



INTERIOR BOARD OF INDIAN APPEALS

Thurston County, Nebraska v. Acting Great Plains Regional Director,
Bureau of Indian Affairs

56 IBIA 62 (12/18/2012)

Related Board case:
56 IBIA 296



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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THURSTON COUNTY, NEBRASKA,)	Order Affirming in Part, Vacating in
Appellant,)	Part, and Remanding
)	
v.)	
)	
ACTING GREAT PLAINS REGIONAL)	Docket No. IBIA 11-031
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	December 18, 2012

Thurston County, Nebraska (County), seeks review by the Board of Indian Appeals (Board) of a September 7, 2010, decision (2010 Decision) by the Acting Regional Director (Regional Director) of the Great Plains Regional Office, Bureau of Indian Affairs (BIA). The Regional Director affirmed the April 27, 2009, decision (2009 Decision) of BIA’s Winnebago Agency Superintendent (Superintendent) to acquire in trust approximately 162.5 acres of land referred to as the “Scott I tract” in Thurston County, Nebraska, for the Winnebago Tribe of Nebraska (Tribe).¹ We affirm the Regional Director’s decision except as to the Regional Director’s consideration of whether the proposed trust acquisition qualifies for a categorical exclusion (Cat Ex) under the National Environmental Policy Act (NEPA). The Regional Director’s reliance on a Cat Ex is not supported by the record because the scope and nature of the intended uses, and their relation to existing uses, are unclear.

Factual and Procedural Background

On June 1, 1994, the Tribe requested that BIA accept a transfer to trust status of the Scott I tract, which the Tribe owns in fee. *See* Administrative Record (AR) Tab 25.²

¹ The Regional Director’s 2010 Decision describes the location of the Scott I tract as Government Lot 3, NE¹/₄SE¹/₄, SW¹/₄NE¹/₄, SE¹/₄NW¹/₄, Section 2, Township 26 North, Range 9 East, Sixth P.M., Thurston County, Nebraska.

² Apparently, the application for the Scott I tract was part of a group of fee-to-trust applications submitted by the Tribe to BIA. The record in this case is unclear as to whether there were a total of six, seven or nine fee-to-trust applications of which the Scott I tract

(continued...)

During BIA's lengthy consideration of the Tribe's request, the Superintendent issued three decisions to accept the property into trust, two of which were remanded by the Regional Director. The Regional Director affirmed the Superintendent's third decision (the 2009 Decision) to take the Scott I tract into trust, and it is the Regional Director's 2010 Decision that is now before the Board. However, the background for our decision begins with the Regional Director's consideration of the County's appeal from the Superintendent's second decision to take the Scott I tract into trust.

On September 11, 2008, when the Regional Director had the Superintendent's second decision before her on appeal, the Regional Director solicited comments on the proposed acquisition from, *inter alia*, the County. AR Tab 17. In this notice, she cited the appropriate regulation, 25 C.F.R. Part 151, and requested information concerning the current annual taxes and special assessments levied on the Scott I tract, governmental services provided to the property, and current zoning of the property. The record does not contain any responses to the Regional Director's solicitation of comments. Notwithstanding the absence of comments, the Regional Director vacated the Superintendent's 2008 decision and remanded the matter for further consideration. Memorandum from Regional Director to Superintendent, Mar. 12, 2009 (2009 Memorandum) (AR Tab 16).

In her 2009 Memorandum, the Regional Director stated that the Superintendent "will be required to issue new 30 day notices and a new decision." *Id.* Nothing in the record suggests that the County was aware of this instruction until it received a copy of the administrative record for the instant appeal to the Board.³ On remand, the Superintendent again decided to take the Scott I tract into trust, *see* Superintendent's 2009 Decision, but did not issue a new 30-day notice to the County. Again, the County appealed to the Regional Director.

On September 7, 2010, the Regional Director affirmed the Superintendent's 2009 Decision to accept the Scott I tract into trust. Regional Director's 2010 Decision (AR Tab 5). The Regional Director cited the Indian Reorganization Act (IRA), 25 U.S.C.

(...continued)

application was one. *See* AR Tabs 5, 8, and 9. But the Board notes that the Regional Director subsequently approved six additional trust applications, and the County has appealed these decisions to the Board where they remain pending. *See* Docket Nos. IBIA 11-084 through 11-087 and IBIA 11-095 through 11-096.

³ The 2009 Memorandum was not served on the County nor was it included in the record provided to the Regional Director for the County's appeal from the Superintendent's 2009 Decision.

§ 465, as legal authority for the trust acquisition. She stated that the Tribe's need for the land is to promote self-sufficiency, self-government, and self-determination. She declared that the Tribe seeks to increase tribal revenue "through leasing and forestry development." *Id.* at 2. In addition, she asserted that taking the land into trust will "aid in the Tribe's land consolidation efforts," and may qualify the Tribe for additional Federal funding. *Id.*

Also in her 2010 Decision, the Regional Director stated that the "primary use" of the Scott I tract "will remain as timber and nature preservation and to be used for Tribal hunting and recreational purposes as well as for re-forestation and cultural usage." *Id.* at 3. She also referred to the use of the land to support the "[T]ribal agricultural leasing program and other [T]ribal social services programs." *Id.* at 5. Still elsewhere in her 2010 Decision, the Regional Director stated that the Tribe can "continue to use the lands for pastureland, timberland, or as a wildlife habitat." *Id.* at 8.

With respect to the total loss of annual real estate tax, the Regional Director determined that the loss will be less than 0.03% of the County's total budget for 2009,⁴ which she found to be "not a significant amount." *Id.* at 3, 11. Any loss, she declared, would be offset by BIA and the Tribe providing a majority of the services that the County would otherwise provide.⁵ She points out that any services the County provides that require fees to be paid by individuals will continue to apply to both Indians and non-Indians if the land is placed in trust. *Id.* at 11. She stated that BIA is not required to evaluate the cumulative impact of all of the Tribe's fee-to-trust applications, only the impact of the individual application. The Regional Director saw no potential conflicts in land use because the Scott I tract is undeveloped (agricultural) and because the land will be subject to tribal ordinances once it is taken into trust. *Id.* at 5. She discussed at length how services would be provided in the wake of taking the Scott I tract into trust, including law enforcement, health, fire protection, roads, land titles, and housing. She determined that BIA will be able to discharge its duties as steward for the land. *Id.* at 5-6.

Finally, in evaluating the environmental consequences of taking the land into trust, the Regional Director found that the two Phase I Environmental Site Assessments (ESAs)

⁴ The Regional Director stated that the "current" tax revenue from the Scott I tract was \$2284.52, which the Regional Director stated was "less than" 0.03% of the County's \$6,178,218.25 total real estate tax collection in 2009. It is less than 0.04% of the County's collected revenue (2284.52 divided by 6,178,218.25 equals 0.00036977, which is more than 0.03% and less than 0.04%).

⁵ These services include BIA/Tribal law enforcement, social services, civil and criminal proceedings, civil defense, road maintenance, housing, medical and emergency services, and fire protection services.

for the Property yielded no recognized environmental conditions of concern. *Id.* at 21. She declared that a Cat Ex had been approved in 2006 and updated in 2009, thus satisfying NEPA. *Id.*; see AR Tabs 10 (2009), 40 (2006). The Cat Ex approval documents referred to by the Regional Director are checklists for determining whether an exception to a Cat Ex applies. Both checklists identify “516 DM 10.5(D)” as the applicable Cat Ex for the decision to take the Scott I tract into trust. This particular provision, 10.5(D), excludes from NEPA’s consideration “Administrative Actions and Other Activities Relating to Trust Resources [including, e.g., m]anagement of trust funds (collection and distribution), budget, finance, estate planning, wills and appraisals.” The checklists themselves reflect that no *exceptions* to the Cat Ex apply, but neither checklist contains any findings by BIA that explain how it was determined that 10.5(D), by its terms, applied to the taking of the Scott I tract into trust.⁶

The County appealed the Regional Director’s 2010 Decision to the Board. The County submitted an opening brief as well as a reply brief in response to the answer briefs filed by the Regional Director and the Tribe.

Discussion

We affirm the Regional Director’s 2010 Decision as to her consideration of the requisite criteria in 25 C.F.R. § 151.10. However, we vacate and remand that portion of her decision in which she concludes that a Cat Ex applies to taking the Scott I tract into trust. The Regional Director admittedly relied on an incorrect Cat Ex, and neither her answer brief nor the record provides any explanation or findings to support any Cat Ex, let alone the no-change-in-use Cat Ex that she asserts she meant to identify.

I. Standard of Review

The standard of review in trust acquisition cases is well established. Decisions of BIA officials 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 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*

⁶ In addition to the Cat Ex documents, the Phase I-ESAs also were completed by BIA in 2006 and updated in 2009. Regional Director’s 2010 Decision Letter at 7.

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*, 2008 WL 2225680, No. 07-cv-543-bbc (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. Department 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.

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.

Ordinarily, our review is limited to those issues raised on appeal to the Regional Director. *See* 43 C.F.R. § 4.318; *Jackson County*, 47 IBIA at 228; *Aitkin County*, 47 IBIA at 106 n.5.

II. Constitutional Arguments

The County raises several arguments challenging the constitutionality of the IRA, 25 U.S.C. § 465, on which the Regional Director relied as the source of her authority to take the Scott I tract into trust. The Board consistently has held that it lacks authority to declare an act of Congress to be unconstitutional, and therefore we do not address the various constitutional challenges raised by the County. *See, e.g., Jackson County*, 47 IBIA 230; *State of South Dakota*, 39 IBIA at 288-89.

III. Procedural Issues

a. Notice

1. The County's notice argument is not waived on appeal.

The County contends that, following the Regional Director's remand of the Superintendent's 2008 Decision, the Superintendent was required, but failed, to issue new 30-day notices for comments before issuing her 2009 Decision to take the Scott I tract into trust. The Regional Director and the Tribe argue that the County waived this argument when it failed to raise it in the County's appeal of the Superintendent's 2009 Decision. We disagree with the Regional Director and the Tribe because there is no showing that the County had actual notice of the Regional Director's 2009 Memorandum until it received the record in its appeal to the Board: No copy of the Regional Director's 2009 Memorandum was served on the County, nor did the Superintendent include the 2009 Memorandum in the record that she provided to the Regional Director. And neither the Tribe nor the Regional Director explain how the County was to have known of the Regional Director's instruction at the time of the County's appeal to the Regional Director from the Superintendent's 2009 Decision. Thus, it appears that the County had no actual knowledge of the Regional Director's instructions to the Superintendent until it obtained or reviewed the record prepared for the present appeal to the Board. Therefore, we conclude that the County did not waive its opportunity to challenge the Superintendent's failure to give it notice and an opportunity to submit new or updated comments on the acquisition application following the Regional Director's 2009 Memorandum.

2. Necessity of 30-day notice Following the Regional Director's 2009 Memorandum

The County argues without support that reversible error occurred upon the failure of the Superintendent provide a new 30-day notice and an opportunity to comment, as instructed by the Regional Director's 2009 Memorandum. We conclude that the Superintendent's failure is harmless for several reasons: First, the County does not explain how it has been injured by the Superintendent's failure to send out another 30-day notice, nor does it proffer any additional comments it would have offered if it had been provided the opportunity to submit them. Second, the Regional Director solicited comments from the County on the proposed acquisition just 7 months previous, *see* AR Tab 17, to which the County apparently did not respond. Thus, whether the Superintendent should have given the County yet another opportunity to submit comments, the County nevertheless did receive some opportunity to provide comments before the Superintendent issued her 2009 Decision. And we note that the County submitted detailed comments in its appeal to the Regional Director from the Superintendent's 2009 Decision, which were considered by

the Regional Director. Finally, it is arguably incumbent on the County, which was informed of the remand by the Regional Director, *see* AR Tab 15, to advise the Superintendent of any updated information it wished to submit. *See Rio Arriba, New Mexico, Board of County Commissioners v. Acting Southwest Regional Director*, 36 IBIA 14, 24 (2001).⁷

Viewing the record as a whole, the County was provided a sufficient opportunity to present comments and evidence for BIA to consider. Additionally, the County made substantive arguments on appeal to the Regional Director, which she considered. Therefore, we reject the County's contention that the Regional Director's 2010 Decision must be vacated on these grounds.

3. The content of BIA's 30-day notices was sufficient.

The County argues that the 30-day notices it did receive did not clearly state the "right to address the[] 'potential impacts' including 'impacts on regulatory jurisdiction,'" which, it argues, violates 25 C.F.R. § 151.10. Reply Br. at 12-13; *see also* 30-day Notice (AR Tab 32). The County failed to raise this argument before the Regional Director, for which reason we decline to consider it on appeal. *See* 43 C.F.R. § 4.218; *Jackson County*, 47 IBIA at 228.⁸

b. Correct Legal Description

1. The County lacks standing to challenge title evidence.

The County contends that because the Commitment for Title Insurance did not have an exhibit attached to it containing a correct legal description of the Property, "the Regional Director failed to ensure that all required steps outlined in the . . . 2009 Memorandum were completed," and the Board must reverse the Regional Director's 2010 Decision. Opening Br. at 8. We disagree. The County fails to show how there is any injury to it as a result of the sufficiency or insufficiency of the title commitment in the record. The purpose of obtaining a title policy is to insure that the Tribe has marketable

⁷ Since the County was not informed that the Superintendent was to provide it with another opportunity to comment, *see* 2009 Memorandum, the County cannot argue that it was waiting for the Superintendent to solicit its comments..

⁸ If we were to consider the argument, we would conclude that the notices provided by BIA provided adequate information to the County. In addition, the County does not argue that it was misled in any way by the notices it received, nor does it identify any arguments it would have made if it had received the notices it claimed to be entitled to receive.

title free of liens, encumbrances, or other infirmities, 25 C.F.R. § 151.13, and is for the benefit and protection of the United States, not the County.⁹

Therefore we reject, on standing grounds, the County's contention that the Regional Director's 2010 Decision must be vacated based on an erroneous legal description in the Commitment for Title Insurance. As the Regional Director explained, the Tribe would be required to purchase a final Title Insurance Policy as the last step in the fee-to-trust acquisition process. Regional Director's 2010 Decision at 8.

2. The legal description of the property has not misled the parties.

The County argues that it never received a 30-day notice letter with the correct legal description of the Scott I tract, which it claims is reversible error. Opening Br. at 9. The County contends that an earlier notice from the Superintendent (in 2007) included an additional quarter-quarter section (the northeast quarter of the northwest quarter of Section 2) that the Regional Director's 2010 Decision omitted. The Board declines to consider this argument as the County raises it for the first time on appeal, and could have raised the issue on appeal to the Regional Director. *See* 43 C.F.R. § 4.218; *Jackson County*, 47 IBIA at 228. However, we note that the Superintendent's 2009 Decision and the Regional Director's 2010 Decision both relied upon the same legal description and that the County recited the correct legal description for the Scott I tract in its appeal from the Superintendent's 2009 Decision. Therefore, any error in the legal description appears to have been harmless.

IV. Regional Director's Consideration of the Criteria of 25 C.F.R. § 151.10

The County contends that the Regional Director abused her discretion when she failed to properly analyze the criteria found in 25 C.F.R. § 151.10. We disagree. The Regional Director need only take these criteria into consideration in her decision. No single factor is determinative of the outcome, and BIA's decision should be reasonable in its overall analysis of the factors. *Town of Charlestown, Rhode Island v. Eastern Area Director*,

⁹ The sufficiency of title insurance is not one of the criteria found in 25 C.F.R. § 151.10 that the Regional Director must consider or weigh in making a decision to take land into trust. As we note *infra* at n.16, the County has standing to challenge the Regional Director's consideration of the criteria in § 151.10. However, § 151.13 is independent of § 151.10 and sets forth a discrete requirement that arises *after* a decision is made to take land into trust. *Ziebach County, South Dakota v. Acting Great Plains Regional Director*, 38 IBIA 227, 232 (2002); *Avoyelles Parish, Louisiana, Police Jury v. Eastern Area Director*, 34 IBIA 149, 153-54 (1999).

18 IBIA 67, 72 (1989). However, we reverse the Regional Director’s NEPA review because we find her reliance on a Cat Ex to be unsupported by the record and her brief. In particular, we find no discussion of the present use(s) of the Scott I tract as contrasted with the intended use(s) of the land for purposes of determining the applicability of a Cat Ex.

a. Trust Acquisition Criteria

In evaluating tribal requests to acquire land in trust that is located within or contiguous to an Indian reservation, BIA must consider the criteria set forth at 25 C.F.R. § 151.10(a)-(c) and (e)-(h).¹⁰ 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 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.

b. Statutory Authority - 25 C.F.R. § 151.10 (a)

The Regional Director determined that she is authorized by the IRA, 25 U.S.C. § 465, to accept land into trust status on behalf of the Tribe. The County contends that the Regional Director was required by *Carcieri* to analyze whether the Tribe was “under federal jurisdiction” in 1934, before taking land into trust. *See Carcieri v. Salazar*, 555 U.S. 379 (2009). The County further argues that the Tribe was not under Federal jurisdiction in 1934 and, therefore, BIA may not take land into trust for the Tribe under the IRA. Opening Br. at 4.

¹⁰ Subsection 151.10(d) is not relevant as it only applies to trust acquisitions for individuals.

The County's arguments are raised for the first time in its appeal to the Board, for which reason we decline to consider them. The Supreme Court's decision in *Carcieri* is dated February 24, 2009. The Superintendent's last decision concerning the Tribe's fee-to-trust application is dated April 27, 2009, over 2 months after the decision in *Carcieri*. The Regional Director did not issue her 2010 Decision until September 7, 2010, more than 18 months after *Carcieri*. Not only did the County fail to mention *Carcieri* in its notice of appeal or its statement of reasons before the Regional Director, the County did not seek to supplement its arguments to add any *Carcieri* issues at any time during the 16 months that its appeal was pending before the Regional Director. Moreover, we find no manifest error in the Regional Director's determination that the IRA provides authority for this trust acquisition.¹¹ See 43 C.F.R. § 4.318 (the Board may exercise the inherent authority of the Secretary of the Interior to correct manifest error). Therefore, the Board declines to consider this argument for the first time on appeal.

c. Need for the Land - 25 C.F.R. § 151.10 (b)

The Regional Director affirmed the Superintendent's determination that the Tribe's need for the land is to "assist the Tribe in promoting self-government, self-sufficiency[,] and self-determination." 2010 Decision at 2. She determined that the acquisition of the Scott I tract would promote economic growth on the Tribe's reservation with the resulting income

¹¹ We note that the Secretary of the Interior (Secretary) held an election in 1934 to allow the Tribe's members to vote on whether to reject the application of the IRA to the Tribe. See *Ten Years of Tribal Government Under I.R.A.*, United States Indian Service, 1947, at 17 (a copy has been added to the record in this appeal; it can also be located on the Internet at <http://www.doi.gov/library/internet/subject/upload/Haas-TenYears.pdf> and thorpe.ou.edu/IRA/IRAbook/index.html). By including the Tribe among those tribes for which such elections were conducted, the Secretary determined that the Tribe was under Federal jurisdiction at that time. See *Shawano County, Wisconsin v. Acting Midwest Regional Director*, 53 IBIA 62, 63, 71 (2011). Notwithstanding the County's argument to the contrary, we need look no further to determine that the Tribe is eligible to have land taken into trust pursuant to § 465. *Id.*

Additionally, the County argues that an unpublished order we entered in *Preservation of Los Olivos v. Pacific Regional Director (POLO)*, Docket No. IBIA 05-050-1, requires us to remand this issue to BIA to consider *Carcieri*. See Order of May 17, 2010 (vacating decision in part and remanding in part). However, in *POLO*, the Regional Director was ordered by the Assistant Secretary - Indian Affairs to request a voluntary remand of the decision in order to consider *Carcieri*, and the Board granted the Regional Director's request for remand. No such situation exists here, and a remand to consider *Carcieri* is not necessary.

to the Tribe being used for various Tribal programs. She also noted that the trust acquisition would aid the Tribe's land consolidation objectives and that trust status could lead to additional Federal funding that is not available for Tribal fee lands.

The County contends that, when pressed, the Regional Director conceded that the tax savings was the Tribe's true "need" for seeking trust status for the land and, as such, an insufficient statement of "need." Opening Br. at 22-23. The County then cites a BIA handbook as stating that tax savings is not a sufficient justification for a tribe's need for additional land.¹² The County mischaracterizes the Regional Director's 2010 Decision.

The Regional Director's 2010 Decision consists of two parts. The first part, at pages 2-7, consists of the Regional Director's review of the Superintendent's 2009 Decision to accept the Scott I tract into trust; the second part, at pages 8-21, consists of the Regional Director's responses to the specific arguments raised by the County in its appeal from the Superintendent's 2009 Decision. With respect to the Tribe's need for the land, the County had argued that "[b]ecause the . . . Tribe already owns this property, there is no self-sufficiency to be gained by placing the land into trust." County's Statement of Reasons to the Regional Director, June 12, 2009, at 1 (AR Tab 13). In responding to this specific argument, the Regional Director asserted that she had already addressed "the 'need of . . . the Tribe for additional land,'" i.e., on page 2 of her 2010 Decision. 2010 Decision at 8. She then *added* that the tax savings resulting from trust status "can be redirected towards program funding to meet other [Tribal] needs." *Id.*

We find no fault with the Regional Director's analysis. She did not rest her decision exclusively on the tax savings to be derived from taking the land into trust, but appropriately considered that the acquisition would promote self-government, self-sufficiency, and self-determination. It cannot reasonably be disputed that removal of Tribally-owned fee land from local jurisdiction enhances these objectives because doing so reduces state and local jurisdiction over the property and increases the Tribe's jurisdiction.

¹² The County cites, but fails to attach a copy of, a BIA handbook that purportedly asserts that "[r]emoving land from taxable status is not a sufficient justification for need." Opening Br. at 21 (citing Acquisition of Title to Land Held in Fee or Restricted Fee, U.S. Dept. of Interior, BIA (May 20, 2008)). The Board is not part of BIA, *see In re Shingle Springs Band of Miwok Indians*, 54 IBIA 339, 340 (2012), and does not have ready access to documents that may be in BIA's possession. Any party that wishes to have the Board consider such documents, or arguments based on such documents, must provide a copy of the documents to the Board and to the parties on the distribution list.

The County also argues that the Regional Director failed to identify how the Tribe might qualify for additional Federal funding if the land were held in trust. Opening Br. at 23. Nothing in § 151.10 requires the Regional Director to provide such detailed information in her decision, although the Regional Director should have explained in her answer brief what she meant by this observation, which she did not. But, even if we were inclined to find this particular basis for the Regional Director's 2010 Decision to be inadequately supported, the Regional Director asserted other reasons for finding that the Tribe's need for the land was met and therefore we decline to vacate the 2010 Decision on this basis.

The County also argues that the Tribe already has a sufficient amount of acreage in trust for its tribal members and thus does not "need" additional land held in trust. And the County argues that because the Superintendent "confirm[ed]" that the property is wooded pastureland and this property will remain as pastureland or as wildlife habitat, there is no "need" for the land to be held in trust. Opening Br. at 23. These arguments were not raised before the Regional Director, for which reason we decline to consider them now. *See* 43 C.F.R. § 4.318; *Jackson County*, 47 IBIA at 228.

BIA has broad discretion in its interpretation of tribal need for the land at issue. *Aitkin County*, 47 IBIA at 108. The County has not shown that BIA improperly exercised that discretion here. Therefore, we affirm the Regional Director's consideration of the Tribe's need for the land.

d. Tribe's Purpose for the Land – 25 C.F.R. § 151.10(c)

The County does not argue that the Regional Director did not adequately consider the purposes for which the land will be used. Instead, the County's arguments regarding the intended purposes are raised in the context of its arguments concerning the Tribe's need for the land (25 C.F.R. § 151.10(b))—because the Tribe "already utilizes" the Scott I tract for certain uses identified by BIA, it is unclear why the land needs to be in trust, except for tax purposes. Opening Br. at 23; *see also* Reply Br. at 16 ("the [Regional Director] stated that the Tribe's purpose for the property 'will remain as timber and nature preservation,'" the Superintendent stated that the Scott I tract is "wooded pastureland and . . . will remain pastureland or as a wildlife habitat," and "[b]ecause the Tribe already . . . utilizes the property for these uses, it is unclear why the land would be needed in trust, other than solely for the tax savings.").

e. Impact on State and Local Tax Rolls - 25 C.F.R. § 151.10(e)

The Regional Director agreed with the Superintendent that the effect of taking the Scott I tract into trust would impact the County by reducing overall tax revenue by

0.03%.¹³ The Regional Director was not persuaded that the impact resulting from this reduction was significant. She rejected the County's contention that she must consider the cumulative impact of taking the Scott I tract into trust along with the additional proposed fee-to-trust acquisitions that were submitted by the Tribe at the same time as the Scott I tract or that she must consider the cumulative impact of taking the Scott I tract into trust on top of the additional properties that BIA has taken into trust for the Tribe in the past.¹⁴ In response, the Regional Director explained that the only decision before her was the Superintendent's decision to take the Scott I tract into trust. She also determined that those County services that require up-front fees, e.g., licensing and titling for vehicles and recording of documents, will still be required of both Indians and non-Indians. Finally, she determined that once the Scott I tract is taken into trust, the Tribe and BIA will provide services to the property, including law enforcement, health services, emergency medical assistance, fire suppression, roads, and real estate services.

Before the Board, the County continues to argue that the Regional Director was required to consider the cumulative impact of taking into trust all lands in the pending fee-to-trust applications and not consider the Scott I tract alone. In *Roberts County, South Dakota v. Acting Great Plains Regional Director*, 51 IBIA 35, 51 and n.13 (2009), the Board stated that BIA's failure to consider collective tax impact of simultaneous trust *acquisitions* could constitute a failure to properly exercise its discretion. However, while the Tribe apparently submitted simultaneous *applications* to have additional properties taken into trust along with the Scott I tract, the Regional Director decided the application for the Scott I tract ahead of and separately from the others. BIA is required to consider the impact resulting from a BIA decision to take property into trust; applications on file have no impact on tax rolls, nor do they constitute BIA action. Therefore, BIA need not consider the cumulative impact of all of the pending fee-to-trust applications.

f. Jurisdictional Issues - 25 C.F.R. § 151.10 (f)

The County disagrees with the Regional Director's consideration of various jurisdictional concerns but does not otherwise show that the Regional Director failed to consider the County's concerns or somehow abused her discretion in her consideration of § 151.10(f). See Opening Br. at 29-32. The County argues that it, rather than BIA or the Tribe, will have the primary responsibility for and will be the primary provider of law enforcement and related services. This argument is part of the County's larger argument

¹³ As noted *supra* at n.4, the Regional Director mischaracterized the reduction as "less than" 0.03%, when the actual effect is 0.036977%, or less than 0.04%.

¹⁴ See, e.g., *Thurston County Board of Supervisors v. Aberdeen Area Director*, 34 IBIA 249 (2000); *Thurston County Board of Supervisors v. Aberdeen Area Director*, 33 IBIA 154 (1999).

that the acquisition in trust of the Scott I tract will somehow exacerbate the existing checkerboard jurisdiction that exists county-wide between trust and fee parcels. The Regional Director addressed the checkerboard jurisdiction in detail in her 2010 Decision and concluded that “[o]ne piece of property [taken into trust] will not further affect the jurisdictional problem that already exists.” 2010 Decision at 15. “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.” *State of South Dakota*, 49 IBIA at 108; *Arizona State Land Department*, 43 IBIA at 173. To the extent that the County maintains that the Regional Director failed to consider the theoretical cumulative “impact” of the existing jurisdictional issues, by considering past and pending trust acquisitions, this issue was not raised before the Regional Director and we see no reason to depart from our practice of not considering new issues for the first time on appeal.¹⁵

Finally, the County contends that the Regional Director did not consider the conflict that would result from two (or three, including BIA) jurisdictions wrestling to provide services to the same parcel. To the contrary, the Regional Director responded in detail, addressing law enforcement services, health services, fire services, roads, title recording services, and housing. In particular, the Regional Director observed that, as to land use, jurisdiction would transfer from the County to the Tribe. We find no fault with the Regional Director’s consideration of jurisdictional issues and observe that the County simply disagrees with the Regional Director’s consideration of these issues.

g. BIA’s Ability to Assume Duties for Land – 25 C.F.R. § 151.10(g)

The County contends that the Regional Director could not accurately analyze whether BIA could take on additional responsibilities. Opening Br. at 32. This issue was

¹⁵ The County also argues that the Regional Director should have considered the potential for gaming even though the Tribe did not mention any intention of gaming on the Scott I tract. Opening Br. at 31. The County also failed to raise this concern before the Regional Director, for which reason we do not consider it. However, we have held previously that mere speculation that gaming may occur at some future time does not require BIA to consider gaming as a possible use of land being considered for trust acquisition. *City of Yreka, California v. Pacific Regional Director, Bureau of Indian Affairs*, 51 IBIA 287, 297 (2010), *aff’d sub nom.*, *City of Yreka v. Salazar*, 2011 WL 2433660, CIV 2:10-1734 WBS (E.D. Cal. June 14, 2011), *appeal docketed*, No. 11-16820 (9th Cir.).

not raised before the Regional Director, and we therefore decline to consider it for the first time on appeal.¹⁶

h. Environmental Compliance - 25 C.F.R. § 151.10 (h); NEPA Consideration

The Regional Director considered the extent to which the Tribe provided information allowing the Secretary to comply with NEPA and 602 DM 2. In her consideration of NEPA's requirements, the Regional Director determined that the Phase I ESA for the Scott I tract showed no recognized environmental conditions of concern, and satisfied the requirements of 602 DM 2. The Regional Director also relied on two Cat Ex documents as satisfying NEPA's requirements. The County challenges the adequacy of the ESAs and argues that the Cat Ex relied upon by the Regional Director is "inapplicable and irrelevant," and that, in any event, this case falls into one of the exceptions for the use of a Cat Ex. Opening Br. at 35-36.

The Superintendent's 2009 Decision informed the County that Phase I ESAs had been completed. Therefore, the County should have included, but did not include, its comments concerning the ESAs in its appeal of the 2009 Decision to the Regional Director. Because it did not, we decline to consider these comments for the first time on appeal. In contrast, the Superintendent's 2009 Decision was silent concerning any determination of a Cat Ex, thus leaving unclear how BIA intended to comply with NEPA. The Regional Director addressed NEPA, asserting in her 2010 Decision that she approved the Cat Ex on October 27, 2006, and updated it on June 23, 2009, "which satisfies the NEPA requirement." 2010 Decision at 21. Therefore, we will consider the County's arguments with respect to the Cat Ex determination.

The County argues that it is unclear what the Regional Director considered in concluding that a Cat Ex applies to the trust acquisition, and that the particular Cat Ex relied upon—found in 516 DM 10.5(D)—is inapplicable and irrelevant because it applies to actions such as "[m]anagement of trust funds, . . . budget, finance, estate planning, wills, and appraisals." Opening Br. at 36. The County also argues that even if 10.5(D) applies, the circumstances of this case trigger several exceptions that disallow application of a categorical exclusion that might otherwise apply. *Id.* Specifically, the County argues that acquisition of the Scott I tract would have "highly controversial environmental effects" because generating "lease income . . . is inconsistent with a [nature] preservation program," and "therefore" the impact on the environment from leasing "is unknown." *Id.* The

¹⁶ The Regional Director argues that the County lacks standing to challenge BIA's determination of its ability to assume duties for the Scott I tract. We concluded otherwise in *County of Sauk*, 45 IBIA at 207-08.

County also argued that there would be “significant impacts on public health and safety.” *Id.*

The Regional Director responds by implicitly conceding that she invoked the wrong exclusion, and argues that 516 DM 10.5(I) authorizes BIA to issue a Cat Ex for approvals of conveyances of interests in land “where no change in land use is planned.” Answer Br. at 23. According to the Regional Director, she signed a Cat Ex “noting that there was no change in the land use proposed for the foreseeable future.” *Id.* at 22-23. As support for that proposition, the Regional Director cites the Exception Checklist.

The problem, however, is that neither the 2006 nor the 2009 Exception Checklist contains any findings that explain why any Cat Ex applies, let alone the no-change-in-use Cat Ex found in 10.5(I). Instead, the Exception Checklist simply recites what apparently is the wrong exclusion, and then proceeds to evaluate whether any *exception* to applying that Cat Ex is present. We have found nothing in the record that clearly documents the Tribe’s existing uses of the Scott I tract and compares those existing uses with the intended uses of the Scott I tract after the trust acquisition. Therefore, we vacate this portion of the Regional Director’s 2010 Decision and remand it for further consideration.

Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Regional Director’s September 7, 2010, decision is affirmed in part and vacated in part. We vacate that portion of the Regional Director’s decision in which she relies on the Cat Ex documents as complying with NEPA’s requirements. We remand this matter to the Regional Director for further consideration of this one issue. In all other respects, the Regional Director’s decision is affirmed.

I concur:

// original signed
Debora G. Luther
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge