



INTERIOR BOARD OF INDIAN APPEALS

Roberts County, South Dakota; State of South Dakota and Sisseton School District
No. 54-2; City of Sisseton, South Dakota; and Wilmot School District No. 54-7
v. Acting Great Plains Regional Director, Bureau of Indian Affairs

51 IBIA 35 (12/30/2009)

Judicial review of this case:

Affirmed, State of South Dakota, County of Roberts, et al. v. U.S. Department of the Interior, 775 F. Supp. 2d 1129 (D.S.D.), appeal dismissed, 665 F.3d 986 (8th Cir. 2012)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ROBERTS COUNTY, SOUTH)	Order Affirming Decisions
DAKOTA; STATE OF SOUTH)	
DAKOTA and SISSETON SCHOOL)	
DISTRICT NO. 54-2; CITY OF)	
SISSETON, SOUTH DAKOTA;)	Docket Nos. IBIA 08-69-A
and WILMOT SCHOOL)	through 08-72-A,
DISTRICT NO. 54-7,)	08-75-A
Appellants,)	through 08-80-A,
)	and 08-86-A,
v.)	
)	
ACTING GREAT PLAINS REGIONAL)	
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	December 30, 2009

Roberts County, South Dakota (County); the State of South Dakota and Sisseton School District No. 54-2 (jointly, the State); the City of Sisseton, South Dakota (City); and Wilmot School District No. 54-7 (Wilmot) (collectively, Appellants) have filed a total of 11 appeals from 4 separate decisions issued on March 5 and March 25, 2008, by the Acting Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA), each of which accepted a particular tract of land into trust for the Sisseton-Wahpeton Oyate (Tribe) of the Lake Traverse Reservation.¹ The Regional Director issued the decisions in

¹ The decisions from which the appeals are taken, and the Appellants challenging each decision are as follows:

1. Smith Subdivision (March 25, 2008, Decision)

Description: Lots 1, 2, 3, 4, 5, 6, Smith Subdivision in the NW¹/₄, Sec. 34, T. 126 N., R. 51 W., 5th Principal Meridian (P.M.), Roberts County, South Dakota. Approximately 6 acres.

(continued...)

response to the appeals taken from the January 25 and February 2, 2007, decisions of the Superintendent of the Sisteon Agency (Agency) approving the trust acquisition applications. In reaching her decisions, the Regional Director reviewed the trust acquisition requests pursuant to 25 C.F.R. § 151.10(a)-(c) and (e)-(h) and determined that the consideration of those factors justified accepting the parcels into trust for the Tribe. She also concluded that neither the Regional Director's Office (including herself) nor the Superintendent was impermissibly biased against the State and denied the State's request that the Regional Director's Office recuse itself from deciding the appeals.

¹(...continued)

Appellants: County (Docket No. IBIA 08-69-A), City (Docket No. IBIA 08-78-A), State (Docket No. IBIA 08-86-A).

2. Gardner parcel (March 5, 2008, Decision)

Description: NW $\frac{1}{4}$ SE $\frac{1}{4}$, W $\frac{1}{2}$ NE $\frac{1}{4}$, and E $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 30, T. 124 N., R. 50 W., 5th P.M. Roberts County, South Dakota. Approximately 200 acres.

Appellants: County (Docket No. IBIA 08-70-A), State (Docket No. IBIA 08-75-A), Wilmot (Docket No. IBIA 08-80-A).

3. German parcel (March 5, 2008, Decision)

Description: NE $\frac{1}{4}$ SW $\frac{1}{4}$, and NW $\frac{1}{4}$ SE $\frac{1}{4}$, Sec. 24, T. 124 N., R. 52 W., 5th P.M. Roberts County, South Dakota. Approximately 80 acres.

Appellants: County (Docket No. IBIA 08-71-A), State (Docket No. IBIA 08-76-A).

4. Marlo Peters land (March 5, 2008, Decision)

Description: N $\frac{1}{2}$ SW $\frac{1}{4}$, Sec. 8, T. 123 N., R. 51 W., 5th P.M. Roberts County, South Dakota. Approximately 80 acres.

Appellants: County (Docket No. IBIA 08-72-A), State (Docket No. IBIA 08-77-A), Wilmot (Docket No. IBIA 08-79-A).

The County and the State also appealed a fifth decision, issued on March 25, 2008, which approved the Tribe's application for the trust acquisition of the Brooks property (Docket Nos. IBIA 08-68-A and 08-85-A, respectively). By order dated February 27, 2009, the Board granted the Regional Director's request that the Brooks property decision be vacated and remanded for further consideration. *Roberts County v. Acting Great Plains Regional Director*, 48 IBIA 304 (2009).

On appeal, the State renews its bias arguments against both the Superintendent and the Regional Director. Appellants collectively challenge the Regional Director's decisions on the merits, asserting that the Tribe failed to meet its burden of showing that the land should be placed into trust; that the Tribe does not need the land to be placed into trust for agriculture, housing, or land consolidation; that the Regional Director failed to consider the significant cumulative impacts on the State and local governments of the removal from the tax rolls of all trust land — both the land included in the current applications and land previously taken into trust; that the Regional Director insufficiently analyzed jurisdictional and land use conflicts; and that the record contains no evidence supporting BIA's ability to discharge the additional responsibilities associated with acquiring the parcels in trust status.

We conclude that Appellants have not shown that the Regional Director's decisions were erroneous or reflected an improper exercise of her discretion, nor has the State demonstrated impermissible bias by either the Superintendent or the Regional Director. Because the administrative record demonstrates that the Regional Director considered each of the relevant criteria in 25 C.F.R. § 151.10 and reasonably exercised her discretion, we affirm her decisions.

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 in trust for Indians in his discretion; Section 203 of the Indian Land Consolidation Act, 25 U.S.C. § 2202, extends the applicability of Section 5 of the IRA to tribes that had not adopted the IRA, including the Sisseton-Wahpeton Oyate. Congress has also enacted legislation specifically authorizing the acquisition of land in trust for the Tribe, including Pub. L. No. 93-491, 88 Stat. 1468 (Oct. 26, 1974), *as amended by* Pub. L. No. 95-398, 92 Stat. 850 (Sept. 30, 1978), and Pub. L. No. 98-513, 98 Stat. 2411 (Oct. 19, 1984). Pub. L. No. 93-491 authorizes the Secretary to bring land into trust for the Tribe

for the purpose of consolidating landholdings, . . . providing land for any tribal program for the improvement of the economy of the tribe and its members through the development of industry, recreational facilities, housing projects, and the general rehabilitation and enhancement of the total resource potential of the reservation. . . . [T]itle to any land acquired under the authority of this Act shall be taken in the name of the United States in trust for the [Tribe].

Section 9 of Pub. L. No. 98-513, 98 Stat. 2415, grants the Secretary the authority to acquire trust land for the purpose of “consolidating tribal interests in land, and developing tribal agriculture or commercial enterprises.”

The regulations governing acquisitions of trust land permit such action “[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 tribal 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)-(c) and (e)-(h).² 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;
-
- (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

² Subsection 151.10(d) only applies to trust acquisitions for individuals. Requests for off-reservation trust acquisitions are controlled by 25 C.F.R. § 151.11, which requires the Secretary to consider the criteria listed in 25 C.F.R. § 151.10 plus three additional factors.

Factual and Procedural Background

By Tribal Council Resolution Nos. SWST-01-010 (Marlo Peters land), SWST-01-011 (German parcel), SWST-01-012 (Gardner parcel), all dated January 19, 2001, and SWST-01-065 (Smith Subdivision), dated May 31, 2001, the Tribe asked BIA to acquire the identified tracts in trust for agriculture and land consolidation (Marlo Peters land, German parcel, and Gardner parcel) and housing (Smith Subdivision). As directed by 25 C.F.R. § 151.10,³ the Superintendent notified Appellants and other local governments that the Sisseton Agency was considering applications from the Tribe to take the tracts into trust and requested comments on the proposed acquisitions, including the annual amount of property taxes levied on the property, the impact on them resulting from the removal of the property from the tax rolls, any special assessments and the amounts thereof currently assessed against the property, any governmental services currently provided to the property, if and how the property was zoned, and any potential land use conflicts that might arise. The County's responses addressed all of the proposed acquisitions, providing the amount of annual taxes, identifying the services it provided to the parcels, and stating that it was unequivocally opposed to the acquisitions. The City responded only as to the Smith Subdivision, noting the amount of annual taxes, the services it provided, and its opposition to the removal of the property from the tax rolls. The State filed two sets of voluminous comments addressing all of the proposed acquisitions. The State initially asserted that the Tribe had the burden of justifying the trust acquisition and that it had failed (1) to demonstrate a need for the land to be in trust, (2) to analyze the impact of the loss of taxes, (3) to address jurisdictional problems, or (4) to establish that the acquisitions fell within the parameters of the IRA. The State also maintained that it was entitled to a contested case

³ In relevant part, 25 C.F.R. § 151.10 provides that
[u]pon receipt of a written request to have lands taken in trust, the Secretary will notify the state and local governments having regulatory jurisdiction over the land to be acquired, unless the acquisition is mandated by legislation. The notice will inform the state or local government that each will be given 30 days in which to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes, and special assessments.

The regulation also directs BIA to provide any state or local government comments to the applicant and to afford the applicant an opportunity to respond to those comments or request that the Secretary issue a decision.

hearing before BIA. In its subsequent submission, the State raised the additional argument that BIA was structurally and actually biased in its decision making, citing the Superintendent's membership in, and former position as chairman of, the Tribe. Both the Sisseton School District and Wilmot also provided comments, with the Sisseton School District focusing on the negative effect of the loss of taxes and the insufficiency of the Federal impact aid it received to cover the cost of educating the Indian students in the school district and Wilmot concentrating on the acquisitions' negative impact on bonds it had issued in reliance on the fee status of the tracts.

The Superintendent forwarded the comments to the Tribe for its review and response. The Tribe submitted two comprehensive responses to the comments, supplementing the information provided in the tribal resolutions in support of the trust acquisitions, denying the State's claims of structural and actual bias, and addressing the substance of Appellants' comments.

The Superintendent also contacted the Regional Director, asking whether the Field Solicitor should review the State's allegation of bias. By memorandum dated November 22, 2006, the Regional Director advised the Superintendent that there were no laws or regulations prohibiting individuals from working as BIA employees on the reservation of the tribe in which they are enrolled members and that she did not see any issues or conflicts of interest with respect to the Superintendent acting as the approving official for on-reservation fee-to-trust acquisitions for the Tribe. She added that, as long as the Tribe met all the criteria for trust acquisitions, the Superintendent, as the designated BIA approving official, could approve the fee-to-trust acquisitions.

By letters dated January 25, 2007 (Smith Subdivision, Marlo Peters land, and Gardner parcel), and February 2, 2007 (German parcel), the Superintendent advised the Tribe and Appellants of his intent to take the lands into trust for the benefit of the Tribe. In the decision letters, the Superintendent addressed and considered both the factors outlined in 25 C.F.R. § 151.10 and the comments and concerns raised by Appellants, including the State's bias claim.

Appellants appealed the Superintendent's decisions to the Regional Director, essentially reiterating and elaborating on their comments on the trust acquisition applications. The Tribe responded to the appeal submissions. The State also requested that the Regional Director's Office recuse itself from deciding the appeals on the ground that the Regional Director previously had determined that the Superintendent could properly decide the initial trust acquisition requests, thus demonstrating that the Regional Director had

prejudged the issue of the Superintendent's bias.⁴ After extensive briefing on the issue by both the State and the Tribe, the Regional Director concluded, in a letter dated May 4, 2007, that the State had failed to allege any specific facts supporting its claim of bias and that she was declining to recuse herself. She also stated that she would perform an independent review of the merits of the acquisition in accordance with 25 C.F.R. Part 151, and that this objective review would cure any possible taint of bias.

By decisions dated March 5, 2008 (Gardner parcel, German parcel, and Marlo Peters land) and March 25, 2008 (Smith Subdivision), the Regional Director affirmed the Superintendent's decisions to acquire the tracts at issue in trust. She first reviewed the on-reservation trust acquisitions pursuant to the regulatory factors set out in 25 C.F.R. § 151.10. Addressing 25 C.F.R. § 151.10(a), she cited Pub. L. No. 93-491, *as amended*; Pub. L. No. 98-513; and 25 U.S.C. § 465, as made applicable by 25 U.S.C. § 2202, as the statutory authority for the acquisitions. As for the Tribe's need for additional land (25 C.F.R. § 151.10(b)), she explained (1) that the Tribe needed the Gardner parcel for agricultural purposes to support the Tribe's 300-450 head buffalo ranch, for land consolidation, and for a gravel pit located on the parcel, and that acquisition of the parcel in trust would promote tribal self-determination and secure and protect future tribal generations from possibly losing the land for unpaid back taxes; (2) that the Tribe similarly needed the German parcel for agricultural purposes to support the Tribe's buffalo ranch, for land consolidation, for a gravel pit located on the parcel, for the promotion of tribal self-determination, and for the protection of future tribal generations, adding that the parcel abuts land owned by the Tribe on the west and east, trust lands owned by tribal members on the south, and allotted lands; (3) that the Tribe needed the Marlo Peters land for agricultural purposes, for land consolidation, for the promotion of tribal self-determination, and for the protection of future tribal generations, noting that all other lands within Section 8 are owned by either the Tribe or its members and managed by BIA; and (4) that the Tribe needed the Smith Subdivision to provide housing for medical staff recruited to work at the nearby Indian Health Service hospital, for the promotion of tribal self-determination, and for the protection of the needs of future tribal generations. The Regional Director also noted, in accordance with 25 C.F.R. §151.10(c), that there would be no change in the use of the four parcels as a result of the trust acquisitions.

Turning to the impact on the State and local governments from the removal of the land from the tax rolls (25 C.F.R. § 151.10(e)), the Regional Director noted that the

⁴ The State relies on the letter from the Regional Director to argue that the "Regional Director" had prejudged the issue of the Superintendent's bias, and thus the entire Regional Director's Office should be recused.

County received approximately \$2,789,388 annually in property taxes and that the taxes assessed on the four parcels were: (1) \$1,300.86, which she described as “.0005 percent” of the County’s tax base, for the Gardner parcel; (2) \$254.92, which she described as “.00009 percent” of the County’s tax base, for the German parcel; (3) \$259.34, which she described as “.00009 percent” of the County’s tax base, for the Marlo Peters land; and (4) \$1,474.80, which she described as “.0005 percent” of the County’s tax base, for the Smith Subdivision. She concluded that there was no evidence that the tax loss would impose economic distress on the State or local governments, nor was there any evidence in the record that the impacts on the school districts from the loss of taxes on the parcels would be anything other than minimal or would create economic distress.

As to jurisdictional problems and potential land use conflicts (25 C.F.R. § 151.10(f)), the Regional Director acknowledged that there would be jurisdictional issues but pointed out that the parcels would be treated the same as other trust land within the reservation, and that their acquisition in trust would not exacerbate the already extant jurisdictional problems. Rather, she found that the jurisdictional issues might, in fact, decrease since the Tribe would be consolidating its lands through the trust acquisition. In any event, she noted that the Tribe and the local governments were familiar with and currently dealt with a checkerboarded jurisdictional area. The Regional Director also determined that BIA was equipped to discharge the additional responsibilities created by the trust acquisitions (25 C.F.R. § 151.10(g)), and that the Phase I Environmental Site Assessment completed and approved on March 16, 2006, and the categorical exclusion document approved on October 27, 2006, satisfied the hazardous substance determination and National Environmental Policy Act requirements set out in 25 C.F.R. § 151.10(h).

The Regional Director then evaluated the comments and other documents submitted by Appellants in opposition to the trust acquisitions. She rejected the State’s claim that the Tribe’s relatively high income from gaming and low population negated any need for additional land to be taken into trust. She pointed out that participation in gaming did not preclude the Tribe from having the land taken into trust status since there was no guarantee that gaming would continue to be a viable economic option for the future and added, parenthetically, that gaming facilities provided additional employment for both Indians and non-Indians and thus increased the amount of individual income taxes paid to State and local governments. She further denied the State’s contention that an “independent hearing officer” was required to adjudicate the Tribe’s applications, concluding that nothing in the Federal regulations required an independent hearing for fee-to-trust applications, that the State had not submitted any evidence that BIA decision makers had not followed applicable regulations, and that the appealability of BIA decisions to the Board and to Federal court ensured that BIA was properly following laws and regulations when making fee-to-trust acquisition decisions.

The Regional Director also rejected the State's assertion that a report issued by the Government Accountability Office (GAO), GAO Report No. GAO-06-781 (GAO Report), demonstrated bias within BIA warranting recusal of BIA officers from processing fee-to-trust applications. She found that, contrary to the State's contentions, the statistics on trust acquisition approvals found in the report did not provide any evidence of bias on the part of BIA, nor did the report's discussion of the malleability of BIA regulations establish that any BIA decision maker had failed to follow Federal law or regulations when making the decision to bring land into trust. In fact, she pointed out that, contrary to the State's averments, the GAO Report actually concluded that BIA generally followed its regulations for processing fee-to-trust applications.⁵ Given the State's failure to submit any substantial information establishing that any BIA decision maker had disregarded any regulations or laws, the Regional Director determined that the Superintendent was capable of making a professional and objective decision on the Tribe's applications based on the facts of the case and current law and regulations. She similarly refused to recuse herself from ruling on the appeals, again citing the lack of any State-submitted evidence of bias on the part of BIA.

Addressing the State's merits-based objections to the Superintendent's decisions, the Regional Director discounted the State's complaint that the Tribe had not met what the State characterized as the Tribe's burden under 25 C.F.R. § 151.9 to provide sufficient evidence to justify the acquisitions under 25 C.F.R. § 151.10, pointing out that 25 C.F.R. § 151.12 clearly authorized the Superintendent to request and gather any additional information or justification he considered necessary to enable him to reach a decision, which he had done in this case. The Regional Director also rejected the State's assertion that the Superintendent should have considered the cumulative effect of the loss of local taxes from all trust lands, noting that the Superintendent only had to consider the loss of the current tax value of the land subject to the specific application. While agreeing with the State that jurisdictional conflicts would arise, she posited that these conflicts would not increase since those conflicts currently existed and the local entities had experience in handling them. Finally, she found no merit in the State's argument that the lands should not be taken into trust because a report by an individual, Terry Anderson, concluded that lands brought into trust status were less productive than fee lands. The Regional Director stated that it was common knowledge, on most reservations, that the best and most potentially productive lands were the first lands sold to non-Indians but that, in any event, the Anderson study was

⁵ She also acknowledged the GAO Report's recommendation that BIA document more of its findings to support its decision, and stated that her decision was designed to implement that recommendation.

irrelevant to these fee-to-trust-acquisitions, especially given the local BIA staff's confidence that agricultural production would remain constant once the land was in trust status.⁶

The Regional Director found no merit in any of the County's challenges to the trust acquisitions. Specifically, she concluded that the Tribe would assume most of the services that the County currently provided, which would save some of the County's expenses; that the conversion of the land into trust would not exacerbate the current checkerboard jurisdictional issues; and that, although the Tribe admittedly had no criminal jurisdiction over non-members, the local entities would have to work to resolve those jurisdictional issues.

The Regional Director also responded to the Sisseton School District's, Wilmot's, and the City's comments.⁷ She noted that the Sisseton School District had stated that its tax revenue losses would be approximately \$585.70 (Gardner parcel), \$125.76 (German parcel), \$132.81 (Marlo Peters land), and \$1,195.10 (Smith Subdivision) and had asked BIA to consider future lost tax dollars if the parcels were taken into trust because services are affected when revenues go down. She determined that the lack of evidence supporting the allegation that services would be negatively affected and the Sisseton School District's omission of the positive impacts and employment opportunities provided by the Tribe to both Indians and non-Indians, which ultimately increased the taxes paid and supported the local economy, undermined the persuasiveness of the School District's objections. She also pointed out the School District's failure to acknowledge the 2 million dollars in Federal Impact Aid funds it received for Indian students attending its schools. In response to the Sisseton School District's assertion that local City and County law enforcement assisted the Tribe with law enforcement issues, the Regional Director indicated that these entities would continue to work together after the land was placed into trust. The Regional Director also rejected Wilmot's comment that it had plans to use various parcels for bonding purposes, citing Wilmot's failure to supply additional information documenting how losing the land would affect bonding. As to the City's concerns about jurisdictional issues and the impact

⁶ The Regional Director did not address the State's complaint that the Tribe had acted unprofessionally by verbally attacking the State's counsel, asserting that she did not supervise tribal staff.

⁷ Since Wilmot's comments related only to the Gardner parcel and the Marlo Peters land, the Regional Director addressed those comments only in her decisions on the trust acquisition of those parcels; similarly, since the City's comments were directed solely to the Smith Subdivision trust acquisition, she discussed those comments only in her decision on that tract.

of losing tax revenue critical to providing various services, the Regional Director noted that the Tribe would assume some of those services, that the tenant on the Smith Subdivision would pay for utilities, and that the Tribe donated to local recreational programs for children.

The Regional Director observed that the Tribe had provided numerous benefits over the years to the local jurisdictions including donations to schools, Boys and Girls Clubs, sports organizations, volunteer fire departments, and other charitable organizations. She also listed other contributions to the community provided by the Tribe and BIA, such as reimbursing local fire departments for suppressing fires on trust lands; paying for ambulance services; snow plowing roads where Indian families live at no cost, a service that also benefits non-Indians living in those areas; providing a no-cost senior nutrition feeding program for both Indian and non-Indian seniors; donating significant sums to the County for road maintenance, police, and ambulance services; and reimbursing the State 50 percent of collected sales taxes. She added that the Tribe had demonstrated a willingness both to reimburse local governmental entities for services which the Tribe cannot provide and to address existing jurisdictional issues.

In sum, the Regional Director discounted the Tribe's participation in gaming as irrelevant to whether the land should be taken into trust status; found that bringing the tracts into trust was authorized by Congress and would provide for the Tribe's agricultural and land consolidation (Gardner parcel, German parcel, and Marlo Peters land) and housing (Smith Subdivision) needs, ensure the Tribe's survival by providing protected lands for current and future generations, help the Tribe preserve its native language and culture, and support tribal self-determination; concluded that the State had submitted no evidence of bias on the part of BIA, that the Superintendent therefore was capable of making a professional and objective decision on the fee-to-trust applications, and that there was no need for the Regional Director to recuse herself from deciding the appeals; and determined that the removal of the tracts from the County tax base would have a minimal effect on the County, City, School Districts, and State, that the trust acquisitions were consistent with applicable Federal regulations and would be in the best interest of the Tribe, and that the trust acquisitions met the applicable requirements of 25 C.F.R. § 151.10. She therefore upheld the Superintendent's decisions taking the parcels into trust.

These appeals followed.

Discussion

Standard of Review

The standard of review in trust acquisition cases is well established. Decisions of BIA officials on requests to take land into trust are discretionary, and the Board does not substitute its judgment in place of BIA's judgment in discretionary decisions. *State of South Dakota, County of Charles Mix, and City of Wagner v. Acting Great Plains Regional Director*, 49 IBIA 84, 98 (2009); *Arizona State Land Department v. Western Regional Director*, 43 IBIA 158, 159-60 (2006); *Cass County v. Midwest Regional Director*, 42 IBIA 243, 246 (2006). Instead, the Board reviews discretionary decisions to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of BIA's discretionary authority, including any limitations on its discretion established in regulations. *State of South Dakota*, 49 IBIA at 98; *Arizona State Land Department*, 43 IBIA at 160. Thus, proof that the Regional Director considered the factors set forth in 25 C.F.R. § 151.10 must appear in the record, but there is no requirement that BIA reach a particular conclusion with respect to each factor. See *State of South Dakota*, 49 IBIA at 98; *Arizona State Land Department*, 43 IBIA at 160; *Eades v. Muskogee Area Director*, 17 IBIA 198, 202 (1989). Nor must the factors be weighed or balanced in a particular way or exhaustively analyzed. *State of South Dakota*, 49 IBIA at 98; *Jackson County v. Southern Plains Regional Director*, 47 IBIA 222, 231 (2008); *Aitkin County v. Acting Midwest Regional Director*, 47 IBIA 99, 104 (2008); *County of Sauk v. Midwest Regional Director*, 45 IBIA 201, 206-07 (2007), *aff'd sub nom. Sauk County v. U.S. Department of the Interior*, No. 07 C 0543 S (W.D. Wis. May 29, 2008). Moreover, an appellant bears the burden of proving that BIA did not properly exercise its discretion. *State of South Dakota*, 49 IBIA at 98; *Aitkin County*, 47 IBIA at 104; *Arizona State Land Department*, 43 IBIA at 160; *Cass County*, 42 IBIA at 246; *State of South Dakota v. Acting Great Plains Regional Director*, 39 IBIA 283, 291 (2004), *aff'd sub nom. South Dakota v. U.S. Dep't. of the Interior*, 401 F. Supp.2d 1000 (D.S.D. 2005), *aff'd*, 487 F.3d 548 (8th Cir. 2007). Simple disagreement with or bare assertions concerning BIA's decision are insufficient to carry this burden of proof. *State of South Dakota*, 49 IBIA at 98; *Aitkin County*, 47 IBIA at 104; *Arizona State Land Department*, 43 IBIA at 160; *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 issues raised in a trust acquisition case, except those challenging the constitutionality of laws or regulations, which the Board lacks authority to adjudicate. *State of South Dakota*, 49 IBIA at 99; *Jackson County*, 47 IBIA at 227-28; *Arizona State Land Department*, 43 IBIA at 160; *Cass County*, 42 IBIA at 247. An appellant, however, bears the burden of proving that BIA's decision was in error or not

supported by substantial evidence. *State of South Dakota*, 49 IBIA at 99; *Arizona State Land Department*, 43 IBIA at 160; *Cass County*, 42 IBIA at 247.

Issues on Appeal

In its appeal submissions, the State renews its bias arguments against both the Superintendent and the Regional Director. Appellants collectively challenge the Regional Director's decision on the merits, asserting that the Tribe failed to meet its burden of showing that the land should be placed into trust; that the Tribe does not need the land to be placed into trust for agriculture, housing, or land consolidation; that the Regional Director failed to consider the significant cumulative impacts on the State and local governments of the removal from the tax rolls of all trust land, not just the land included in the current applications; that the Regional Director insufficiently analyzed jurisdictional and land use conflicts; and that the record contains no evidence supporting BIA's ability to discharge the additional responsibilities associated with acquiring the parcels in trust status. We find that Appellants have failed to meet their burden of showing error in the Regional Director's decisions and affirm those decisions.

Bias

The State's bias claim is multi-faceted. The State first asserts that the Due Process Clause of the U.S. Constitution prohibits a member and former multi-term chairman of the Tribe from acting as the decision maker for the Tribe's trust acquisition applications. It avers that it is entitled to an "impartial" decision maker and that the Superintendent, as the former tribal chairman, should have been precluded from issuing the trust acquisition decisions on the basis of both the appearance of bias and actual bias. The State speculates that the Superintendent saw the trust application process as a means by which he could accomplish goals he had been unable to meet as tribal chairman, and that an unbiased observer would question the impartiality of the Superintendent.

As to actual bias, the State lists several personal and institutional factors which it claims demonstrate actual bias, including statements in the Superintendent's decisions that the State's bias arguments had no validity; the Superintendent's failure to respond to the State's specific arguments on this issue; the systematic or structural bias inherent in BIA with its congressionally-imposed preference for hiring tribal members; BIA's status as a "captured agency," the expressed mission of which is to fulfill the Government's trust responsibilities and promote self-determination on behalf of tribal governments, in part through taking land into trust for the tribes; and the Superintendent's and Regional Director's discounting of the State's evidence on whether the 25 C.F.R. § 151.10 factors had been met. The State further contends that the approval rate statistics for fee-to-trust

applications set out in the GAO Report — indicating that 98 percent of the applications are approved on the merits — demonstrate bias on the part of BIA and the futility of opposing those applications. The State adds that an impartial decision maker is even more imperative because, as the GAO Report notes, BIA’s fee-to-trust regulations grant BIA wide discretion with few clear guidelines and thus are almost infinitely malleable.

The State avers that impermissible bias also tainted the Regional Director because she had previously decided that no conflict of interest existed that would preclude the Superintendent from issuing the initial decisions on the applications. The availability of review of the Superintendent’s decisions is irrelevant, according to the State, because it was entitled to an impartial adjudication in the first instance. None of the State’s bias arguments convinces us that the Regional Director’s decisions should be overturned.

As an initial matter, we note that the State’s structural bias arguments as grounds to disqualify BIA as a decision maker have been squarely rejected by the courts. In *State of South Dakota*, the court explicitly found that BIA’s policies of tribal self-determination, Indian self-government, and hiring preferences were policies established by Congress in the IRA, and that the U.S. Supreme Court had found the preference policy reasonable and rationally designed to further Indian self-government and not violative of due process. 401 F. Supp.2d at 1011, citing *Morton v. Mancari*, 417 U.S. 535, 542, 555 (1974). The court therefore held that “[f]ollowing Congress’s statutory policies does not establish structural bias warranting reversal of the Director’s decision.” 401 F. Supp.2d at 1011. Thus, the State has not shown that the Superintendent’s and Regional Director’s decisions were tainted by improper structural bias that denied it due process. See *State of South Dakota and County of Charles Mix v. Acting Great Plains Regional Director*, 49 IBIA 129, 144 (2009). Indeed, the State acknowledges the true source of its complaint by arguing that “Congress, unfortunately,” has set up BIA to favor tribal interests. See State’s Brief at 20.

The State’s citation of statements in the GAO Report does not undermine the conclusion that BIA need not be disqualified from making fee-to-trust decisions. Not only did the report not consider or address the question of agency bias, but its statistical analysis was based on a limited sample (87 decided applications to which there was little or no opposition) that did not consider the over 1,000 pending fee-to-trust applications awaiting action. And the report’s observations about the “malleability” of BIA’s regulations, which constitute applicable law, provide no basis for concluding that BIA must be disqualified as a decision maker in applying its own regulations. Indeed, the GAO Report’s observations were tempered by the report’s conclusion that BIA generally followed its regulations for processing trust acquisition applications.

The State's additional grounds for asserting both the appearance of bias and actual bias are similarly unpersuasive. The State's bias claims revolve around the Superintendent's status as a tribal member and former tribal official; the State, however, has offered no evidence demonstrating that either the Superintendent's membership in the Tribe or his former service as a tribal official improperly influenced his decision, or that he was acting as a tribal representative, rather than as a BIA official, when he evaluated the trust acquisition requests. Absent such actual evidence,⁸ the State's bald assumption that the Superintendent's status necessarily calls into question his impartiality is insufficient to demonstrate either the appearance of bias or actual bias. See *State of South Dakota*, 401 F. Supp.2d at 1010 (absent clear evidence to the contrary, "courts should presume that public officers have discharged their official duties properly"), 1011 ("It requires a substantial showing of bias to disqualify a hearing officer in administrative proceedings or to justify a ruling that a hearing was unfair."). Nor does the fact that the Superintendent did not reject the Tribe's requests, as he was urged to do by the State, prove that the Superintendent was biased. See *McAlden v. California Library Assn.*, 955 F.2d 1214, 1224 (9th Cir. 1990).⁹ The State therefore has not met its burden of showing that the Superintendent should have been disqualified from deciding the Tribe's trust acquisition applications based on the appearance of or actual bias.

Even if the State had shown possible bias on the part of the Superintendent, the State has provided no basis for us to conclude that the Regional Director's independent review of the applications did not cure any such bias. See *State of South Dakota*, 49 IBIA at 102.¹⁰ The State denies that the Regional Director's review was independent and asserts that she, too, was impermissibly biased against the State and should have recused herself from deciding the appeals. The State rests this contention on the Regional Director's previous determination that the Superintendent could properly rule on the acquisition

⁸ Instead of evidence, the State simply speculates about the Superintendent's motives for approving the acquisitions, hypothesizing that the approvals fulfill the Superintendent's original goals as tribal chairman.

⁹ We note that the Superintendent had the Tribe's requests under consideration for about 6 years before he approved the applications, and that during this time he sought and accepted additional information from Appellants, as well as from the Tribe. These facts weigh against the State's bias arguments.

¹⁰ A party's due process rights are also protected by appeals to this Board, which afford an adversely affected party with an independent review of the challenged BIA decision and thus further insure against an erroneous or improper decision. *Id.*

applications. The Regional Director rendered this opinion after reviewing both the Superintendent's request for an opinion and the State's submission alleging bias. This preliminary ruling, like a ruling on a temporary restraining order or on a motion for a stay, was subject to reconsideration based on subsequent briefings. In this case, the Regional Director allowed the State to submit extensive briefing on the bias issue; after considering the additional submissions, she determined that the State had not provided specific facts supporting the bias claim and accordingly upheld the Superintendent's authority to issue the initial decisions on the acquisitions. On appeal, the State similarly has not provided any evidence substantiating its claim that the Regional Director had impermissibly prejudged the bias question or the merits, but again chooses to rely on assumptions and speculation, which are inadequate to meet its burden of demonstrating the claimed prejudgment. The State also has proffered no substantiation for its claim that the Regional Director did not independently and thoroughly evaluate the applications, a claim which is belied by the comprehensiveness of the decisions themselves. The State therefore has not shown that the Regional Director erred in rejecting its bias claims.

Merits

Appellants' arguments on the merits focus on four main issues: 1) the Tribe's need for the additional land; 2) the impact on the State and local subdivisions resulting from the removal of the land from the tax rolls; 3) jurisdictional problems and land use conflicts; and 4) BIA's ability to discharge the additional responsibilities resulting from the acquisition of the lands in trust.¹¹ We find none of these arguments persuasive.

Appellants' challenges to the Tribe's need for the land centers on their insistence that BIA was required to consider the Tribe's need for the land *in trust*. However, as both the courts and the Board have consistently held, 25 C.F.R. § 151.10(b) requires BIA to consider the Tribe's "need for additional land," not whether the Tribe needs the land *held in trust*. See *South Dakota v. U.S. Department of the Interior*, 423 F.3d 790, 801 (8th Cir.

¹¹ Appellants also insist that the Tribe has the burden under 25 C.F.R. § 151.9 to provide sufficient information showing that the fee-to-trust applications should be granted and that the Tribe's applications failed to meet that burden. The Tribe and BIA point out that BIA has the authority under 25 C.F.R. § 151.12 to request additional information and did, in fact, do so here. We find that the additional information provided by the Tribe in its responses to Appellants' comments, in conjunction with the tribal council resolutions requesting the acquisitions, provided sufficient information supporting the requests to enable BIA to consider those requests under 25 C.F.R. § 151.10, and we reject the challenge to the sufficiency of the evidence.

2005); *Jackson County*, 47 IBIA at 232; *Jefferson County, Oregon v. Northwest Regional Director*, 47 IBIA 187, 201-202 (2008). Furthermore, both this Board and the courts have rejected the arguments that a Tribe's gaming revenue, financial security, or economic success disqualifies it from further acquisition of land in trust. See *State of South Dakota*, 49 IBIA at 104; *County of Sauk*, 45 IBIA at 210; *State of South Dakota*, 39 IBIA at 290-91; *County of Mille Lacs v. Midwest Regional Director*, 37 IBIA 169, 173 (2002); see also *State of South Dakota*, 401 F. Supp. 2d at 1007-08. BIA has broad discretion in its interpretation or construction of tribal need for the land at issue. *Aitkin County*, 47 IBIA at 108. Appellants have not shown that BIA improperly exercised that discretion here.¹²

Appellants' arguments relating to the impact of the tracts' removal from the tax rolls rest on their claim that BIA was required to consider the *cumulative* impact of the removal of all existing trust lands from the tax rolls, or at least the cumulative financial impacts of the removal of the four tracts at issue here. Under 25 C.F.R. § 151.10(e), BIA is directed to consider the impact on the affected jurisdictions of "removal of *the* land from the tax rolls" (emphasis added). Relying on the plain language of this subsection, the Board has consistently rejected the argument that analysis of the cumulative effects of all tax revenue losses on all lands within an appellant's jurisdictional boundaries is required. *State of South Dakota*, 49 IBIA at 106; *Shawano County, Wisconsin, Board of Supervisors v. Midwest Regional Director*, 40 IBIA 241, 249 (2005); *State of South Dakota*, 39 IBIA at 294-95; *Ziebach County, South Dakota v. Acting Great Plains Regional Director*, 38 IBIA 227, 230 (2002); *County of Mille Lacs*, 37 IBIA at 172. Appellants have not convinced us that our consistent interpretation is wrong or that our precedent should be revisited. Moreover, in light of the small amount of tax loss attributable to each parcel and the limited number of parcels at issue, Appellants have failed to meet their burden of showing that the Regional Director improperly exercised her discretion in considering only the tax loss from each individual parcel.¹³

¹² Although Appellants cite Anderson's report for the contention that taking the land into trust would result in the land being less productive for agricultural purposes, the regulations do not identify productivity as a relevant criterion in determining whether to approve a trust acquisition application. Thus, we need not determine the validity of the claimed diminishment in productivity because, even if true, that diminishment would not undermine BIA's consideration of the Tribe's need for the parcels, especially since it does not affect the Tribe's need for the tracts for land consolidation, housing, and self-determination.

¹³ We do not foreclose the possibility that, in an appropriate case, BIA's failure to consider the collective tax impact of simultaneous trust acquisitions — e.g., numerous simultaneous

(continued...)

Appellants' jurisdictional and land use conflicts contentions are also unconvincing. Appellants speculate that taking the parcels into trust will exacerbate existing jurisdictional and land use problems and will create "islands of refuge" where an individual can escape the reach of one jurisdiction; however, they offer no evidence showing that such islands of refuge currently exist on trust lands, or that the taking of the tracts into trust would promote such islands or would intensify already extant jurisdictional and land use problems.¹⁴ In any event, section 151.10(f) requires the Regional Director to *consider* jurisdictional problems or potential conflicts; it does not require her to *resolve* those problems or issues. *See State of South Dakota*, 49 IBIA at 108; *Arizona State Land Department*, 43 IBIA at 173. The record demonstrates that she did, in fact, consider those matters. Appellants thus have not shown error in the Regional Director's consideration of jurisdictional issues.

Finally, Appellants contend that there is no evidence in the record supporting the Regional Director's conclusion, under 25 C.F.R. § 151.10(g), that BIA is equipped to

¹³(...continued)

acquisitions which, collectively, would have a significant tax impact — might constitute a failure to properly exercise its discretion. This is not such a case.

We note that — although not an issue raised by Appellants on appeal — the Regional Director mis-described the percentages attributable to the tax losses for each parcel. She described the tax loss for the Gardner parcel as ".0005 percent," when the actual percentage is 0.05 percent ($\$1300.86 \div \$2,789,388 = 0.00046$, which, rounded, is 0.0005, or 0.05 percent). Similarly, the correct percentage losses for the German parcel, Marlo Peters land, and Smith Subdivision are 0.009 percent (not .00009 percent), 0.009 percent, and 0.05 percent, respectively. The collective percentage loss attributable to the 4 parcels is 0.12 percent of the County's tax base, which is still well below the 1 percent impact that the Board has characterized as "minimal." *See State of South Dakota*, 39 IBIA at 297.

¹⁴ Appellants rely on a 2008 memorandum addressing off-reservation trust acquisitions for gaming purposes as support for their claim that BIA was required to extensively analyze and resolve jurisdictional problems and land use conflicts. However, as that memorandum makes abundantly clear, off-reservation trust acquisitions for gaming purposes raise unique and distinct concerns not present in on-reservation trust acquisitions for non-gaming purposes. That memorandum thus does not apply to on-reservation, non-gaming trust acquisitions, and we reject Appellants' claim that it controls here, or that BIA somehow abused its discretion by declining to voluntarily apply the guidance set out in the memorandum.

discharge the additional responsibilities flowing from the trust acquisitions. While admittedly the tribal council resolutions requesting the acquisitions do not address this factor, nor did the Regional Director's and the Superintendent's decisions do more than simply state their conclusions, the Tribe discussed this consideration in its October 3, 2005, response to Appellants' comments. In that response, the Tribe asserted that the only additional responsibilities that would be placed on BIA as a result of the trust acquisitions would be minimal administrative functions, which BIA is already handling for the Tribe on a regular basis, such as recording land transaction documents, reviewing and approving rights of way where required to cooperate with other jurisdictions, and reviewing necessary environmental documents. Appellants have provided nothing to contradict the Tribe's submission, and, in the absence of any such showing, we are not convinced that the Regional Director was required to address this factor in more detail. Appellants therefore have not met their burden of showing that the Regional Director's consideration of this factor was erroneous.

Conclusion

We have carefully considered all the arguments raised by Appellants, including those not specifically addressed herein, and find that Appellants have not shown that the Regional Director's decision was erroneous or reflected an improper exercise of her discretion, nor has the State established impermissible bias on the part of either the Superintendent or the Regional Director. Because the administrative record demonstrates that the Regional Director considered each of the relevant criteria in 25 C.F.R. § 151.10 and reasonably exercised her discretion, we conclude that the Regional Director properly accepted the tracts into trust for the Tribe and affirm her decisions.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director's decisions.

I concur:

// original signed
Sara B. Greenberg
Administrative Judge*

// original signed
Steven K. Linscheid
Chief Administrative Judge

*Interior Board of Land Appeals, sitting by designation.