



INTERIOR BOARD OF INDIAN APPEALS

County of Sauk, Wisconsin v. Midwest Regional Director, Bureau of Indian Affairs

45 IBIA 201 (08/31/2007)

Judicial review of this case:

Affirmed, *Sauk County v. United States Dep't of the Interior*, No. 07-CV-543-bbc,
2008 WL 2225680 (W.D. Wis. May 29, 2008)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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COUNTY OF SAUK, WISCONSIN,)	Order Affirming Decision
Appellant,)	
)	
v.)	
)	Docket No. IBIA 05-53-A
MIDWEST REGIONAL DIRECTOR,)	
BUREAU OF INDIAN AFFAIRS,)	
Appellee.)	August 31, 2007

The County of Sauk, Wisconsin (County), seeks review of a January 27, 2005, decision (Decision) of the Midwest Regional Director, Bureau of Indian Affairs (Regional Director; BIA). The Regional Director’s decision affirmed a March 13, 2003, decision of the Great Lakes Agency Superintendent, BIA (Agency; Superintendent), that approved the acceptance into trust of approximately five acres, known as “Parcel 7,” in the County by the United States for the Ho-Chunk Nation of Wisconsin (Nation). The subject property is described as Lot 1, located in the SE¹/₄ of the SE¹/₄ of Section 9, Township 12 North, Range 6 East, Town of Delton (Town), in the State of Wisconsin (State). We conclude that the County has failed its burden of showing that the Regional Director did not consider the necessary criteria in his determination to take Parcel 7 into trust and therefore we affirm.

Statutory and Regulatory Background

Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. § 465, authorizes the Secretary of the Interior (Secretary) to acquire land for Indians in his discretion. The regulations governing acquisitions of trust land describe BIA’s land acquisition policy, in part, as allowing land to be taken into trust “[w]hen the Secretary determines that the acquisition . . . is necessary to facilitate tribal self-determination, economic development, or Indian housing.” 25 C.F.R. § 151.3(a)(3). In evaluating requests to acquire land located within or contiguous to an Indian reservation, BIA must consider the criteria set forth in

25 C.F.R. § 151.10(a)-(h).¹ These criteria are:

- (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;
- (g) If the land to be acquired is in fee status, whether the [BIA] is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status; and
- (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.

In addition, the Regional Director must determine whether the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq., requires the preparation of an Environmental Impact Statement (EIS) for the trust acquisition decision. If the decision constitutes a major Federal action that may significantly affect the quality of the environment, then BIA must prepare an EIS. See 42 U.S.C. § 4332(2)(c). An Environmental Assessment (EA) may be used to determine whether an EIS is required. See 40 C.F.R. § 1501.4(c).

Factual and Procedural Background

The Nation, a tribe of approximately 6,000 enrolled members, has a land base consisting of approximately 2,100 acres of tribal trust land scattered throughout several counties in Wisconsin, including the County. Parcel 7, consisting of approximately five

¹ Section 151.11 of 25 C.F.R. governs BIA's analysis for proposed acquisitions that are located outside of and noncontiguous to a tribe's reservation.

acres, is located directly across U.S. Highway 12 from the Nation's "Ho-Chunk Casino."² A residence and several outbuildings are apparently the only structures on Parcel 7.

In 1995, the Nation requested the United States to take into trust 14 parcels of land located in the County, including the subject property. The 14 parcels, purchased by the Nation in 1995, comprise approximately 724.24 acres in the County. Prior to any decision by BIA on the Nation's request, the State, the County, and the Town, filed suit in Federal court to enjoin BIA from approving the acceptance of the land in trust, claiming that 25 U.S.C. § 465 is unconstitutional. See *State of Wisconsin v. U.S. Dep't of the Interior*, Civ. No. 96C 0263S (W.D. Wis.). The parties entered into a Stipulation of Voluntary Dismissal on April 24, 1996, after the Department of the Interior (Department) agreed it would not acquire the land in trust until at least 30 days after publication of an announcement of the Department's decision to take the land into trust, in accordance with a newly-published amendment to 25 C.F.R. Part 151.³ The Nation subsequently withdrew its request for BIA to accept the 14 parcels in trust by the United States on behalf of the Nation.

On May 28, 1996, the Nation adopted Resolution No. 5/28/96D, which requested BIA to accept only Parcel 7 into trust instead of all 14 parcels originally proposed to be taken into trust. In the Resolution, the Nation stated that the current land use for Parcel 7 was housing with "no anticipated change" to result from the acceptance of the property into trust.

By letter dated March 27, 1997, the Superintendent advised the County, State, and Town that the Nation had withdrawn its request for the trust acquisition of the 14 parcels but had submitted a new request for Parcel 7 to be accepted into trust status. In accordance with 25 C.F.R. § 151.10, the Superintendent solicited comments on the proposed trust acquisition of Parcel 7. The County responded in opposition to the proposal⁴ and argued that 1) 25 U.S.C. § 465 is an unconstitutional delegation of legislative power; 2) an EIS is required under NEPA, based on "significant impacts associated with this action," Letter from County to Superintendent, Apr. 25, 1997, at 5; and 3) the Nation "has not complied

² The Nation's casino is located on land established as reservation land. See 49 Fed. Reg. 1431 (Jan. 11, 1984).

³ The amendment is now published at 25 C.F.R. § 151.12(b).

⁴ The Town and State, as well as a number of state representatives and one U.S. Senator, also responded to the Superintendent's letter.

with the requirements of 25 C.F.R. §§ 151.10 and 151.11 because the proposed acquisition will have significant revenue and jurisdictional impact upon the political subdivisions and the [Nation] has not negotiated with the affected units of government,” *id.* at 3. The County argued that the “macro revenue impact” of taking the entire 724.24 acres into trust needed to be considered. *Id.* at 7.

In 2000, BIA prepared an EA on Parcel 7 and a draft Finding of No Significant Impact (FONSI), and interested parties were invited to comment. The County, Town, and State submitted comments. The Nation then responded to the various comments, reiterating that no change of use is intended: “The Nation is not proposing commercial development on the subject parcel” and “the Nation intends to continue to use [Parcel 7] for housing and community services purposes for Ho-Chunk members.” Letter from Nation to Superintendent, Mar. 21, 2001, at 2; see *id.* at 3 (Parcel 7 “has a residence and an outbuilding located on it. It has been used by the Nation for housing, as a youth study center and as a facility where Nation members may take Nation language classes. The Nation intends to continue these housing and community service uses of the lands”). On December 6, 2001, the Acting Superintendent issued a FONSI. In the FONSI, the Acting Superintendent determined that,

[t]he trust acquisition of [Parcel 7] does not include any development o[r] construction, and no change in land-use is associated with the proposed acquisition. Impacts of the proposed acquisition include the loss of property taxes paid on the subject parcel as well as the transfer of zoning authority to the Ho-Chunk Nation.

FONSI, Dec. 6, 2001. She concluded that “the proposed project will not have significant environmental impacts, and that the preparation of an environmental impact statement will not be necessary.” *Id.* On November 26, 2002, the Superintendent sent separate letters to the County, Town, and State responding to their concerns regarding the EA. On November 29, 2002, an Agency Natural Resource Specialist issued a memorandum stating that BIA had completed its review of the proposed trust acquisition for compliance with NEPA, and that “[n]o significant impacts were identified in the EA, by the Tribe, by interested parties or by any of the consulting agencies.”

On March 13, 2003, the Superintendent issued a decision approving the acceptance of Parcel 7 in trust for the Nation. The Superintendent reached his conclusion after determining that Parcel 7 is adjacent to reservation land and examining the factors set forth for trust acquisitions in 25 C.F.R. § 151.10.

The County appealed the Superintendent's decision to the Regional Director, and submitted a statement of reasons.⁵ The Nation submitted an answer brief.

On January 27, 2005, the Regional Director issued the decision that is the subject of the present appeal. The Regional Director reviewed the Superintendent's analysis of the eight criteria set forth in 25 C.F.R. § 151.10, subsections (a) through (g), and reached the following conclusions with respect to each factor: (a) Section 465 of 25 U.S.C. provides the authority for the trust acquisition, which the County has not challenged in its appeal from the Superintendent's decision; (b) the Nation's need for additional land was demonstrated by the fact that the Nation has over 6,000 enrolled members but only holds a small and scattered land base consisting of approximately 2,100 acres of tribal trust land throughout eleven counties; the Nation's members have unmet needs for housing, education, cultural opportunities, and health and social service programs; and an adequate land base is critical to house such essential programs and services; (c) the Nation's stated intent for the property is to continue to use it for housing and community services consisting of a youth study center, drop-in site, and language center, and, even if, as the County alleges, the Nation were to consider a cultural center in the future, the County provides no support for its assertion that a change from the present use to another lawful use would be grounds to invalidate the trust application;⁶ (e) accepting Parcel 7 into trust would not adversely impact the State and local governments because the taxes levied against Parcel 7 are de minimis and the loss of tax revenue is offset by the Nation's "substantial contributions to the County and Town totaling \$27,867,241.71," Decision at 4; (f) the Nation's use of the subject parcel is consistent with the uses of nearby property and does not appear to present any current or future conflicts in land use; and (g) the acquisition of the parcel would not unduly burden BIA and the County has not challenged the Superintendent's analysis of this factor.⁷

⁵ The State and Town did not appeal from the Superintendent's decision.

⁶ Subsection (d), which applies to land acquisitions on behalf of an individual Indian, was not addressed by the Regional Director inasmuch as the acquisition was on behalf of a tribe.

⁷ Subsection (h), which applies to the Nation's submission of information to enable BIA to comply with NEPA, appeared as a heading to the Regional Director's discussion of BIA's NEPA determination. Although the Regional Director did not address the Nation's submission of environmental information, the EA issued by BIA specifically acknowledged that the Nation was consulted in the preparation of the EA and attachments to the EA include documents that were provided by the Nation.

In addition, the Regional Director determined that a transfer of land title from fee simple into trust, without any proposed change in use of the land is, as a general matter, categorically excluded⁸ from review under NEPA and the County's objections to the EA are not based on the Nation's existing and stated use of the property, but rather are based on speculation regarding possible future commercial development of the land. The Regional Director concluded by affirming the Superintendent's decision to acquire Parcel 7 in trust for the Nation.

The County filed a timely appeal of the Regional Director's decision with the Board of Indian Appeals (Board). The County and the Regional Director submitted briefs. On March 16, 2007, the Board *sua sponte* ordered briefing on whether the County has standing under 25 C.F.R. § 151.10 to challenge the Regional Director's consideration of factors other than subsections 151.10(e) and (f) — i.e., other than those factors directly implicating County interests — and whether the County has demonstrated standing to challenge the FONSI under NEPA. Briefs were received from the County, the Regional Director, and the Nation.⁹

Discussion

A. Standard of Review

The standard of review in trust acquisition appeals is well established. Decisions by BIA officials to take land into trust are discretionary, and the Board does not substitute its judgment in place of BIA's judgment in such decisions. *Arizona State Land Dep't v. Western Regional Director*, 43 IBIA 158, 159-60 (2006). Instead, the Board reviews discretionary decisions to determine whether BIA considered the legal prerequisites to the exercise of its discretionary authority, including any established limitations on its discretion. *Cass County v. Midwest Regional Director*, 42 IBIA 243, 246 (2006). Thus, the decision must reflect that the Regional Director considered the factors set forth in section 151.10, but there is no requirement that BIA reach a particular conclusion with respect to each factor. *Skagit County v. Northwest Regional Director*, 43 IBIA 62, 63 (2006). The factors are not weighted or balanced in any particular way, *Village of Ruidoso v. Albuquerque Area Director*, 31 IBIA

⁸ “Categorical exclusion” refers to certain “[categories] of actions that would have no significant individual or cumulative effect on the quality of the human environment and, for which in the absence of extraordinary circumstances, neither an [EA] nor [EIS] is required.” 516 Departmental Manual (DM) 2.3(A)(1) (2005).

⁹ Only the County addressed standing under NEPA.

143, 152 (1997), nor must each factor be exhaustively analyzed, see *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 801 (8th Cir. 2005).

In contrast to the Board's limited review of BIA discretionary decisions, the Board has full authority to review legal issues raised in a trust acquisition case other than issues raising the constitutionality of laws or regulations. See *Skagit County*, 43 IBIA at 64; *Cass County*, 42 IBIA at 247.

Appellants bear the burden of establishing that BIA did not properly exercise its discretion. *Cass County*, 42 IBIA at 246; *Shawano County v. Midwest Regional Director*, 40 IBIA 241, 244 (2005); *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. *Arizona State Land Dep't*, 43 IBIA at 160.

B. Review of the Regional Director's Decision to Accept Parcel 7 into Trust

1. Scope of County's Standing Under 25 C.F.R. Part 151

Based on our review of the parties' arguments and consideration of legal principles, we conclude that the County has standing to challenge BIA's consideration of all factors set forth in section 151.10 as part of its claim that BIA did not properly exercise its discretion under section 151.10, and is not limited to raising factors (e) and (f).

The County adequately articulated that the fee-to-trust decision directly and adversely affected the County's real property tax base and its regulatory jurisdiction sufficient to establish constitutional standing. Additionally, the regulation itself, 25 C.F.R. § 151.10, makes clear that the County and all state and local jurisdictions have prudential standing, at least administratively, to challenge a BIA fee-to-trust decision based on an alleged failure to consider factors (e) and (f) of section 151.10. What was unclear is whether the scope of their prudential standing is limited to challenging only those two factors, especially in light of the first paragraph of section 151.10, which provides that state and local governments shall have "30 days [from notice of a proposed fee-to-trust land acquisition] in which to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments." (Emphasis added.) See 3 Richard J. Pierce, Jr., *Administrative Law Treatise*, § 16.10, at 1204 (4th ed. 2002) (Agencies have discretion to limit the manner in which parties may participate in administrative proceedings, citing *Office of Communication of United Church of Christ v. F.C.C.*, 359 F.2d 994 (D.C. Cir. 1966)).

In response to the Board’s order for briefing on this issue, the Regional Director advised the Board that in the Department’s Petition for Writ of Certiorari to the Supreme Court in *Dep’t of the Interior v. South Dakota*, 519 U.S. 919 (1996), the Department not only assured the Supreme Court that land acquisition decisions under 25 U.S.C. § 465 are subject to judicial review but that BIA’s decisions to accept land into trust would “receive full review in administrative adjudications.” Regional Director’s Answer Brief on Jurisdiction at 5 n.1 (emphasis added).¹⁰ The Regional Director interprets that statement to mean that the Department took the position that where a State or local government has standing based on an injury that is cognizable under factors (e) or (f) of section 151.10, it is entitled to full administrative review of all of the factors. The Regional Director also argues that because the factors are all considered together as part of a single, discretionary decision, the standing inquiry should not be analyzed on a factor-by-factor basis. The County, in response to the Board’s order, notes that the Board historically has considered the arguments of State or local governments regarding factors other than (e) and (f) without commenting on standing.

Upon consideration of the position taken by the Regional Director, we conclude that the County’s standing is not limited to raising factors (e) and (f), and we therefore hold that the County has both constitutional and prudential standing to make its arguments under any applicable factor found at section 151.10.

2. Review of the Regional Director’s Trust Acquisition Analysis Under Part 151

As noted above, decisions concerning whether to take land into trust are discretionary, and the County bears the burden of proving that BIA did not properly exercise its discretion. On appeal, the County challenges the Regional Director’s analysis for the proposed trust acquisition under two of the criteria listed in 25 C.F.R. Part 151 — sections 151.10(b) (Nation’s need for additional land) and 151.10(e) (impacts resulting from removal of land from tax rolls).¹¹ We are not persuaded by the County’s arguments.

¹⁰ The Regional Director did not provide the Board with a copy of the Petition for Writ of Certiorari filed in South Dakota.

¹¹ The County also asserts that Parcel 7 “is not, in reality, directly contiguous to any trust or reservation land [because] it is located across a major United States Highway,” Reply Brief at 2, which suggests that the factors of 25 C.F.R. § 151.11, rather than section 151.10, should be considered. The County raises this argument for the first time on appeal in its reply brief, and therefore we need not address it. See *Aloha Lumber Corp. v. Alaska* (continued...)

We conclude that the County has failed to show that BIA did not properly exercise its discretion to take Parcel 7 into trust and we affirm the Regional Director's decision. We will address each issue in turn.

a. 25 C.F.R. § 151.10(b) - The Nation's Need for Additional Land

The County contends that the Regional Director abused his discretion in assessing the Nation's need for additional land. The County argues that (1) the Regional Director erred in concluding that the Nation's financial condition has no bearing on the trust acquisition; (2) the "record is bereft of any real finding regarding the [Nation's] need to acquire additional land," Opening Brief at 5; and (3) the Regional Director erroneously failed to consider that the Nation is seeking to acquire a significant amount of land in trust from the Federal Government at the 7,000-acre Badger Army Ammunition Plant. We are not persuaded by the County's arguments.

Although subsection 151.10(b) requires BIA to consider "[t]he need of the individual Indian or the tribe for additional land," we observe at the outset that BIA has broad leeway in its interpretation or construction of tribal "need" for the land. Indeed, it is readily imaginable that that "need" will vary from one tribe to another or from one individual Indian to another such that flexibility in evaluating "need" is an inevitable and necessary aspect of BIA's discretion. It is not the role of an appellant to determine how that "need" is defined or interpreted by BIA; that role is properly left to BIA. Notwithstanding, we turn our attention to the three arguments raised by the County with respect to the Nation's need for Parcel 7.

i. Financial Condition

The County argued before the Regional Director that the Superintendent failed to consider the Nation's gaming revenue, which, the County argued, is in excess of \$100,000,000 per year and sufficient for the Nation to satisfy the "basic human needs" of its tribal members without the "need for additional land." Statement of Reasons filed with the Regional Director at 3. In response, the Regional Director incorrectly observed that

¹¹(...continued)

Regional Director, 41 IBIA 147, 161 (2005); cf. *Carcieri v. Kempthorne*, — F.3d —, —, 2007 U.S. App. LEXIS 17628 at *79 (1st Cir. 2007) (en banc) (separation of a tribe's land by road does not render the parcels noncontiguous for purposes of the application of 25 C.F.R. § 151.10); see also *Maahs v. Acting Portland Area Director*, 22 IBIA 294, 296 (1992).

“[n]othing in the provisions of the IRA or the criteria regulating trust land acquisitions allows the BIA to consider a tribe’s income.” Decision at 3 (emphasis added). Notwithstanding this statement, the Regional Director then stated that “[t]he Nation realizes that gaming may not always be a viable income and that a protected land base is essential in the protection of tribal self determination . . . [and] brings stability to the Nation.” Id.

We agree with the County that the Regional Director erred in stating that he was not allowed to consider the Nation’s financial condition in assessing the Nation’s need for additional land. However, we disagree with the County that the Regional Director’s error is fatal to his decision.

The Board has held that a tribe need not be landless or suffering financial difficulties to need additional land. See *County of Mille Lacs v. Midwest Regional Director*, 37 IBIA 169, 171-72 (2002); *State of Kansas v. Acting Southern Plains Regional Director*, 36 IBIA 152, 155 (2001); *Avoyelles Parish, Louisiana, Police Jury v. Eastern Area Director*, 34 IBIA 149, 153 (1999). The fact that the Nation’s financial status is not dispositive of whether it needs additional land, however, does not mean that the Nation’s financial status may not be considered. In *Avoyelles Parish*, the appellant argued that the Tunica-Biloxi Tribe of Louisiana did not need any more land because the tribe was financially secure. There was evidence in the record however, that the Tribe’s reservation was fully utilized and that the Tribe required additional land for future economic development. The Board concluded that the appellant had not shown that the Area Director improperly exercised his discretion in assessing the Tribe’s need, and noted, “[a] financially secure tribe might well need additional land in order to maintain or improve its economic condition if its existing land is already fully developed.” 34 IBIA at 153. Thus, the Board implicitly recognized that BIA’s consideration of a tribe’s financial condition was permissible.¹²

Notwithstanding our determination that the Regional Director erred in stating that he could not consider the Nation’s financial status, we conclude that it was harmless error.

¹² We disagree with the interpretation the County attaches to our decision in *Avoyelles Parish*, which is that the Board “clearly implied that financial condition should be considered, but may be overcome by an appropriate showing that ‘. . . existing land is already fully developed.’” Opening Brief at 5. Our decision in *Avoyelles Parish* does not imply that financial condition must be considered nor, as suggested by the County, does it suggest that a healthy tribal financial status mandates rejection of a fee-to-trust acquisition in the absence of showing that “existing [trust] land is already fully developed.” It is neither a prohibited consideration nor is it a mandatory consideration.

Contrary to the County's argument, the Regional Director did ultimately consider the Nation's financial status when he acknowledged the Nation's concern that "gaming may not always be a viable income and that a protected land base is essential in the protection of tribal self determination . . . [and] brings stability to the Nation." Decision at 3. In essence, the Regional Director concluded that the Nation's interest in securing its tribal self-determination and stability was rooted not in its gaming income, which "may not always be a viable income," but in its landbase. Therefore, the Regional Director actually considered and rejected the Nation's income as a barrier to taking the land into trust.

Therefore, for the foregoing reasons, we conclude that the Regional Director erred in determining that BIA was not "allow[ed]" to consider the Nation's financial status but because he nevertheless considered it, we conclude that his statement is harmless error.

ii. Evidence of Nation's Need for Additional Land

The County asserts that the Regional Director made a number of conclusory statements without factual support regarding the Nation's need for additional land. In particular, the County maintains that the following factual conclusions are unsupported: (1) that the current 2,100 acres held in trust for the Nation is insufficient for the Nation's 6,000 tribal members, (2) that the Nation's land base in the County is insufficient to support the 404 tribal members who live there, and (3) that the acquisition of the parcel assures the permanency of the Nation's land base and brings stability to the Nation. The County also claims that the Regional Director found that the Nation has a scattered land base and, therefore, according to the County, "[i]t is an abuse of discretion by the Regional Director to approve more scattered land acquisitions in an effort to ameliorate a scattered land base." Opening Brief at 4. The County asserts that if more land were taken into trust, "it would seem to make more sense to acquire land near Black River Falls," where, according to the County, the Nation's seat of government and most of its land are located.

We disagree with the County that the record is bereft of any evidence demonstrating the Nation's need for additional land. First, the Nation's legislature stated that conveyance of Parcel 7 into trust would enable the Legislature "to prevent further encumbrances to the property." Tribal Resolution No. 11/14/95G, Dec. 5, 1995; Tribal Resolution No. 5/28/96-D, May 28, 1996. The record also reflects that the Nation once possessed over ten million acres, all or nearly all of which was lost in the 1800's. Letter from Nation to Secretary and Superintendent, July 7, 1997, at 6. These statements support the Regional Director's finding that "acquisition of this 5 acre parcel will ensure that the land will be held for the Nation by the federal government for future generations [and] . . . assures permanency of the land base." Decision at 3.

Next, the record also contains statements by the Nation that its existing housing is at maximum capacity. Letter from Nation to Superintendent, July 7, 1997, at 14; Nation's Response to Request for Comments on Proposed Acquisition by U.S. Government of 724.24 acres for the Nation, March 1, 1996, at 5 and Appendix III. The repeated statements to this effect support the Regional Director's determination that "Nation members and their families have an unmet need for housing," Decision at 3, although the Nation has no current plans to construct additional housing on Parcel 7.

Finally, the Nation stated that its land base falls short of what is reasonably necessary to serve the needs of its members. See Nation's Answer Brief to County's Appeal of Superintendent's Decision, at 16; Letter from Nation to Superintendent, July 7, 1997, at 14. The Nation pointed out that it holds only 91 acres of land in trust in the County, but provides many services to Nation members and non-member Indians who are eligible for services from the Nation in the County. Nation's Answer Brief to County's Appeal of Superintendent's Decision, at 16 n.21. The record shows, and the County does not dispute, that the parcel has been used by the Nation for housing, as a youth study center, and as a facility where Nation members may take language classes. See *id.* at 2 (housing and community services); Letter from Nation to the Superintendent, March 21, 2001, at 3 (housing and community services); Letter from Nation to Superintendent, July 7, 1997, at 14 (housing); Nation's Response to Request for Comments on Proposed Acquisition by U.S. Government of 724.24 acres for the Nation, March 1, 1996, at 5 (housing). These undisputed statements support the Regional Director's determination that "Nation members and their families have an unmet need for housing, education[], cultural opportunities, and health and social services programs . . . that could be developed if the Nation had an adequate land base to house such programs and services." Decision at 3. It also supports his determination that the Nation's current trust lands cannot meet the Nation's articulated needs.

The County also argues that, in evaluating need, BIA failed to consider whether the 91 acres that the Nation currently has in trust in the County is adequate to provide services to the 404 tribal members who reside in that County. The County did not raise this argument in its appeal to the Regional Director from the Superintendent's decision and, thus, the Regional Director did not have the opportunity to consider it. Therefore, we are not required to consider it now. *Arizona State Land Dep't*, 43 IBIA at 165.¹³

¹³ Even if we were to consider this argument, we would reject it. The County cites no basis for requiring the Regional Director to consider the Nation's need based on the residency of the Nation's members at a fixed point in time or based on a fixed geographical area. While
(continued...)

Next, the County takes issue with the Regional Director's observation that the Nation has "a small and scattered land base consisting of approximately 2,100 acres of tribal trust land throughout eleven counties." Decision at 3. The County argues that it is an abuse of discretion to accept into trust a parcel of land that exacerbates, rather than ameliorates, the "scattered" land base of the Nation. The County offers no explanation for its conclusion that Parcel 7 exacerbates the "scattered" land base, much less any evidentiary support for this conclusion, other than to suggest that it would be more prudent for the Nation to add to its tribal land holdings around the Nation's capital at Black River Falls. Based on the parcel maps in the record, Parcel 7 appears, in fact, to be contiguous to a larger parcel on which sits the Nation's "Ho-Chunk Casino." The fact that a highway easement separates the actual land surfaces of the two parcels does not render them any less contiguous for purposes of section 151.10, see Maahs, 22 IBIA at 296; Carcieri, — F.3d at —, 2007 U.S. App. LEXIS 17628 at *79, nor does it add another "scattered" parcel to the tribe's land holdings. With respect to whether Parcel 7 is a prudent addition to the Nation's trust land holdings, as opposed to a parcel at Black River Falls or some other location, is not for the County to say.

iii. Badger Army Ammunition Plant

The County's final argument under factor (b) is with the Regional Director's statement "that no other trust land acquisitions are pending in the County." Opening Brief at 6.¹⁴ The County claims that the Nation has requested the United States to transfer Federal land at the Badger Army Ammunition Plant (Badger land) to the Nation. The Regional Director asserts in his answer brief that although the Nation has requested that it

¹³(...continued)

it is not impermissible for BIA to consider whether a tribe has adequate trust lands in a given jurisdiction to provide services for tribal members who reside in that jurisdiction, we reject any argument that BIA must or should include this point in its analysis. See *South Dakota v. U.S. Dep't of Interior*, 487 F.3d 548, 552 n.3 (8th Cir. 2007) ("[I]t is sufficient for the Secretary to 'express the Tribe's needs and conclude generally that the IRA purposes were served.'"). In the instant case, where the Nation itself articulated needs for Parcel 7 based on overall tribal needs, it was not an abuse of the Regional Director's discretion not to have memorialized any consideration of whether the Nation's existing trust properties were adequate to meet the Nation's needs in the County.

¹⁴ We note that the Regional Director made this statement in connection with his rejection of the County's argument that a "cumulative impact analysis" is required as part of the EA that was done to comply with NEPA.

be conveyed such lands as Federal surplus lands, the request is still pending consideration by the Department of Defense and may or may not be granted.

The County did not raise the argument on appeal from the Superintendent's decision to the Regional Director and therefore, we need not address it here. See *Arizona State Land Dep't*, 43 IBIA at 165.¹⁵ However, we note that at the time of the Regional Director's decision, it was speculative whether the Nation's request for the transfer of the Badger land would be granted by the Department of Defense, and the County does not contend that the Tribe's acquisition of the Badger land would eviscerate its needs with respect to Parcel 7.

We conclude that the County has failed to demonstrate that the Regional Director did not consider the Nation's need for additional land.

b. 25 C.F.R. § 151.10(e) - Impact on the County's Tax Base

The County contends that the Regional Director abused his discretion when he relied on a materially false figure in assessing the financial consequences of the acquisition on the County under 25 C.F.R. § 151.10(e). The County asserts that “[i]n reality, the [Nation] has not made anywhere near such a contribution [as \$27,867,241.71],” and, relying on an affidavit by the Deputy Treasurer for the County, points out that the total property and personal tax contribution of the Nation to all taxing units in the County for the period 1996 through 2004 is \$3,886,803.07. Opening Brief at 7. The County requests that the Board remand the Regional Director's decision for “clarification of this fictitious entry and its source,” because “[i]t can only be assumed that such a gross error would have influenced the Agency's decision in favor of granting the request.” *Id.* Appellant asserts that because the \$27,867,241.71 figure was referenced for the first time in the Regional Director's decision, the County must be provided an opportunity to refute the figure.

The Regional Director responds that the \$27,867,241.71 figure represents “the aggregate of all types of contributions and benefits flowing from the [Nation] to the local units of government,” and is not limited to the direct property tax contributions from the Nation to the County. Answer Brief at 13. The Regional Director relies on a spreadsheet,

¹⁵ The County did raise this concern before the Superintendent, but only in the context of arguing the cumulative impact, from an environmental perspective, of the Nation's proposed acquisition of the Badger land as well as the lands currently owned in the County by the Nation in fee. The County did not raise this concern in any context in its appeal to the Regional Director and now resurrects it before the Board.

included in the administrative record, that itemizes the contributions from the Nation to the County and the local economy. The spreadsheet is entitled, "Sauk County Contributions by [Nation] Provided by [Nation] at Meeting with Great Lakes Agency on 12/03/04." The spreadsheet lists a number of categories of contributions, including "charitable contributions," "employment & taxes," "public services," "County vendors received," "real estate taxes," "service agreements," "road construction/maintenance," "elderly community center," "new home construction," "purchase for existing homes," "refinance existing mortgages," "wellness center," "waste water facility," and "water/sewer costs," and breaks down each category of contribution by two-year periods, from 1995/1996 through 2003/2004. The spreadsheet calculates the total number of contributions per two-year period. Attached to the spreadsheet is a tape from an adding machine which calculates the total amount of calculations to be \$27,867,241.71. The Regional Director asserts that the information in the spreadsheet was provided to BIA by the Nation, and points out that the County "has provided no information which refutes the information provided by the [Nation]." Answer Brief at 13.

The County did not address the spreadsheet in its opening brief. In its reply brief, the County refers to the \$27,867,241.71 figure as "apparently extrapolated from some buried submission of the Nation," Reply Brief at 9, but does not offer any evidence refuting the information in the spreadsheet.

We conclude that the County has not met its burden of showing that the Regional Director improperly exercised his discretion in analyzing the impact resulting from the removal of the land from the tax rolls. The Regional Director found that the property taxes levied against Parcel 7 amounted to \$1,090.78 in 1996, \$2,249.17 in 2000, and \$2,645.44 in 2005. The County does not contest these figures. The Regional Director then concluded that the taxes were "de minimis," and that his consideration of the loss of property taxes resulting from the trust acquisition was offset by consideration of the financial benefits provided by the Nation to the County. Decision at 4. The Regional Director determined that these contributions from the Nation to the County and the Town totaled \$27,867,241.71. This figure was taken from the spreadsheet and adding machine tape as discussed above.¹⁶

¹⁶ The spreadsheet and adding machine tape contain two errors that, when corrected, raise the total amount of the Nation's asserted financial contributions to the County to \$53,038,922.96. One error appears in the Regional Director's total of the amounts of the Nation's contributions to the County: Instead of adding "\$27,855,594.52" for the 2001/2002 column, the Regional Director entered "\$2,755,594.52," which resulted in the

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Most of the spreadsheet entries appear to have been taken from two reports, dated 2001 and 2002, that were prepared by the Nation. The reports' stated purpose is to "demonstrate the positive impacts of the [Nation] on the local community, economy, and government of Sauk County." 2001 Report at 2. The reports summarize the impacts of the Nation in each of these areas and provide financial data on the Nation's contributions to the County. The property tax information contained in the spreadsheet was taken from several tax bills issued by the County to the Nation. Also included in the record is a copy of a November 2003 Agreement between the County and the Nation, under which the Nation agreed to pay the County for various services from the County, and an agreement between the Nation and the County Sheriff's Office to pay \$25,131 in 2003 towards the salary of one officer who will patrol trust land. All of the numbers included in the spreadsheet were either supported by the 2001 and 2002 reports, the tax bills, the law enforcement agreement, or the fire, ambulance, and rescue agreement.

The County has not offered any evidence that the information in the spreadsheet or in the reports prepared by the Nation is incorrect, or that the items listed in the spreadsheet should not have been considered by the Regional Director as relevant contributions.¹⁷ The

¹⁶(...continued)

omission of \$25.1 million dollars from the total. Also, instead of adding "\$71,573" as the total amount of 1997/1998 contributions, the Regional Director entered \$71.753. On the other hand, the spreadsheet does include certain "contributions" that do not appear to accrue to the County or local economy (e.g., Federal income taxes). However, even subtracting these amounts, the resulting figure would still be above the incorrect "sum" stated by the Regional Director and thus we conclude that the mathematical errors are harmless.

¹⁷ The County argues without support that the amount asserted by the Nation, nearly \$28 million, is "false," in "gross error," and, alone, is sufficient for this matter to "be remanded back [to the Regional Director] for clarification of this fictitious entry and its source." Opening Brief at 7. The County has always been apprised of the source of the financial data. Beginning with the Superintendent's decision, he referred to the "substantial economic benefits" provided by the Nation and cited to the Nation's report, "Impacts of Ho-Chunk Nation Enterprises and Programs on Sauk County." Superintendent's Decision at 9. Pages 3 through 7 of the Nation's report address direct and indirect financial benefits to the County, benefits that the County has never challenged. In addition, the record includes the Nation's contract with Delton Fire and Ambulance Commission, pursuant to
(continued...)

County simply contends that the nearly \$28 million dollar figure is “patently false.” Reply Brief at 9. The only evidence offered by the County relates to the property and personal tax contributions of the Nation to the County, which are only part of the contributions the Regional Director considered when evaluating the impact of the trust acquisition on the County.

Simple disagreement with or bare assertions concerning BIA’s decision are insufficient to carry the County’s burden of proof. *Anderson v. Acting Southwest Regional Director*, 44 IBIA 218, 225 (2007). The information contained in the spreadsheet, and relied on by the Regional Director, is supported by the reports and other evidence included in the record. Accordingly, we conclude that the County has not carried its burden of proof to demonstrate that the Regional Director abused his discretion in concluding that the de minimis tax impacts were offset by consideration of the financial benefits the Nation has provided to the County.

After considering the County’s arguments under factors (b) and (e), we conclude that the County has not met its burden of establishing that the Regional Director failed to give due consideration to the Nation’s need for the land and to the financial impact on the County.¹⁸

¹⁷(...continued)

which the Nation paid \$25,000 per year for fire, ambulance, and rescue call services for the years 2002-2004.

Before the Regional Director, the Nation provided the spreadsheet and supporting documentation, discussed above. Again, the County did not dispute these payments.

¹⁸ In its reply brief, the County states that the acceptance of Parcel 7 into trust status will take it “out of the jurisdictional control of the County and the Town [and will] mean[] that only the [Nation] will have any decision making regarding the kind of development that will take place on this parcel.” Reply Brief at 11. The County then argues that “[i]t is critical that land use decisions in this region of the County not be the exclusive province of a privileged Nation,” *id.*, without advancing any legal or evidentiary arguments in support. The County raises this argument for the first time in its reply brief, for which reason we adhere to precedent in declining to consider it further. *Wasson v. Western Regional Director*, 42 IBIA 141, 156 (2006).

In addition, the County’s reply brief also challenges that portion of the Decision that addresses the purpose for taking Parcel 7 into trust. In response to the County’s concern that the Nation had indicated recently that it would use Parcel 7 for a cultural center, the

(continued...)

C. Standing to Challenge the FONSI Decision Under NEPA

Prudential standing to raise a claim under NEPA is the subject of a separate inquiry from prudential standing under 25 C.F.R. Part 151 to challenge the Regional Director's decision to accept land into trust status. The purpose of NEPA is to address the environmental impact of proposed Federal action, in this case, the proposed acquisition of Parcel 7 by the United States in trust for the Nation. *County of Colusa v. Pacific Regional Director*, 38 IBIA 274, 282 (2003). We conclude that the County has failed to assert a concrete and particularized injury that falls within the "zone-of-interests," i.e., environmental interests, that NEPA protects.¹⁹

Although the Board, as an Executive Branch forum, is not limited by the same constitutional and prudential constraints that apply to the exercise of judicial authority, the Board has a well-established practice of adhering to those jurisdictional constraints as a matter of prudence in the interest of administrative economy. See *Pueblo of Tesuque v. Acting Southwest Regional Director*, 40 IBIA 273, 274 (2005). These constraints include the requirement that an appellant demonstrate that it has standing. *Arizona State Land Dep't*, 43 IBIA at 163. In particular, an appellant may have standing to raise certain claims, but not others. See, e.g., *Skagit County*, 43 IBIA at 70; *Santa Ynez Valley Concerned Citizens v. Pacific Regional Director*, 42 IBIA 189, 202 (2006), *aff'd* after limited reopening, *Preservation of Los Olivos v. Pacific Regional Director*, 45 IBIA 98 (2007).

The Board adheres to the three traditional elements of constitutional standing as described in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992): An appellant

¹⁸(...continued)

Regional Director stated, "[e]ven if the Nation were to consider a cultural center in the future, the County provides no support [for] its assertion that a change from the present use to another lawful use would result in invalidating the trust evaluation." Decision at 3. The County now argues that the Regional Director "cannot render an evaluation under [subsection 151.10(c)] unless the BIA knows what the land is to be used for." Reply Brief at 9. Again, we decline to consider this argument, which is raised for the first time in the County's reply brief. *Wasson*, 42 IBIA at 156.

¹⁹ Prudential standing to challenge BIA's decision to accept land into trust is established under 25 U.S.C. § 465 or 25 C.F.R. § 151.10; prudential standing to challenge BIA's compliance with NEPA in rendering its decision to accept land into trust is established under 42 U.S.C. §§ 4321 et seq. These provisions impose distinctly separate requirements on BIA, and the standing analysis is different for each one.

must show that (1) it 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. *Arizona State Land Dep't*, 43 IBIA at 163. As noted earlier the County has established constitutional standing in this case based on the removal of Parcel 7 from the County's tax base and the loss of County jurisdiction that will occur if Parcel 7 is placed into trust status.

In addition to the constitutional requirements of standing, prudential principles of standing require that when a plaintiff claims to have been

“adversely affected or aggrieved [by agency action] within the meaning” of a statute, the plaintiff must establish that the injury he complains of (his aggrievement, or the adverse effect upon him) falls within the “zone of interests” sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.

Lujan v. National Wildlife Federation, 497 U.S. 871, 883 (1990) (emphasis in the original). Where the alleged injury is to a procedural right granted by statute, as, e.g., the County has alleged under NEPA, an appellant must demonstrate constitutional standing based on the substantive action taken by the agency. *Defenders of Wildlife*, 504 U.S. at 561-62. The appellant must also establish that “the procedures in question” — in this case, NEPA procedures — “are designed to protect some threatened concrete interest of [appellant] that is the ultimate basis of [appellant's constitutional] standing.” *Id.* at 573 n.8.

In the present appeal, the County claims that BIA failed to apply a cumulative impact analysis to assess the environmental impact under NEPA of the trust acquisition. The County argues that BIA was required to assume that the Nation will seek trust status for the remaining 719.24 acres owned in fee by the Nation in the County and, therefore, the environmental impact of taking the 5-acre Parcel 7 into trust should be considered as part of the entirety of the Nation's landholdings in the County, including its proposed acquisition of the Badger land. The County argues that the decision to take Parcel 7 into trust will deprive it “of ever more revenue and jurisdiction.” *Opening Brief on Jurisdiction* at 4. Thus, the procedural violation asserted by the County is the absence of a cumulative impact analysis; the asserted injury to the County is the deprivation of revenue and jurisdiction.

With respect to the alleged economic injury asserted by the County, neither the cumulative impact analysis nor NEPA is designed to protect the County from any deprivation of revenue. See *County of Colusa*, 38 IBIA at 282; cf. *Santa Ynez Concerned*

Citizens, 42 IBIA at 202 (purely economic concerns are not within the zone of interests of NEPA). Therefore, standing to challenge the FONSI cannot be predicated on the alleged loss to the County's treasury.

For two reasons, the County does not fare any better with its jurisdictional deprivation argument. First, the County cites no authority for the proposition that loss of governmental jurisdiction, standing alone, is within the zone of interests that NEPA was intended or designed to protect.

Second, the County fails to identify any environmental injury that would allegedly result from the loss of its jurisdiction over Parcel 7. The County asserts generally that it exercises jurisdiction over various interests that NEPA arguably is intended to protect, e.g., floodplain zoning, shoreland zoning, enforcement of the state sewage code, but the County does not allege that the removal of Parcel 7 from the County's jurisdiction will have any actual effect on these or any environmental interests that it regulates. There are no allegations that Parcel 7 is located in a floodplain or is shoreland or that the use of the property will be inconsistent with the state's private sewage code.²⁰ Although the County asserts that it "shares" land use planning with the Town, Opening Brief on Jurisdiction at 3, there is no identification of any environmental injury that is alleged to result from BIA's decision to take Parcel 7 into trust, regardless of whether we treat the acquisition as an isolated acquisition or, as argued by the County, as part of the Nation's total fee holdings in the County.

Thus, we conclude that the County has not satisfied the elements of standing for purposes of a NEPA challenge and, therefore, we do not consider the County's cumulative impact analysis argument.

²⁰ In its response to comments on the EA, the Nation noted that the Nation's waste water treatment facility is a state-of-the-art facility, regularly monitored by the Ho-Chunk Nation's Department of Health and operated in close cooperation with the Wisconsin Department of Natural Resources pursuant to a WPDES permit. The facility has consistently met, or exceeded, all groundwater discharge standards established by the State of Wisconsin, with the quality of the discharge from the Ho-Chunk facility considerably higher than that of surrounding non-Indian landowners. Letter from Nation to Superintendent, Mar. 21, 2001, at 12.

Conclusion

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, we affirm the Regional Director's January 27, 2005, decision to accept Parcel 7 into trust and we dismiss the County's challenge to the FONSI for lack of standing.

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge