



INTERIOR BOARD OF INDIAN APPEALS

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

56 IBIA 296 (04/30/2013)

Related Board case:
56 IBIA 62



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
)	
)	
)	
)	Docket Nos. IBIA 11-084
v.)	11-085
)	11-086
)	11-087
)	11-095
GREAT PLAINS REGIONAL)	11-096
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS)	
Appellee.)	April 30, 2013

Thurston County, Nebraska (County), appealed to the Board of Indian Appeals (Board) from six decisions (Decisions) of the Great Plains Regional Director (Regional Director),¹ Bureau of Indian Affairs (BIA). The Regional Director’s decisions affirmed six decisions of the Winnebago Agency Superintendent (Superintendent), BIA, each of which accepted land into trust for the benefit of the Winnebago Tribe of Nebraska (Tribe). We now affirm the Decisions in part, vacate them in part, and remand them to the Regional Director for further consideration.

The properties at issue in these appeals are known as Hughes, Chambers I, Chambers II, Scott II, Kaup, and Jensen-Frey. All were accepted into trust by the Regional

¹ Five of the decisions were issued by one of two acting regional directors and one was decided by the Great Plains Regional Director. We will refer herein to all three decision makers as Regional Director, and will refer to the Regional Director as she/her because four of the decisions were made by a female acting regional director.

Director between February 4 and February 22, 2011.² On appeal to the Board, the County argues that there were procedural problems with the acquisitions, that BIA exhibited bias in the acquisition process, that the authority for taking land into trust is unconstitutional, and that the Regional Director erred and/or abused her discretion in her consideration of the factors found in 25 C.F.R. § 151.10(a), (b), (c), (e), (f), and (h).

We reject the bulk of the County's arguments as erroneous, unsupported, or beyond our jurisdiction. However, the County has identified material inconsistencies between the Regional Director's statements of the proposed uses of each of the properties and the Superintendent's and the Tribe's statements. We therefore vacate the Regional Director's consideration of 25 C.F.R. § 151.10(c) (the purposes for which the properties will be used), because the discrepancies are not explained. We remand the matter to her to explain or resolve these discrepancies.

We also vacate the Regional Director's reliance on categorical exclusions to satisfy BIA's environmental review. In all six Decisions, she relied on an inapplicable categorical exclusion, found at 516 Departmental Manual (DM) 10.5(D). It is evident that the Regional Director intended to invoke 10.5(I), which applies to conveyances of land where no change in land use is anticipated. Because the records for these Decisions do not clearly show whether or not the Tribe is proposing to change the land use, we must vacate the Regional Director's reliance on categorical exclusions for those properties.

Finally, the Regional Director's consideration of § 151.10(f) (jurisdictional and land use concerns) relied, in part, on her findings that the uses of the properties would not change. If, on remand, the Regional Director determines that the Tribe is proposing to change the use of any of these properties, then she must reconsider § 151.10(f) for those properties. If, on the other hand, she determines that the uses will not change, then she need not reconsider § 151.10(f). We reject the remainder of the County's arguments.

² The six appeals were docketed as follows: Hughes, consisting of 40 acres—Docket No. IBIA 11-084; Chambers I, consisting of approximately 77.49 acres—Docket No. IBIA 11-085; Chambers II, consisting of 115.31 acres—Docket No. IBIA 11-086; Scott II, consisting of 120 acres—Docket No. IBIA 11-087; Kaup, consisting of 88.9 acres—Docket No. IBIA 11-095; and Jensen-Frey, consisting of 5 parcels and a total of 384.52 acres—Docket No. IBIA 11-096.

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 on-reservation land taken into trust, BIA must consider the criteria set out in 25 C.F.R. § 151.10(a)-(c) & (e)-(h):³

- (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.

II. Facts

A. The Land

The Tribe presently owns each of the six properties in fee simple. Two of the properties are mixed woodland and grassland (Hughes and Scott II; collectively, Wooded Properties). The other four properties are agricultural land (Chambers I, Chambers II, Jensen-Frey, and Kaup; collectively, Agricultural Properties). With the exception of the Scott II property, there are no improvements on the properties; the Scott II property has one home and some outbuildings on it. All are located within the boundaries of the Tribe's historical reservation and within Thurston County, Nebraska.

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

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

The Tribe promulgated several resolutions requesting BIA to accept each property into trust. In 2007, the most recent set of resolutions were enacted for each property.⁴ BIA solicited comments for each property from state and local jurisdictions. In particular, the County opposed the proposed acquisitions, arguing that its ability to provide services to its citizens would be affected by the losses in tax revenue. County's Comment Letters, July 10, 2007 & Aug. 21, 2007 (Hughes AR Tab 6(7)).⁵ The County provided tax, zoning, and jurisdiction information for the properties. *Id.* The State of Nebraska (State) did not raise any specific objections, but expressed its support for the County's concerns. *See, e.g.*, State's Comment Letter, July 2, 2007 (Hughes AR Tab 6(7)). The Tribe declined to respond to the County's comments, arguing that the objections were vague and unsupported. Letter from Tribe to BIA, July 23, 2007 (Hughes AR Tab 6(9)).

The Superintendent issued a decision accepting the Kaup property into trust some time prior to April 2007, and issued decisions accepting the other five properties into trust in January 2008 (collectively, Initial Decisions). In response to the County's appeals, the Regional Director vacated each of these decisions on the grounds that the decisions lacked supporting documentation. *See* Remand Memoranda.⁶ She remanded the decisions to the Superintendent "to create a more complete administrative record" and to provide updated environmental and title insurance policies. *See, e.g.*, Hughes Remand Memorandum.

The Superintendent issued a new decision accepting the Kaup property into trust on April 16, 2008. Kaup AR Tab 1. She issued new decisions accepting the Hughes, Chambers I, Chambers II, and Jensen-Frey properties into trust on April 17, 2009, and issued a new decision accepting the Scott II property into trust on April 27, 2009.⁷ The County appealed each of the Superintendent's Second Decisions to the Regional Director.

⁴ *See* Resolutions (Hughes Administrative Record (AR) Tab 6(2); Chambers I AR Tab 7(2); Chambers II AR Tab 6(2); Scott II AR Tab 7(2); Kaup AR Tab 6(2); Jensen-Frey AR Tab 5(2)).

⁵ The County's comment letters appear in each of the administrative records for these proposed acquisitions. For the sake of ease, we cite only to the Hughes administrative record where the documents appear in each administrative record.

⁶ (Kaup AR Tab 6(6); Hughes AR Tab 6(15); Chambers I AR Tab 7(15); Chambers II AR Tab 6(15); Scott II AR Tab 12; Jensen-Frey AR Tab 5(15)).

⁷ Hughes AR Tab 2. Chambers I AR Tab 3; Chambers II AR Tab 2; Jensen-Frey AR Tab 1; Scott II AR Tab 3. We refer collectively to all six of the Superintendent's second decision letters as Superintendent's Second Decisions.

On appeal to the Regional Director, the County raised a number of objections to the Superintendent's Second Decisions, arguing in essence that the Superintendent had not adequately considered 25 C.F.R. §§ 151.10(a), (b), (c), (e), (f), (h), 151.12(b), & 151.13, and that BIA has misinterpreted the State's comment letter. *See, e.g.*, Statement of Reasons to Regional Director, June 12, 2009 (Hughes AR Tab 8).

C. Regional Director's Decisions

The Regional Director affirmed all six acquisitions. Hughes Decision, Feb. 4, 2011; Chambers I Decision, Feb. 4, 2011; Chambers II Decision, Feb. 11, 2011; Scott II Decision, Feb. 11, 2011; Kaup Decision, Feb. 16, 2011; Jensen-Frey Decision, Feb. 22, 2011. In each Decision, the Regional Director gave consideration to the factors found in § 151.10, then addressed the County's objections. The County appealed the Regional Director's Decisions to the Board, and the Board consolidated the appeals. Orders Consolidating Appeals, Mar. 18, 2011 & Mar. 30, 2011.

The County filed opening and reply briefs. The Regional Director and the Tribe each filed an answer brief.⁸

Discussion

I. Standard of Review

The standard of review in trust acquisition cases is well established. Decisions of BIA officials on requests to take land into trust are discretionary,

⁸ In its reply brief, the County argues that (1) the Board should not accept the Tribe's answer brief because it claims that the Tribe did not comply with 43 C.F.R. § 4.313, which governs amicus curiae, intervention, and joinder motions, and (2) the Tribe's brief was not timely. Reply Brief (Br.) at 4. We reject these arguments because § 4.313 must, by its own terms, "be liberally construed." 43 C.F.R. § 4.313(a). Moreover, we have no difficulty finding the Tribe to be an interested party in these appeals by virtue of its status as the entity on whose behalf the Regional Director's Decisions were issued and whose interests could be adversely affected by the Board's decision. *See* 25 C.F.R. § 2.2 (definition of "Interested Party" includes a tribe "whose interests could be adversely affected by a decision in an appeal"), incorporated into the Board's regulations at 43 C.F.R. § 4.330(a). As an "interested party," the Tribe is an "opposing part[y]" within the meaning of 43 C.F.R. § 4.311(a). And we find the Tribe's brief, which was filed on August 30, 2011, is timely because it was submitted within the extension period granted by the Board. *See* Order Granting [Tribe's] Motion for Extension, July 28, 2011.

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.

South Dakota v. Acting Great Plains Regional Director, 49 IBIA 84, 98-99 (2009) (internal citations omitted), and cases cited therein. The Board does not normally consider arguments that could have been, but were not, first raised to the Regional Director. See 43 C.F.R. § 4.318; *Thurston County, Nebraska v. Acting Great Plains Regional Director*, 56 IBIA 62, 66 (2012) (*Scott I*).

II. Analysis

We affirm the Decisions in part, vacate them in part, and remand them for further consideration for the reasons that follow.

A. Procedural Issues

The County raises several procedural objections related to the acquisition process. It first argues that, after the Superintendent's Initial Decisions were vacated and remanded by the Regional Director, the Superintendent failed to issue new notice letters consistent with the Regional Director's instructions in her Scott II Remand Memorandum. Opening Br. at 22-25. The County also claims that, to the extent the Superintendent supplemented the records on remand, the County was not given an opportunity to review and comment upon any new documents that may have been added to the administrative records before the Superintendent issued the Second Decisions. *Id.* at 25-26. Finally, the County argues that

the 30-day notice letters were defective because they did not use the exact phrasing found in the regulation and in a BIA handbook. *Id.* at 26-27. We reject the County's arguments.

1. Notice and Opportunity to Comment on Remand

a. Waiver

The County maintains that the Superintendent failed to comply with the Regional Director's Scott II Remand Memorandum requiring that she provide the County with a second opportunity to comment on the Scott II proposed fee-to-trust application prior to the Superintendent issuing a new decision. And the County argues that the Superintendent should have followed this instruction with respect to the remaining five fee-to-trust applications that were remanded by the Regional Director. Before reaching the merits of this issue, we first address the Regional Director's position that the County failed to preserve these arguments for appeal before the Board. According to the Regional Director, these arguments should have been presented first to the Regional Director in the County's appeals from the Superintendent's Second Decisions. Regional Director's Answer Br. at 32-33. We address this contention separately for the Scott II property and for the remaining properties.

i. Scott II

In her remand instructions to the Superintendent for the Scott II property, the Regional Director directed the Superintendent to issue new notices of the fee-to-trust application and solicit updated or new comments. Scott II Remand Memo. The Regional Director neglects to explain how the County could or should have known of the remand instructions to the Superintendent. Nothing in the record shows that the County had any notice of the remand instructions *prior to* obtaining or reviewing a copy of the administrative record for its appeal to the Board. Therefore, we conclude that the County did not waive its opportunity to challenge the Superintendent's failure to comply with the Regional Director's remand instructions for the Scott II acquisition. *See Thurston County*, 56 IBIA at 67.

However, while the County did not waive these arguments for the Scott II appeal, we reject them for the same reasons we rejected them in *Thurston County*. *See* 56 IBIA at 67-68.⁹

⁹ One of the reasons we rejected these arguments in *Scott I* was that the Superintendent's second *Scott I* decision was issued only 7 months after the initial solicitation for comments. *See Thurston County*, 56 IBIA at 67. In the Scott II acquisition, the gap was nearly 2 years.

(continued...)

ii. Remaining Properties

For the remaining properties except for Kaup,¹⁰ the Regional Director's Remand Memoranda did not instruct the Superintendent to issue new notice or provide a new comment period. Nor did anything in the Scott II Remand Memorandum require that its instructions apply to any other remand. But because the County apparently contends that the new notice request by the Scott II Remand Memorandum should necessarily have been applied to the other five properties, and because the County did not have notice of the Scott II Remand Memorandum instructions, we are not persuaded that it waived the right to assert these arguments on appeal.

b. Notice and Opportunity

We reject the County's argument that it should have received a second opportunity to comment on the proposed acquisitions, including the opportunity to review any new documents on which the Superintendent might rely. Notably, the County fails to explain how it was injured by the absence of a second opportunity to comment on the proposed trust acquisitions. We note that the County was provided an opportunity to (and did) comment prior to the Superintendent's Initial Decisions, the County commented extensively again in its appeal to the Regional Director from the Superintendent's Second Decisions, and these latter comments were duly considered by the Regional Director.

2. Content of Notice Letters

The County received and responded to notice letters for each of the six properties at issue in these appeals, and did not object to their content before the Regional Director. The County therefore waived this argument. *See* 43 C.F.R. § 4.318; *Thurston County*, 56 IBIA at 68.

(...continued)

Thus, that reason does not apply to the Scott II acquisition, but the remaining reasons discussed in *Scott I* still apply to the Scott II acquisition. *See id.* at 67-68.

¹⁰ It is evident that the County received a notice and an opportunity to comment on the fee-to-trust application for the Kaup property after the Regional Director's remand decision. *See* Kaup Remand Memo. Consequently, the County's argument that the Superintendent failed to provide it with new notice is flatly contradicted by the record and we need not consider it further with respect to the parties' arguments.

B. Bias

The County argues that the Superintendent and Regional Director exhibited a bias in favor of the Tribe in the acquisition process, and the Decisions should be set aside for that reason. Opening Br. at 29-31. According to the County, BIA's assistance to the Tribe manifests bias and any BIA officer who assists a fee-to-trust applicant should be barred from deciding the application. *Id.*

First, most of the County's bias arguments relate to the Superintendent. *Id.* at 30-31. But the County did not raise any bias issues in its appeals to the Regional Director, for which reason we will not consider them now. See 43 C.F.R. § 4.318; *Thurston County*, 56 IBIA at 66. Further, the Regional Director has full authority to review *de novo* the decisions of his subordinates. *South Dakota*, 49 IBIA at 102. Thus, any alleged bias by the Superintendent was cured by the Regional Director's *de novo* review.

As to the Regional Director, the County identifies two statements from the Decisions that it argues are evidence of bias. Opening Br. at 31. First, the Regional Director "determined that [each] trust acquisition . . . would be in the best interest of the [Tribe]." See, e.g., Hughes Decision at 19. Second, the Regional Director suggested that local jurisdictions work together with the Tribe to resolve jurisdictional conflicts. See, e.g., *id.* at 14. We are simply not convinced that either of these statements prove, as the County contends, that "the decision maker has made a 'preannounced decision' on the matter, or [that these statements are] 'objective and undisputed evidence of administrative bias.'" See Opening Br. at 29 (quoting *White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677-78 (9th Cir. 1988)). Moreover, as the district court expressly found in *South Dakota v. U.S. Dep't of the Interior*, 401 F. Supp.2d 1000, 1011 (D.S.D. 2005), *aff'd*, 487 F.3d 548 (8th Cir. 2007), "[f]ollowing Congress's statutory policies does not establish structural bias warranting reversal of the [decision to accept property into trust]." Here, Congress has authorized the Secretary to take land into trust for Indians. See, e.g., 25 U.S.C. § 465. And, given BIA's mission to provide services on behalf of the United States to the tribes and to individual Indians, we find no evidence of impermissible bias, either structural or actual, in the two statements attributed to the Regional Director.¹¹

¹¹ We note that the County is incorrect in its fundamental perception of BIA's decision making process as a formal adjudication. It is not. Tribes and individual Indians are permitted by law to apply for trust status for lands that they may own. See, e.g., 25 U.S.C. § 465. An application is submitted therefor, interested parties such as local jurisdictions are invited to comment, BIA gives consideration to the information provided within the parameters of the criteria set out by law, and a decision is rendered. See, e.g., 25 C.F.R.

(continued...)

C. Section 151.10 Criteria

The County objects to the Regional Director's analysis of the factors in § 151.10(a), (b), (c), (e), (f), and (h). It did not object to the Regional Director's consideration of § 151.10(g), for which reason we do not address this factor.

We vacate and remand the Regional Director's consideration of § 151.10(c) and her reliance on Categorical Exclusions (CatExes) for each of the Decisions. If, on remand, the Regional Director determines that the uses of any of the properties will change after it is taken into trust, then she must also reconsider § 151.10(f) for that property. We affirm the remaining portions of these Decisions and reject the County's remaining arguments.

1. Statutory Authority—§ 151.10(a)

The Regional Director determined in each Decision that 25 U.S.C. § 465 (§ 5 of the Indian Reorganization Act (IRA)) authorizes her to acquire these lands on behalf of the Tribe. *See, e.g.*, Hughes Decision at 2. The County argues that it was error for the Regional Director to conclude that the statute authorized the acquisitions without including a detailed analysis under *Carciere v. Salazar*, 555 U.S. 379 (2009). Opening Br. at 6-8. It further argues that such an analysis would reveal that these acquisitions were unauthorized and unconstitutional. *Id.* at 8-22.

The County failed to raise these arguments before the Regional Director, for which reason we decline to consider them now. *See* 43 C.F.R. § 4.318; *see also Thurston County (Scott I)*, 56 IBIA at 71. The decision in *Carciere* issued on February 24, 2009. The Superintendent's second Kaup decision had already been issued by then, but the remaining Second Decisions were not issued until 2 months after *Carciere*, and the Regional Director did not issue her Decisions until April 2011—over 2 years after *Carciere*. The County did not raise *Carciere* in its Statements of Reasons to the Regional Director, nor did it seek to supplement its arguments to include any *Carciere* issues while the appeals were pending before the Regional Director. Further, we find no manifest error in the Regional Director's determination that the IRA provides her authority for these trust acquisitions. *See*

(...continued)

Part 151. Thus, the fee-to-trust application process is not intended to be an adjudicatory process.

43 C.F.R. § 4.318. Therefore, the Board declines to consider these arguments for the first time on appeal.¹²

2. Need—§ 151.10(b)

The County argues that the Regional Director failed to establish that the Tribe “needs” the land and that she failed to show that the Tribe needs the land to be in trust status. We hold that the Regional Director’s Decisions adequately explained her consideration of the Tribe’s need for the land and she was not required to show why it needed the land to be in trust rather than fee status.

The Regional Director found that the land would “assist the Tribe in promoting self-government, self-sufficiency and self-determination.” *See, e.g.*, Hughes Decision at 2. She also found that the properties “will help the Tribe to maintain economic growth on the reservation,” noting that while the Tribe’s population had increased by 15% over the previous 10 years, its land base had not. *Id.* In addition, the Regional Director observed that trust status might “qualify the Tribe for additional federal funding.” *Id.* Finally, the Regional Director noted that the tax savings could be put to use by the Tribe to meet other Tribal needs. *Id.* at 8.

The County broadly asserts that the “Tribe has no need for these properties to be placed into trust.” Opening Br. at 33; *see also id.* at 32. But, as we have often stated, the inquiry is whether the Tribe needs the land, *not* whether it needs the land to be in trust status. *See, e.g., Cass County, Minnesota v. Midwest Regional Director*, 42 IBIA 243, 247-48 (2006). In the present case, the Regional Director determined that additional trust lands were needed to support growing tribal membership—the Tribal population had increased 15% in 10 years—and these lands will contribute to “self-government, self-sufficiency, and self-determination.” Hughes Decision at 2. This is a sufficient statement of the Tribe’s

¹² 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 (Haas Report), at 17 (copy added to record; also available at <http://www.doi.gov/library/internet/subject/upload/Haas-TenYears.pdf>). 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). Although the Haas Report was published in 1947, there is no showing that the information reported therein for the Tribe is inaccurate. We need look no further to determine that the Tribe is eligible to have land taken into trust pursuant to 25 U.S.C. § 465. *Id.*

need for the land. *See, e.g., Thurston County (Scott I)*, 56 IBIA at 71-73 (affirming an identical statement of need and noting BIA’s “broad discretion” in considering § 151.10(b)).

The County argues that the only reason the Tribe “needs” the land to be in trust status is to avoid paying property taxes, which it claims is an insufficient statement of need. Opening Br. at 32, 49-50. The County provides no foundation for its opinion that the Tribe only seeks to avoid paying property taxes nor does it appear to have played any role in the Regional Director’s consideration of the Tribe’s need for the land. Here, the Regional Director sufficiently described the Tribe’s need for the land. To the extent she also noted that the Tribe would benefit from re-allocating money that would otherwise be used to pay property taxes, those additional statements were not included in her consideration of § 151.10(b), *see, e.g., Hughes Decision* at 2, but were part of a separate discussion of the County’s comments, *see, e.g., id* at 8. The inclusion of those statements in the Decisions does not undermine the Regional Director’s sufficient statement of the Tribe’s need for the land. *See Thurston County*, 56 IBIA at 72. The tax savings are merely an additional benefit to the Tribe apart from its demonstrated need for the land.

The County also argues that the Tribe has “no need” for the lease income generated by the four Agricultural Properties, because it already collects approximately \$500,000 per year from agricultural leases and has successful gaming operations. Opening Br. at 35. But a tribe need not be suffering financial difficulties to “need” additional land. *County of Sauk, Wisconsin v. Midwest Regional Director*, 45 IBIA 201, 210 (2007). As noted above, the Regional Director’s statement of need was sufficient.

The County has not shown any error in the Regional Director’s consideration of § 151.10(b) in any of the Decisions.

3. Purpose—§ 151.10(c)

The County next argues that the Regional Director abused her discretion in accepting the properties into trust because there were unexplained inconsistencies between the Tribe’s and BIA’s statements of the intended purposes or uses of the properties. We agree.

In examining the purpose(s) or use(s) for any Tribal property proposed for trust acquisition, BIA must first determine the current use of the property, then ascertain the Tribe’s plans for the property. Doing so not only facilitates a clear understanding for BIA of how the property will be used for purposes of determining whether to grant the fee-to-trust applications, but also assists local jurisdictions in their planning for any ongoing services that may be needed and in commenting on a proposed fee-to-trust land acquisition.

In addition, knowledge of the current and intended uses of the land also informs and facilitates BIA's consideration of whether there may be jurisdictional or land use conflicts (§ 151.10(f)) and determines the level of environmental review required under the National Environmental Policy Act (NEPA). Here, we agree with the County that the Regional Director did not adequately consider the purposes or uses designated by the Tribe for these six properties.

a. Agricultural Properties: Kaup, Jensen-Frey, Chambers I, and Chambers II

The Tribe asserted that each of the Agricultural Properties “has been and presently is used for agricultural purposes and the Tribe’s intent is to use the land for agricultural purposes *and housing*.” Emphasis added.¹³ In their decisions for the Agricultural Properties, the Superintendent and the Regional Director stated that “[t]he primary use of this property will be for agricultural purposes.”¹⁴ Although, the Superintendent did observe, with respect to compliance with NEPA for the Jensen-Frey, Chambers I, and Chambers II properties (but not Kaup), that the Tribe’s “intent [is] to build[] housing, [and] develop agriculture and economic growth,”¹⁵ the Regional Director did not mention housing as a purpose of or use for the Agricultural Properties.

b. Wooded Properties: Hughes and Scott II Properties

As for the two Wooded Properties, the administrative records and Decisions do not clearly indicate what their current and proposed uses are. In her Decisions for both

¹³ Tribal Resolution #08-09, Oct. 23, 2007, as amended by Tribal Resolution #09-98, July 6, 2009 (Kaup AR Tab 6(2)); Tribal Resolution #08-06, Oct. 23, 2007, as amended by Tribal Resolution #09-87, June 15, 2009 (Jensen-Frey AR Tab 5(2)); Tribal Resolution #08-07, Oct. 23, 2007, as amended by Tribal Resolution #09-88, June 15, 2009 (Chambers I AR Tab 7(2)); Tribal Resolution #08-08, Oct. 23, 2007, as amended by Tribal Resolution #09-89, June 15, 2009 (Chambers II AR Tab 6(2)). The Tribe’s amendments corrected only the year the original resolutions were promulgated, from 2008 to 2007.

¹⁴ Kaup Decision at 3; Jensen-Frey Decision at 3; Chambers I Decision at 3; Chambers II Decision at 3; Kaup Second Decision at 2 (unnumbered); Jensen-Frey Second Decision 2-3 (unnumbered); Chambers I Second Decision at 3 (unnumbered); Chambers II Second Decision at 2 (unnumbered).

¹⁵ Jensen-Frey Second Decision at 5 (unnumbered); Chambers I Second Decision at 5 (unnumbered); Chambers II Second Decision at 5 (unnumbered).

properties, the Regional Director found that “[t]he Tribe stated that the primary use[s] of this property will remain as timber, nature preservation[,] and agricultural uses.” Hughes Decision at 3; Scott II Decision at 3. But the most recent assertions by the Tribe concerning its intentions for the two properties states that each “has been and is presently timber *and is to be used for tribal hunting and recreational purposes and the Tribe’s intent is to use the land for hunting and recreation.*” Resolution #08-12 (Hughes AR Tab 6(2)); Resolution #08-11 (Scott II AR Tab 7(2)) (emphasis added). Neither the Superintendent nor the Regional Director made any mention of the Tribe’s stated intentions to use the Wooded Properties for hunting and recreational purposes, and did not discuss whether the Tribe intends to leave the properties in their natural condition for hunting and recreation or whether it will make improvements to the properties to facilitate hunting and recreation.¹⁶

c. Regional Director’s Decisions

For all six properties, the Regional Director completely overlooked and failed to consider some of the purposes asserted by the Tribe for these lands: She did not mention housing as one of the purposes for the Agricultural Properties and she did not mention hunting and recreation as the sole future purpose articulated by the Tribe for the Wooded Properties. Furthermore, we find no support in the record for the use of the Wooded Properties for agricultural uses, and no support in the record that identifies the “primary” uses intended by the Tribe for these properties. Thus, we cannot affirm the Regional Director’s consideration of § 151.10(c).

The County squarely raised these omissions in its opening brief, *see* Opening Br. at 35-42, and neither the Regional Director nor the Tribe attempted to clarify in their answer briefs how the six properties are to be utilized by the Tribe.¹⁷ The failure to address the

¹⁶ The undated Fee-to-Trust Checklists for the Wooded Properties suggest that the Tribe may intend to build improvements on the properties. *See* Undated Fee-to-Trust Checklist (Hughes) at 4 (unnumbered) (“Future uses for this property may include a recreational park area, overnight camping or a hunting area to provide additional income”) (Hughes AR Tab 6(1)); Undated Fee-to-Trust Checklist (Scott II) at 4 (unnumbered) (same) (Scott II AR Tab 7(1)). However, there is also an August 8, 2008, letter from the Tribe to BIA that asserts that the Tribe “has ‘NO’ plans for a recreational park.” Scott II AR Tab 14 (although this letter appears to pertain to all six properties at issue in these appeals, a copy of this letter only appears in the Scott II AR). On remand, BIA should determine whether the Tribe intends to construct any improvements on the Wooded Properties and consider this information as appropriate.

¹⁷ Of course, if a proposed “clarification” is really a post-hoc justification, it may not suffice. *See Cheyenne River Sioux Tribe v. Aberdeen Area Director*, 28 IBIA 288, 296 (1995)

(continued...)

Tribe's most recent assertions of use for these six properties is not insignificant. Not only does the failure adversely affect the adequacy of consideration given to § 151.10(c), it also potentially affects, as we discuss *infra*, the consideration of § 151.10(f) concerning conflicts in land use as well as consideration of the environmental impact.

Given the above discrepancies, we vacate the Regional Director's consideration of the purpose(s) and use(s) for the six proposed trust acquisitions and remand these decisions to her so that she may clarify the intended uses of the properties and give appropriate consideration to each of them.¹⁸

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

The County argues that the Regional Director failed to adequately consider the impacts on the County's tax rolls. It claims that the Regional Director erred in failing to consider the cumulative impact of the removal of all parcels then under consideration and also the impact of all non-taxable land within the County's borders. It also argues that even after the land is in trust, the County will continue to provide a variety of services to the properties, though the properties will no longer generate tax revenue for the County. We affirm the Regional Director's consideration of this factor for the reasons that follow.

First, the Regional Director did not err in failing to consider the cumulative impact these acquisitions would have on the County's tax rolls. We have held in the past that "in an appropriate case," the proper exercise of discretion may require consideration of "the collective tax impact of simultaneous trust acquisitions—e.g., numerous simultaneous acquisitions which, collectively, would have a significant tax impact." *Roberts County, South Dakota v. Acting Great Plains Regional Director*, 51 IBIA 35, 51-52 n.13 (2009). Here, however, the County failed to show how the acquisitions, collectively, would have a "significant tax impact." While the annual taxes the County collects on these parcels

(...continued)

(post-hoc justifications generally are disfavored and can be grounds for vacating a decision as a denial of due process).

¹⁸ In addition, we note that the Environmental Site Assessment (ESA) for the Scott II property states that a "homesite" exists on the property, and photographs show a mobile home and at least one or two outbuildings. Scott II ESA (Phase I), updated June 2009, at 4, 6, 11-12 (Scott II AR Tab 7(17)); *see also* ESA Questionnaire at 2 (Scott II AR Tab 7 (19)) ("Currently used by Wildlife & Parks Department and housing"). If the property currently is used for residential purposes or if the Tribe intends to utilize the property for residential purposes, the Regional Director must address this use on remand.

amount to approximately 0.33%¹⁹ of its total tax revenue, the County has not shown that this loss would have a significant impact on its ability to provide services, nor has it identified any relevant information in the record that the Regional Director failed to consider. Without any information about how the potential loss of tax revenue specifically impacts the County, e.g., through reductions in staff, programs, or equipment, BIA cannot determine whether 0.33% is a “significant” loss. That is, the County has not provided a context in which BIA can evaluate the actual expected impact that the loss of revenue will have on the County. For this reason, we conclude that it matters not whether BIA should have considered the cumulative impact of taking these several parcels into trust.

Similarly, the County claims that it retains “only a small portion” of the property taxes it collects, and that the Regional Director did not “consider the true numbers involved.” Opening Br. at 45, 47. Apparently, the County collects and distributes tax revenue on behalf of a number of taxing entities within the County, e.g., school districts, villages, etc. But the tax receipts in the record only show the gross amount collected by the County and does not break down the tax into the amounts that ultimately are distributed to the various taxing entities, nor did the County inform BIA of “the true numbers.” *See, e.g.*, 2009 Property Tax Receipt (Hughes Property) (Hughes AR Tab 6(12)). The County did inform the Regional Director that it retained only \$1,410,037.55 out of the total annual real estate tax collection of \$6,178,218.25 in 2007. *See, e.g.*, Stmt. of Reasons to Regional Director at 3 (unnumbered) (Hughes AR Tab 2). But this information does not assist the Regional Director in understanding the potential loss of tax revenue to, or impact on, the County from these six properties. The County asserted only that its share of the gross tax revenue is “1% of real and personal property tax collections for village, school districts, natural resource districts, educational service units, community colleges and bond funds [and] just 2% of real and personal property tax collections for townships, fire districts, airport authorities, and hospital districts.” *See id.* The County failed to provide the “true numbers,” i.e., the actual amount of its share of the gross tax revenue, *for these six properties*. Consequently, the Regional Director appropriately considered that information she did have available to her: the total amount of property tax collected from each parcel, which she then compared to the total amount of tax revenue collected throughout the County.

¹⁹ The County’s brief states that the total is 0.37% of its tax revenue, *see* Opening Br. at 44, but that amount includes the Scott I property, which was accepted into trust 1 year before the properties at issue in this appeal. The tax loss associated with Scott I was approximately 0.037% of the County’s tax revenue. *See Thurston County*, 56 IBIA at 64 n.4. The tax loss associated with the acquisitions at issue here is approximately 0.33% of the County’s total tax collections.

The County also argues that “21% of the land in Thurston County is already non-taxable,” *see* Opening Br. at 45, and implies that adding additional, non-taxable land will be a burden. The tax loss associated with a trust acquisition must be considered in relation to the revenue baseline at the time of the acquisition. *State of Kansas v. Acting Southern Plains Regional Director*, 53 IBIA 32, 37 (2011). Historical losses of the County’s tax revenue are not directly relevant to determining how a proposed trust acquisition under *current* consideration may affect the County because reductions in revenue in past tax years, e.g., from completed trust acquisitions, have become part of the relevant baseline. While the percentage of untaxable *trust* lands within a county might have some relevance in evaluating the potential effect of a proposed new trust acquisition, e.g., in establishing the likelihood that an increase to property taxes will be required, the burden is on the local government to demonstrate such relevance. The mere fact that a certain percentage of lands in a given jurisdiction are nontaxable is not, by itself, sufficient to give rise to an implication that additional trust lands will cause an adverse impact. Therefore, BIA appropriately considered the impact of a proposed trust acquisition without regard to the total amount of non-taxable land within the County’s jurisdiction.²⁰

The County goes on to argue that the acquisition is inequitable because the County would still be required to provide services to the properties, even though they would no longer generate tax revenue to offset the costs of providing services. Opening Br. at 46-47. The Regional Director responded at length to this concern. She determined that BIA/Tribal law enforcement would service the parcels; the Winnebago Indian Health Service Hospital would provide medical care; BIA is party to fire protection agreements with local volunteer fire departments; and the Tribe’s Roads Department is working with BIA for funding and technical support. Hughes Decision at 3-5. The Regional Director held that BIA “has made several programs available to local governments that will help offset losses in property taxes due to” trust lands within their boundaries. *Id.* at 10. BIA offered to facilitate a meeting with the County to discuss the provision of services to the properties, but the County apparently did not request a meeting. *See, e.g.*, Letter from BIA to the County, Aug. 23, 2007 (Hughes AR Tab 6(7)); Regional Director’s Answer Br. at 2. The Regional Director also determined that members of the Tribe would continue to pay for fee-based, County-provided services. Hughes Decision at 4. She thus concluded that “the removal of this property from the County[’s] tax base will have a minimal effect on [the County].” *Id.* at 19. The County does not dispute that the Tribe and BIA will

²⁰ Similarly, we reject the County’s argument that the Regional Director must consider the cumulative impact of all fee-to-trust applications *pending* before BIA. These applications will be considered in due course by BIA and, if appropriate, BIA may then consider any cumulative impact based on, e.g., the tax loss from all applications decided simultaneously or previously in the same tax year.

provide services to the properties, but maintains, without support, that the County will be required to continue to provide the same services. The Regional Director considered the impact of the proposed acquisitions on the County's tax rolls, and determined that the impact would be minimal. We thus conclude that she adequately considered the tax impact on the County of these proposed acquisitions.

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

The County argues that the Regional Director minimized or failed to consider certain jurisdictional and land use conflicts. It argues that accepting the six properties into trust would exacerbate the existing checkerboard jurisdiction on the Tribe's reservation, especially in the area of law enforcement. Opening Br. at 48. The County claims that the Regional Director should have considered the "cumulative impact" of jurisdictional problems. *Id.* at 45-46, 48. It also argues that the Regional Director should have considered the possibility that the properties will be used for gaming. *Id.* at 50-51. Finally, the County objects to the Regional Director's reliance on a finding that the land use would not change in deciding that no new land use issues will arise, because it argues that the record is unclear about the properties' uses. *Id.* at 49.²¹ We affirm the Regional Director's consideration of this factor to the extent that the Tribe is not proposing a change in land use. But if the Regional Director determines on remand that the land use of any of these six properties will change vis-à-vis zoning and land uses of adjacent and nearby lands, then she must revisit her consideration of § 151.10(f) for those properties. *See* discussion *supra* at 307-10.

The Regional Director clearly considered the issue of checkerboard jurisdiction. *See* Hughes Decision at 14. She determined that the new trust properties would be treated the same as existing trust properties. *Id.* She found that checkerboard jurisdiction already exists on the Tribe's reservation and these acquisitions would "not increase any existing jurisdictional issues." *Id.* She also noted that the Tribe has cooperative law enforcement agreements with the State and the County. *Id.* Thus, we conclude that the County's "bare assertions concerning jurisdictional problems are insufficient to show that trust acquisition of this land would alter that pattern or worsen any existing problems with the pattern." *Ziebach County, South Dakota v. Acting Great Plains Regional Director*, 38 IBIA 227, 231 (2002). Further, "[§] 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. The Regional Director considered the issue of

²¹ The County also argues in this section that the Regional Director erred by focusing on the potential tax savings to the Tribe. Opening Br. at 49-50. We rejected this argument. *See supra* at 307.

checkerboard jurisdiction and found that these additional acquisitions would not exacerbate any existing jurisdictional problems because the jurisdictional pattern is already in place. She adequately addressed that issue.

The County argues that the Regional Director failed to consider the “cumulative impact” of these acquisitions with regard to jurisdictional and land use issues. The County failed to raise this argument before the Regional Director, for which reason we decline to consider it now. 43 C.F.R. § 4.318; *Thurston County (Scott I)*, 56 IBIA at 66.

The County also argues that the Regional Director should have considered the possibility of gaming on the properties, even though nothing in the record suggests that the properties will be used for gaming purposes. “[M]ere 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.” *Thurston County (Scott I)*, 56 IBIA at 75 n.15. The Regional Director therefore was not required to consider gaming as a possible use of the properties.

Thus, we conclude that the County has failed to satisfy its burden of showing error in the Regional Director’s consideration of § 151.10(f), given the Regional Director’s consideration of the purposes and uses for the six properties under § 151.10(c). However, the Regional Director may need to reconsider—following clarification and reconsideration of the uses and purposes for the properties—whether jurisdictional problems and potential conflicts of land use may arise.

6. NEPA Compliance

The County raises several arguments related to environmental compliance.²² It first argues that the Regional Director’s reliance on the ESAs was in error because they did not comply with new departmental guidelines, were out of date at the time of her Decisions, and contrary to their conclusions, indicated that further investigation was warranted. Opening Br. at 27-28, 51-56. The County also asserts that the Regional Director abused her discretion by relying on an inapplicable CatEx for these acquisitions. *Id.* at 55.

The County failed to raise any argument related to the ESAs in its appeals to the Regional Director from the Superintendent’s Second Decisions. The Board ordinarily does not consider arguments that could have been, but were not, raised before the Regional

²² The County frames these arguments as whether or not the Regional Director failed to consider the “criteria” in § 151.10(h), but the issues raised by the County pertain to compliance with NEPA or Departmental guidance and policy.

Director, 43 C.F.R. § 4.318, *Thurston County (Scott I)*, 56 IBIA at 66, and we see no reason to depart from that rule today.

The County argues that the Regional Director abused her discretion by relying on a CatEx that does not apply to these transactions.²³ We agree that the Regional Director cited an inapplicable exclusion. In each decision, the Regional Director indicated that BIA satisfied NEPA by relying on CatEx documents that were approved in 2006 or 2007, and updated on June 23, 2009. *See, e.g.*, Hughes Decision at 7. The only CatEx documents in the records are “checklists” that indicate that the applicable CatEx is found at 516 DM 10.5(D) and note that no “exceptions” to the exclusions apply. *See, e.g.*, Hughes AR Tab 6(18). The CatEx found at 10.5(D) applies to “Administrative Actions and Other Activities Relating to Trust Resources. Examples are: Management of trust funds (collection and distribution), budget, finance, estate planning, wills and appraisals.” 516 DM 10.5(D). This exclusion simply is inapplicable to changes of title to land—such conveyances, if there is no change in land use, fall under a different exclusion, 516 DM 10.5(I).

The Regional Director implicitly concedes that she intended to rely upon 10.5(I). *See* Regional Director’s Answer Br. at 30-31 (“516 DM 10.5(I) specifically authorizes BIA to issue a [CatEx] for . . . transfers of interest[s] in land where no change in land use is planned.” *Emphasis added.*). But even if the Regional Director had invoked 10.5(I) rather than 10.5(D), her reliance on that CatEx still would not be adequately supported because the records and Decisions for the properties do not support a finding of “no change in land use.” *See supra* at 307-10.

We thus vacate the Regional Director’s reliance on CatExes for each of the properties because fee-to-trust acquisitions do not fall under 10.5(D), “Administrative Actions,” and because the records do not support a 10.5(I), “No Change in Land Use,” exclusion. *See also Thurston County (Scott I)*, 56 IBIA at 77 (vacating the Regional Director’s reliance on a CatEx for the same reason). On remand and after giving due

²³ As in *Thurston County*, *see* 56 IBIA at 76, the Superintendent’s Second Decisions (except for Kaup) failed to mention her reliance on CatExes under § 151.10(h). Although the County failed to raise the CatEx issue in its appeals to the Regional Director, it has not waived that argument with respect to five of the properties because it was not on notice that the Superintendent intended to rely on CatExes for NEPA compliance. *See id.*

In the Kaup Second Decision, the Superintendent stated that a CatEx applied, and thus the County should have, but did not, challenge the CatEx on appeal to the Regional Director. Nevertheless, we conclude that it was manifest error, *see* 43 C.F.R. § 4.318, for the Regional Director to rely on a CatEx for the reasons that we explain above.

consideration to the Tribe's intended uses and purposes for the properties, the Regional Director must cause an appropriate environmental review to be conducted or she may identify an appropriate CatEx, with proper support.

Conclusion

We vacate the Regional Director's consideration of § 151.10(c) for each of the six properties because her factual conclusions were not supported by the records and because of unexplained discrepancies concerning the purposes articulated by the Tribe for these lands. We also vacate her reliance on a 10.5(D) CatEx for these properties because that exclusion does not apply to fee-to-trust acquisitions and the records do not support an exclusion at this time.

On remand, the Regional Director must clarify the current and proposed uses of the properties and reconsider § 151.10(c). If she finds that the uses of the properties will change, then she must also reconsider § 151.10(f) for those properties for which the Tribe proposes to change the use. In addition, after determining the properties' uses, the Regional Director must reconsider the environmental analysis. Except as set out above, we affirm the Regional Director's Decisions.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director's Decisions in part, vacates them in part, and remands each for further consideration consistent with our decision.

I concur:

 // original signed
Debora G. Luther
Administrative Judge

 //original signed
Steven K. Linscheid
Chief Administrative Judge