



## INTERIOR BOARD OF INDIAN APPEALS

Skagit County, Washington v. Northwest Regional Director, Bureau of Indian Affairs

43 IBIA 62 (05/24/2006)



# 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

SKAGIT COUNTY, WASHINGTON, : Order Dismissing Appeal in Part and  
Appellant, : Affirming Decision in Part  
: :  
v. : Docket No. IBIA 02-102-A  
: :  
NORTHWEST REGIONAL DIRECTOR, :  
BUREAU OF INDIAN AFFAIRS, :  
Appellee. : May 24, 2006

The Board of Commissioners of Skagit County, Washington (County) appeals from a March 26, 2002 decision of the Northwest Regional Director, Bureau of Indian Affairs (Regional Director; BIA), affirming an August 8, 2001 decision of the Acting Superintendent of the Puget Sound Agency, BIA (Superintendent), to take approximately 350 acres of land into trust for the Swinomish Indian Tribal Community (Tribe). For the reasons discussed below, the Board of Indian Appeals (Board) dismisses this appeal in part, and affirms the Regional Director's decision in part.

## Statutory and Regulatory Background

Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465, authorizes the Secretary of the Interior (Secretary) to acquire land for Indians in his discretion. The federal regulations implementing Section 465 provide that the Secretary may acquire land for a tribe in trust status: “(1) when the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or (2) when the tribe already owns an interest in the land; or (3) when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.” 25 C.F.R. § 151.3(a).

Where, as here, the land proposed to be taken into trust status is within the boundaries of a reservation and the decision to take land into trust is within the Secretary's discretion, the Secretary must consider the following factors:

- (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
- (b) The need of the individual Indian or the tribe for additional land;

- (c) The purposes for which the land will be used;
- (d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;
- (e) If 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;
- (f) Jurisdictional problems and potential conflicts of land use which may arise; and
- (g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.
- (h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.

25 C.F.R. § 151.10.

#### Standard of Review

The standard of review in trust acquisition cases is well established and described most recently in our decision in Cass County v. Midwest Regional Director, 42 IBIA 243, 246 (2006):

Decisions of BIA officials whether to take land into trust are discretionary. The Board does not substitute its judgment in place of BIA's judgment in decisions which are based upon the exercise of BIA's discretion. Rather, the Board reviews such discretionary 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.'

42 IBIA at 246 (quoting Shawano County v. Midwest Regional Director, 40 IBIA 241, 244 (2005) (internal citations omitted)). Thus, proof that the Regional Director considered the factors set forth in section 151 must appear in the record, but there is no requirement that BIA reach a particular conclusion with respect to each factor. See Eades v. Muskogee Area Director, 17 IBIA 198, 202 (1982). Moreover, Appellant bears the burden of proving that BIA did not properly exercise its discretion. Cass County, 42 IBIA at 246; Shawano County, 40 IBIA at 244; South Dakota v. Acting Great Plains Regional Director,

39 IBIA 283, 291 (2004). Simple disagreement with or bare assertions concerning BIA's decision are insufficient to carry this burden of proof. Cass County, 42 IBIA at 246-47.

In contrast to the Board's limited review of BIA discretionary decisions, the Board has full authority to review any legal challenges raised in a trust acquisition case. Id. at 247; Shawano County, 40 IBIA at 245. Appellant, however, bears the burden of proving that BIA's decision was in error or not supported by substantial evidence. Id.

### Factual and Procedural Background

The Tribe is situated on the Swinomish Indian Reservation, located north of Seattle, Washington. The Tribe's current reservation includes 7,169 acres of land area and 2,890 acres of tidelands. The Tribe is federally recognized and organized pursuant to section 16 of the Indian Reorganization Act, 25 U.S.C. § 476. On September 18, 1998, the Tribe submitted an application formally requesting BIA to acquire into trust approximately 350 acres of land within the Reservation boundaries that is held by the Tribe in fee simple ownership (the Property). The Tribe's application anticipates that the Property will be used in part to construct a saltwater marina project.

The marina project has a long history. The Tribe first proposed the project in the early 1980s. The plans for the marina initially focused on a site different from the one proposed for trust acquisition. The initial site encompassed 136 acres of land on the Reservation north of State Route 20, an area adjacent to the pre-existing Swinomish Casino and Industrial Park. A Draft Environmental Impact Statement (DEIS) under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4347, identifying this site as the preferred alternative for the marina project, was issued for public comment in July 1987. <sup>1/</sup> The DEIS proposed development of an 800-slip marina and associated facilities. Construction would have involved the filling of 30.8 acres of intertidal and subtidal areas, including 7.1 acres of wetlands. The DEIS contemplated that BIA's action would be deciding whether to approve a lease from the Tribe to the Swinomish Channel Marina Development Corporation, which would then develop the marina. The DEIS examined five alternatives of various sizes and configurations, all essentially at the same site. Eight other sites were considered for inclusion in the alternatives analysis in a preliminary site-review process but rejected for various reasons. One of the sites considered but rejected in the 1987 DEIS was on the Property at issue in this appeal, which is referred to in the DEIS

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<sup>1/</sup> For purposes of preparing the EIS under NEPA, BIA was designated as the lead agency and the U.S. Army Corps of Engineers (Corps) and the Tribe were designated as cooperating agencies. See 40 C.F.R. §§ 1501.5, 1501.6.

as the “Knudson farmlands.” <sup>2/</sup> The Knudson farmlands site was considered infeasible for various reasons, including that the land, while within the Reservation boundaries, was at that time held in non-trust private ownership and its agricultural use conflicted with the Tribe’s proposed commercial development. DEIS at 2-7.

Public comments on the DEIS expressed considerable concern about the aquatic impacts of the proposed project. In response, the Tribe developed a mitigation plan and redesigned the project to reduce such impacts. Because of the significant changes made to the original proposal, the Corps requested that a Supplemental DEIS (SDEIS) be prepared before it would issue to the Tribe required permits under section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403, and section 404 of the Clean Water Act, 33 U.S.C. § 1344 (section 10/404 permit).

BIA issued the SDEIS in June 1992. The 1992 preferred alternative was located on the same site as the 1987 proposal but reduced the acreage affected by dredge and fill activities and included the creation of a 39-acre salt marsh on 55 acres of agricultural land south of the project site. SDEIS at 2-2 to 2-3. The SDEIS evaluated three alternatives: the 1987 preferred alternative, the new 1992 redesigned preferred alternative, and a “no action” alternative. A preliminary alternatives analysis prepared in 1991 again considered but rejected the other potential sites that had been considered in the 1987 DEIS. This included a re-evaluation of the Knudson farmlands site. The alternatives analysis identified the Knudson farmlands as the second most viable site but, because efforts to negotiate a purchase of the site had failed, the site was rejected. SDEIS at 2-7 to 2-8.

In the meantime, the United States, on behalf of the Tribe, had filed suit in federal district court to quiet title to a portion of the Knudson farmlands. The area in question included unallotted tidal areas held in trust by the United States and certain allotted artificial upland areas that the Knudson family claimed to own. In 1993, the United States and the Tribe entered into a settlement agreement with the Knudson family, which was entered by the district court in 1994. The settlement provided the Tribe with a three-year option to purchase the Knudson farmlands property. The Tribe subsequently negotiated an extension of the option, which it exercised in 2000 when it purchased the farmlands for more than \$3.6 million. See Tribe’s Answer Brief at 2.

Comments on the 1992 SDEIS expressed continuing concerns about the environmental impacts of the marina project, and many commenters, including the County,

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<sup>2/</sup> The DEIS incorrectly refers to the Knudson Farmlands as the “Knudsen” Farmlands. See DEIS at 2-7.

recommended that the Tribe reconsider and locate the marina on the Knudson farmlands site. See Final Supplemental Environmental Impact Statement (FSEIS) at 2-5. Accordingly, after obtaining the option to acquire the Knudson farmlands, the Tribe began to redesign the marina project for location at that site. In 1996, BIA issued a FSEIS, which proposed to locate the marina project on the Knudson farmlands site. The 1992 SDEIS and the 1996 FSEIS still contemplated, as BIA's action, approval of a lease issued by the Tribe to the Swinomish Development Authority.

The marina project, as set forth in the 1996 FSEIS, is a 1,200-slip marina that would encompass 239.8 acres: 57.8 acres of boat basins, 119.2 acres of commercial development in the upland area, and 62.8 acres of wetland mitigation/fisheries enhancement. FSEIS at S-1. Of the 119.2 acres planned for commercial development, 35.4 acres are planned for facilities associated with the marina and the remaining 83.8 acres are reserved for unspecified future commercial development. Id. The marina project would result in the dredge or fill of 9.6 acres of wetlands. Id. On-site mitigation would restore 40.6 acres of existing wetland to more closely resemble their historic function and create approximately 22.2 acres of new wetland. Id. Overall, the marina project would impact 230.2 acres of farmland: 167.4 acres of farmland would be converted for the marina and associated services, and an additional 62.8 acres of farmland would be managed as a fisheries enhancement area, thus making these acres unavailable for agricultural use. Id. at S-6. 3/

As explained in the FSEIS, the purpose of the proposed marina project is to enable the Tribe "to provide for sustainable, long-term economic development opportunities within the Reservation and to enable the attainment of fisheries habitat restoration goals as an element to developing a sustainable Tribal economy." FSEIS at 3-1. Location of the proposed marina within the Reservation is important for the Tribe because "land use management is directly linked to maintenance of Tribal jurisdiction over Tribal resources." Id. at 3-3.

The FSEIS examines three alternatives: the Knudson farmlands site proposal, the 1992 preferred alternative, and a "no action" alternative. It once again considers, but rejects from further analysis, three sites off the Reservation. Prior to the release of the FSEIS, the Corps held a preliminary meeting regarding the section 10/404 permit for the project, which was attended by interested federal, state, and local government agencies, including the County. FSEIS at 2-13. According to the FSEIS, no new substantive issues were raised at the meeting and the revised proposal was generally favorably received. Id.

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3/ The Tribe states that the proposed project would involve conversion of approximately 180 acres of farmland. Tribe's Answer Brief at 3.

A public comment period was provided after release of the FSEIS and before approval of the section 10/404 permit to allow any new information to be provided and considered before a final decision on the permit. *Id.* The Skagit County Planning and Permit Center submitted a letter asserting that the FSEIS did not address the County's land use authority over the project site, which includes activities on non-trust lands. The letter stated that development activity on these lands required County permits and that "[b]efore a project of this nature can be approved by the County, the question of the loss of natural resource lands must be addressed." Nov. 15, 1996 Letter from County to Corps and Tribe.

On February 27, 1997, BIA issued a "Record of Decision" announcing the selection of the Knudson farmlands alternative as the action that the Tribe would implement. On December 22, 1997, the Corps issued a Record of Decision adopting the FSEIS and granting the Tribe's application for a section 10/404 permit. The permit was valid for five years. <sup>4/</sup> The County did not challenge the Corps permit or the NEPA analysis on which the permit decision relied.

#### The Land-into-Trust Application and Regional Director's Decision

On September 18, 1998, the Tribe filed an application requesting that BIA take the Property into trust. Prior to the filing of the formal application, on July 13, 1998, BIA notified the County that the application was under consideration and solicited its comments. On August 24, 1998, the County responded to BIA, stating that it did not formally object to the transfer of the Property to trust status pending the outcome of negotiations with the Tribe and BIA. The County expressed concerns, however, about the loss of productive agricultural land, decrease in tax revenues, increased cost of providing government services to the Property, and the need to mitigate the effects of these impacts.

On August 8, 2001, the Superintendent approved the Tribe's application to take the Property into trust. The Superintendent addressed the criteria for trust acquisitions set forth in 25 C.F.R. § 151.10. <sup>5/</sup> The Superintendent notified the County of the decision to approve the Tribe's application and the County filed a timely appeal to the Regional Director.

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<sup>4/</sup> The permit issued by the Corps was set to expire December 22, 2002. On May 8, 2002, the Corps issued an amendment to the 1997 decision that extended the permit through December 22, 2007.

<sup>5/</sup> The decision did not address factor (d), which pertains to acquisitions for individual Indians and therefore does not apply here.

In briefing before the Regional Director, the County filed a Statement of Reasons setting forth numerous objections to the Superintendent's decision. These objections included assertions that the NEPA analysis was incomplete because its scope was improperly limited to the first phase of the marina project and therefore ignored "indirect, secondary, and cumulative effects of the project," Statement of Reasons at 2, and because it failed to adequately consider the impacts of the marina project on federally listed threatened and endangered species. The County also contended that the Superintendent's decision ignored the fact that the marina project's conversion of farmlands would violate the Farmland Protection and Policy Act (FPPA), 7 U.S.C. §§ 4201-4209. In addition, the County contended that the Superintendent's decision did not comply with 25 C.F.R. § 151.10 because it improperly ignored the marina project's negative impacts to the County's tax revenue, cost of road improvements, and County services. The Tribe filed an answering brief and the County filed a reply brief.

On March 26, 2002, the Regional Director issued the decision now on appeal, affirming the Superintendent's decision, and the County filed a timely appeal with the Board, again raising claims under NEPA, FPPA and the trust acquisition regulations. On July 16, 2002, the County filed a motion for subpoenas directed to the Tribe for all records pertaining to the development of the Property and to BIA for all records pertaining to the fee-to-trust application and marina project. BIA and the Tribe filed responses in opposition, and the County filed a supplemental statement in support of its motion for subpoenas, to which the Tribe filed an opposition. The County filed a reply in which it alternatively requested an evidentiary hearing because of its contention that the scope of the project is actually greater than what the FSEIS analyzed, and includes development of 600 acres. On July 29, 2002, the Board issued an order denying the motion for subpoenas on the ground that the Board has no subpoena authority. The Board took the request for evidentiary hearing under advisement. The County, the Tribe, and BIA all submitted briefs to the Board.

During briefing in this appeal, the Ninth Circuit decided Gobin v. Snohomish County, 304 F.3d 909 (9th Cir. 2002), in which it held that the State of Washington lacked regulatory jurisdiction over Indian fee lands within the boundaries of a reservation when the Tribe had its own regulatory laws in place. In Gobin, the court rejected Snohomish County's argument that Congress had expressly authorized state and county jurisdiction over reservation fee lands when it made those lands freely alienable and encumberable, and the County's alternative argument that its various interests — e.g., in its natural resources and in providing land use enforcement for all fee lands — constituted "exceptional circumstances" sufficient to outweigh the Tribe's interest in self-determination. 304 F.3d at 915-17.

In its Answer Brief, filed one month after the Gobin decision, the Tribe argued that the Gobin decision “casts considerable doubt on whether the BIA even needs to address the criterion set out in 25 C.F.R. § 151.10(f) [jurisdictional problems and potential conflicts of land use] in a case such as this, where a Tribe seeks to have taken into trust on-Reservation land that it already owns in fee.” Tribe’s Answer Brief at 27-28. In its reply, the County notes, and does not dispute the Tribe’s reading of Gobin as “removing all non-federal barriers to its development project, whether or not the land is in trust.” County’s Reply Brief at 32 & n.55 (“The Board has not clearly indicated how the BIA should assess the tax impacts from a project that will proceed whether or not trust status is granted”).

On August 19, 2005, the County filed a motion styled as a “Motion to Dismiss and Remand,” which was effectively a motion to vacate the Regional Director’s decision on new, limited grounds. In its motion, the County contends that circumstances relating to the FSEIS’s analysis of the effect of the marina project on federally listed threatened and endangered species had changed since 2002, when the Regional Director issued his decision. The County claims that these changed circumstances render the administrative record on which the Regional Director relied outdated and inaccurate and may therefore require BIA to undertake additional analysis under NEPA before making its trust acquisition decision. The Tribe filed an answer brief, the content of which was adopted by the Regional Director, and the County filed a reply brief.

On December 20, 2005, the Board issued an order directing the parties to brief the threshold jurisdictional question of whether the County has standing to challenge the Regional Director’s compliance with NEPA. In its order, the Board noted that it cannot resolve the County’s motion to dismiss, which is based on the Regional Director’s alleged failure to comply with NEPA, until it determines whether the County has standing to raise its NEPA claims. The Board stated that while the County clearly has standing to challenge the Regional Director’s compliance with 25 C.F.R. § 151.10 based on injuries the County alleges will result from reduced tax income if the Property is taken into trust, it is not clear that the County has standing to challenge the Regional Director’s decision based on potential environmental impacts resulting from the marina project. The County filed a brief, the Regional Director and the Tribe each filed a response, and the County filed a reply.

### Jurisdiction

Although the Board is not bound by the case or controversy requirement of Article III of the U.S. Constitution, as a matter of prudence, the Board limits its jurisdiction to cases in which the appellant can show standing. See Citizens for Safety and Environment v. Acting Northwest Regional Director, 40 IBIA 87, 92 (2004). The Board relies on the

analysis provided in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), to evaluate standing. The appellant therefore bears the burden of showing: (1) an injury to a legally protected interest that is concrete and particularized, as well as actual or imminent; (2) that the injury is causally connected with or fairly traceable to the actions of the appellee and not caused by the independent action of a third party; and (3) that it is likely, as opposed to speculative, that the injury will be redressed by a favorable decision. Lujan, 504 U.S. at 560-61. Moreover, the appellant must “demonstrate standing separately for each form of relief sought.” Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc., 528 U.S. 167, 185 (2000). Cf. Evitt v. Acting Pacific Regional Director, 38 IBIA 77, 79 (2002) (“an appellant may have standing to challenge an environmental determination made by BIA even though the same appellant may lack standing to challenge a related (or even the same) BIA decision on another basis”).

As we noted in our December 20, 2005 order, the County clearly has standing to raise at least some claims under 25 C.F.R. § 151.10 to challenge the Regional Director’s decision approving the Tribe’s trust application based on its alleged failure to comply with the relevant portions of that regulation. We will address these claims later in this opinion. As we also noted in our December 20, 2005 order, however, the County must also show that it has standing to challenge the Regional Director’s decision based on the potential impacts from the marina project. As explained below, we conclude that the County cannot establish standing to pursue these claims because it cannot satisfy the second element of the Lujan test for standing — causation. That is, the County cannot demonstrate a causal link between BIA’s decision to approve the proposed trust acquisition and the environmental injuries the County alleges will result from development of the marina project.

Because we conclude that the County’s standing fails on causation, we will assume for purposes of our analysis that the County has shown that it satisfies the injury element of standing because it would suffer concrete and particularized injuries to a legally protected interest that would result from the marina project. 6/

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6/ Neither the Tribe nor the Regional Director concedes this issue, and it is not clear that the County can successfully demonstrate that its “proprietary interests” would be injured by the marina project under City of Sausalito v. O’Neill, 386 F.3d 1186, 1197-98 (9th Cir. 2004) (to satisfy injury element of standing, municipality must seek to protect its own “proprietary interests,” which are broad and may include its interest in “protecting its natural resources from harm”). The Tribe and the Regional Director contend that, in the absence of regulatory authority, the County lacks a “proprietary interest” in the natural resources affected by the marina project.

Causation is demonstrated when the alleged injury is causally connected with or fairly traceable to the actions of the appellee and not caused by the independent action of a third party. Lujan, 504 U.S. at 560-61 (emphasis added). Where a third party's action is the source of the alleged injuries, demonstrating causation can be difficult because the causal link between the challenged action and the appellant's alleged injuries is often speculative, and speculation, without more, is insufficient for establishing a basis for standing. See Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26, 44-45 (1976) ("unadorned speculation will not suffice to invoke the federal judicial power" and "indirectness of injury, while not necessarily fatal to standing, 'may make it substantially more difficult to meet the minimum requirement of Art. III'") (internal citation omitted); Ecological Rights Foundation v. Pacific Lumber Co., 230 F.3d 1141, 1152 (9th Cir. 2000) ("the causal connection \* \* \* cannot be too speculative, or rely on conjecture about the behavior of other parties"); Yesler Terrace Community Council v. Cisneros, 37 F.3d 442, 446 (9th Cir. 1994) ("Because neither the court nor the defendant can control the third party's actions, the causal link between the \* \* \* challenged actions and the \* \* \* threatened injuries may be only speculative").

The Board, too, requires more than mere speculation in cases such as this one, where BIA's decision to take land into trust is challenged based on the impacts of the tribe's intended use of the land once it is in trust status. In such a situation, causation can be demonstrated when the tribe's intended use of the land is "dependent upon" the land being in trust status, as opposed to remaining in fee status. Citizens for Safety and Environment, 40 IBIA at 93; Evitt, 38 IBIA at 82. See also TOMAC v. Norton, 193 F. Supp.2d 182, 188 (D.D.C. 2002), aff'd, TOMAC v. Norton, 433 F.3d 852 (D.C. Cir. 2006) (causation element satisfied because trust status was a "necessary prerequisite" for the tribe's intended use of the property for a casino).

Here, the injuries alleged by the County will occur as a result of the action of a third party — the Tribe's development of the marina project — and not as a result of the transfer of the fee title to the United States in trust for the Tribe. Thus, in order to satisfy the causation element of standing, the County bears the burden to show that the Tribe's marina project is not an independent action of the Tribe, but is dependent upon the land being in trust status. The County must satisfy its burden based on specific facts in the record, and not merely on averments contained in briefs and arguments. See FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 235 (1990) (citing Bender v. Williamsport Area School Dist., 475 U.S. 534, 547 (1986)). If the County cannot show that the marina project is not likely to proceed without approval of the trust acquisition, then the County's alleged harm from the project is not caused by or fairly traceable to BIA's decision and the County would not have standing to pursue its appeal. See Citizens for Safety and Environment, 40 IBIA at 93; Evitt, 38 IBIA at 82-83.

In its initial briefs on the merits of the appeal, the County argues that the marina project is dependent upon trust status because without trust status, the Tribe would be subject to County and State regulation that would likely prevent the Tribe from proceeding with the project. The County states: “Without trust status, the Tribe’s project could not proceed. No private citizen or government entity would be permitted to convert agricultural land in the manner the Tribe proposes.” County’s Opening Brief at 23. The County further states that the marina project is a “massive” development project that could not proceed on lands where “[e]ven soccer fields constitute impermissible development.” Id. at 23, 22; Anderson Dec. of Dec. 11, 2001, ¶ 5.

The Board recognizes that, prior to the Ninth Circuit’s decision in Gobin, the parties had reason to believe that the marina project was “dependent upon” trust status because of the regulatory requirements that the County could have imposed on the project. In fact, during the course of BIA’s consideration of the matter, trust status appears to have been assumed by all parties to be necessary for providing immunity from County regulation. Thus, at the time the Regional Director issued his decision and the County filed its appeal with the Board, neither the Board nor the parties questioned the County’s standing.

During the course of this appeal, however, the Ninth Circuit’s decision in Gobin dramatically altered the legal landscape. As noted above, in Gobin, the Ninth Circuit held that land within reservation boundaries that is held in fee simple ownership by a member of an Indian tribe is not subject to the jurisdiction of the county where the land is located, absent “exceptional circumstances” or an express intent of Congress to subject the land to non-tribal jurisdiction. 304 F.3d at 915-17. The rule of Gobin applies with as much or more force in this case because the land at issue is held in fee simple ownership, not by an individual tribal member, but by the Tribe itself. Further, the “exceptional circumstances” alleged by the county in Gobin and rejected by the court are highly similar to the circumstances here. <sup>7/</sup> Thus, even if the Property is not taken into trust, nothing in the record indicates that the County can show the existence of exceptional circumstances

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<sup>7/</sup> In Gobin, the County claimed that exceptional circumstances existed by virtue of its interests in “protecting endangered species, regulating County-maintained roads and storm sewers, providing a continuum of land use enforcement for all fee lands, and complying with applicable health and safety codes.” 304 F.3d at 917. The court held that these interests were not exceptional circumstances that outweighed the Tribe’s interest in self-determination. Id. at 918. Here, the County similarly claims that it has “concrete interests” in its natural resources, farmlands, traffic and road maintenance and archeological resources. County’s Brief in Support of Standing at 7-10; see also County’s Reply Brief in Support of Standing at 9-13.

justifying its exercise of jurisdiction over the Property. Indeed, in its reply brief the County cites to Gobin in suggesting that the marina project “will proceed whether or not trust status is granted.” County’s Reply Brief at 32 & n.55. Under Gobin, the County does not have regulatory authority over the Property. A decision to take the Property into trust therefore is not necessary to free the Tribe from County regulation that otherwise could preclude or hinder construction of the marina project. In other words, after Gobin, BIA’s decision to approve the trust application has no impact on the regulatory landscape within which the Tribe operates, with respect to immunity from County laws. Cf. Bennett v. Spear, 520 U.S. 154, 169 (1997) (standing to challenge biological opinion under Endangered Species Act was demonstrated because the opinion “alters the legal regime to which the action agency is subject” and has a “determinative or coercive effect upon the action of someone else”). Accordingly, we conclude that the County cannot now demonstrate that its regulatory authority over the Property makes the marina project dependent upon trust status.

Now that the sole identified potential legal impediment to the marina project proceeding absent trust status — the County’s regulatory jurisdiction over the Property — has been removed, the County would have the Board speculate that the economics of the project on fee land are such that the Tribe will abandon the project if the land is not taken into trust. We conclude, however, that the record does not support such speculation.

To support its assertion that “trust status is a prerequisite of the proposed project,” County’s Brief in Support of Standing at 11, the County points to two statements made by the BIA realty officer in his July 30, 2001 memorandum recommending approval of the trust acquisition: (1) “Acquisition of the property is a necessary component to the Tribe’s plans to develop up to a 1200 slip marina,” and (2) the Tribe’s request “to take the subject property into trust is necessary to facilitate Tribal self-determination and economic development.” Id. at 11-12. Further, the County relies on a statement made by the Tribe’s Director of Planning and Community Development describing the difficulty the Tribe has had attracting a development partner for the marina project as evidence that the project is dependent upon trust status. Id. at 12 & 16 n.27 (“[w]ithout trust status the Tribe has been unable to secure the development partner it needs to complete the project”). 8/

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8/ In a declaration, the Tribe’s Director of Planning and Community Development states: The continued uncertainty regarding the status of the Knudson land has impeded and continues to impede the ability of the Swinomish Tribe to attract quality development partners and to negotiate a favorable business relationship with those investors. The inability of the Tribe to demonstrate

(continued...)

We conclude that this evidence is insufficient to satisfy the County's burden to show that the marina project is dependent upon trust status. All of this evidence pre-dates Gobin and none of it indicates that the Tribe's plans are dependent on gaining tax-exempt status for the Property — the only relevant remaining consequence of trust status. The BIA realty officer's statements were made pre-Gobin and thus were based on an assumption that trust status would eliminate any regulatory restrictions that would be imposed by the County if the Property remained in fee status. Similarly, the evidence of the Tribe's difficulty in obtaining a development partner pre-dates Gobin and assumed that trust status was necessary for avoiding County regulation. Moreover, the declaration of the Tribe's Director of Planning and Community Development states only that it is a lack of clarity as to how the property will be administered (fee vs. trust) that has hampered the Tribe's ability to attract development partners. It does not say that the Tribe will be unable to attract development partners if the land is not taken into trust. 9/

The Board does not rule out the possibility that the economics of the marina project could be affected if the Property is not taken into trust. But there are simply no specific facts in the record that support the County's claim that any economic disadvantage that the Tribe would face in the event that the Property is not taken into trust would cause the Tribe to abandon a project now nearly thirty years in the making. Further, after Gobin, whether to proceed with the project or abandon the project is a decision now left to the "unfettered" discretion of the Tribe, based on the Tribe's "perceptions of wise \* \* \* fiscal policy and myriad other circumstances," ASARCO, Inc. v. Kadish, 490 U.S. 605, 615 (1989), and it is pure speculation on the part of the County to suggest that the economics of developing the project on fee land will prevent the project from going forward. The County therefore has not met its burden to show that the project is dependent upon trust status.

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8/(...continued)

that the Knudson land is in "federal trust" status rather than "fee simple" status raises additional questions regarding taxation, regulatory jurisdiction, etc. This lack of clarity escalates uncertainty and severely limits the Tribe's business opportunity for any economic development activities on the Knudson land.

O'Hara Dec. of July 19, 2002, ¶ 6.

9/ We note that to the extent the Tribe has yet to line up a development partner today, the primary legal obstacles to the marina project may very well relate to Endangered Species Act consultation requirements associated with the Corps' section 10/404 permit, and not to BIA's trust acquisition decision.

The County's final attempt to convince the Board that the project is dependent upon trust status rests on the County's assertion that BIA's trust acquisition decision and the marina project are "inexorably intertwined" and therefore the County's alleged injuries from the project are necessarily fairly traceable to the trust acquisition decision. County's Brief in Support of Standing at 18. First, the County asserts that the scope of the FSEIS reflects the scope of BIA's action. *Id.* at 2. The County states: "As evidenced by BIA's own NEPA documents, the NEPA analysis of the fee-to-trust decision encompassed the connected action of development of the marina project." *Id.* at 11. Second, the County attempts to rely on BIA's role as the lead agency for development of the FSEIS to support its argument. County's Reply Brief in Support of Standing at 8 ("BIA is the lead agency for a variety of actions necessary for the marina project, and each of those decisions requires NEPA compliance") (emphasis in original). Third, the County characterizes the marina project as a major federal action within the meaning of NEPA and states that therefore, a causal link exists between BIA's decision and the impacts that will result from the marina project because "neither the acquisition of the 350 acres in trust *nor* the construction of the marina project can go forward unless, and until, the BIA complies with NEPA." *Id.* at 5 (emphasis in original).

We find no merit to the County's arguments. First, at the time the FSEIS was prepared, the federal actions being analyzed included BIA's potential approval of a lease to a tribal development corporation and the Corps' issuance of the section 10/404 permit. The FSEIS analyzed the entire marina project so that it could function as the environmental analysis for both of these actions. The Corps, in fact, adopted the FSEIS in its Record of Decision granting the section 10/404 permit to the Tribe. Moreover, because at that time it appeared that the marina project could or would not proceed without both of these actions, the marina project was a "connected action" within the meaning of NEPA and the NEPA analysis appropriately encompassed the impacts of the marina project itself. <sup>10/</sup> The fact that BIA was the "lead agency" for purposes of NEPA, and therefore prepared the FSEIS, has no independent meaning. It does not mean that BIA is going to be the federal agency taking all of the actions contemplated by the NEPA analysis. Therefore, the marina project

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<sup>10/</sup> A "connected action" is defined, in part, as an action that is "closely related" to the proposed action because it "[c]annot or will not proceed unless other actions are taken previously or simultaneously." 40 C.F.R. § 1508.25(a)(1)(ii).

itself is not part of BIA's action and the scope of the FSEIS in no way reflects the scope of BIA's action. 11/

Furthermore, the County is simply wrong in its assertion the marina project is a major federal action that triggers NEPA compliance. The marina project, if it proceeds, will be developed by the Tribe, which is not a federal agency and therefore not subject to the requirements of NEPA. The sole action that BIA has taken and that is at issue in this appeal is BIA's approval of the trust acquisition. 12/

Finally, we turn to the County's argument that the doctrine of exhaustion of administrative remedies requires that the proper forum for resolving all of the County's NEPA claims on the merits is its appeal to the Board from the Regional Director's trust acquisition decision. County's Brief in Support of Standing at 2-3. This is incorrect. The doctrine of exhaustion of administrative remedies requires that the agency have the first opportunity to adjudicate a claim, but this does not necessarily mean that the agency must adjudicate the claim on the merits. The agency must determine first whether it has jurisdiction to consider a claim. Here, we have concluded that the Board does not have jurisdiction to consider the County's NEPA claims. The fact that the County has raised NEPA claims does not somehow entitle it to resolution on the merits. And the Board is

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11/ We note that once the Tribe submitted its trust acquisition application, BIA's action changed from the potential approval of a lease to its decision to approve the trust application. This does not affect our analysis, however, because at the time the Regional Director issued his decision to approve the trust acquisition, the parties reasonably could have assumed that the marina project could not proceed absent trust status. This is because, prior to Gobin, trust status would have freed the Property from County jurisdiction. Therefore, the broad scope of the NEPA analysis remained appropriate.

We think it is also worth noting that nowhere does the FSEIS suggest a causal link between BIA's trust acquisition decision and the environmental impacts of the marina project. Of course, we would not expect the FSEIS to discuss BIA's trust acquisition decision at all, since the FSEIS was prepared prior to the Tribe's request to take the Property into trust.

12/ Our conclusion does not mean that BIA's NEPA compliance for its trust acquisition decision should analyze the impacts of that decision in a vacuum. Under NEPA, a federal agency is required to analyze whether the impacts of its action, when added to the impacts of reasonably foreseeable future actions, are significant. See 40 C.F.R. § 1508.7. Thus, whenever such other actions must be included in the analysis, the scope of the analysis is necessarily broader than the scope of the federal action that is the subject of the analysis.

certainly not the place to resolve any challenges the County may have to the Corps' NEPA compliance in connection with issuance of the section 10/404 permit. 13/

We conclude that the County has failed to meet its burden to demonstrate that the Tribe's marina project is dependent upon the Property being in trust status, and cannot establish standing to pursue its claims based on the potential environmental impacts of the marina project. We therefore dismiss these claims for lack of jurisdiction. 14/

### The County's Motion to Dismiss and Remand

The County's Motion to Dismiss and Remand is based on events that occurred during 2005 and that are related to the question of whether the Corps' issuance and extension of the section 10/404 permit complies with Section 7 of the Endangered Species Act (ESA). Section 7 requires federal agencies to consult with the appropriate federal wildlife agency to insure that any action authorized, funded, or carried out by them is not likely to jeopardize the continued existence of an endangered or threatened species. 16 U.S.C. § 1536(a)(2). Under the circumstances here, BIA is not required to comply with the ESA because the marina project is not an action "authorized, funded, or carried out" by BIA. The County does not assert otherwise. Rather, the County contends that it is NEPA that requires BIA to further consider impacts on listed species before taking the land into trust. 15/

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13/ Our decision here does not mean that the County will never have another opportunity to challenge federal actions related to the marina project. Assuming it can meet the requirements of standing, the County will be able to challenge the NEPA compliance associated with such federal action, including future BIA action, if any.

14/ Because we conclude the County lacks standing to raise environmental claims in this appeal, and because its request for an evidentiary hearing was solely related to the scope of the marina project, we conclude that the request for a hearing is moot.

15/ In deciding to issue the section 10/404 permit to the Tribe, the Corps relied on the 1996 FSEIS's discussion of the marina project's potential impacts on ESA-listed species. The FSEIS had relied on a 1992 biological assessment (BA), prepared under section 7 of the ESA, that had been updated in 1996 and which concluded that the marina project would have no effect on ESA-listed species. The BA was updated again in 1999, and both the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) issued letters concurring in the BA's no effect determination. In 2002, the BA was  
(continued...)

Because we have concluded that the County has not established standing to raise its NEPA claims, however, we dismiss the County's motion and do not address the merits of the County's arguments.

### Analysis of the County's Remaining Claims

Because we have determined that the County does not have standing to pursue any of its claims related to alleged environmental injuries resulting from the construction and operation of the marina project, all that remains is for the Board to consider the County's claims under the FPPA and 25 C.F.R. § 151.10.

#### 1. The Farmland Protection Policy Act

Independent from its NEPA claims, the County argues that the Regional Director's decision ignored the requirements of the FPPA. The FPPA requires federal agencies to consider the adverse effects of Federal programs on the preservation of farmland; consider alternative actions that could lessen such adverse effects; and assure that such Federal programs, to the extent practicable, are compatible with state, local and private programs and policies to protect farmland. 7 U.S.C. § 4202(b). "Farmland" is defined to include prime or unique farmland or certain other farmland of statewide or local importance. *Id.* § 4201(i)(1).

The Regional Director rejects this argument on two grounds. First, the Regional Director states that taking land into trust does not constitute a "Federal program" as defined in the statute. Appellee's Answer at 6. Second, the Regional Director argues that, in any event, the express terms of the FPPA preclude the County from challenging the agency's compliance with the statute. *Id.* at 6-7.

The Board agrees that the County may not seek to enforce the FPPA. The FPPA provides:

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15/(...continued)

again updated and again made a no effect determination. In 2005, however, FWS and NMFS each issued letters withdrawing their 1999 concurrences and both agencies have decided to prepare full biological opinions for the marina project under section 7 of the ESA. It is the Services' withdrawal of their concurrences and the preparation of biological opinions that the County asserts require re-examination of the NEPA analysis.

This chapter shall not be deemed to provide a basis for any action, either legal or equitable, by any person or class of persons challenging a Federal project, program, or other activity that may affect farmland: *Provided*, That the Governor of an affected State where a State policy or program exists to protect farmland may bring an action in the Federal district court of the district where a Federal program is proposed to enforce the requirements of section 4202 of this title and regulations issued pursuant thereto.

7 U.S.C. § 4209 (emphasis added). By this language, Congress expressly sought to make the statute unenforceable except by the governor of an affected state. See United States v. South Florida Water Management Dist., 847 F. Supp. 1567, 1572-73 n.4 (S.D. Fla. 1992) (“The FPPA, by expressly prohibiting private causes of action based on its provisions \* \* \* precludes judicial review of compliance with its terms”); Town of Norfolk v. U.S. Environmental Protection Agency, 761 F. Supp. 867, 890 n.8 (D. Mass 1991).

The County argues that section 4209 does not apply here because, if it filed suit in court to challenge BIA’s compliance with the FPPA, its “basis of action” would be the Administrative Procedure Act (APA), 5 U.S.C. § 702. County’s Reply Brief at 17. This is incorrect. The APA merely provides a right of review to persons suffering a “legal wrong because of agency action.” If the County brought an action challenging BIA’s compliance with the FPPA, the legal wrong the County would assert would be a violation of the FPPA. Thus, it is the FPPA, not the APA, that would provide the “basis” for such action. Moreover, reading the FPPA to allow challenges to be brought under the APA would render section 4209 wholly ineffective and be contrary to congressional intent. The County’s interpretation cannot be credited.

The County also argues that, regardless of the statutory bar against enforcement of the FPPA, the Board has broad authority to ensure that BIA “faithfully executes the law.” County’s Reply Brief at 17 (citing 43 C.F.R. § 4.1 and City of Lincoln City, Oregon v. Portland Area Director, 33 IBIA 102 (1999)). The regulations and Board decision on which the County relies, however, do not support this proposition in the face of section 4209’s express language. Section 4.1 of 43 C.F.R. describes the scope of authority of the Board to “decide[] finally appeals \* \* \* pertaining to \* \* \* administrative actions of officials of the Bureau of Indian Affairs.” 25 C.F.R. § 4.1(b)(2). In City of Lincoln City, the Board merely re-states its authority to review BIA’s legal determinations as well as BIA’s exercise of discretion. See 33 IBIA at 104. Neither the regulation nor the decision provides that the Board has authority to consider claims by a party when a statute expressly precludes that party from bringing the claim. The FPPA clearly intends to preclude third party enforcement of the FPPA, except in the case of certain suits brought by governors, and it furthers this intent for the Board to preclude administrative enforcement as well.

We therefore conclude that the County is precluded from attempting to enforce the FPPA and we dismiss these claims for lack of jurisdiction.

2. Compliance with 25 C.F.R. § 151.10(f) (jurisdictional problems)

In its initial briefs on the merits, the County argues that BIA failed to consider jurisdictional problems and potential conflicts of land use, as required by 25 C.F.R. § 151.10(f). In particular, the County argues that the Regional Director improperly relied on the existence of a Memorandum of Understanding (MOU) between the Tribe and the County related to land use planning because the Tribe had failed to comply with the MOU's procedures. County's Opening Brief at 20-22. The County also argues that the Regional Director improperly based his analysis in part on the Tribe's "willingness and ability to resolve complex jurisdictional issues without protracted conflict" without considering that the Tribe entered into an agreement with the fire district that provides fire protection service to the Reservation only under duress. Id. at 23.

In response, the Tribe argues in part that under the Ninth Circuit's decision in Gobin, there are no jurisdictional problems or potential conflicts in land use because the County does not have regulatory jurisdiction over the Property, which is tribally-owned land within reservation boundaries. In effect, the Tribe argues that Gobin renders the question of jurisdictional problems and land use conflicts moot.

We agree with the Tribe and conclude that the County lacks standing to raise its claim that the Regional Director's decision failed to comply with section 151.10(f). As we have already concluded, Gobin's impact is that BIA's decision to take the Property into trust cannot cause jurisdictional problems or land use conflicts between the County and the Tribe because the County no longer has any regulatory jurisdiction over the Property. Because the County must prove standing for each claim that it raises, and because it cannot do so here, we dismiss the County's claim under 25 C.F.R. § 151.10(f) for lack of jurisdiction.

3. Compliance with 25 C.F.R. § 151.10(e) (removal from tax rolls)

Section 151.10(e) requires BIA to consider the impact of approving a trust application on "the State and its political subdivisions resulting from the removal of the land from the tax rolls." In his decision, the Regional Director reviews and affirms the Superintendent's conclusion that the potential loss of tax revenue from taking the Property into trust "would have a negligible impact on overall property tax revenues of the County." Regional Director's Decision at 16. The Regional Director recites the Superintendent's findings that the County currently receives approximately \$8,400 annually in taxes from the

Property, and that according to County data, in 1998 the County received a total of approximately \$20,165,000 in property taxes, accounting for approximately 28% of the County's total revenue. The Superintendent concluded:

The subject property is less than 0.042% [of] the County's taxable land base and accounted for less than 0.012% of the total County revenue for 1998. This potential loss of tax revenue would have a negligible impact on overall property tax revenues and is likely to be surpassed in additional tax revenues generated by the marina project.

Regional Director's Decision at 16 (quoting the Superintendent's Decision Memorandum at 5). Based on his review of the Superintendent's findings, the Regional Director agreed with these findings.

The County argues that the Regional Director's decision improperly ignored the potential tax loss that the County would experience if it did not receive tax revenues from the marina project, and was incorrect to consider only the loss of tax revenue based on the current use of the land at issue. County's Opening Brief at 25-26. The County asserts that BIA should have examined "how the Tribe's proposed marina would otherwise have been taxed" and "assess the tax loss in terms of a comparable development." *Id.* at 26. *See also* County's Brief in Support of Standing at 4 n.4 ("the lost tax revenue to be considered is the tax that would be assessed on the developed land in fee status").

The Board concludes that the Regional Director was not required to consider revenues that might result from the marina project's potential future development on fee lands and that the Regional Director adequately considered the impacts of BIA's trust acquisition decision on tax revenue. The Board has ruled that section 151.10(e) requires only an analysis of taxes actually assessed and paid. In Rio Arriba, New Mexico, Board of County Commissioners v. Acting Southwest Regional Director, 38 IBIA 18 (2002), the appellant challenged a decision to take land into trust in part by arguing that the Regional Director should have attempted to quantify and consider potential taxes on future construction that might be undertaken by the Tribe on the subject Property. The Board agreed with the Regional Director that such an exercise would be "entirely speculative" and that the Regional Director "was not required to engage in speculation on this point." *Id.* at 22. The appellant also argued that the Regional Director should have considered certain other possible future tax losses. The Board ruled that the Regional Director "properly based his analysis on taxes actually assessed and paid and was not required to consider speculative tax losses." *Id.* at 24.

Numerous other cases have applied this rule. See Shawano County, 40 IBIA at 249 (BIA need not consider future loss of tax revenues if vacant property were developed, but rather “must consider only the loss of taxes actually assessed and paid on the property”); Rio Arriba, New Mexico, Board of County Commissioners v. Acting Southwest Regional Director, 36 IBIA 14, 24 (2001) (in considering whether to take land into trust, Regional Director need only consider “taxes actually assessed and paid”); City of Eagle Butte, South Dakota v. Aberdeen Area Director, 33 IBIA 246, 248 (1999) (Regional director should consider “what, if any, taxes were assessed by Appellant in regard to these properties, or what, if any, taxes were received by Appellant in regard to each property; and the impact, if any, on Appellant of the removal of the tracts from the tax rolls”).

As indicated at the outset of this opinion, the Board’s role in a trust acquisition case is limited to determining whether BIA “gave proper consideration to all legal prerequisites to the exercise of its discretionary authority.” Cass County, 42 IBIA at 246. Here, the Regional Director considered the impacts of acquiring the Property in trust on the County’s loss of tax revenue. His decision considers the fact that the Property accounted for a very small percentage of the County’s taxable land base and a very small percentage of the County’s tax revenue and reasonably concludes that the loss of such revenue would be negligible. Further, the Regional Director’s decision specifically concludes that it was appropriate for the Superintendent to consider only past tax assessments of the Property and not potential future tax revenues as argued by the County. Regional Director’s Decision at 17 (“I find that there is no indication that the regulations contemplate speculation about loss of future tax revenues”). Based on this analysis, the Regional Director agreed with the Superintendent’s conclusion that “the potential loss of tax revenue would have a negligible impact on overall property tax revenues of the County.” Id. at 16.

The County also argues that the Regional Director treated tax impacts arbitrarily and capriciously because he quoted the Superintendent’s statement that the potential loss of tax revenue “is likely to be surpassed in additional tax revenues generated by the marina project.” The County argues that it was arbitrary and capricious for the Regional Director to weigh revenue losses based on the Property’s current status against potential revenue gains based on its development for the marina project. County’s Reply Brief at 33. The Regional Director, however, did not rely on this portion of the Superintendent’s analysis. The Regional Director specifically stated: “I agree with the conclusion of the Superintendent that the potential loss of tax revenue would have a negligible impact on overall property tax revenues of the County,” and omitted the Superintendent’s statement about potential offsetting revenues. The Regional Director properly based his analysis of tax impacts on existing circumstances and not a potential change in land use, and the County’s claim to the contrary is without merit.

The County further argues that the section 151.10(e) analysis is flawed because BIA's consideration of road maintenance impacts on the County did not properly account for the increased need for maintenance and enhancements that would result from the marina development. The plain language of 151.10(e), however, does not require BIA to consider impacts resulting from potentially increased costs due to changes in land use on property that is taken into trust; it requires only consideration of the impacts of removing property from the tax rolls.

We conclude that BIA properly considered the tax implications as they pertain to road maintenance. The Superintendent noted that taxes on real and personal property within the exterior boundary of the Reservation generate \$1,977,733 to Skagit County of which \$2.0831 per \$1000 of assessed property value is allocated to the County road program. The Superintendent also noted that the Tribe was expected to provide, through BIA, more than \$800,000 for a State Route 20 project, plus funds for repainting the steel truss bridge on the Reservation. The Superintendent had already noted at the beginning of the section 151.10(e) analysis that taking the land into trust would cause the County to lose over \$8,000 in tax revenues, which otherwise would provide a very small portion of the funds that the Reservation supplies to the County for the road program. The County does not dispute any of this information. The Superintendent, and the Regional Director who affirmed his analysis, considered the appropriate information. 16/

The County has provided no evidence to demonstrate that the information relied upon by the Regional Director was erroneous, or that he failed to consider relevant information. The County has therefore failed to demonstrate the Regional Director abused his discretion in concluding that impacts of acquiring the Property in trust on the County's loss of tax revenue would be negligible. Accordingly, the Board affirms the Regional Director's decision.

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16/ We also note that the County has never provided BIA with any estimate of what the increased costs of road improvements and maintenance might be. In this appeal, the County relied in its opening brief on estimates of road maintenance costs included in the FSEIS and then backed away from this reliance after the Tribe and BIA pointed out that most of those costs would be shouldered by the State of Washington. A party cannot complain that BIA did not consider information that the party failed to provide. See State of Iowa and Board of Supervisors of Pottawattamie County, Iowa v. Great Plains Regional Director, 38 IBIA 42, 53 (2002) ("when a governmental entity provides incorrect or incomplete tax information in response to a BIA request for information, it may not later complain about the BIA's use of that incorrect or incomplete information"), and cases cited therein.

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 dismisses the County's appeal for lack of jurisdiction for all of the County's claims except for its claims under 25 C.F.R. § 151.10(e). With respect to the County's claim under this regulation, the Board affirms the Regional Director's decision.

I concur:

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// original signed  
Amy B. Sosin  
Acting Administrative Judge

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge