the purpose of providing land for Indians." Nothing in Appellant's articulation of its prudential standing or its claims in this appeal is consistent with or furthers the purpose of providing land for Indians. Therefore, we conclude that Appellant lacks prudential standing to pursue its claim under ILCA.

## 5. Organizational Standing

As discussed above, in addition to establishing that some individual members of an appellant organization have standing to pursue an appeal in their own right, an organization must also show that the asserted claims are germane to the purpose(s) for which the organization exists, and that there are no extenuating circumstances that require the individual participation of the members in this appeal. The three member declarations proffered by Appellant each attest that the purpose of the organization is to protect the rural character of the County. *See* Pearson Declaration at ¶ 2 (Appellant exists “to protect the rural environment and quality of life in El Dorado County”); Hummer Declaration at ¶ 2 (same); Dosh Declaration at ¶ 2 (Appellant’s purpose is to “protect[] the rural quality of life in El Dorado County”). The asserted purpose of the organization is sufficiently broad to encompass the claims asserted in this appeal, and therefore we conclude that Appellant satisfies the second prong of organizational standing. With respect to the third prong of organizational standing, we conclude that there are no extenuating circumstances indicating that individual participation is necessary in this appeal.

## 6. Summary

We conclude that Appellant has demonstrated standing for most of its NEPA claims: Appellant demonstrates that its members enjoy the wildlife and scenic beauty of the parcels, and that these environmental qualities may be disturbed by the proposed development; that the purported injury is causally related to BIA’s decision to take the two parcels into trust; and that Appellant’s procedural injury under NEPA would be redressed if the matter were remanded to BIA for further environmental consideration. Further, Appellant establishes that its claims are consistent with and germane to the purposes for which the organization exists. However, Appellant has not established that it may raise claims concerning the impact of the Proposed Action on the water supply or on the disposal of waste because Appellant’s declarants have not articulated injury to themselves as to these two concerns in their declarations. Therefore, as to claims concerning the water supply or waste disposal, we conclude that Appellant apparently seeks to assert the interests of others, which they may not do.

In addition, as to Appellant’s claims under ILCA, we conclude that Appellant is unable to show prudential standing because its claims are not within the zone-of-interests that ILCA is intended to protect. Therefore, we find that Appellant lacks standing to argue that there is no authority under ILCA to take the two parcels into trust for the Tribe.

## B. NEPA

### I. Standard of Review

NEPA is essentially a procedural vehicle, *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 558 (1978), and “exists to ensure a process, not particular substantive results,” *Hells Canyon Alliance v. U.S. Forest Serv.*, 227 F.3d 1170, 1177 (9th Cir. 2000). NEPA does “not require agencies to elevate environmental concerns over other appropriate considerations.” *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 97 (1983). It requires only a “hard look” at environmental effects of any major Federal action. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976). NEPA does not bar actions which affect the environment, even adversely. Rather, the process assures that decision-makers are fully apprised of the likely effects of alternative courses of action so that the selection of a particular course represents a fully informed decision.

By preparing an EA, as was done here, the agency is able to determine whether an impact on the environment will result from one or more of the alternative courses of action and the severity of the impact: If the impact will be significant, the agency then prepares an EIS; if the agency determines that there will be no impact or that any impact will be insignificant (or can be reduced to insignificance), it may then issue a FONSI. Thus, an EA serves to (1) provide evidence and analysis for determining whether to prepare an EIS or a FONSI; (2) aid an agency’s decision making process when no EIS is necessary; and (3) facilitate preparation of an EIS when one is necessary. 40 C.F.R. § 1508.9. Therefore, to support a FONSI and, hence, the conclusion that an EIS is not required, an EA must take a hard look at the environmental consequences of a proposed action, identify the relevant areas of environmental concern, and make a convincing case that environmental impacts from the proposed action are insignificant or can be reduced to insignificance through the imposition of mitigation measures. *See Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1114, 1121-22 (9th Cir. 2000). BIA not only must analyze the reasonably foreseeable environmental consequences of the proposed action, but must also examine reasonable alternatives to the proposed action and their environmental consequences. *Neighbors for Rational Development, Inc. v. Albuquerque Area Director*, 33 IBIA 36, 43 (1998).<sup>16</sup>

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<sup>16</sup> The “rule of reason” governs the agency’s discretion in preparing environmental documents, such as an EA. *Dept. of Transportation v. Public Citizen*, 541 U.S. 752, 767 (2004) (“[I]nherent in NEPA and its implementing regulations is a ‘rule of reason,’ which ensures that agencies determine whether and to what extent to prepare an EIS”). The rule extends to the agency’s selection of alternatives to be evaluated. *Neighbors for Rational Dev.*, 33 IBIA at 44 n.7.

We review BIA's FONSI to determine whether it is supported by the record and whether it "articulate[s] a rational connection between the facts found and the choice made." *Cf. Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1032 (9th Cir. 2008) (quoting *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 793 (9th Cir. 2003)); *see also Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 376 (1989) (citing *Balt. Gas & Elec. Co.*, 462 U.S. at 97-98). In general, we will not second-guess BIA's determination of how much discussion to include on each topic [in a NEPA document], and how much data is necessary to fully address each issue. *Cf. Town of Winthrop v. Federal Aviation Administration*, 535 F.3d 1, 10 (1st Cir. 2008) (quoting *Sierra Club v. van Antwerp*, 526 F.3d 1353, 1361 (11th Cir. 2008)). As long as the EA contains "a reasonably thorough discussion of the significant aspects of the probable environmental consequences," we will uphold BIA's decision. *Neighbors for Rational Dev.*, 33 IBIA at 48.

## 2. Appellant's NEPA Challenges

We have carefully reviewed the record and we conclude that where Appellant raised claims with sufficient specificity to enable the Regional Director to make a reasoned response, the record reflects that Appellant's concerns were addressed by the EA or that a supplemental response was made that satisfies NEPA standards.<sup>17</sup>

### a. Consultation

Appellant claims that BIA violated NEPA regulations, 40 C.F.R. § 1506.6, concerning consultation in several respects: No public meetings were held, no Notice of Availability of the EA was published or circulated, no notice was provided to local or regional press, and no consultation was undertaken with Federal agencies. We disagree, both factually and legally, with Appellant's claims.

There is no requirement that public meetings be held. As Appellant observes, the regulation requires agencies to "[m]ake diligent efforts to involve the public." 40 C.F.R. § 1506.6(a). But for an EA, the regulations only require the involvement of the public "to the extent practicable," *id.* § 1501.4(b), and do not *require* public meetings or hearings. The purpose of providing notice and the purpose of holding public meetings or hearings is

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<sup>17</sup> In October 2008, the Department of the Interior published final regulations implementing NEPA within the Department, which became effective in November 2008. 43 C.F.R. Part 46, 73 Fed. Reg. 61,292 (Oct. 15, 2008). Because these regulations were not in effect at the time of the September 8 Decision, we do not cite to these regulations. However, we note that the September 8 Decision fully complies with the new regulations.

“to inform those persons and agencies who may be interested [in] or affected [by the proposed action].” *Id.* § 1506.6(b). Public meetings or hearings shall be held “whenever appropriate” as determined by the agency, considering criteria such as whether another agency with jurisdiction requests a public hearing, whether there is “substantial controversy” concerning the proposed action, or whether there is a substantial interest in holding a hearing. *Id.* § 1506.6(c). Notice of the proposed action may be provided by distribution to state and area-wide clearinghouses, publication in local newspapers, etc. *Id.* § 1506.6(b)(3)(i)-(ix).

Appellant has not demonstrated that BIA violated any of the notice and public involvement provisions in the regulation. The record reflects that a copy of the EA was provided to California’s Clearinghouse on March 26, 2003, which acknowledged receipt by letter dated April 2, 2003, and confirmed that the EA had been distributed to 13 agencies. A Notice of Availability of the EA was sent to the Tribe with a request to post a copy of the Notice in the tribal office. In addition, copies of the EA were sent on March 21, 2003, to those who had requested a copy: The State Attorney General, the Governor’s Office, EPA, the El Dorado County Board of Supervisors, the U.S. Fish and Wildlife, and the Office of Senator Dianne Feinstein.<sup>18</sup> Public notice of the availability of the EA was published on April 4, 7, and 9, 2003, in *The Mountain Democrat*, a newspaper of general circulation in El Dorado County.<sup>19</sup> Requests for extensions of time to submit comments were received from the El Dorado County Planning Department and from Appellant. BIA granted a 1-week extension, both entities submitted detailed written comments, and both received detailed responses to those comments. Other written comments were received by BIA after the closing date for comments, and the agency provided specific responses to these comments. Therefore, we conclude, as a factual matter, that BIA gave appropriate notice of the EA and was diligent in its efforts to involve the public.

Of all 23 comment letters received, none specifically requested a public hearing, and only Appellant complained about the absence of a public hearing. Appellant does not explain how it has been injured by the absence of a public hearing, nor does it proffer any additional comments it would have offered if a public hearing had been held or if additional time for comments had been allowed. With respect to holding a public meeting, there is no

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<sup>18</sup> Letters notifying several County agencies of the proposed acquisition also were sent on April 1, 2003. *See* 25 C.F.R. § 151.10.

<sup>19</sup> According to the proof of publication in the administrative record, which was provided by the newspaper, the paper is printed in Placerville, California, which is the county seat of El Dorado County. *See also* [www.mtdemocrat.com](http://www.mtdemocrat.com).

requirement that one be held in the absence of “substantial environmental controversy” concerning the proposed action. As the Tribe observed in its brief, to the extent that there was any controversy, the controversy apparently stemmed primarily from citizens’ concerns that the Tribe would construct a casino on the proposed trust acquisition.<sup>20</sup> The Tribe argues that since it has no plans to use the land for a casino, there was no need for a public hearing. We agree that a public hearing was not required. No individual or entity specifically requested a hearing, the comments received expressed concern for the environment but did not raise concerns of a substantial nature, and these concerns were addressed by BIA.

b. Consideration of Reasonably Foreseeable Impacts

Appellant argues that BIA failed to consider those effects of the decision to take the parcels into trust that “are caused by the [decision] and are later in time or farther removed in distance, but . . . reasonably foreseeable.” Opening Brief at 6, quoting 40 C.F.R. § 1508.8(b). Appellant speculates that “[i]ntensive commercial development such as a major casino is possible.” Opening Brief at 7. The FONSI expressly noted that the Tribe does not propose use of the property for gaming, explained in detail the legal obstacles to any such use, and concluded that the trust acquisition could not facilitate gaming on the property. FONSI at 4-5. Appellant adduces no evidence in support of its speculation and, since the filing of Appellant’s appeal, the Tribe has constructed and, in December 2008, opened the “Red Hawk Casino” on existing trust land. See [www.foothilloakscasino.com](http://www.foothilloakscasino.com). Additionally, Appellant argues that BIA did not give consideration to “the potential growth-inducing impacts of the [decision] on the surrounding [fee] area.” Opening Brief at 8. Appellant speculates that the construction of six houses and the health clinic on the proposed trust acquisition *may* lead to new water and sewer facilities in the area, which in turn *may* lead to “additional growth in the surrounding rural residential area.” *Id.*

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<sup>20</sup> We note that, of 17 comment letters received from citizens, 10 (including Appellant’s) expressed concerns about the property ultimately serving as the site for a tribal casino or for purposes related thereto. One writer wrote:

Please take notice, that more and more local residents are opposed to the proposed casino. The last Voices for Rural Living meeting I attended, was standing room only with over 150 people in attendance (and that was only due to the size of the room.) The opposition [to] this proposed casino is significant because it does not belong in a rural residential area . . . .

Letter from Dan and Jeanine Stiles to BIA, Apr. 28, 2003. Several comment letters spoke favorably of having the property used for a health clinic and only queried why it could not be built instead on the Tribe’s Rancheria.

It is well established that BIA is not required to examine the environmental consequences of every conceivable development that could take place in the future on the parcels proposed for trust acquisition, much less the environmental consequences of possible future “growth” in the area surrounding the proposed trust acquisition. *See Neighbors for Rational Dev.*, 33 IBIA at 43. Instead, BIA is required, as Appellant seemingly observes, to examine the environmental consequences of “reasonably foreseeable impacts” of the decision. *See, e.g.*, 40 C.F.R. § 1508.25 (cumulative impact requires consideration of the impact of reasonably foreseeable future actions in addition to the proposed action and alternatives). “Reasonably foreseeable future actions” include proposed actions, *Northern Alaska Env'tl. Ctr. v. Kempthorne*, 457 F.3d 969, 980 (9th Cir. 2006), but do not extend to actions that are dependent on contingencies, such as the possible installation of water and sewer facilities, *Gulf Restoration Network v. U.S. Dept. of Transp.*, 452 F.3d 362, 370-71 & n.15 (5th Cir. 2006); the phrase “reasonably foreseeable future actions” certainly does not mean or require the study of all possible uses of the land, including those that Appellant fears may result, but of which there is no demonstrable evidence supporting the likelihood of occurrence. Moreover, to the extent that Appellant fears development that may occur if water and sewer facilities are added, we note that the FONSI reports that the Tribe plans to install on-site septic systems and to utilize well water combined with water delivery. *See* FONSI at 5-6. Therefore, any concern that future development will follow on the heels of the installation of water and sewer facilities is not supported by the record. Moreover, even assuming that water and sewer facilities were constructed for the Tribe’s development of the parcels, any future development would not flow from the decision to take the land into trust but from other factors such as the availability of water and sewer services, and various planning, zoning, political, and economic considerations.

Finally, to the extent that Appellant complains that BIA has not considered the cumulative effects of the proposed acquisition and the plans thereon for tribal housing and health clinic, together with the construction of the nearby freeway interchange and tribal casino on the Rancheria, Appellant errs. The EA clearly states that the cumulative analysis gave consideration “to the proposed hotel and casino project to be located on the existing Shingle Springs Rancheria [and] the proposed interchange located on [Highway] 50, south of the existing Rancheria, which is required to provide access to the proposed hotel and casino.” EA at 5-1.

### c. Alternatives Considered

Appellant argues that BIA “adopted a statement of purpose and need calculated to preclude other reasonable uses of the [proposed trust acquisition].” Opening Brief at 9. Appellant fails, however, to explain what other *reasonable* uses of the property should have

been included among the alternatives considered. BIA accepted the purpose and need statement presented by the Tribe. Appellant provides no basis for us to find that BIA impermissibly restricted the potential use of the property.<sup>21</sup>

Appellant also claims that BIA has failed to consider, as an alternative, whether the proposed housing and health clinic can be located on the Rancheria rather than on the proposed trust acquisition property. Those choices, however, were determined and controlled by the Tribe, not by BIA. BIA's choices were, ultimately, to accept the property in trust or decline to do so. In considering those two options, BIA considered several different configurations of the Tribe's development plans for the subject parcels as well as the alternative of no change in the use of the parcels, i.e., leaving the parcels undeveloped. Put another way, for BIA's purposes in reviewing the request to take the land into trust, consideration of alternative *locations* for the proposed housing and health clinic are, in effect, tantamount to the "[n]o [a]ction [a]lternative" that was considered. *See* EA at 2-8. Because the agency action under consideration exclusively concerns the two parcels proposed for trust acquisition, it is prudent and reasonable for BIA to consider alternatives for implementing the Tribe's identified needs and purposes for these two parcels.

We note that BIA has considerable latitude in selecting the alternatives to be considered and, as long as the alternatives selected by the agency are reasonable, in light of the goals, needs, and purposes of the project, they will be upheld. *Neighbors for Rational Dev.*, 33 IBIA at 44 n.7. Moreover, there is no set number of alternatives that must be examined. *Id.* Appellant does not complain that the alternatives considered by the Regional Director were unreasonable, only that the Regional Director should have considered another alternative involving the use of the Tribe's Rancheria rather than the subject parcels. Ultimately, the Tribe is the owner of the proposed trust acquisition parcels and, therefore, should be able to utilize its land. Therefore, it was reasonable for the Regional Director to consider alternative uses for the proposed acquisition consistent with the Tribe's stated needs and purposes for the use of the land.

#### d. Traffic Impacts

Appellant argues that BIA failed to utilize traffic data for the current health clinic in analyzing the anticipated traffic impact from the proposed health clinic, and argues that BIA

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<sup>21</sup> To the extent Appellant speculates that the property may be used for the construction of a casino or for purposes related thereto, we note that the FONSI explained that the bare acquisition of the property in trust would not, itself, facilitate gaming on the property.

failed to consider traffic impacts at the intersection of Buckeye Road and Holiday Lake Drive near Motherlode Drive. We reject Appellant’s arguments.

Admittedly, the proposed health clinic will be considerably larger than the existing health clinic and, presumably, will generate more traffic than the current health clinic.<sup>22</sup> The traffic analysis relied upon “trip generation rates” derived from the *Trip Generation Manual* published by the Institute of Transportation Engineers. EA at App. G, p. 18. In particular, the study relied upon traffic rates based upon the square footage of a medical-dental office building. *Id.* Appellant has not shown this choice to be unreasonable.

Second, as to a specific, intersection-level study of the intersection of Holiday Lake Drive and Buckeye Road, we examine the EA to determine whether it “provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS] or a [FONSI].” 40 C.F.R. § 1508.9(a). The EA specifically addressed this issue in its response to Appellant’s comments on the EA:

**Figure 4-2** in the EA shows an estimated 2 percent trip distribution to the intersection in question as a result of the health clinic and residential development. Additionally **Table 4-5** in the EA shows that the project is only expected to generate 450 weekday trips. With an expected 2 percent trip distribution in the direction of the intersection in question, this translates to 9 daily trips across the intersection in question, 1 trip in the AM peak hour, and 1 trip in the PM peak hour. The effects of the Proposed Action on the intersection in question are de minim[i]s and do not warrant intersection level analysis.

Exhibit A to EA at Ch. 3.0, p. 3-16. Appellant does not disagree with the EA’s response, but argues that “traffic can be considerable, especially during the morning peak hour.” Opening Brief at 10.<sup>23</sup> Appellant has not shown BIA’s response to be unjustified, and we conclude that BIA took a hard look at Appellant’s concern, analyzed the potential impact, and concluded that the effect on traffic from the use of the parcels would be de minimis.

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<sup>22</sup> We do note, however, that in advocating placement of the health clinic on the Tribe’s Rancheria, Appellant describes the proposed clinic as “relatively small,” Reply Brief to Tribe’s Brief at 13, which suggests that any traffic impact would likewise be relatively small.

<sup>23</sup> Appellant’s comments on the EA suggest that the primary source of concern arises from *existing* traffic patterns, and not from a projected incremental increase attributable to the Tribe’s development plans.

e. Endangered Species and their Habitat

Appellant argues that the proposed construction on the parcels “would penetrate a critical oak woodland wildlife corridor . . . [that] was documented in the County’s oak woodland study conducted several years ago.” *Id.* at 11. Appellant made the same observation in its comments on the EA, at which time the agency responded to say it was unaware of the purported study. Appellant still has not provided a copy of this study or a specific identification of this study, nor did Appellant explain in any detail in its comments the ecological value of this “corridor” of oak woodland, except to suggest that wildlife use it to reach Shingle Springs Drive, which in turn is used to cross under Highway 50.<sup>24</sup> However, BIA’s response to Appellant’s comment was that notwithstanding the possible existence of such a study, “the Tribe . . . design[ed] a project that is sensitive to existing woodland trees. . . . [V]ery little tree coverage will be removed. The Tribe preserves all of the oak woodland on Parcel 4 and [a]ffects only those trees necessary to allow for access to Parcel 3.” Exhibit A to EA at p. 3-17.<sup>25</sup> Appellant does not disagree that the proposed scope of construction will result in the removal of very few trees, nor does Appellant claim that these few trees will interfere with or disrupt the oak woodland wildlife corridor. Therefore, we conclude that the agency has appropriately addressed this concern.

Appellant also claims that there is a discrepancy in the EA concerning the existence of elderberry shrubs, which is a habitat for the Federally threatened valley elderberry longhorn beetle, because the first biological survey of the parcels, done in January 2002, did not observe any elderberry shrubs on the parcels, *see* EA at App. C (“Biological Assessment for Shingle Springs Rancheria – Health Clinic and Residential Development”), p. 12, whereas the final EA concluded that the “[p]roject could disturb elderberry shrubs [on one parcel],” Opening Brief at 12, quoting EA at p. 3-23. As explained in the response to Appellant’s comments on the EA, a specific survey of elderberry shrubs was subsequently conducted on the parcels by BIA. This survey found four elderberry shrubs near the site of the proposed health clinic, but no evidence of any valley elderberry longhorn beetles. *See* EA at App. M (“Elderberry Shrub Survey”), p. 4. The study, prepared in March 2002, proposed mitigating any impact by providing a 100-foot buffer around the elderberry shrubs. *See* EA at 6-4. Where adverse environmental effects can be mitigated to insignificance or avoided, NEPA’s requirements are satisfied and an EIS need not be

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<sup>24</sup> Although Appellant states that the County prepared the study, the County did not raise concerns about any impacts to the oak woodland in its responses to the EA.

<sup>25</sup> Parcel 3 refers to one of the three parcels collectively denominated as Parcel 1; Parcel 4 is the same as that parcel denominated in our decision as Parcel 2. *See* n.1 and 4 *supra*.

prepared. *See Wetlands Action Network*, 222 F.3d at 1121-22. Appellant does not disagree that this proposed mitigation measure reduces the impact to an insignificant level.

Given the foregoing responses by BIA, we conclude that Appellant has not met its burden of showing error with respect to the assessment of the biological impact of the proposed construction.

f. Water Supply

Appellant claims that water is in short supply in El Dorado County and that the EA fails to address the impact on the County's water supply from the proposed construction on the two parcels. As we noted *supra* at 233-34, none of the declarants claim that they will be injured by the purported impact on the County's water supply from the Tribe's development of the two parcels. Thus, it appears that Appellant is attempting to assert interests that are not its own, which it may not do. *See Cheyenne River Sioux Tribe v. Acting Great Plains Regional Director*, 41 IBIA 308, 311 (2005). Even assuming this issue is raised properly, Appellant errs.

The FONSI states that the Tribe would rely on on-site well water as supplemented by water delivery through contract with Aeropure. The EA notes that no adverse impact on ground water is anticipated. EA at 4-4 ("No adverse effects are expected to result from on-site [well] water use."). This conclusion is supported by the explanation of the source of the groundwater in Section 3.2.2 of the EA, which states that the "data suggests the aquifer [that feeds the on-site wells] to be semi-confined." *Id.* at 3-10. Thus, if wells are utilized to provide water for the proposed health clinic and homes on the parcels, any depletion of the groundwater supply will be similarly confined. Moreover, as explained in the responses, the annual projected draw on groundwater resources is expected to be between 1,533,000 and 3,029,500 gallons, whereas the annual recharge of the aquifer is expected to range from 20,202,788 to 76,900,937 gallons. Therefore, the annual recharge is well above the projected annual water usage. *See Exhibit A to EA* at p. 3-10. Appellant does not disagree with these findings. With respect to water delivery, Appellant contends only that it is expensive and unreliable. Opening Brief at 14.

Notwithstanding Appellant's failure to assert any injury resulting from any alleged impact to the water supply, we nevertheless would conclude that Appellant has not shown error in the Regional Director's decision with respect to any impact from the Proposed Action on the water supply.

g. Waste Disposal

The FONSI states that the Tribe intends to install septic systems to handle liquid waste disposal. Appellant contends that the environmental effects of this option were not addressed in the EA.<sup>26</sup> Again, Appellant alleges no injury to its members related to the waste disposal component of the Tribe's proposed development nor does Appellant explain how it is germane to Appellant's organizational purposes. But again, if we consider the issue, we conclude that Appellant errs.

i. *On-Site Disposal*

Appellant first complains that Appendix A does not include two studies cited in the Shingle Springs Rancheria Health Clinic Water/Wastewater Feasibility Study.<sup>27</sup> Although Appellant is correct that the two studies do not appear with the Wastewater Feasibility Study in Appendix A of the EA, they are nonetheless part of the record and appear as Attachments 5 and 6 in Exhibit A (AR, Vol. 2, Tab 10). Appellant does not state whether it ever requested a copy of these studies or inquired where they could be located. Therefore, inasmuch as they are part of the record before the Board, which record was made available to Appellant, and Appellant had the opportunity to comment on these studies in the course of its appeal to the Board, we find no reversible error.

Second, Appellant alleges that the environmental study of the on-site septic system did not analyze the potential environmental impacts of disinfectants and potentially toxic chemicals, which Appellant supposes would enter the leach field disposal system for the health clinic. Appellant claims that the effect of such contaminants on ground water and surface water was not considered, and notes that there are drinking water wells "within short distances of the proposed disposal area." Opening Brief at 15. Appellant does not identify either the precise location of these drinking water wells or their distance from the proposed disposal area.

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<sup>26</sup> Apart from the disposal of medical waste, Appellant does not challenge the FONSI with respect to the removal of solid waste.

<sup>27</sup> Both studies were prepared by Youngdahl & Associates, Inc. The first, prepared in 1999, is entitled "Shingle Springs Rancheria Casino/Hotel Complex Preliminary Groundwater Impact Assessment," and the second, prepared in 2000, is entitled "Onsite Wastewater Disposal Feasibility Study for Shingle Springs Rancheria Casino Project."

Contrary to Appellant’s argument, the EA does address these concerns, specifically recommending mitigating measures that are set forth in Section 6.0 of the EA. The EA sets out recommended volumes for the septic tanks as well as setback distances for the associated leach fields to avoid contamination of nearby water sources, including wells. *See* EA at Appendix A (“Shingle Springs Rancheria Health Clinic *Water/Wastewater Feasibility Study*”), p. 22. The EA recommends that leachfields be installed 100 feet from such wells, and the site plan locates the septic system along the freeway at points furthest away from any existing construction. The EA concludes that, as long as the setbacks are observed, no adverse effects are expected from an on-site septic system. EA at p. 4-19. Appellant does not dispute these determinations.

ii. *Disposal of Medical Waste*

Appellant argues that the study does not specifically account for the disposal of “disinfectants and potentially toxic chemicals” that may be used at the health clinic. Opening Brief at 15. Contrary to Appellant’s assertion, the EA specifically addresses the disposal of medical waste and states that it will be collected and disposed in accordance with California law, and “is not expected to result in significant effects to the public or staff.” *See* EA at 4-24. The EA also relates that the Tribe’s current health clinic utilizes a medical waste removal service, which is expected to continue. Appellant errs in contending that the EA fails to address the disposal of medical waste, for which reason we would conclude that Appellant has not met its burden as to this particular NEPA claim.

3. Summary

We conclude that Appellant has not met its burden of showing that the Regional Director erred in issuing a FONSI for the proposed trust acquisition either because she had insufficient data or because the data shows that an EIS should have been prepared. Therefore, we affirm the Regional Director’s decision to issue a FONSI and reject Appellant’s argument that an EIS is required.<sup>28</sup>

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<sup>28</sup> Appellant also claims that there are significant errors in the analysis of the impact of traffic on air quality. Appellant did not raise any argument in its comments on the EA concerning its evaluation of air quality and, therefore, BIA was not given the opportunity to respond to this concern. Consequently, we need not consider these arguments because they are raised for the first time on appeal to the Board. *Jackson County v. Southern Plains Regional Director*, 47 IBIA 222, 228 (2008).

C. BIA's Legal Authority to Accept Land in Trust for the Tribe

In the alternative to our finding that Appellant lacks standing to pursue its claim under ILCA, we would conclude that Appellant's argument — that ILCA does not authorize BIA to acquire the parcels in trust for the Tribe — is nonmeritorious. In his September 8 Decision, the Regional Director states that authority to take the two parcels into trust for the Tribe is found in 25 U.S.C. § 2202, which is a provision of ILCA. Appellant argues that ILCA does not apply to the Tribe because the Tribe does not currently have any tribal trust land, and ILCA only applies to tribes for which the United States already holds land in trust at the time of a tribe's fee-to-trust application (i.e., tribes lacking any trust land are prohibited from having lands taken into trust on their behalfs). Appellant errs.

The Board has full authority to review legal issues other than issues raising the constitutionality of laws or regulations. *See Skagit County*, 43 IBIA at 64; *Cass County v. Midwest Regional Director*, 42 IBIA 243, 247 (2006).

The Tribe voted not to accept the provisions of the Indian Reorganization Act (IRA)<sup>29</sup> in 1934. *See* <http://thorpe.ou.edu/IRA/IRAbook/tribalgovptltblA.htm>; *see also* BIA Tribal Relations Pamphlet IA, "Indian Tribes, Bands and Communities Which Voted to Accept or Reject the Terms of the [IRA], the Dates When Elections Were Held, and The Votes Cast," Sept. 1946, at 4. Therefore, the Tribe is ineligible to have land accepted into trust directly under the IRA's land acquisition statute, 25 U.S.C. § 465. 25 U.S.C. § 478.<sup>30</sup>

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<sup>29</sup> The IRA was comprehensive legislation

designed 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. Native people were encouraged to organize or reorganize with tribal structures similar to modern business corporations. A federal financial credit system was created to help tribes reach their economic objective. Educational and technical training opportunities were offered, as were employment opportunities through federal Indian programs.

Cohen's Handbook of Federal Indian Law § 1.05 at 86 (2005 ed.).

<sup>30</sup> Section 465 authorizes the Secretary of the Interior (Secretary) "in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, . . .

(continued...)

However, when Congress enacted ILCA, it added a provision expressly extending section 465 “to all tribes notwithstanding the provisions of [25 U.S.C. §] 478,” and further provided “[t]hat nothing in this section is intended to supersede any other provision of Federal law which authorizes . . . the acquisition of land for Indians . . . .” *Id.* § 2202.

Notwithstanding the explicit language of section 2202, Appellant argues that the Tribe is ineligible under section 2202 because ILCA only applies to an “Indian tribe, band, group, pueblo, or community for which, or for the members of which, the United States holds lands in trust,” *id.* § 2201(1), and, according to Appellant, the United States holds no land in trust for the Tribe. Appellant argues that the land claimed by the Tribe as its Rancheria was set aside by the United States for the “Sacramento-Verona Band of Homeless Indians” and Appellant speculates that the “Sacramento-Verona Band” is not the same group as the Tribe. Appellant offers no evidence to support its speculation, for which reason it is rejected.

Appellant also claims that the form of title for the Rancheria — “United States of America, for the use and occupancy of the Sacramento-Verona Band of Homeless Indians” — did not create a trust. This argument has been soundly rejected. *See Duncan v. United States*, 667 F.2d 36, 41 (Ct. Cl. 1981) (lands purchased “*for the use* of the Indians of California . . . [w]hile not expressly stating that the United States held the [Rancheria] as trustee [for the Indians], . . . clearly contemplated that this land have the same general status as [Indian] reservation lands.” Emphasis added.).

Therefore we reject Appellant’s contention that ILCA somehow prohibits the subject fee-to-trust transaction. The authority for taking the two parcels into trust is found in the IRA, which is made applicable to the Tribe through 25 U.S.C. § 2202.

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<sup>30</sup>(...continued)

for the purpose of providing land for Indians.” *See also* 25 U.S.C. § 467 (authorizing Secretary to establish new Indian reservations on lands acquired pursuant to the IRA or to add such lands to existing reservations).

Section 478 held that the provisions of the IRA, including section 465, would not apply to tribes that had voted to reject application of the IRA.

## Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director's September 8, 2006, decision to take the two parcels into trust.

I concur:

\_\_\_\_\_/ / original signed  
Debora G. Luther  
Administrative Judge

\_\_\_\_\_/ / original signed  
Steven K. Linscheid  
Chief Administrative Judge