



## INTERIOR BOARD OF INDIAN APPEALS

Benewah County, Idaho v. Northwest Regional Director, Bureau of Indian Affairs

55 IBIA 281 (09/21/2012)



# United States Department of the Interior

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

|                            |   |                           |
|----------------------------|---|---------------------------|
| BENEWAH COUNTY, IDAHO,     | ) | Order Affirming Decisions |
| Appellant,                 | ) |                           |
|                            | ) |                           |
| v.                         | ) |                           |
|                            | ) | Docket Nos. IBIA 10-114   |
| NORTHWEST REGIONAL         | ) | 10-115                    |
| DIRECTOR, BUREAU OF INDIAN | ) |                           |
| AFFAIRS,                   | ) |                           |
| Appellee.                  | ) | September 21, 2012        |

Benewah County, Idaho (County), appealed to the Board of Indian Appeals (Board) from two decisions, each dated May 27, 2010 (collectively, Decisions), of the Northwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA), to accept into trust for the Coeur d'Alene Tribe of Idaho (Tribe) two parcels of land owned by the Tribe in fee.<sup>1</sup> In the proceedings before the Regional Director, the County argued that the Regional Director should deny the Tribe's fee-to-trust applications for these parcels because preserving the County's property tax base outweighed the Tribe's interest in having the properties placed in trust (and, thus, nontaxable). On appeal to the Board, the County argues that the Regional Director did not give sufficient consideration to the impact on the County of placing these parcels into trust, and also raises various additional objections to the Decisions.

We affirm the Decisions because the Regional Director considered the arguments raised by the County as well as the factors that BIA is required to consider in deciding whether to accept the properties into trust. Although the Regional Director reached a different result than that urged by the County, the County has not demonstrated that the Decisions are arbitrary or capricious or not in accordance with the law. Many of the County's arguments on appeal could have been presented to the Regional Director, but

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<sup>1</sup> In one decision, the appeal from which is docketed as No. IBIA 10-114, the Regional Director approved the trust acquisition of the 412.45-acre Johnson property. In another, otherwise identical decision, the appeal from which is docketed as No. IBIA 10-115, he approved the trust acquisition of the 610.4-acre Bader property. The Board consolidated the two appeals for all purposes.

were not, and thus were not properly preserved as grounds for arguing on appeal to the Board that the Decisions are deficient.

## Background

### I. Acquisition of the Properties by the Tribe and the Memorandum of Agreement with Bonneville Power Administration

The Tribe acquired fee title to the Johnson and Bader properties using funds provided by the Bonneville Power Administration (BPA) to fulfill BPA's obligations to mitigate adverse environmental effects on fish and wildlife caused by hydroelectric projects administered by BPA. The Tribe acquired the parcels in connection with BPA's Albeni Falls Wildlife Mitigation Project (Project), and the Tribe's management of the properties is governed by a Memorandum of Agreement (MOA) executed by the Tribe and BPA in 2001.<sup>2</sup> The Tribe apparently acquired the Johnson property in 2001, and the Bader property in 2001 or early 2002, as evidenced by the dates of conservation easements for the properties executed by the Tribe in favor of BPA. *See* Commitment for Title Insurance, at 6, ¶ 14 (Johnson Property Administrative Record (Johnson AR) Tab 12); Commitment for Title Insurance, at 6, ¶ 21 (Bader Property Administrative Record (Bader AR) Tab 12).

Under the terms of the MOA, the Tribe was required to dedicate the properties to the permanent protection of fish and wildlife and to manage the properties according to the terms of the MOA. *See* MOA, Recitals ¶¶ D & G. Among other things, "[t]o ensure that the Project is protected as a self-sustaining native fish and wildlife habitat permanently," the Tribe was required to execute deeds of conservation easements in favor of BPA, MOA § 6.4, which, as noted above, it did. The MOA prohibits timber harvesting and all residential use of the properties unless provided for in a property management plan prepared by the Tribe. MOA § 2.10 (prohibited uses); *see* MOA § 2.4 (Property Management Plan).<sup>3</sup>

The MOA provides that "[t]he public shall have reasonable access to the Project," but also states that the Tribe "shall not provide public access or use that will result in

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<sup>2</sup> The MOA is not part of the Regional Director's administrative records for the Decisions, but a copy is attached as Exhibit 1 to the County's Statements of Reasons (SOR), which it filed in support of its appeals to the Board.

<sup>3</sup> The MOA requires the Tribe to prepare a Property Management Plan, which must be approved by BPA, but no such plan is included in the administrative records for the Decisions, nor did any of the parties submit such a plan for the appeal record or indicate that one has been drafted.

adverse impacts to fish and wildlife, the reduction of habitat values, or the destruction of other natural resource values for which the Project is managed.” MOA § 12.1 (“Public Access”). The MOA further provides that “[t]he Tribe may regulate access, provided that access and transportation regulations shall apply equally to tribal members and non-tribal members,” and that “[t]he scope of public access will be defined by the Property Management Plan.” *Id.*

Section 2.1.2 of the MOA states:

The Tribe may use funding from BPA only for acquisitions and improvements that are in addition to, not in lieu of, other expenditures it is required to make under other agreements or provisions of law. The Tribe shall pay, from a source other than BPA, payments in lieu of taxes, county weed assessments and minimum noxious weed control costs as required by applicable law for the Project.

Sections 2.12 and 4.1 of the MOA provide that the Tribe must comply with “all applicable federal and state laws,” and will be responsible for all incidents of ownership of real property interests acquired under the MOA.

The MOA is “binding on the parties and their assigns and successors.” MOA § 16.1 (“Binding Effect”). “All parties shall have the right to enforce” the terms of the MOA. *Id.* Section 7.1 of the MOA gives BPA the right to seek termination of the MOA, after dispute resolution, if BPA believes the Tribe has violated the MOA. But BPA does “not have the power to terminate under [§ 7.1] if the United States takes or is in the process of taking the property into trust on behalf of the Tribe.” MOA § 7.1.

Section 16.9 of the MOA states that “[n]othing in [the MOA] shall prevent the United States from taking properties acquired under this agreement into trust on behalf of the Tribe.” MOA § 16.9 (“Taking Property into Trust”).

## II. The Tribe’s Requests to Have the Properties Placed in Trust, the County’s Comments, and the Tribe’s Response

On December 7, 2006, the Tribal Council passed resolutions requesting that BIA accept the Johnson and Bader properties in trust. *See* CDA Resolution 82 (2007) (Johnson AR Tab 4, Ex. A); CDA Resolution 85 (2007) (Bader AR Tab 4, Ex. A). Both resolutions state that the Tribe will continue to use the properties for the ongoing preservation of wildlife habitat.

By letter dated April 4, 2007, the County provided comments to BIA on nine fee-to-trust applications by the Tribe, including the applications for the Johnson and Bader properties. Letter from County to BIA Coeur d'Alene Agency, Apr. 4, 2007, at 7 (County's Comments) (Johnson AR Tab 4; Bader AR Tab 4).<sup>4</sup> The County either supported or declined to object to five of the applications involving properties for which the County had previously granted property tax exemptions. *Id.* The County objected to the other four applications, arguing that the properties that were the subject of those applications, including the Johnson and Bader properties, are "part of the small, critically needed tax base" of the County. *Id.* The County argued that BIA is required to balance the Tribe's interests and those of the County, and that BIA should not approve fee-to-trust acquisitions that would "collectively disable county government or are unnecessary to tribal government." *Id.* at 5.

In its comments, the County also stated that it was "not opposed to the Tribe's proposed uses of these lands per se," and that "[f]arming and wildlife conservation are not in conflict with surrounding land uses." *Id.* at 8. But the County argued that the "conflict lies in the benefit of all being burdened on the few," *id.*, i.e., in removing land from taxation and reducing the County's tax revenue without reducing its obligations to provide services throughout the County, such as road maintenance, emergency services, fire suppression, solid waste disposal, and schools. The County urged BIA to deny the Tribe's fee-to-trust application, contending that the interests of the County outweighed those of the Tribe because the Tribe is "wealthy" whereas the County is "impoverished," the Tribe does not need the land for essential government functions, and continuing fee-to-trust transfers will eventually bankrupt the County and reduce services to both Tribal and non-Tribal residents. *Id.* at 9.

The Tribe responded to the County's comments, arguing that BIA was not required by the trust acquisition regulations, 25 C.F.R. Part 151, to "balance" the respective interests of the County and the Tribe, but was only required to consider various factors, two of which include the effects of the trust acquisition on the County. Tribe's Response, Aug. 22, 2007, at 2-3 (ARs, Tab 8). The Tribe disputed the County's characterization of the effects of removing the properties from its tax base, asserting that the costs to the County were "insignificant" and constituted a loss of approximately one-half of one percent

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<sup>4</sup> The administrative records for the Decisions contain copies of the return receipt card for BIA's second notice to the County of the proposed trust acquisition, but neither record contains a copy of the actual notice (the first notice or the second).

of the County's tax base. *Id.* at 3.<sup>5</sup> The Tribe contended that the "relatively small sums at issue here will certainly not bankrupt" the County. *Id.* at 4. The Tribe took issue with what it understood as the County's suggestion that the fee-to-trust applications were "a mere scheme to save money." *Id.* Instead, the Tribe argued, restoration of the Tribe's title and sovereign jurisdiction over ancestral lands that had been taken from it in the nineteenth century was a high priority for the Tribe and fulfilled "the most essential purposes of Tribal government," of far more significance than the property taxes implicated. *Id.* Finally, the Tribe argued that many Tribal programs benefit both members and non-members and that the Tribe is the largest employer in the County, providing significant services at no cost to the County. *Id.* at 4-5.

In March 2010, the County submitted two letters to BIA, one for the Johnson property and one for the Bader property, providing the amounts of property taxes and special assessments associated with each property. For the Johnson property, the County reported the property taxes currently levied as totaling \$3,695.18, and the special assessments as totaling \$223.02, for a combined total of \$3,918.20. Letter from County to Regional Director, Mar. 5, 2010 (Johnson AR Tab 4, Ex. H). For the Bader property, the County reported the property taxes currently levied as totaling \$9,570.46, and the special assessments as totaling \$1,162.38, for a combined total of \$10,732.84. Letter from County to Regional Director, Mar. 5, 2010 (Bader AR Tab 4, Ex. H). In each letter, the County reiterated its assertion that "[t]he loss of tax revenue undermines [the] County's tax base and the land acquisitions that occur will eventually bankrupt the [C]ounty." *Id.* at 2.

### III. The Regional Director's Decisions

On May 27, 2010, the Regional Director issued his Decisions to accept the Johnson and Bader properties in trust. The Regional Director discussed each of the seven applicable regulatory criteria that BIA must consider in deciding whether to accept land in trust for a tribe. *See* 25 C.F.R. § 151.10(a)-(c), (e)-(h).<sup>6</sup>

#### A. Authority (25 U.S.C. §§ 151.3; 151.10(a))

The Regional Director first addressed his statutory authority to accept the properties in trust, as required by 25 C.F.R. § 151.10(a), and concluded that he had such authority under 25 U.S.C. §§ 465 and 2202. The Regional Director also concluded that he had

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<sup>5</sup> The County objected to two other fee-to-trust applications that are not at issue in this appeal, and the Tribe's calculation of the potential tax revenue loss to the County apparently is based on all four of those applications, and not just the Johnson and Bader properties.

<sup>6</sup> Subsection 151.10(d) is only relevant to trust acquisitions for individual Indians.

regulatory authority for the trust acquisitions under 25 C.F.R. § 151.3(a). In relevant part, § 151.3(a) authorizes BIA to accept land in trust for a tribe,

- (1) When the property is located within the exterior boundaries of the tribe's reservation . . . ; or
- (2) When the tribe already owns an interest in the land; or
- (3) When [BIA] determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

Although the criteria in § 151.3(a) are stated in the disjunctive, the Regional Director concluded that all 3 criteria were satisfied in this case. The first two were met because both properties are within the boundaries of the Tribe's reservation and the Tribe already owns fee title to the land. In finding that the third criterion is satisfied, the Regional Director noted that the Tribe intends to continue the use of the properties for the preservation of wildlife habitat, and concluded that the acquisitions will provide the Tribe with "unique recreational opportunities which facilitate[] tribal economic development." Decisions at 3 (Bader), 4 (Johnson).

B. Need (25 C.F.R. § 151.10(b))

Subsection 151.10(b) requires that BIA consider "[t]he need of the . . . tribe for additional land." The Regional Director discussed this issue in the context of the aboriginal territory originally inhabited by the Tribe, and the reductions to the Tribe's land base through cessions and the allotment of Tribal lands to individuals. The Regional Director concluded that the Tribe had established a need for additional trust land for housing, economic development, and self-determination, *see* 25 C.F.R. § 151.3(a)(3), as a result of anticipated growth of the Tribal population, below-average level of Tribal member income, the relatively few acres of Tribal trust land within the Reservation boundaries, and the substantial amount of Tribal trust acreage already used for Indian housing, Tribal facilities, agricultural cultivation, and commercial enterprises. The Regional Director relied on data from a 2009 Community Economic Development Strategy to support his findings concerning the per capita income of Tribal members and expected population growth. Decisions at 5-6 (Bader), 6 (Johnson).

C. Purpose (25 C.F.R. § 151.10(c))

Subsection 151.10(c) requires that BIA consider "[t]he purposes for which the land will be used." The Regional Director found that the properties were being "used for wildlife conservation purposes, specifically, for the ongoing preservation of wildlife habitat, and will continue to be used for that purpose." Decisions at 6 (Bader), 7 (Johnson). The Regional Director found that the Tribe's administration of the properties as a Tribal wildlife

preserve weighed in favor of the trust acquisition because the acquisition would facilitate Tribal self-determination—one of the criteria provided in § 151.3(a) that serves as a basis for BIA’s authority to acquire land in trust for a tribe. *Id.* at 6 (Bader), 7 (Johnson).

D. Impact of Removing the Land from Taxation (25 C.F.R. § 151.10(e))

Because the Tribe owns both properties in unrestricted fee, § 151.10(e) requires BIA to consider “the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls.” The Decisions state that notices were sent to the State and County in 2007 and in 2010 regarding the proposed trust acquisitions, and that the County responded in 2007 and in 2010. *Id.* at 6 (Bader), 7 (Johnson). The Regional Director noted the County’s objection to the loss of tax revenue. For the Johnson property, the Regional Director found that County taxes were \$3,071.58 in tax year 2007 and \$7,836.40 in tax year 2009;<sup>7</sup> for the Bader property, he found that County taxes were \$11,891.62 in tax year 2007 and \$10,732.84 in tax year 2009. *Id.* at 6 (Bader), 7 (Johnson). In each case, the Regional Director found that the taxes on the subject properties were not a significant amount of the total tax revenues of the County and that the trust acquisition would have a minimal impact on the County. *Id.* at 6 (Bader), 7 (Johnson).

E. Jurisdictional Conflicts (25 C.F.R. § 151.10(f))

Subsection 151.10(f) requires that BIA consider “[j]urisdictional problems and potential conflicts of land use which may arise.” The Regional Director found that neither the State nor the County had raised any concerns about jurisdictional problems or land use, and concluded that there are no jurisdictional problems arising from the acquisition and no land use conflicts because the use of the land for wildlife habitat would continue for the foreseeable future. Decisions at 7 (Bader), 7-8 (Johnson).

F. BIA’s Capability to Discharge its Responsibilities (25 C.F.R. § 151.10(g))

Under § 151.10(g), the Regional Director was required to consider whether BIA is equipped to discharge the additional responsibilities resulting from acquisition of the land in trust. The Regional Director answered this affirmatively, noting that because the Tribe contracts to administer almost all BIA programs on the Reservation, including the realty program, the likelihood of needing realty services from BIA was remote, given the use of

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<sup>7</sup> As discussed *infra*, *see* n.13, the amount of taxes considered by the Regional Director for the Johnson property in 2009 was twice as high as the actual amount. The actual amount of property taxes for the Johnson property in 2009 was \$3,918.20.

the property for wildlife habitat and the unlikelihood of a change in that use. Decisions at 7-8 (Bader), 8 (Johnson).

G. Information for Compliance with the National Environmental Policy Act (NEPA) and Hazardous Substances Determinations (25 C.F.R. § 151.10(h))

Subsection 151.10(h) requires BIA to consider the extent to which an applicant for a trust acquisition has provided information that allows BIA to comply with the Department of the Interior (Department) procedures regarding NEPA compliance and evaluation of land for possible hazardous substances. The Regional Director found that because there would be no change in land use as a result of the trust acquisition, the decision to accept the land in trust came under a categorical exclusion from further evaluation under NEPA. The Regional Director also stated that the final title package must include evidence that a hazardous waste survey had been completed. Decisions at 8 (Bader), 8-9 (Johnson).

After discussing each of the seven criteria, as described above, the Regional Director decided to approve the Tribe's trust acquisition applications for the Johnson and Bader properties.

IV. The County's Appeal and Arguments on Appeal

The County appealed the Decisions to the Board and filed a Statement of Reasons with each appeal as well as a Reply Brief in response to the Answer Briefs filed by the Regional Director and the Tribe.

In addressing the factors that BIA is required to consider under 25 C.F.R. § 151.10, the County contends that the Tribe did not demonstrate a "need" for the land. Statement of Reasons (SORs) at 1-2. Also, the County challenges the data on which the Regional Director relied to support his determination that the Tribe requires additional land for housing, economic development and self-determination. *Id.* at 2. In particular, the County challenges the Regional Director's reliance on urban population data instead of data for rural areas around the Tribe's reservation for his determination that the Tribe's population was expected to grow and additional land would be needed to sustain that growth. *Id.* The County further challenges the Regional Director's finding that Tribal members are economically behind the regional, non-Tribal population and argues that Tribal members are no more economically deprived than local non-Tribal members in the County. *Id.* The County does not identify any data that it contends is more appropriate or reliable than the 2009 study cited in the Decisions.

Next, with respect to "purpose," the County argues that "[s]ince this land must . . . be preserved as a wildlife preserve for the benefit of all persons, it is inconsistent and

contrary to the [MOA] for the United States to take [the land] in trust for the benefit of the Tribe.” *Id.* at 3. The County suggests that the Tribe is to hold the land in trust for all people, and “[t]aking these parcels into trust stands the [MOA] on its head, potentially subjecting BIA to litigation.” *Id.*

The County asserts that the Regional Director failed to consider the total impact that the acquisition will have on the County’s tax revenue. The County maintains that its revenue has dropped substantially since the filing of the subject fee-to-trust applications; that the Tribe has at least 20 additional such applications pending; that the Tribe intends to regain all of the lands within its original reservation boundary, which would be more than half the County’s taxable land; that the Tribe has an acquisition budget of \$8 million generated from casino revenue; that another 16,000 acres remain to be purchased by BPA pursuant to the MOA; that in 2009 the Tribe’s total revenue was \$60 million, and with 1,066 Tribal members residing on the Tribe’s Reservation, the Tribe has \$60,000 available per resident for services whereas the County, with annual tax revenues under \$5 million and nearly 10,000 residents (including resident Tribal members), has an average of \$500 per resident for services including fire, drainage, school, roads, and solid waste disposal; in the MOA, the Tribe agreed “to pay the ordinary costs of land ownership, including payments in lieu of taxes”; the Tribe can afford to pay the property taxes; the trust acquisition of property in the County “unfairly shift[s] the burden of providing County services to fewer and fewer non-Tribal members”; the tax revenue of one property decreased when the Tribe destroyed a habitable home and farm buildings, which in turn eliminated an active farm operation, eliminated employment at, purchasing for, and production of the farm, and led to a reduction in personal property taxes and sales taxes; and the removal of timbered acreage from harvest similarly led to a decrease in local employment and tax revenue. *Id.* at 4-6.

With respect to jurisdictional issues, the County claims that the Tribe’s reservation already “is [s]aturated with [j]urisdictional [p]roblems,” which it contends will only get worse with the trust acquisition of the subject properties. *Id.* at 6. It asserts that the Tribe cites non-Tribal members for violations of Tribal law, e.g., traffic violations, hunting and fishing violations, even on private lands within the Tribe’s reservation boundaries, and attached copies of various citations issued by Tribal police as well as Tribal court notices concerning infractions. The County also produced a report by an officer in which he stated that he informed four men “that if they were going to be hunting within the [e]xterior [b]oundaries of the [Tribe’s reservation] that they were going to need to buy a Tribal

hunting license unless it is their own private property [that they were hunting on].” *Id.*, Ex. 4.<sup>8</sup>

The County maintains that, following the United States Supreme Court’s decision in *United States v. Idaho*, 533 U.S. 262 (2001), the Tribe excludes non-Tribal members from navigable waters over certain submerged lands and that the Tribe insists that it owns the submerged lands of a state park. *Id.* at 7. The County did not produce or cite to any evidence in support of this assertion. The County claims that the Tribe already has ignored its agreement, memorialized in the MOA, to keep the two subject properties open to reasonable access by all people. *Id.* In support, it attaches a photo of a sign posted on the Bader property that states that it is a “Wildlife Mitigation Area [subject to] Controlled Access” and that “any attempt to hunt, capture or harass wildlife” is a violation of Tribal law. *Id.*, Ex. 7. The sign bears the Tribal seal as well as BPA’s seal. In addition, the County speculates that the Tribe intends to prevent non-Indians from hunting and fishing on the properties by denying access or by requiring compliance with Tribal regulations, which the County characterizes as “aggressively discriminatory” and in violation of the MOA. *Id.* at 7. The County also claims that the Tribe’s hunting and fishing regulations violate the opinion of a Deputy Solicitor for the Department, which stated that non-Tribal members need not possess a Tribal license to hunt or fish on non-Tribal lands, i.e., privately-owned lands, within the Tribe’s reservation. *Id.* Ultimately, the County asserts that “conflict and potential violence” will result from the allegedly discriminatory application of the law, i.e., the application of Tribal law to Tribal members and State law to non-Tribal members. *Id.* at 8.

Moving to BIA’s ability to manage the additional properties, the County asserts that if the parcels are taken into trust, the United States will become a party to the MOA as a successor in interest to the Tribe. *Id.* It asserts that BIA failed to consider whether or how it “is going to comply with the terms, conditions and obligations of the [MOA] with the BPA, and the [D]ecisions fail to consider or provide for payments in lieu of taxes as promised by the Tribe and which obligation is assumed by the BIA pursuant to the [MOA].” *Id.* at 9.

As to the final factor for consideration under § 151.10, the County argues that the Regional Director was required to obtain an environmental impact statement (EIS) as a condition precedent to considering whether to accept the properties into trust. *Id.* at 11. It claims that both the Project and “the pending fee to trust applications are creating large areas of lands not properly maintained [to mitigate fire danger],” that this “improper”

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<sup>8</sup> The Tribe’s regulations define its reservation “as the total land and water area within the exterior boundaries of the *present* Reservation.” SORs, Ex. 8, § 2(B) (emphasis added).

management, combined with reduced tax revenues for local fire districts and “jurisdictional issues over land management, . . . significantly affect[] the human environment,” and that an EIS was required to “evaluate whether . . . the joint actions of the BPA and the BIA will result in the irreversible commitment of resources and the elimination of long term productivity of the subject lands addressed by 42 USC 4332(C)(v) & (iv), respectively.” *Id.*<sup>9</sup>

In addition to the above contentions, the County raises a number of other general arguments against taking the Bader and Johnson properties into trust. The County generally opposes the proposed trust acquisitions on the grounds that taking the properties into trust somehow effects a transfer of title that permits the Tribe to “avoid[] its obligations under the [MOA],” including (according to the County) the requirement that the lands be preserved for wildlife purposes, that the County’s tax revenue be preserved through in lieu payments, *Id.* at 3, 8, and that in the absence of written consent to the trust acquisition from BPA, the United States cannot acquire valid title, *id.* at 9. The County also argues that BPA and BIA are “intentionally and systematically displacing non-Tribal members from within that portion of the [Tribe’s] Reservation in [the] County” in violation of Congressional policy as set forth in 42 U.S.C. § 4621(b) and the Civil Rights Acts of 1964 and 1968, 42 U.S.C. §§ 2000 *et seq.* and 3601 *et seq.*, respectively. *Id.* at 12. Finally, the County argues that the Tribe failed to explain in its application, and the Regional Director failed to consider, that the MOA constitutes “an encumbrance or infirmity” within the meaning of 25 C.F.R. § 151.13. *Id.* at 13.

In its reply brief, the County raises additional arguments. It contends that the Regional Director asserted that the Tribe has a “need” for the land for economic development, housing, and Tribal self-determination yet, pursuant to the MOA, the lands may not be used for any other purpose than a wildlife preserve in perpetuity. Reply Brief at 2. It further argues that the Regional Director did not consider or explain how the trust acquisition of the lands promotes the Tribe’s self-determination, and the failure to provide an explanation violates due process. *Id.* The County maintains that the wildlife preserve can be developed under state law without the land being in trust, and that there is no Tribal or government “need” present in having lands for a wildlife preserve.

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<sup>9</sup> The relevant subsections cited, 42 U.S.C. § 4332(c)(iv) & (v), direct Federal agencies to address, in every recommendation or report for legislation or major Federal action, factors “significantly affecting the quality of the human environment, . . . (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and ir retrievable commitments of resources which would be involved in the proposed action should it be implemented.”

The County reiterates its claim that the Regional Director did not consider that the lands' tax exempt status after they are taken into trust will be a "breach" of the MOA. *Id.* at 3-4. According to the County, the MOA's provision that the Tribe will comply with "applicable state law" includes the obligation to pay taxes on the lands.

The County claims that the Tribe's position on state and local taxation—that it is not liable and pays these taxes voluntarily—is a significant jurisdictional issue that the Regional Director did not consider. *Id.* at 4. The County argues that the Regional Director's Decisions are arbitrary in that he determined that the loss of one-half of one percent of the County's gross tax revenue would have a minimal impact and because he did not consider the County's status as "an extremely poor county with less than \$500 revenue [per] citizen." *Id.* at 5. It argues that the destruction of two large farms on the lands and the loss of their tax revenue and related economic activity "resonates through the community." *Id.*

The County's final argument, raised for the first time in its reply brief, is that the acquisition of lands belonging to non-Tribal individuals and then destroying these homes is a violation of the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.* *Id.* at 6-8. According to the County, the Tribe is engaging in "the practice of eliminating non-tribal housing," which it contends is a racially discriminatory policy. *Id.* at 6.

## Discussion

We affirm the Decisions to accept the two properties into trust. The Regional Director properly considered all of the relevant criteria as well as those arguments raised by the County in its comments to the Regional Director on the proposed acquisitions.

### I. Standard of Review

Our review of trust acquisition decisions is well-established:

Decisions of BIA officials on requests to take land into trust are discretionary, and the Board does not substitute its judgment for BIA's judgment in discretionary decisions. *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 that may be established in regulations. *Arizona State Land Department*, 43 IBIA at 160. Thus, proof that the Regional Director considered the requirements set forth in 25 C.F.R. § 151.11 (which incorporates the factors found in § 151.10) must appear in the record, but

there is no requirement that BIA reach a particular conclusion with respect to each factor. See *City of Yreka, California v. Pacific Regional Director*, 51 IBIA 287, 294 (2010), *jud. rev. pend'g sub nom. City of Yreka v. Salazar*, No. 2:10-CV-01734-WBS-EFB (E.D. Cal.).<sup>10</sup> Nor must the factors be weighed or balanced in a particular way or exhaustively analyzed. *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. Dep't. 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. *Aitkin County*, 47 IBIA at 104; *Arizona State Land Department*, 43 IBIA at 160; *Cass County*, 42 IBIA at 246; *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. *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. *Jackson County*, 47 IBIA at 227-28; *Arizona State Land Department*, 43 IBIA at 160; *Cass County*, 42 IBIA at 247. At all times, appellants bear the burden of proving that BIA's decision was in error or not supported by substantial evidence. *Arizona State Land Department*, 43 IBIA at 160; *Cass County*, 42 IBIA at 247.

*State of Kansas v. Acting Southern Plains Regional Director*, 53 IBIA 32, 35-36 (2011).

The scope of our review ordinarily is limited to those issues put before the Regional Director for his consideration, for which reason we generally decline to

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<sup>10</sup> On June 14, 2011, the district court affirmed the Board's decision. The matter is now pending on appeal before the U.S. Court of Appeals for the Ninth Circuit. *City of Yreka v. Salazar*, No. 11-16820 (9th Cir.).

consider arguments raised for the first time on appeal to the Board. 43 C.F.R. § 4.318; *Bunney v. Pacific Regional Director*, 49 IBIA 26, 31 (2009).

## II. Analysis

We have reviewed the record and find that the Regional Director gave due consideration to the requisite criteria identified in 25 C.F.R. § 151.10 and to the comments submitted to him by the County. Now, the County raises, for the most part, wholly new arguments that it could have but did not include in its comments before the Regional Director. We do not consider these new arguments as our role is not to substitute our judgment for the Regional Director's, but to ensure that he addressed the arguments that were presented to him and that he considered the requisite criteria of § 151.10. Because the County's remaining arguments do not show error in the Regional Director's Decisions, we affirm.<sup>11</sup>

### A. Need and Purpose for the Land — 25 C.F.R. § 151.10(b), (c)

We reject the arguments raised by the County in opposition to the Regional Director's consideration of the Tribe's need for the land. First, the County argues that the Tribe did not assert why it "needs" the land. We decline to consider this argument inasmuch as it is raised for the first time on appeal and it could have been raised in the County's comments to the Regional Director. We note, however, that the Tribe asserts that it purchased these properties for their conservation value, which "is a responsible and essential government function of the Tribe." Tribe's Answer Brief at 3.

Next, to the extent that the County argues that the Regional Director's reliance on the Tribe's 2009 Community Economic Development Strategy is misplaced, the statement underscores a misunderstanding of the Regional Director's discussion of the Tribe's need for the land. The Regional Director relied on this data to support the Tribe's *general* need for land for housing purposes and on another study to show the average income of Tribal members living on the reservation to support the Tribe's *general* need for land for economic development. The Regional Director specifically observed that recreational opportunities provided by the lands "facilitate[] tribal economic development." Decisions at 3 (Bader), 4 (Johnson). And the Regional Director expressly determined that the acquisition of the Johnson and Bader properties, which will be used for wildlife conservation purposes

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<sup>11</sup> The County does not contest the Regional Director's authority to take land into trust for the Tribe, *see* 25 C.F.R. §§ 151.3, 151.10(a), for which reason we do not discuss this criterion. We also do not discuss § 151.10(d), which applies only to trust acquisitions on behalf of individuals.

pursuant to the MOA, “facilitate[] tribal self-determination.” Decisions at 6 (Bader), 7 (Johnson); *see also* Tribe’s Answer Brief at 3 (These properties “were carefully chosen by the Tribe for fish and wildlife conservation purposes. The restoration and protection of land on the Tribe’s Reservation is a responsible and essential government function of the Tribe.”).<sup>12</sup> Therefore we affirm the Regional Director’s consideration of the Tribe’s need for the Johnson and Bader properties.

Turning now to the purpose for which these properties were acquired—the preservation of wildlife—we decline to consider the County’s argument that it is inconsistent with the MOA to have the subject properties taken into trust for the benefit of the Tribe because the MOA requires the properties to “be preserved as a wildlife preserve for the benefit of all persons.” SORs at 3. This argument was not raised before the Regional Director. Even assuming that it had been, we are compelled to observe that a “wildlife preserve” generally is established not for the benefit of persons, but for the benefit of wildlife. What the Tribe’s MOA provides is that the public shall have “*reasonable* access [to the properties]” that may be restricted or even barred if access or use “will result in adverse impacts to fish and wildlife, the reduction of habitat values, or the destruction of other natural resource values for which the [lands are] managed.” MOA, § 12 (emphasis added). We conclude that the County’s arguments as to the Tribe’s need and purpose for the lands are misplaced, and we affirm the Regional Director’s consideration of these two criteria.

#### B. Impact on Tax Rolls — 25 C.F.R. § 151.10(e)

The County argues that the Regional Director failed to consider 14 separate “factors” that it identifies in its statements of reasons to the Board. At best, the County only raised two of these “factors” in its comments to the Regional Director during the comment period that preceded his decisions to accept the properties into trust. Moreover, the County does not explain the relevance of most of these “factors” and several are predicated on data post-dating the Regional Director’s Decisions. We decline to consider those issues that could have been but were not raised for the Regional Director’s consideration. We further decline to consider those arguments predicated on post-decisional data as irrelevant to the Regional Director’s consideration.

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<sup>12</sup> Under the terms of the Conservation Easement, “all residential, commercial, or industrial uses of [the Bader and Johnson properties]” are prohibited except as may be allowed in the property management plan. *See* Regional Director’s Answer Brief, Ex. A at 3, § IV. Thus, to the extent that a property management plan may be developed at some future date to permit these additional uses, the acquisition in trust of the subject properties would help meet the Tribe’s needs for housing and economic development.

The two factors that the County did ask the Regional Director to consider were (1) the cumulative impact on the tax rolls from the number of fee-to-trust applications that the Tribe has submitted and (2) the Tribe's financial ability to continue paying property taxes. Although the Regional Director did not address these two issues in either of his decisions, we conclude as a matter of law that he was not compelled to do so.

With respect to the County's cumulative impact argument, nothing in § 465 or in 25 C.F.R. Part 151 requires the Regional Director to conduct such an analysis. *See State of Kansas*, 53 IBIA at 37. Rather, the Regional Director is required to consider the "removal of *the* land from the tax rolls," 25 C.F.R. § 151.10(e) (emphasis added), which commands only that BIA consider the impact that the land that is the subject of the decision has on the tax revenues of state and local jurisdictions. And even if he were to conduct a "cumulative impact" analysis, the County has not provided any information to the Regional Director that shows a significant impact. In essence, the County argues that it would still be required to provide the same services that it presently provides, but with less revenue. The County simply does not provide any evidence to show that the loss of tax revenue from the proposed trust acquisitions will result in a significant revenue shortfall or will cause the elimination of any programs, or even the reduction of any services. In short, the County does not demonstrate that the loss of revenue cannot be absorbed and, instead, asks that BIA assume that any loss of tax revenue will *ipso facto* impair or disrupt County services. We decline to require BIA to engage in such speculation. And, the fact that these two properties may have been part of a larger group of fee-to-trust applications submitted to BIA by the Tribe does not compel a cumulative impact analysis to be made of the entire group of properties when only two are actively considered at one time. Here, the combined property tax liability for the two properties, as computed by the Regional Director, was \$18,569.24 in 2009, which was just under 0.39% of the County's \$4.8 million budget for 2006.<sup>13</sup> The Regional Director did not consider the separate tax amounts of these two parcels to be "a significant amount of [the] total tax revenues of [the] County," Decisions at 6 (Bader), 7 (Johnson),<sup>14</sup> and we previously have characterized a fraction of one percent

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<sup>13</sup> The Regional Director's Decisions recited the County's total tax revenue as "approximately \$4.8 million," Decisions at 6 (Bader), 7 (Johnson), but the County reported its total revenue in 2006 to be \$4.7 million, County's Comments. The County did not provide its revenue for any years after 2006.

<sup>14</sup> In fact, the Regional Director inadvertently doubled the amount of tax revenue from the Johnson property. Therefore, the actual combined tax loss for the County was \$14,651.04 in 2009 (0.31% of the County's \$4.7 million total revenue in 2006), instead of \$18,569.24 (0.39% of the County's 2006 total revenue), and slightly less than the Regional Director had calculated.

impact on local revenues as “minimal.” See *South Dakota*, 39 IBIA at 297; see also *Roberts County, South Dakota v. Acting Great Plains Regional Director*, 51 IBIA 35, 52 n.13 (2009), *aff’d sub nom. State of South Dakota v. U.S. Department of the Interior*, 775 F. Supp. 2d 1129 (D.S.D.), *appeal dismissed*, 665 F.3d 986 (8th Cir. 2012).

As for the Tribe’s alleged wealth or ability to pay assessed taxes, nothing in 25 C.F.R. Part 151 requires the Regional Director to consider whether the Tribe can afford to pay the taxes. The Tribe’s financial security or economic success simply is not a relevant consideration. See *County of Sauk*, 45 IBIA at 210; *South Dakota*, 39 IBIA at 290-91, *aff’d*, 401 F. Supp. 2d at 1007; *County of Mille Lacs v. Midwest Regional Director*, 37 IBIA 169, 173 (2002). Rather, the focus, for purposes of the impact on local tax rolls under § 151.10(e), is on the adverse consequences, if any, to the jurisdiction that will lose the revenue that would otherwise accrue from the parcels if they remained in fee status.<sup>15</sup>

#### C. Jurisdictional Issues and BIA’s Ability to Discharge New Responsibilities — 25 C.F.R. § 151.10(f) & (g)

At the outset, we note that the County did not submit any concerns to the Regional Director regarding jurisdictional issues or BIA’s ability to discharge any new responsibilities that may be occasioned by accepting the land into trust. These issues are now raised for the first time on appeal to the Board when they should have been raised in the County’s comments to the Regional Director *prior* to his decisions so that he could consider them in the first instance. The County did not do so, and we see no reason to depart from our well-established precedent of declining to consider such issues for the first time on appeal.

#### D. Environmental Issues — 25 C.F.R. § 151.10(h)

The County argues that BIA was required to prepare an EIS instead of designating the Bader and Johnson properties as categorically excluded from NEPA’s requirements. A categorical exclusion applies to “conveyances and other transfers of interests in land where no change of land use is planned.” 516 DM § 10.5(I).<sup>16</sup> The County maintains that taking these properties into trust is “creating large areas of lands not properly maintained” to

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<sup>15</sup> The County argues that the Tribe or the United States will remain obligated, as a condition of the MOA, to continue to pay property taxes after the properties are taken into trust. We see nothing in the MOA that imposes any such duty. Moreover, the transfer of title from the Tribe to the United States does not effect a transfer of tax liability. See 25 C.F.R. § 1.4(a).

<sup>16</sup> The “DM” is the Department’s “Departmental Manual.” A copy of § 10.5 has been added to the record of this appeal.

mitigate fire danger. SORs at 11. The County fails to explain how the act of accepting the two properties into trust effects any change whatsoever in fire mitigation measures.

The County also argues that an EIS is required to address whether certain “joint actions” of BPA and BIA “will result in the irreversible commitment of resources and the elimination of the long term productivity of the subject lands.” *Id.* Again, the County fails to identify these so-called “joint actions” and the “resources” that may be “irreversibly committed.” As to the elimination of “long term productivity,” we presume that the County refers to former residential and farming uses of the properties, which apparently ceased when the lands were purchased by the Tribe over 10 years ago.<sup>17</sup> In determining whether the environment will be affected by altering the title status of the lands, we look to whether the Tribe has plans or intends to alter the *present* use of the land. Here, it is undisputed that the lands have been set aside as a wildlife preserve since their purchase by the Tribe and pursuant to the terms of the MOA. The record does not contain a property management plan, which suggests that one has not been drafted and therefore the present use of the properties as a wildlife preserve is not anticipated to change. Therefore, we affirm the Regional Director’s determination that the lands are categorically excluded from consideration under NEPA.

#### E. Other Issues

The County’s remaining arguments (including but not limited to claims that the trust acquisition somehow violates the Civil Rights Act, the Fair Housing Act, and is intended to avoid the Tribe’s responsibilities under the MOA) not only were not raised before the Regional Director for his consideration, but are not required to be considered under 25 C.F.R. Part 151. Therefore, and assuming that the County has standing to raise these claims, we decline to consider them for the first time on appeal to the Board.

### Conclusion

Because the Regional Director gave consideration to the appropriate criteria of 25 C.F.R. Part 151 and to the arguments that were before him in connection with the Tribe’s fee-to-trust applications for the Johnson and Bader properties, we affirm his Decisions to accept these properties into trust.

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<sup>17</sup> According to the Environmental Site Assessments prepared in 2001 for the Tribe’s purchase of the Johnson and Bader properties, the Johnson property was uninhabited and sold to the Tribe by the estate of its last owner. Tribe’s Answer Brief at Ex. B. The Bader property had “one single tenant” who was provided relocation assistance. *Id.* at 15.

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 May 27, 2010, Decisions of the Regional Director to accept the Johnson and Bader properties into trust for the Tribe.

I concur:

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// original signed  
Debora G. Luther  
Administrative Judge

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//original signed  
Steven K. Linscheid  
Chief Administrative Judge