



INTERIOR BOARD OF INDIAN APPEALS

State of Kansas and Jackson County, Kansas v. Acting Southern Plains Regional Director,
Bureau of Indian Affairs

56 IBIA 220 (03/15/2013)



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

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|-----------------------------|---|--------------------------|
| STATE OF KANSAS and JACKSON |) | Order Affirming Decision |
| COUNTY, KANSAS, |) | |
| Appellants, |) | |
| |) | |
| v. |) | Docket Nos. IBIA 11-048 |
| |) | 11-049 |
| ACTING SOUTHERN PLAINS |) | |
| REGIONAL DIRECTOR, BUREAU |) | |
| OF INDIAN AFFAIRS, |) | |
| Appellee. |) | March 15, 2013 |

The State of Kansas (State) and Jackson County, Kansas (County) (collectively, Appellants), appeal to the Board of Indian Appeals (Board) from a December 8, 2010, decision of the Acting Southern Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director’s decision affirmed a January 13, 2009, decision by the Superintendent of BIA’s Horton Agency (Superintendent) to accept a parcel of land (Huffman parcel) into trust on behalf of the Prairie Band Potawatomi Nation (Nation). We affirm the Regional Director’s decision because Appellants have failed to meet their burden of demonstrating error in the decision.

Both Appellants contend that the Regional Director failed to consider the criteria found in 25 C.F.R. § 151.10(b), (c), (e), (f), and (g). The County separately argues that the Regional Director should have, but failed to, consider additional criteria found in 25 C.F.R. § 151.11, which apply to fee-to-trust acquisitions of off-reservation parcels. The State separately avers that its due process rights were violated when BIA allegedly issued a fee invoice in response to the State’s request for copies of certain documents that were apparently part of the administrative record.

We reject each of Appellants’ arguments. First, they have not carried their burden of demonstrating error in the Regional Director’s consideration of the § 151.10 criteria. Next, we reject the County’s contention that the Regional Director should have considered the parcel to be off-reservation and subject to § 151.11 because, by the time the matter came under active consideration by the Board, circumstances had changed and § 151.11 was clearly inapplicable. Finally, the State has failed to explain how its due process rights were harmed, for which reason we dismiss that argument. We therefore affirm the

Regional Director's December 8, 2010, decision to accept the Huffman parcel into trust for the Nation.

Background

I. Regulatory Framework

Fee-to-trust acquisitions are governed by 25 C.F.R. Part 151. In evaluating a tribe's request to have land taken into trust, BIA must consider the criteria set out in 25 C.F.R. § 151.10(a)-(c) & (e)-(h).¹ They 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;
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- (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
- (f) Jurisdictional problems and potential conflicts of land use which may arise; and
- (g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.
- (h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.

25 C.F.R. § 151.10.

When the parcel to be acquired is "located within or contiguous to an Indian reservation," BIA need only consider the § 151.10 criteria. *Id.* But "when the land is located outside of and noncontiguous to the tribe's reservation," BIA must consider additional criteria found in 25 C.F.R. § 151.11: the distance from the parcel to state and reservation boundaries, and if the property will be used for business purposes, the tribe's plan specifying "the anticipated economic benefits associated with the proposed use." *Id.* § 151.11.

¹ 25 C.F.R. § 151.10(d) only applies to acquisitions for individual Indians.

II. Facts

A. The Land

The Nation acquired the Huffman parcel in fee simple in 1998. The Huffman parcel is approximately 26.6 acres, comprising a 1.075 acre homesite and 25.55 acres of agricultural land.² The homesite includes a house and outbuildings.

The Huffman parcel shares its northern boundary with another parcel owned by the Nation known as the Buck parcel (also known as PT-56). *See* Jackson County Tax Assessor's Map, www.jackson.kansasgis.com/Map/ParcelMap.aspx (generated and annotated on Mar. 14, 2013) (copy added to record); Nation's Planning and Environmental Protection Map (AR Tab 41). The Buck parcel was accepted into trust in 2011 as an on-reservation acquisition pursuant to 25 C.F.R. § 151.10. *See State of Kansas v. Acting Southern Plains Regional Director*, 53 IBIA 32 (2011).³

B. Fee-to-Trust Application and Superintendent's Decision

In 2004, the Nation applied to have the Huffman parcel taken into trust by the United States for the benefit of the Nation. Fee-to-Trust Application, Jan. 23, 2004 (AR Tab 1). BIA solicited comments from the State and County, but only the County responded. 2004 Solicitation for Comments, Feb. 6, 2004 (AR Tab 2); County's 2004 Comments, Feb. 23, 2004 (AR Tab 3). The County opposed the acquisition, arguing among other things that the loss in tax revenue would negatively affect the County and its

² The Huffman parcel is more particularly described as a tract of land commencing 120 rods West from the Northeast Corner of the Southeast Quarter of Section 27, Township 8 South, Range 15 East of the 6th P.M., thence running South 71 rods, thence West 60 rods, thence North 71 rods, thence East 60 rods to the place of beginning, Jackson County, Kansas. The Huffman Parcel is also known as PT-119.

³ The Buck parcel, in turn, shares part of its western boundary with a third parcel, ABC Exteriors (also known as PT-71). *See* Jackson County Tax Assessor's Map; Nation's Planning Map. The ABC Exteriors parcel was transferred into trust in 2008 as an on-reservation trust acquisition. *See Jackson County, Kansas v. Southern Plains Regional Director*, 47 IBIA 222 (2008). The ABC Exteriors parcel's western boundary lies on the original eastern boundary of the Nation's reservation (Reservation). *See* Jackson County Tax Assessor's Map; Nation's Planning Map. The ABC Exteriors parcel does not share a boundary with the Huffman parcel, but the southeast corner of the ABC Exteriors parcel, the southwest corner of the Buck parcel, and the northwest corner of the Huffman parcel all meet at the same point.

citizens. *Id.* The Nation responded to the County's comments and addressed each objection. Nation's 2004 Response, May 4, 2004 (AR Tab 8).

The Superintendent decided to accept the Huffman parcel into trust in 2009, considering it an off-reservation acquisition subject to § 151.11. Superintendent's Decision, Jan. 13, 2009 (AR Tab 47). Both the County and the State appealed the Superintendent's decision to the Regional Director. State's Notice of Appeal to Regional Director, Jan. 29, 2009 (AR Tab 48); County's Notice of Appeal to Regional Director, Jan. 20, 2009 (AR Tab 49). The State argued that the Superintendent had failed to consider the criteria in § 151.10(b), (c), (e), (f), and (g), and § 151.11, and had violated the State's due process rights. State's Statement of Reasons to Regional Director, Feb. 25, 2009 (AR Tab 50). The County's arguments were identical to the State's, with the exception of the due process claim, which the County did not raise. *Compare id. with* County's Statement of Reasons to Regional Director, Sept. 29, 2010 (AR Tab 55). The Nation responded to Appellants' statements of reasons. Nation's Brief to Regional Director, Oct. 28, 2010 (AR Tab 56).

C. Regional Director's Decision

The Regional Director affirmed the Superintendent's decision on December 8, 2010. AR Tab 57. While the Superintendent had treated the Huffman parcel as off-reservation and applied the § 151.11 criteria, the Regional Director determined that the Huffman parcel was contiguous to the ABC Exteriors parcel and he impliedly invoked our holding in *Aitkin County, Minnesota v. Acting Midwest Regional Director*, 47 IBIA 99, 104-07 (2008) (if a tribally owned fee parcel is contiguous to a tribal trust parcel, then the fee parcel is considered to be "on-reservation" for purposes of 25 C.F.R. Part 151, regardless of its location relative to the tribe's historical reservation boundaries). Regional Director's Decision at 3-4 (unnumbered). The Regional Director concluded by stating that he had considered all of the § 151.10 criteria and that the record supports BIA's discretionary decision to accept the Huffman parcel into trust; he found that there was "no evidence of . . . severe negative impact [to the State and County] in this case." *Id.* at 4 (unnumbered).

The State and County each appealed the Regional Director's decision to the Board. They both relied on the briefs filed with their notices of appeal, which made the same arguments that had been presented to the Regional Director. The Regional Director filed an answer brief; the Nation did not submit a brief in this matter.

Discussion

I. Standard of Review

Our standard of review is well established for appeals of decisions concerning fee-to-trust applications:

Decisions of BIA officials on requests to take land into trust are discretionary, and the Board does not substitute its judgment in place of BIA's judgment in discretionary decisions. 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. 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. Nor must the factors be weighed or balanced in a particular way or exhaustively analyzed. Moreover, an appellant bears the burden of proving that BIA did not properly exercise its discretion. Simple disagreement with or bare assertions concerning BIA's decision are insufficient to carry this burden of proof. 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. 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 v. Acting Great Plains Regional Director, 49 IBIA 84, 98-99 (2009) (internal citations omitted), and cases cited therein.

II. Merits

We affirm the Regional Director's decision to accept the Huffman parcel into trust. He adequately considered the criteria found in § 151.10 and Appellants have shown no error in his analysis. And because of the contiguity of the Huffman parcel to the Buck parcel, which was taken into trust as an on-reservation acquisition during the pendency of this appeal, § 151.11 does not apply. Finally, the State has failed to explain and support the alleged violation of its due process rights related to the document request, so we dismiss that claim. For the foregoing reasons, we affirm the Regional Director's December 8, 2010, decision to accept the Huffman parcel into trust on behalf of the Nation.

A. 25 C.F.R. § 151.10 Criteria

Appellants object to the Regional Director's analysis of the factors in § 151.10(b), (c), (e), (f), and (g). They did not object to the Regional Director's consideration of § 151.10(a) or (h), and subsection (d) only applies to acquisitions for individuals. We affirm the Regional Director's analysis.

1. Need and Purpose—§ 151.10(b) & (c)

Appellants first argue that BIA failed to adequately consider the Nation's need for this land and the purpose for which it would be used. State's Brief (Br.) at 2.⁴ They claim that the Regional Director's statement of need is "boilerplate" and would apply equally to any grassland. *Id.* They also claim that BIA's consideration was inadequate because it failed to consider why the Nation needs the land to be in trust status. We find no error in the Regional Director's consideration of these factors.

First, we conclude that the Regional Director's discussion of the Nation's need for the land and its proposed use is complete. He stated that the Huffman parcel was needed to expand the Nation's agricultural program, which in turn would provide additional job training opportunities for tribal members. Regional Director's Decision at 2 (unnumbered). He determined that these goals would provide for sustained growth, self-determination, and self-sufficiency for the Nation. *Id.* This is an adequate statement of his consideration of the Nation's need for the land and its purpose. *See, e.g., Aitkin County*, 47 IBIA at 108 (BIA has "broad discretion" in its consideration of § 151.10(b)).

Next, Appellants argue that the Regional Director failed to explain why the Nation needs the land to be in trust status. State's Br. at 2. This argument fails for two reasons. First, we have consistently held that § 151.10(b) only requires consideration of the tribe's need for the land—not its need for the land to be in trust status. *See, e.g., Cass County, Minnesota v. Midwest Regional Director*, 42 IBIA 243, 247-48 (2006). Second, BIA *did* explain why the tribe needed the land to be in trust status instead of fee status: The Regional Director explained that the Nation needs the Huffman parcel in trust so that it would be subject to the same regulatory scheme as the Nation's other agricultural lands. Regional Director's Decision at 3 (unnumbered). Having some of its agricultural lands subject to Federal regulations and others subject to state and local laws would create difficulties in administering the Nation's agricultural program. *See Answer Br. at 3-4.* BIA

⁴ Because both Appellants' briefs are so similar, we will only refer to the State's brief in reference to the arguments advanced by both.

therefore considered the Nation's need for the parcel to be in trust status, even though consideration of that issue is not required by § 151.10.

We thus reject Appellants' arguments that the Regional Director did not adequately consider the § 151.10(b) and (c) criteria.

2. Impact on State and Local Tax Rolls—§ 151.10(e)

Appellants argue that the Regional Director failed to adequately consider the acquisition's impact on state and local tax rolls under § 151.10(e). State's Br. at 2-3. They claim that the Regional Director failed to consider the cumulative impact that the Nation's entire trust acquisition program would have on the County's tax revenue. The State also argues that the Regional Director did not address the alleged inequity created by the County's maintenance of roads that service the Huffman parcel. As we explain, these arguments are not persuasive.

The State admits that the tax assessment on the Huffman parcel is “a de minimis amount,” but argues that BIA should consider “the overall effect of the [Nation's] land acquisition program.” State's Br. at 2. The State does not elaborate on its argument, and we have consistently “rejected arguments that BIA must undertake a separate ‘cumulative impacts’ analysis,” while acknowledging “the possibility that BIA's proper exercise of discretion may, under certain circumstances, require consideration of the collective impact of multiple simultaneous fee-to-trust applications.” *State of Kansas*, 53 IBIA at 37; *cf. Roberts County, South Dakota v. Acting Great Plains Regional Director*, 51 IBIA 35, 51 n.13 (2009) (“We do not foreclose the possibility that, in an appropriate case, BIA's failure to consider acquisitions which, collectively, would have a significant tax impact — might constitute a failure to properly exercise its discretion.”), *aff'd sub nom., South Dakota v. U.S. Dept. of the Interior*, 775 F. Supp. 2d 1129 (D.S.D.), *appeal dismissed*, 665 F.3d 986 (8th Cir. 2012). In any event, Appellants make only generalized allegations and have not submitted any information on, e.g., the County's baseline property tax revenue, the reduction in tax revenue due to the Nation's trust acquisitions, or the effect such reductions would have on County-provided services, which presumably could facilitate a cumulative impacts analysis.

We also reject the State's unsupported argument that it is a due process violation for BIA to consider one fee-to-trust application at a time. Due process is met by affording interested parties the opportunity to present their views and objections on a matter that is pending before BIA for decision. BIA did so, and the State provides no authority for its notion that due process was not thereby satisfied. For all of these reasons, we conclude that Appellants have failed to demonstrate that a cumulative impact analysis is warranted.

Additionally, the State argues that “[t]he decision . . . fails to note the unfairness to [the] County—the parcel is served by roads maintained by [C]ounty funds.” State’s Br. at 3.⁵ But the Regional Director’s decision reflects that he considered that situation and concluded that the equities were not grossly out of balance. *See* Regional Director’s Decision at 4 (unnumbered). The Nation contends—and Appellants do not dispute—that the Nation expends considerable funds to maintain roads and bridges both on and off the Reservation, thus reducing the County’s burden. *See* Boursaw Affidavit, May 3, 2004, at 2, 5-7 & Attach. (Nation’s 2004 Response, Attach. (AR Tab 8)) (noting that the Nation had spent over \$2 million improving off-reservation roads between 1997 and 2002, in addition to the average \$4.3 million per year it spends maintaining roads within the Reservation); Superintendent’s Decision at 3 (unnumbered) (“The Nation’s Road and Bridge Department currently has responsibility for 119 of the 212 miles of road on the reservation.”). Considering the Nation’s contributions, including road construction and maintenance, the Regional Director determined that there would be no “severe negative impact” on the County due to the Huffman acquisition. Regional Director’s Decision at 4 (unnumbered). We thus conclude that the Regional Director considered the issue of roads and road maintenance.

We therefore conclude that the Regional Director adequately considered § 151.10(e) in this matter.

3. Land Use and Jurisdictional Conflicts—§ 151.10(f)

The State and County next argue that the Regional Director failed to consider the zoning issues raised by Appellants. They argue that the acceptance of the Huffman parcel into trust will create a “peninsula” or “island” of land subject to the Nation’s zoning regulations, surrounded by land subject to the County’s zoning authority. State’s Br. at 3 (“peninsula”); County’s Br. at 2 (“island”). Appellants posit that having two neighboring zoning authorities will necessarily create conflict, but their concern is nothing more than speculation. For that reason, we reject this argument.

Currently, the Huffman parcel is zoned agricultural by the County. *See* County’s 2009 Comments, Oct. 12, 2009 (AR Tab 36). The Nation maintains that it uses the parcel for agricultural purposes and it has no plans to zone it for anything other than agricultural use. Nation’s Br. to Regional Director at 3. The current and proposed uses of the Huffman parcel, nearby tribal trust parcels, and nearby County-zoned parcels are all agricultural. Nation’s 2004 Response at 11; Environmental Site Assessment, Sept. 22, 2005, at 5 (AR Tab 15).

⁵ The County does not raise this specific issue before the Board.

Thus, Appellants apparently argue that having separate zoning authorities—county and tribal—for two separate but adjoining parcels *ipso facto* creates “a quite real jurisdictional conflict.” State’s Br. at 3. But we are not convinced that having separate zoning authorities governing neighboring parcels necessarily creates a conflict—particularly where all the lands are zoned for the same use and no changes in use or zoning are anticipated. Land in neighboring states, counties, or towns may be subject to different zoning authorities, and conflicts are not inevitable, especially where, as here, the zoning plans are congruent.

And any potential “conflict” here (i.e., incongruent zoning on neighboring lots) is based purely on speculation that the parcel’s use or zoning will change. “[S]peculative concerns do not satisfy an appellant’s burden in challenging the Regional Director’s exercise of discretion in a trust acquisition appeal.” *Shawano County, Wisconsin v. Acting Midwest Regional Director*, 53 IBIA 62, 82 (2011). Appellants’ speculative concerns do not carry their burden of showing error in the Regional Director’s Decision.

We thus conclude that the Regional Director’s consideration of potential zoning and land use conflicts was satisfactory.

4. BIA’s Ability to Administer the Additional Land—§ 151.10(g)

Appellants next argue that the record does not support BIA’s assertion that it is equipped to handle the additional administrative responsibilities associated with this trust acquisition. State’s Br. at 3. They claim that the Regional Director “reverse[d] the burden of proof” in his finding that “there is no evidence to contradict” the Superintendent’s determination that the Horton Agency could handle the additional responsibilities. *Id.*; Regional Director’s Decision at 3 (unnumbered). They also assert that BIA did not consider whether it would be able to administer this parcel *in addition to* other pending fee-to-trust parcels. Finally, Appellants claim that the amount of time the trust application was under consideration is evidence that BIA cannot handle any additional responsibilities. None of these arguments demonstrate error in the Regional Director’s consideration of this criterion.

First, the determination of whether BIA can handle the additional duties is “a managerial judgment that falls within BIA’s administrative purview [and] we do not construe § 151.10(g) to necessarily require BIA” to include evidence of such ability in the record. *State of Kansas*, 53 IBIA at 39. Here, the Superintendent determined that (1) the land is agricultural and adjacent to existing tribal fee and trust lands, (2) the Nation “has been competently managing tribal lands with minimal guidance and assistance from” BIA, and (3) “[t]he Nation has its own police and fire departments, social services, road and

bridge department, and tribal court.” Superintendent’s Decision at 4 (unnumbered). Contrary to Appellants’ assertion, the Superintendent’s findings are supported by the record, *see* Boursaw Affidavit (Nation’s 2004 Response, Attach.), and by the Superintendent’s own firsthand knowledge of BIA’s ability to assume any additional duties and what those duties will require. The Regional Director adopted the Superintendent’s conclusion and determined that nothing in the record contradicted it. Regional Director’s Decision at 3 (unnumbered). This determination did not “reverse[] the burden of proof,” but instead recognized that Appellants did not dispute, e.g., that the Nation manages its trust land with minimal input from BIA or direct our attention to contradictory evidence in the record. “Simple disagreement” with BIA’s conclusion is not enough to carry Appellants’ burden of proof. *See Jackson County*, 47 IBIA at 228.

Appellants also assert that the Huffman parcel is “one of many that are being put into trust, and there is no indication that the BIA is equipped to handle such additional responsibilities.” State’s Br. at 3. We disagree. Each time BIA approves a fee-to-trust acquisition, § 151.10(g) requires it to determine whether it is equipped to discharge any new responsibilities related to *that* parcel, *in addition* to those for the lands it already administers. *See* 25 C.F.R. § 151.10(g) (whether BIA “is equipped to discharge the *additional* responsibilities resulting from the acquisition of the land.” Emphasis added.). But it would be pure speculation for BIA to also consider the potential burden of possible future trust acquisitions when determining if it can assume the trust duties for a single parcel presently under consideration. We therefore conclude that the Regional Director need not engage in speculation about possible burdens related to potential future acquisitions, which will be considered if and when the applications come before him or the Superintendent for decision.

Finally, we reject Appellants’ claim that the amount of time this fee-to-trust application was under consideration by BIA stands as evidence that BIA is not able to discharge the additional duties stemming from the proposed acquisition. *See State of Kansas*, 53 IBIA at 40 (“We are not prepared to simply assume, as the State would have us do, that the length of time this particular appeal was pending before BIA constitutes evidence that BIA does not have the ability to assume additional trust responsibilities for this parcel.”). Appellants make no effort to show how the consideration of fee-to-trust applications has any bearing on BIA’s ability to discharge entirely separate and distinct duties once the parcel is taken into trust.

We therefore conclude that Appellants have failed to demonstrate any error in BIA’s determination that it is equipped to administer the Huffman parcel in trust.

B. Applicability of 25 C.F.R. § 151.11

The County argues that the Regional Director “fail[ed] to cite 25 CFR 151.11” and failed to apply its additional scrutiny. County’s Br. at 3. We reject this argument because the Regional Director did cite to § 151.11, *see* Regional Director’s Decision at 3-4 (unnumbered), but determined that it did not apply. We affirm the Regional Director’s determination that § 151.11 does not apply to the Huffman parcel’s acquisition.

Section 151.10 applies to fee-to-trust applications “when the land is located within or contiguous to an Indian reservation”; § 151.11 applies only “when the land is located outside of and noncontiguous to the tribe’s reservation.” 25 C.F.R. §§ 151.10, 151.11. A fee parcel owned by a tribe that is contiguous to a parcel that is held in trust for the tribe is considered to be “contiguous to [the tribe’s] reservation” under Part 151. *Aitkin County*, 47 IBIA at 104-07. As we explained in *Aitkin County*,

The regulation itself defines “Indian reservation” to mean in relevant part “that area of land over which the tribe is recognized by the United States as having governmental jurisdiction.” 25 C.F.R. § 151.2(f). There is no requirement in section 151.2(f) that there be a formal proclamation before a parcel may be considered an Indian reservation or part of an Indian reservation for purposes of a land acquisition under Part 151.

Id. at 106. Parcels that share a boundary are deemed “contiguous.” *Jefferson County, Oregon v. Northwest Regional Director*, 47 IBIA 187, 205-06 (2008).

In his decision, the Regional Director determined that the Huffman parcel was contiguous to the ABC Exteriors parcel, which is held in trust for the Nation, and so found that the Huffman parcel was an “on-reservation acquisition” under Part 151. Regional Director’s Decision at 3-4 (unnumbered). We need not determine whether parcels that touch at a single point, such as the Huffman and ABC Exteriors parcels, are contiguous for purposes of Part 151, *see Jefferson County*, 47 IBIA at 205-06, because a third parcel—the Buck parcel—was taken into trust during the pendency of the instant appeal before the Board. The Buck parcel shares a border on one side with the Huffman parcel and, thus, pursuant to our decision in *Aitkin County*, the application to take the Huffman parcel into trust properly is considered pursuant to the on-reservation criteria of § 151.10. Therefore, we conclude that the Huffman parcel is contiguous to the Nation’s reservation and we

affirm, on this ground, the Regional Director's determination that the Huffman parcel is an "on-reservation" fee-to-trust acquisition not subject to § 151.11.⁶

C. Due Process Concerns

Finally, the State claims that when it filed a request for copies of documents "held by [BIA] in this matter," BIA informed the State that there would be a charge of \$528.97 for the documents, pursuant to the Freedom of Information Act (FOIA). State's Br. at 3-4. The State argues that "BIA's policy of charging for what amounts to the administrative record constitutes a denial of due process." *Id.* at 4. The Regional Director argues that the record before the Board does not contain anything related to the request, nor does the State allege that it paid the fee or that any documents were withheld. Answer Br. at 7-8. Furthermore, the Regional Director asserts that the documents were provided to the State. The State did not file a reply brief and thus did not respond to the Regional Director's assertion or provide any further details relevant to its claim.

We reject this claim for several reasons. First, the State did not meet its burden of providing us with a copy of its document request, and it does not appear in the administrative record. Therefore, it is entirely unclear whether BIA knew that the State's document request was a request for a copy of the record (or part of the record) for its appeal of the Huffman fee-to-trust decision.⁷ Second, the State did not argue before the Regional Director that the issuance of the fee invoice violated its rights. The scope of our review ordinarily is limited to those issues raised before the Regional Director, 43 C.F.R. § 4.318, and the State did not assert this claim before the Regional Director.⁸ Finally, the

⁶ Thus, whether touching at a single point is sufficient for contiguity for purposes of § 151.10 is moot. *See, e.g., Whiteskunk v. Acting Southern Plains Regional Director*, 43 IBIA 96, 103 (2006) (an issue is moot when nothing turns on its determination).

⁷ It appears that the State may have identified the document request as a FOIA request. *See* State's Statement of Reasons to Regional Director at 4 n.1 ("the agency record is not available to interested parties, absent a FOIA request"). If so, then BIA cannot be faulted for treating the request as a FOIA request. The State is informed that interested parties in appeals to BIA regional directors are entitled to inspect the record free of charge, but copies of the record are subject to fees. *See* 25 C.F.R. § 2.21(b). And parties may request an extension of time from BIA for filing a statement of reasons to accommodate a request for a copy of the record. *Id.* § 2.16.

⁸ The State's brief to the Regional Director complained that the record was not available absent a FOIA request, and that it did not have sufficient time to access to the record. State's Statement of Reasons to Regional Director at 4 n.1.

Regional Director represents that documents *were* provided to the State and that it granted additional time for the State to review them, although, again, we have no idea what documents were provided to the State and whether they were the documents the State requested. In any event, the State did not respond to the Regional Director's assertion, for which additional reason we presume that any injury was cured, and we thus dismiss the State's due process claim.⁹

Conclusion

Appellants have failed to carry their burden of establishing error in the Regional Director's decision. Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director's December 8, 2010, decision.

I concur:

// original signed
Debora G. Luther
Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge

⁹ To the extent that the State may believe that BIA improperly interpreted FOIA or its regulations, we note that the Board does not have jurisdiction over FOIA appeals. *See, e.g., Descendants and Heirs of Behalh/Katrina Jim v. Northwest Regional Director*, 53 IBIA 131, 132 (2011); *see also* 43 C.F.R. § 2.28(a)(1)-(7) (grounds for FOIA appeals).