



INTERIOR BOARD OF INDIAN APPEALS

Village of Hobart, Wisconsin v. Midwest Regional Director, Bureau of Indian Affairs

57 IBIA 4 (05/09/2013)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ARLINGTON, VA 22203

VILLAGE OF HOBART, WISCONSIN,)	Order Affirming in Part and Vacating
Appellant,)	in Part, and Remanding
)	
v.)	
)	Docket Nos. IBIA 10-091
ACTING MIDWEST REGIONAL)	10-092
DIRECTOR, BUREAU OF INDIAN)	11-045
AFFAIRS,)	
Appellee.)	
<hr/>		
VILLAGE OF HOBART, WISCONSIN,)	Docket Nos. IBIA 10-107
Appellant,)	10-131
)	11-002
v.)	
)	
MIDWEST REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	May 9, 2013

The Village of Hobart, Wisconsin (Village), appeals to the Board of Indian Appeals (Board) from six Notices of Decision (NODs) issued by the Midwest Regional Director and Acting Midwest Regional Director (Regional Director¹), Bureau of Indian Affairs (BIA), accepting a total of eight properties—consisting of 21 parcels and 499.022 acres—into trust on behalf of the Oneida Tribe of Indians of Wisconsin (Tribe). We consolidate

¹ Because all six NODs were issued under the authority of the Midwest Regional Director, we will refer in our decision to the Acting Midwest Regional Director and the Midwest Regional Director as “Regional Director.”

these six appeals for purposes of our decision today,² and we affirm in part, vacate in part, and remand each of the NODs to the Regional Director. With the exception of the Village's bias claim, which we leave for the Regional Director to consider in the first instance on remand, we reject the Village's procedural challenges to the Tribe's fee-to-trust applications and we do not address the Village's constitutional challenges, over which we lack jurisdiction. We affirm the Regional Director's decisions as to her authority to accept land into trust on behalf of the Tribe under the Indian Reorganization Act (IRA), 25 U.S.C. § 465, and her consideration of the Tribe's need for the land, the Tribe's purposes for and uses of the land, and BIA's ability to absorb any additional responsibilities (25 C.F.R. § 151.10(a), (b), (c), & (g)). However, because the Regional Director failed to address certain information in the record and objections presented by the Village to the proposed trust acquisitions concerning tax loss, potential land use conflicts, and jurisdictional problems, we vacate the remainder of her decisions and remand these matters to her so that the Regional Director may give those the consideration that is due as well as consider the Village's arguments with respect to environmental concerns (25 C.F.R. § 151.10(e), (f), & (h) (NEPA³)).

Background

I. Procedural Background

On April 12, 2006, the Tribe's Business Committee enacted multiple resolutions requesting BIA to accept into trust certain tracts of fee land owned by the Tribe. The following year, the Tribe submitted a total of 56 fee-to-trust applications to BIA.⁴ Here, we review six resulting NODs that approved the fee-to-trust applications for eight properties consisting of 21 parcels of land with a combined acreage of 499.022.⁵ Each of

² The Board previously consolidated Docket Nos. IBIA 10-091, 10-092, and 10-107 and later consolidated Docket Nos. IBIA 10-131 and 11-002. *See* Orders Granting Motions to Consolidate, Docket Nos. 10-131, 11-002, Oct. 26, 2010, and Docket Nos. IBIA 10-091, 10-092, 10-107, Aug. 31, 2010; and Order Consolidating Appeals, Docket Nos. IBIA 10-091, 10-092, May 19, 2010.

³ National Environmental Policy Act, 42 U.S.C. §§ 4321-4335.

⁴ These 56 applications sought trust status for a total of 133 parcels with a combined acreage of 2673.

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<u>Docket No.</u>	<u>Properties</u>	<u>Date of NOD</u>
10-091	Boyca	Mar. 17, 2010
10-092	Cornish	Mar. 17, 2010
10-107	Gerbers	May 5, 2010

(continued...)

the eight properties is located within the boundaries of the Tribe’s reservation in Wisconsin and also within the boundaries of the Village.⁶ The Gerbers, Calaway, Catlin, and DeRuyter properties form a large and contiguous, if irregular-shaped, land mass; the Cornish, Buck, Lahay, and Boyea properties are not contiguous to any other property that is the subject of our decision.

Relative to the eight properties at issue in these consolidated appeals, it appears that the Village submitted at least two comment letters to BIA in response to the Tribe’s applications for trust status. The first letter from the Village, dated October 6, 2007, objected to the fee-to-trust application for the Catlin property and two other properties not presently at issue. Catlin AR Vol. 4, Tab 20. A later letter from the Village, dated November 26, 2008, objected to each of the 56 fee-to-trust applications. AR Vol. 2, Tab 16 (Comment Letter).⁷ The Comment Letter was 25 pages long with substantial attachments. In its letter, the Village raised a number of objections to the trust acquisitions, including

- procedural concerns (e.g., lack of access, despite its request, to view the applications submitted by the Tribe to BIA);
- its concern that the Tribe’s well-publicized goal of reclaiming all of the land within its original reservation boundaries would eliminate the Village as a governmental entity;

(...continued)

10-131	Buck	July 8, 2010
11-002	Catlin	Aug. 16, 2010
” ”	Calaway	” ”
” ”	DeRuyter	” ”
11-045	Lahay	Nov. 23, 2010

⁶ We note that the Village apparently takes the position that Congress disestablished the Tribe’s reservation. The Tribe disagrees. Resolution of that issue is not germane to our decision. The parties do not dispute that each of the eight parcels lies within the original borders of the Tribe’s reservation or that BIA applied the correct fee-to-trust criteria of 25 C.F.R. § 151.10, which governs on-reservation fee-to-trust land acquisitions. See 25 C.F.R. §§ 151.2(f), 151.3; *Shawano County, Wisconsin v. Acting Midwest Regional Director*, 53 IBIA 62, 76-77 (2011).

⁷ The NODs, the administrative records, and the briefs are substantially identical for each of the decisions before the Board. Therefore, unless otherwise stated, all references to AR, NOD, and briefs are to those submitted for the Lahay property.

- the Tribe's lack of any need for the lands beyond simply expanding its land base because the Tribe has not utilized much of the 1581 acres presently held in trust in the Village;
- the loss of property tax revenue;⁸
- the loss of special assessments, such as storm water infrastructure assessments, that will adversely impact the Village's ability to implement, e.g., its storm water drainage plan in compliance with the Clean Water Act and jurisdictional complications for managing storm water runoff;⁹
- the inability to collect delinquent amounts owed by the Tribe and assessed against the Gerbers property and one parcel of the Boyea property (HB-1331), *see* Nov. 26, 2008, Comment Letter at Ex. Q.; and
- land use conflicts and jurisdictional problems.¹⁰

The Tribe provided a detailed written response to the Village's comments (Tribe's Response). Tribe's Response, Jan. 16, 2009 (AR Vol. 2, Tab 8).

⁸ In its Comment Letter, the Village provides the total loss of property tax (\$36,148.88 in 2009) from all 133 parcels. *See* Comment Letter at 11. The administrative records contain the property tax invoices submitted by the Tribe with its fee-to-trust applications for each of the properties at issue, except for the DeRuyter property. These invoices show, *inter alia*, the portion of the property tax belonging to the Village out of the property taxes paid to the county. *See* Boyea AR Vol 1, Tab 46(8); Cornish AR Vol. 2, Tab 32(8); Gerbers AR Vol. 1, Tab 53(8); Buck AR Vol. 1, Tab 26(8); Catlin AR Vol. 1, Tab 21(8); Calaway AR Vol 2, Tab 17 (10); and Lahay AR Vol. 1, Tab 27 (11). It is possible that the tax invoices for the DeRuyter property, which consists of five tax parcels, were inadvertently omitted from the record prepared for the Board since the invoices are present in the records for the remaining properties at issue in these appeals. On remand, the Regional Director should determine whether BIA received these invoices and overlooked them in putting the administrative record together for the Board.

⁹ According to a spreadsheet provided by the Village, the 21 parcels at issue here collectively were billed in \$1,404 in storm water project assessments in 2009. *See* Nov. 26, 2008, Comment Letter at Ex. Q.

¹⁰ The Village maintains that the Gerbers property is located in an area zoned by the Village for commercial or industrial use and where the Village claims it is actively working to stimulate commercial development; in contrast, the Tribe's zoning for the Gerbers parcel is agricultural, which apparently is its present and historical use, and which the Tribe maintains will not change, thus the Village claims that the Tribe's use of the property does not conform to neighboring land use and interferes with the Village's development plans.

While the applications were pending before the Regional Director, the Supreme Court decided *Carcieri v. Salazar*, 555 U.S. 379 (2009), which addressed BIA's authority under 25 U.S.C. §§ 465 and 2202 to accept land into trust for tribes. The Village supplemented its Comment Letter with new arguments based on the decision in *Carcieri*, and the Regional Director requested the Tribe to submit additional materials. See Regional Director's Request for Additional Information, Mar. 25, 2009 (AR Vol. 2 (*Carcieri* Log), Tab 5); Village's Supplemental Comment Letter, Mar. 18, 2009 (AR Vol. 2 (*Carcieri* Log), Tab 6) (Supplemental Comment Letter). The Tribe responded to both the Village's submission and the Regional Director's request in a single filing. Tribe's *Carcieri* Response, Apr. 28, 2009 (AR Vol. 2 (*Carcieri* Log), Tab 3).

Thereafter, the Regional Director issued six NODs accepting into trust the eight properties at issue in these appeals.

II. Regulatory Structure for the Regional Director's Decisions

The statutory and regulatory framework that governs fee-to-trust acquisitions by the Department of the Interior (Department) on behalf of Indian tribes was succinctly explained in *State of South Dakota v. Acting Great Plains Regional Director*:

Section 5 of the IRA, 25 U.S.C. § 465, authorizes the Secretary of the Interior (Secretary) to acquire land for Indians in her discretion. . . . In evaluating requests to acquire land located within or contiguous to an Indian reservation, BIA must consider the criteria set forth in 25 C.F.R. § 151.10(a)-(h).^[*] 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;
- (d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;
- (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;

* Requests for off-reservation trust acquisitions are controlled by 25 C.F.R. § 151.11, which requires the Secretary to consider the criteria listed in 25 C.F.R. § 151.10 plus additional factors.

(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.

49 IBIA 129, 130-31 (2009).

III. Regional Director's Decisions

The six NODs each contain a discussion of the requisite criteria of 25 C.F.R. § 151.10. In the discussion of § 151.10(a), the Regional Director determined that the IRA (25 U.S.C. § 465) authorized her to accept land from the Tribe into trust. Based on the record, the Regional Director concluded that the Tribe had been in continuous existence and in relations with the United States since approximately 1784. In particular, the Regional Director determined that—based on its “long standing relationship with the [F]ederal government, which culminated in [a Federal election in which the Tribal membership] voted to accept the IRA” and the subsequent approval of the Tribe’s constitution, in 1936, by the Secretary—the Tribe was under Federal jurisdiction in 1934 when the IRA was enacted. NOD at 2 (unnumbered).

In discussing § 151.10(b), concerning the Tribe’s need for additional land, the Regional Director considered that each parcel was originally part of the Tribe’s reservation, then lost by the Tribe through allotment, and subsequently repurchased by the Tribe. The Regional Director considered that holding the parcels in trust would return the land to its original inalienable status to be held for the benefit of the Tribe, thus “ensur[ing] that tribal investments within the Oneida Reservation will never be lost.” *Id.*

With respect to § 151.10(c), concerning the Tribe’s intended use of the land, the Regional Director noted that each of the parcels presently is used for residential or agricultural purposes or both, and that the Tribe expected to continue these uses for the properties. The NODs observe that the Tribe’s established goals include the acquisition of lands to assure future generations that sufficient lands will be available for economic development, housing, and agriculture. The Regional Director cited to a recent report of socioeconomic conditions on the Tribe’s reservation to highlight a critical housing deficit on the reservation, and noted that community well-being is supported and reinforced through the connection to the land over generations. NOD at 3 (unnumbered).

In her discussion of § 151.10(e),¹¹ concerning the impact on the Village of the removal of the parcels from the tax rolls, the Regional Director characterized the comments received from the Village as “unsupported speculations and assertions [that] were unpersuasive in this decision.” NOD at 3 (unnumbered). The Regional Director did not identify the Village’s arguments or explain why she believed them to be unsupported or speculative.¹² The Regional Director asserted that the Tribe had provided documentation of its intent to renew a service agreement with the Village but noted that the existing agreement expired in 2007 and the parties were unsuccessful in negotiating a new agreement. The remainder of the Regional Director’s comments addressed the impact on other local governments, particularly Brown County, which did not submit any comments on the proposed acquisitions. The Regional Director concluded her discussion by stating, “we have determined that there will be no additional fiscal impacts on county services and that the economic and social benefits of the planned use of this property outweigh any impact on the State or local political subdivisions.” *Id.* at 4 (unnumbered).¹³

As to § 151.10(f), the Regional Director commented on the fact that Pub. L. 83-280 applies to criminal offenses in Indian country in Wisconsin, including the Tribe’s lands, and noted that primary responsibility for patrolling the Tribe’s reservation falls to the Tribe’s police department. The Regional Director stated that “Tribal members are entitled to city services, such as[] police, fire, etc. [from the Village].” *Id.* at 5

¹¹ The Regional Director did not discuss § 151.10(d), which applies only to fee-to-trust applications for individual Indians.

¹² The Village specifically cited road repair and provided an estimate for the repair of three roads that primarily serve Tribal trust and fee lands. The Village explained that state law requires local government services to be available to everyone, and many such services, such as fire, emergency, and law enforcement have “fixed costs that cannot be reduced.” Comment Letter at 11. Finally the Village argued that it could offset the costs by raising taxes on the remaining fee lands except that state law prohibits the Village from raising “taxes above a 2% tax levy limit.” *Id.*

¹³ The Regional Director asserted, in a different section of her NODs, that in its application, the Tribe “stated that [it is] willing to accept any additional costs in regards to law enforcement, road maintenance, and lease administration, after the land is accepted into trust.” NOD at 5 (unnumbered); *see also* Gerbers NOD at 6 (unnumbered) (“The Tribe has stated in this application that they are prepared to pay for whatever municipal services that may be required in connection with the newly acquired property, if any.”). The Regional Director did not elaborate on these isolated comments in her NODs, and none of the parties address them in their briefs.

(unnumbered). The Regional Director concluded that “as a result of the [Pub. L. 83-280 findings], and given the jurisdictional pattern on the reservation is well established, we have determined that no new jurisdictional problems are likely to result from the transfer of this property into trust.” *Id.* The Regional Director did not mention any of the specific land use or jurisdictional issues raised by the Village, such as the Gerbers property, which is within the area set aside by the Village for an industrial park, and issues relating to the implementation of the Village’s storm water plan.

Turning to § 151.10(g), concerning BIA’s ability to discharge additional responsibilities from the addition of these parcels to the Tribe’s trust land base, the Regional Director found that the impact on BIA would be “limited” because the Tribe already administers, through Pub. L. 93-638 contracts, *see* 25 U.S.C. § 450f, many of the services that BIA otherwise would provide. NOD at 5-6 (unnumbered). Thus, the Regional Director concluded that BIA could absorb the additional responsibilities that would attach to taking these parcels into trust.

Finally, with respect to § 151.10(h), and more specifically, environmental compliance, the Regional Director found that each parcel was categorically excluded from the need for an Environmental Assessment or an Environmental Impact Statement because no change in land use for the parcels is anticipated. *Id.* at 6 (unnumbered). BIA completed an Environmental Site Assessment, and found that there were no recognized environmental conditions, contamination-related concerns, or other environmental liabilities.

Having thus considered the requisite criteria under § 151.10, the Regional Director granted the Tribe’s applications to take the eight properties into trust. The Village timely appealed each of the NODs to the Board. The Village, the Tribe, and the Regional Director have fully briefed the appeals.

Discussion

I. Introduction

We affirm in part and vacate in part each of the NODs at issue in these appeals, and remand them for further consideration by the Regional Director. At the outset, we have considered but are not persuaded by the procedural challenges raised by the parties. On the merits, we affirm the Regional Director’s NODs insofar as her consideration of § 151.10(a), (b), (c), & (g). We agree with the Regional Director that the Tribe was under Federal jurisdiction at the time the IRA was enacted in June 1934 because the Federal government held an election later that year pursuant to the IRA for the Tribe to decide whether to reject the application of the IRA. Although that fact is dispositive of this issue, we briefly address why other evidence would independently be sufficient to show that the

Tribe was under Federal jurisdiction in 1934. To the extent that the Village argues that the IRA is unconstitutional or that § 465 in particular is unconstitutional, we lack jurisdiction to determine the constitutionality of laws and regulations, and thus we do not address these claims.

We conclude that the Regional Director adequately considered the Tribe's need and purposes for the proposed acquisitions, and that the Regional Director also adequately considered whether BIA would be able to discharge its administrative responsibilities for the new lands. However, we conclude that the Regional Director failed to give adequate consideration to the tax information provided by the Tribe along with information concerning potential land use conflicts and jurisdictional problems. With respect to the impact to the Village from the removal of the land from the tax rolls, the Regional Director simply asserted in conclusory terms that the Village's comments "provide[d] unsupported speculations and assertions." There was nothing speculative or unsupported about the tax loss to the Village that was documented by the Tribe. As to land use conflicts and jurisdictional problems, the Regional Director again did not articulate any specific consideration of the Village's contentions regarding the disparity between the Tribe's existing and intended uses and the Village's zoning for the parcels, and regarding the Village's concerns for storm water management. Therefore, we vacate those portions of the Regional Director's NODs and remand these matters to her for further consideration. In addition, on remand, the Regional Director shall also consider the Village's arguments as to the environmental analysis and alleged bias in the decision making. Although we affirm as to the Regional Director's consideration of the criteria at § 151.10(a), (b), (c), and (g), nothing in our decision precludes the Regional Director from weighing those findings, in conjunction with her reconsideration on remand of the remaining factors, as part of her ultimate reconsidered decision on the Tribe's fee-to-trust applications.

II. Standard of Review

The standard of review in trust acquisition cases is well-established. Decisions of BIA officials on requests to take land into trust are discretionary, and the Board does not substitute its judgment for BIA's in discretionary decisions. *Shawano County*, 53 IBIA at 68-69; *Arizona State Land Department v. Western Regional Director*, 43 IBIA 158, 159-60 (2006). Instead, the Board reviews discretionary decisions to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of that discretion, including any limitations on its discretion that may be established in regulations. *Shawano County*, 53 IBIA at 68. An appellant bears the burden of proving that BIA did not properly exercise its discretion. *Id.* at 69; *Arizona State Land Department*, 43 IBIA at 160; *South Dakota v. Acting Great Plains Regional Director*, 39 IBIA 283, 291 (2004), *aff'd sub nom. South Dakota v. U.S. Dep't of the Interior*, 401 F. Supp. 2d 1000 (D.S.D. 2005), *aff'd*, 487 F.3d 548 (8th Cir. 2007).

“[P]roof 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.” *Shawano County*, 53 IBIA at 68-69; *Arizona State Land Department*, 43 IBIA at 160. Simple disagreement with or bare assertions concerning BIA’s decisions are insufficient to carry this burden of proof. *Shawano County*, 53 IBIA at 69; *Arizona State Land Department*, 43 IBIA at 160. The factors need not be “weighed or balanced in a particular way or exhaustively analyzed.” *Shawano County*, 53 IBIA at 69; *see also County of Sauk, Wisconsin v. Midwest Regional Director*, 45 IBIA 201, 206-07 (2007), *aff’d sub nom. Sauk County v. U.S. Dep’t of the Interior*, No. 07-0543, 2008 WL 2225680 (W.D. Wis. May 29, 2008). We must be able to discern from the Regional Director’s decision, or at least from the record, that due consideration was given to timely submitted comments by interested parties. *See Jefferson County, Oregon v. Northwest Regional Director*, 47 IBIA 187, 199-200 (2008) (BIA’s failure to consider county’s concerns as to jurisdiction in a proposed trust acquisition is grounds for remand); *Cass County, Minnesota v. Midwest Regional Director*, 42 IBIA 243, 247 (2006) (BIA’s decision must reflect “consideration [of] all facts which were, or should have been known to it and which were critical to the analysis under 25 C.F.R. § 151.10.”).

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. *Shawano County*, 53 IBIA at 69.

The scope of the Board’s review ordinarily is “limited to those issues that were before the . . . BIA official on review.” 43 C.F.R. § 4.318. Thus, the Board ordinarily will decline to consider for the first time on appeal matters that could have been but were not first raised before the Regional Director. *See Kansas v. Acting Southern Plains Regional Director*, 53 IBIA 32, 36 (2011).

III. Procedural Issues

As a preliminary matter, we note that the parties raised several procedural issues related to the Regional Director’s consideration of the fee-to-trust applications. We reject all but one of these arguments, as detailed below. Because we remand these decisions to the Regional Director on the merits, *see infra*, we decline to address the Village’s bias argument but refer this argument to the Regional Director for her consideration in the first instance.

A. Adequacy of Time for Comments on the Fee-to-Trust Applications

The Village argues that, given the volume of fee-to-trust applications that were submitted, the 30-day comment period set by the regulations was insufficient for it to draft adequate responses. *See* Notice of Appeal at 5.

Although 25 C.F.R. § 151.10 states that “state [and] local government[s] . . . will [have] 30 days in which to provide written comments,” that provision does not bar BIA from granting additional time in which to respond. Here, the Village apparently received notices from BIA of the proposed acquisitions and requests for comments on June 11, September 23, and October 8, 2008, each of which requested the Village’s comments within 30 days.¹⁴ Letter from the Village to Regional Director, Oct. 13, 2008, at 1 (AR Vol. 1, Tab 26). The Village responded to the Regional Director and requested an extension of time to November 30, 2008, for filing its comments, which the Regional Director granted. *Id.* at 2; Letter from Regional Director to the Village, Oct. 17, 2008 (AR Vol. 1, Tab 22). The Village submitted its comments within the extended deadline, and did not seek any further extensions.

Because the Village received the extension of time it asked for and submitted its comments to BIA without seeking another extension, it cannot now complain that the comment period was insufficient to craft an adequate response. Nothing in the Regional Director’s grant of additional time suggested that no further extensions would be granted and the Village does not claim that it was discouraged from seeking any further extensions of time. We therefore conclude that the Village had adequate time to submit its comments on the proposed acquisitions.¹⁵

¹⁴ The Tribe asserts that it also sent notices and requests for comment to the Village in 2006. *See, e.g.*, AR Vol. 1, Tab 27(9).

¹⁵ The Village complains that the Regional Director did not provide it with an opportunity to respond to documents that the Regional Director requested from the Tribe in the wake of the Supreme Court’s decision in *Carciere*. Opening Br. at 27 n.77. The Village does not argue, however, that this constitutes reversible error, and we conclude it does not. This information was offered to the Regional Director to assess and determine whether she had authority to take land into trust for the Tribe. Whether or not she is so authorized is a mixed question of law and fact, but it is not a discretionary determination. Therefore, the Board may review the evidence, the arguments of the parties, and the Regional Director’s decision, and determine—as a matter of law—whether the Regional Director was authorized to take land into trust for the Tribe.

B. Village's Motion to Strike Tribe's Brief

The Village argues that the Tribe's answer brief in Docket No. IBIA 11-045 (Lahay) should not be considered because the Tribe is not a party to the appeal and had not filed a motion to intervene. *See* Village's Reply to Tribe's Answer Br. at 2.¹⁶ We construe this argument as a motion to strike the Tribe's brief, and it is denied. The Tribe is automatically an interested party in the appeals before the Board by virtue of its status as the fee-to-trust applicant whose applications are now before the Board. *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 by reference into the Board's regulations at 43 C.F.R. § 4.330(a). When the Board granted the Tribe's motion to intervene in Docket Nos. IBIA 10-091 and IBIA 10-092 (Boyea and Cornish, respectively), we expressly stated that the Tribe was an interested party that was already identified on the distribution list and thus it was not required to file a motion to intervene. *See* Order Granting Motion to Intervention, Docket Nos. IBIA 10-091 & IBIA 10-092, June 7, 2010. For the same reason, the Tribe is also an interested party in Docket No. IBIA 11-045 and is not required to file a motion to intervene. Therefore, we deny the Village's motion to strike the Tribe's brief.

C. Bias

The Village argues that the BIA staff members who processed the Tribe's fee-to-trust applications were tainted by "blatant bias." Opening Br. at 48. The claim of bias stems from a "consortium agreement," whereby a group of tribes apparently directed Federal funding back to BIA specifically to fill staff positions to process the tribes' fee-to-trust applications.¹⁷ According to a 2006 Government Accountability Office (GAO) report, *Indian Issues: BIA's Efforts to Impose Time Frames and Collect Better Data Should Improve the Processing of Land in Trust Applications*, GAO-06-781 at 20, two such agreements, including one involving BIA's Midwest Regional Office, were then under investigation by the Inspector General of the Department (IG). *Id.*,¹⁸ *see also* Memorandum of Understanding

¹⁶ This argument was only raised in the Village's appeal from the proposed acquisition of the Lahay property.

¹⁷ The tribes apparently received the funding from BIA as part of their Tribal Priority Allocation funding pursuant to Indian Self-Determination and Education Act contracts or Tribal Self-Governance compacts with BIA.

¹⁸ The Village cited to but did not provide a copy of the GAO report. A copy was found online at www.gao.gov/assets/260/250940.pdf. This document is one of many cited by the Village in its briefs to the Board for which no copy appears in the administrative records or in the appendices to the Village's briefs. In addition to citing the GAO report, the Village

(continued...)

Between Tribe and Midwest Regional Office for FY 2008-2010 (Opening Br., App. at 37). The outcome of the investigation is not made clear in the briefs or in the Administrative Records. On remand, the Regional Director should specifically address the Village's allegations of bias as well as the outcome of the IG investigation and its relevance, if any, to the Village's allegations. The Regional Director should also discuss any corrective actions that may have been taken in response to the IG investigation prior to the NODs at issue, if relevant to the Village's allegations of bias.¹⁹

IV. Regional Director's Consideration of the § 151.10 Criteria²⁰

A. BIA's Authority for Taking Land into Trust (25 C.F.R. § 151.10(a))

The Regional Director determined that 25 U.S.C. § 465 provided the requisite authority to accept land into trust on behalf of the Tribe. In particular and pursuant to the Supreme Court's decision in *Carcieri*, the Regional Director found that the Tribe was under Federal jurisdiction at the time the IRA was enacted. On appeal to the Board, the parties devote considerable attention in their briefs to the *Carcieri* decision: The Village contends that the authorizing statute, 25 U.S.C. § 465, is unconstitutional and that the Tribe was not under Federal jurisdiction in 1934 as required for the acquisition in trust of land for the Tribe; the Tribe and the Regional Director contend otherwise and further argue that the Village's argument is time-barred.

(...continued)

also cited to a BIA publication, *Acquisition of Title to Land Held in Fee or Restricted Fee*, and to an NOD for the Shakopee Mdewakanton Sioux Community, June 7, 2007. See Opening Br. at 49, 59. Neither of these documents appear in the record nor did the Village provide a copy. The Board is not part of BIA, see *In re Shingle Spring 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 copies of them to the Board and to the parties on the distribution list.

¹⁹ We note that the IG investigation apparently was underway in 2006 prior to the NODs at issue in this appeal and prior to the consortium agreement in effect at the time of NODs.

²⁰ The Village contends that the Tribe's fee-to-trust applications were insufficient. We reject this argument. The application process is not meant to be onerous but simply must set out the "identity of the parties, a description of the land to be acquired, and other information which would show that the acquisition comes within the terms of this part." 25 C.F.R. § 151.9. If additional information is required for a decision on the application, BIA may request the applicant to provide the information needed. *Id.* § 151.12. We do not find fault with the Tribe's applications in these proposed fee-to-trust acquisitions.

We first conclude that timeliness does not bar our consideration of the Village's argument that the Regional Director lacks authority under the IRA to take land into trust for the Tribe. We decline to consider the Village's arguments concerning the constitutionality of § 465 because we lack jurisdiction to do so. Turning to the merits of the Village's argument that the Tribe is ineligible to have land taken into trust under § 465, we disagree with the Village. It is evident that the Tribe was under Federal jurisdiction at the time the IRA was enacted: The Federal government held an election in December 1934 for the Tribe to vote on whether it would reject the application of the IRA to the Tribe. For this reason, we affirm the Regional Director's conclusion that § 465 authorizes the acceptance of land into trust for the Tribe. We turn now to a detailed examination of the parties' arguments.

1. Timeliness of the Village's Challenge to BIA's Authority to Take Land into Trust

The Tribe and the Regional Director contend that the Village's arguments concerning BIA's authority to take land into trust for the Tribe are untimely. Tribe's Answer Br., App. A at 23-26; Regional Director's Answer Br. at 9. According to the Tribe, BIA approved the Tribe's constitution in 1936 under the authority of the IRA and, subsequently, upon enactment of the Administrative Procedure Act of 1946 (APA), 5 U.S.C. § 551 *et seq.*, the Village then should have challenged BIA's action as outside the scope of its jurisdiction. Thus, according to the Tribe, the statute of limitations lapsed long ago on the Village's challenge to whether the Tribe was under Federal jurisdiction in 1934. Tribe's Answer Br., App. A at 24-25; *see also* Regional Director's Answer Br. at 9 (claiming only that the 1936 determination by the Department makes the Village's current challenge "untimely," without citing the APA). We reject this argument.

First, the BIA "action" challenged here consists of decisions to take eight parcels in trust and there is no question about the timeliness of the Village's appeal to the Board from those decisions. What both BIA and the Tribe appear to be arguing is that we should apply a doctrine of laches to bar consideration of the Village's argument that BIA lacks authority to accept the eight parcels in trust. The difficulty with this argument is that it is not clear that the Village would have been injured by BIA's approval of the Tribe's constitution sufficient to establish standing to challenge the determination that the Tribe was under Federal jurisdiction in 1934. And, assuming the Village *could* have challenged BIA's authority by objecting to the approval of the Tribe's constitution simply does not mean that the Village waived its challenge or should now be time-barred from raising the challenge in a different factual context. Moreover, the time for the Tribe to raise this issue was during the pendency of the appeals before the Regional Director. It did not, and therefore, the Tribe arguably waived the argument. And finally, the Regional Director fails to explain on what basis *she* reached and decided the merits of this issue if she now contends that the

Board, which exercises the delegated authority of the Secretary, lacks such authority. Thus we conclude that the Village's challenge to BIA's authority to take land into trust for the Tribe is not time-barred.

2. Constitutionality of § 5 of IRA (25 U.S.C. § 465)

The Village raises several arguments that challenge the constitutionality of the IRA or, more particularly, 25 U.S.C. § 465. *See, e.g.*, Opening Br. at 31-42. The Board lacks authority to adjudicate the constitutionality of statutes and regulations. *See, e.g.*, *Voices for Rural Living v. Acting Pacific Regional Director*, 49 IBIA 222, 250 (2009); *South Dakota*, 49 IBIA at 141. Therefore, we do not address these claims.

3. BIA's Authority to Take Land Into Trust for the Tribe Under the IRA

The Regional Director determined that the IRA, specifically 25 U.S.C. § 465, authorized her to accept the parcels into trust. To be eligible to have land taken into trust for it under § 465, the Tribe must be a “[Federally] recognized Indian tribe now under Federal jurisdiction.” 25 U.S.C. § 479. “Now,” as used in § 479, means 1934 when the IRA was enacted. *Carcieri*, 555 U.S. at 395. Here, the Village maintains that the Tribe was neither Federally recognized nor under Federal jurisdiction in 1934. We disagree.

a. Historical Background

Events in the Tribe's history relevant to this appeal date back to the 18th century. The Oneidas of Wisconsin originally were part of a larger Oneida tribe in New York. In the 1830s, the United States negotiated treaties with the Menominee Tribe in Wisconsin for land for the Oneidas and several other New York tribes. Treaty with the Menomones [sic], Feb. 8, 1831, 7 Stat. 342; Treaty with the Menominee Nation, Oct. 27, 1832, 7 Stat. 405. Groups of New York Oneidas, including the “First Christian” and “Orchard” parties, left New York to colonize the new tribal lands. A final treaty with the First Christian and Orchard parties was executed in 1838 and created a 65,540 acre reservation (Reservation) for those two groups in Wisconsin. Treaty with First Christian and Orchard Parties, Feb. 3, 1838, 7 Stat. 566.

The enactment of the General Allotment Act (Dawes Act) in 1887 brought about the transfer of tribal lands into individual ownership. 24 Stat. 388, Feb. 8, 1887. The patents for the allotments were to be held in trust by the United States for a period of 25 years. 25 U.S.C. § 348. Most of the land on the Reservation was allotted during this period, but not all of it, *and*, while most of the allottees ultimately received fee patents for their land, not all did. At least three executive orders were signed that extended the trust period on certain Wisconsin Oneida allotments to 1937. *See* Executive Order (E.O.)

Nos. 2623 (May 19, 1917) (1 year), 2856 (May 4, 1918) (9 years), and 4600 (Mar. 1, 1927) (10 years) (copies added to Docket no. IBIA 10-091 (Boyea)).²¹ With the enactment of the IRA in 1934, the trust period was extended indefinitely. *See* 25 U.S.C. § 462.

In 1931, BIA remained aware that there were still “a few scattered tracts of [tribal] land on the Oneida reservation.” Letter from Comm’r of Indian Affairs (Comm’r or Commissioner) to Oscar Archiquette, Nov. 13, 1931 (Opening Br., App. Tab 15); *see also* Letter from Comm’r to Chauncey Doxtator, Nov. 19, 1931 (Opening Br., App. Tab 16) (same). On these lands, state laws did not apply. *See, e.g., id.* (“State game laws apply to the Indians, except when exercising their hunting or fishing privileges within their reservation on restricted tribal or allotted [trust] land.”).

In 1934, the year in which the IRA was enacted, Federal correspondence reflected the following situation for the Oneida Indians of Wisconsin: Few of their lands remained in trust and the Federal government had limited involvement. In February 1934, the Commissioner wrote the Secretary that the Oneidas “lost all of their land” through fee patenting and other allotment procedures, an assertion that proved to be factually incorrect. Opening Br., App. Tab 23. He went on to say that the Indians were “living practically unprotected and not in any real way under Federal jurisdiction. They are one of the groups that ought to be brought into new land as an organized community.” *Id.* In March 1934, in a more accurate statement, the Secretary wrote that most of the fee-patented land had passed out of Oneida ownership by that time, but “about 20 allotments, or parts of allotments, containing between 500 and 600 acres, remain[ed] under trust.” Letter from Secretary to Walter B. Watkins, Mar. 13, 1934 (Opening Br., App. Tab 24).²² The Secretary went on to describe two bills then pending in Congress, including H.R. 7902, that would become the IRA: “[T]he purpose of [these bills] is to establish a new policy with respect to Indian rights, acquisition of lands upon which to establish Indian communities or colonies where worthy landless Indians could be supplied with home

²¹ Under the cited Executive Orders, 21 allotments on the Oneida Reservation were to remain in trust through 1937. *See also* Modification, Nov. 17, 1961, *Estate of Edwin John Skenandore*, Prob. No. A-34-49 (Dep’t of the Interior) (distributing share of Allotment No. 1410, belonging to Daniel Skenandoah, who is one of the deceased allottees identified in E.O. No. 4600) (copy added to Docket no. IBIA 10-091 (Boyea)).

²² *See also* E. O. No. 4600; Declaration of Rebecca M. Webster, Esq., Apr. 28, 2009, at ¶ 3 (AR Vol. 2 (*Carcieri* log), Tab 4, Attach.) (confirming that 591 acres of land on the Oneida Reservation “have never been patented in fee and have always been held as either restricted treaty land or individual trust land or tribal trust land.”)

places, and for other purposes.” *Id.* The Secretary stated, “[I]f enacted [these bills] *would no doubt be applicable to the Oneidas.*” *Id.* (emphasis added.)²³

In his annual report for 1934, submitted in April of that year, the Commissioner reported on the Indian population in the continental United States. He tabulated his population statistics first by state, followed by jurisdiction, then by reservation, and by tribe. The Oneida Tribe is listed, and its listing appears under the jurisdiction of the Keshena Agency and “Oneida Reservation.” AR Vol. 2 (*Carciere* log), Tab 3, Attach. 1. The census counted 2,992 Oneidas on the Reservation. *Id.*

On June 18, 1934, the IRA became law. In the IRA, Congress legislated an about-face with respect to Indian policy, immediately halting the allotment process, abandoning the assimilation policy that generated the General Allotment Act, and freezing the trust status of Indian lands. 25 U.S.C. §§ 461-62. Additional provisions in the IRA sought to restore tribal land bases, strengthen tribal governments, and authorize the establishment of new reservations. *Id.* §§ 463, 467, 469, 476. Of particular note, the IRA was *not* to “apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary . . . , shall vote *against* its application.” *Id.* § 478 (emphasis added).

On December 15, 1934, a Federal election was held by the Department for the Oneidas to vote on whether to reject the IRA (IRA election). *Ten Years of Tribal Government under IRA . . .*, United States Indian Service (1947) (Haas Rpt.) at 20 (Regional Director’s Answer Br., Docket No. IBIA 10-091 (Boyea), Attach.). The Tribe did not vote against the IRA, and thus ratified the application of the IRA to the Tribe. *Id.* In 1936, the Tribe drafted a Constitution pursuant to the IRA, 25 U.S.C. § 476, which was approved that year by the Tribe and by the Secretary. *Id.* at 26; *Oneida Tribe of Indians of Wisconsin v. Village of Hobart, Wisconsin*, 891 F. Supp. 2d at 1058, 1060 (E.D.Wis. 2012). The Tribe was included on the Commissioner’s 1937 list of Tribes that had adopted, and organized under, the IRA. Letter from Comm’r to Indian Affairs Subcommittee Chairman, Mar. 18, 1937, Attach. (Opening Br., App. Tab 27.) Also in 1937, the Secretary issued a Charter of Incorporation, *see* 25 U.S.C. § 477, to the Tribe, which the Tribe subsequently ratified in an election. Haas Rpt. at 26.

²³ After the Secretary’s letter to Watkins, Congress added the phrase, “now under Federal jurisdiction,” to the definition of “Indian” in H.R. 7902. But this amendment does not alter the import of the Secretary’s statement: The Secretary explained that the United States continued to hold land in trust for the Tribe or its members. While any number of factors may establish that a tribe is “under Federal jurisdiction,” it cannot reasonably be disputed that when the United States holds land in trust for a tribe or its members, that tribe is then “under Federal jurisdiction.”

b. *Carcieri v. Salazar* and *Shawano County*

During the time that the Tribe’s applications were under consideration by the Regional Director, the Supreme Court delivered a decision on the reach of the Secretary’s authority to take land into trust under § 465. *Carcieri v. Salazar*, 555 U.S. 379 (2009). In *Carcieri*, the Secretary had agreed to take land into trust on behalf of the Narragansett Indian Tribe in the State of Rhode Island pursuant to his authority under § 465. The Supreme Court, in construing § 465, held that Congress intended the Secretary’s land acquisition authority to apply only to those recognized tribes “under . . . federal jurisdiction . . . when the IRA was enacted in 1934.” 555 U.S. at 395.²⁴ Because the parties stipulated that the Narragansett Indian Tribe—for which the Secretary did not hold an IRA election—was not under Federal jurisdiction in 1934, the Court concluded that BIA lacked authority under § 465 to take land into trust for the Narragansetts. Given the parties’ stipulation, the Court did not take up the issue of how BIA or a tribe establishes that a tribe was under Federal jurisdiction in 1934. However, we took up this issue in *Shawano County*.

In *Shawano County*, the Board held that one brightline test for determining whether a tribe was “under Federal jurisdiction” in 1934 turns on whether an IRA election was held for the tribe. As we explained in *Shawano County*, 53 IBIA at 71-72,

Under § 18 of the IRA, 25 U.S.C. § 478, the terms of the IRA would not apply to a reservation if the adult Indians of a reservation voted to reject its application. To permit tribes to exercise this option, the Secretary was required to conduct elections pursuant to § 478. The Secretary held such an election for the [Stockbridge-Munsee] Tribe on December 15, 1934, at which the majority of the Tribe’s voters voted not to reject the provisions of the IRA. [T]he Secretary’s act of calling and holding this election for the Tribe informs us that the Tribe was deemed to be “under Federal jurisdiction” in 1934. That is the crux of our inquiry, and we need look no further to resolve this issue.

²⁴ The Court’s decision turned on the word “now,” as used in one portion of the definition of “Indian”: “‘Indian’ as used in [§465] . . . shall include all persons of Indian descent who are members of any recognized Indian tribe *now* under Federal jurisdiction” 25 U.S.C. § 479 (emphasis added). The United States contended that this provision referred to whether a tribe was under Federal jurisdiction at the time of the decision to take land into trust for the tribe; the State of Rhode Island maintained that it referred to the status of the tribe in 1934 when the IRA was enacted, i.e., whether the tribe seeking to have land taken into trust for it was “under Federal jurisdiction” in 1934.

c. Analysis

Here, it is undisputed that the Secretary held an IRA election for the Tribe, and therefore we conclude that the Tribe was under Federal jurisdiction at the time the IRA was enacted and that the Regional Director is authorized pursuant to 25 U.S.C. § 465 to take land into trust for the Tribe.

The Village criticizes our decision in *Shawano* as conclusory and as assuming, with no foundation, that because the Secretary held an IRA election for a particular tribe, that tribe necessarily was deemed and confirmed to be under Federal jurisdiction in 1934, within the meaning of the IRA. According to the Village, “the IRA allowed Indians to become organized and *then fall under federal jurisdiction.*” Village’s Reply to Tribe’s Br. at 11 (emphasis added). The Village misconstrues the IRA, as applied in this case, and the significance of a decision by the Executive Branch, through the Secretary, to conduct a referendum on the IRA for a particular tribe, and we reaffirm our decision in *Shawano*.

The tribal referenda held by the Secretary pursuant to 25 U.S.C. § 478 commonly are described as elections on whether to “accept or reject” the IRA, but in reality § 478 required the Secretary to call special elections to afford the adult Indians of tribes with the opportunity to *reject* the IRA by majority vote because it otherwise applied by default as a matter of law and remained applicable in the absence of such a vote. This distinction is significant in understanding why the Secretary’s decision to hold an IRA referendum for a particular tribe necessarily means that the Secretary recognized the tribe as being under Federal jurisdiction.

As interpreted by Solicitor Margold shortly after enactment of the IRA in 1934, the IRA “continues to apply to a reservation” unless rejected by the tribe, and only then does it “cease to apply to such reservation.” Sol. Op., “Wheeler-Howard Act Interpretation,” M-27810 (Dec. 13, 1934) (§ 478 does not call for election for the purpose of adopting or rejecting the IRA; it simply provides that a majority of the Indians of any reservation may *reject* the act); *accord Carciari*, 555 U.S. at 395 (the IRA “allowed tribal members to reject the application of the IRA to their tribe”). The “whole purpose” of § 478, as construed at the time, was “to assure every group of Indians the fullest opportunity to continue the *status quo ante* if it disapproves of the purposes of the act.” Sol. Op. M-27810. The status quo “ante” was the status quo as it existed before the IRA was enacted and applied to tribes and their reservations by default. The Indians who were entitled to vote on the IRA under § 478 were those who “may be seriously affected by the application of the [IRA] to a given

reservation.” *Id.*²⁵ An Indian, or an Indian tribe, that was not under Federal jurisdiction in 1934 would not automatically have been affected by application of the IRA, and thus had no need to be afforded the right to vote on whether “to reject the application of the IRA to their tribe.” *Carcieri*, 555 U.S. at 395.

The legal predicate, and necessary determination by the Secretary prior to holding an IRA election for a particular tribe, was that the tribe was one to which the IRA applied (i.e., it was under Federal jurisdiction) and to which its provisions were available, *unless and until* the tribe expressly *rejected* the IRA in the referendum. Thus, as interpreted at the time by the Solicitor, and recently by the Supreme Court, the purpose of the IRA referenda was not to bring existing tribes under Federal jurisdiction, but to afford *those tribes that were already under Federal jurisdiction* a right to opt out of the IRA, if they so chose.²⁶

The Department’s holding of the IRA election pursuant to 25 U.S.C. § 478 in 1934 for the Oneidas of Wisconsin necessarily was premised upon a determination by the Executive Branch that the individuals who were allowed to vote were “adult Indians” within the meaning of 25 U.S.C. § 479, which in turn meant that they must have been “persons of Indian descent who are members of [a] recognized Indian tribe now under Federal

²⁵ Of course, if an Indian tribe and its members no longer had any lands in trust or restricted fee, the provisions of the IRA that applied to reservation lands would remain without practical effect until a land base was restored, although other provisions of the IRA (e.g., tribal government reorganization) could still affect a tribe unless a majority of its members voted to reject the IRA’s applicability.

Undoubtedly, Congress and the Department considered the IRA to provide a significant *benefit* to tribes and their members. See 1934 Annual Report of the Comm’r at 83. But as the Solicitor recognized, concerns had been raised during hearings on the IRA about forcing change on the Indians, and for that reason the Indians who would be affected by its application were afforded a right to reject it for their reservation. Sol. Op. M-27810.

²⁶ As noted by Justice Breyer in his concurrence in *Carcieri*, the Federal government overlooked some tribes in conducting IRA referenda, but the fact that the Federal government failed to afford certain tribes under Federal jurisdiction the right to opt out of the IRA does not mean that they were not under Federal jurisdiction. 555 U.S. at 397-98. In order to conduct an IRA vote, the Secretary necessarily must have determined that a tribe was under Federal jurisdiction, or else there would have been no need to hold the election because there was no need to give the Indians the right to opt out of the IRA. But the failure to hold an election carried no contrary necessary determination because it may simply have been an oversight, or a failure to appreciate the jurisdictional significance of the Federal government’s dealings with a particular Indian group that was, in fact, a tribe.

jurisdiction,” *id.*²⁷ Otherwise, the Secretary would not have afforded the Oneidas of Wisconsin an opportunity to opt out from application of the IRA to their tribe.

Although the Secretary’s action in calling an IRA election in 1934 for the Wisconsin Oneidas is dispositive, the historical record serves to further illustrate the Secretary’s decision to call the election, and to understand why such an election was required. Most notably, it is undisputed that in 1934, there were still tribal and individual lands that were held in trust for the Tribe or its members by the United States. Even if, as the Village argues, the dissolution of trusteeship over Oneida lands was commensurate with the dissolution of Federal jurisdiction over the Tribe and its members, the dissolution of Federal jurisdiction could not occur unless and until the last parcel of Oneida land passed out of trust status. Until that happened, the lands remained Indian country, subject to Federal and Tribal jurisdiction, and the Tribe necessarily remained under Federal jurisdiction, regardless of whether state jurisdiction had attached to certain allottees and their allotted lands for which unrestricted fee patents had been issued. *See, e.g.*, Letter from Comm’r to Archiquette (“State game laws apply to the Indians, *except when exercising their hunting or fishing privileges within their reservation on restricted tribal or allotted [trust] land.*” Emphasis added.); Letter from Secretary to Walter B. Watkins, Mar. 13, 1934 (Opening Br., App. Tab 24) (“about 20 allotments, or parts of allotments, containing between 500 and 600 acres, remain under trust.”). Notably, the Secretary had “no doubt” that the then-pending bill that became the IRA would “be applicable to the Oneidas.” Letter from Secretary to Watkins.

The record contains various other indicia of the Federal government’s jurisdiction over the Oneidas of Wisconsin—inclusion in the Indian population census and assignment of the Tribe to the jurisdiction of a BIA agency. It also contains strong evidence of the

²⁷ The Village contends that the IRA vote for the Wisconsin Oneidas could not have been premised on one of the IRA’s alternate definitions of “tribe”—Indians residing on one reservation—because, the Village argues, the Oneida Reservation had been disestablished. If the Village’s disestablishment argument were correct, it would reinforce—not undercut—our conclusion that the Tribe was under Federal jurisdiction in 1934 because § 479 defines “tribe” as an Indian (1) tribe, (2) organized band, (3) pueblo, *or* (4) the Indians residing on one reservation. If the Wisconsin Oneidas no longer had a reservation, then the “tribe” could *only* refer to an entity that the Federal government understood at the time to be an “Indian tribe” or “organized band,” within the meaning of 25 U.S.C. § 479, and not “the Indians residing on one reservation.” *Id.* (Nothing in the record or the parties’ contentions suggests that the Tribe’s IRA vote was limited to “persons of one half or more Indian blood,” *see* 25 U.S.C. § 479, and thus we need not consider this definition of “Indian;” “pueblo” is generally reserved for certain Indian tribes in the state of New Mexico.)

Secretary's conscious understanding that the Tribe was among the tribes that were under Federal jurisdiction. *Id.*

The Village attaches great significance to the Commissioner's statement that the Tribe was "not in any real way under Federal jurisdiction," *see* Letter from Comm'r to Secretary, Feb. 24, 1934, but if anything, the qualifying language—"any real way"—could be read to imply recognition that the Tribe was under Federal jurisdiction, but that the Federal government's active involvement with the Tribe had diminished appreciably, commensurate with the issuance of fee patents to the allottees.

The Regional Director found that the Tribe had a "long standing relationship with the federal government, [as evidenced by treaties, statutes, and executive orders,] which culminated in the fact that the . . . Tribe voted to accept the IRA." NOD at 2 (unnumbered). With these facts, she determined that the Tribe was under Federal jurisdiction in 1934 and therefore 25 U.S.C. § 465 supplied the necessary authority to take these lands into trust for the Tribe. We affirm her NODs based on the Tribe's inclusion among the tribes deemed eligible to vote on whether to reject the IRA.

B. Consideration of Remaining Criteria Under 25 C.F.R. § 151.10

We first address the Regional Director's consideration of the three additional criteria in § 151.10 that we conclude were adequately considered (§ 151.10(b), (c), & (g)) before turning to her consideration of those criteria that we found deficient. Because the Regional Director's consideration of criteria (b), (c), and (g) was explained and is supported by the record, we affirm. The Village has not shown that the Regional Director's consideration was misplaced or inadequate.

1. Need — § 151.10(b)

We affirm the Regional Director's consideration of § 151.10(b) concerning the Tribe's "need" for the land. The Regional Director addressed this criterion by noting that the acquisition of these parcels of land in trust would "ensure[] that tribal investments within the . . . Reservation will never be lost." NOD at 2 (unnumbered). She also noted that each of the parcels had originally been allotted to a member of the Tribe, had passed out of Indian ownership, and had been subsequently repurchased by the Tribe. *Id.* She noted that trust status would protect the land for future generations by restricting alienation, and would generally support "community well-being." *Id.* at 3 (unnumbered).

The Village argues that the Tribe does not "need" the land proposed for trust acquisition because it is already self-sufficient, but instead the acquisition satisfies a Tribal "goal," which the Village identifies as both the acquisition of all lands within the exterior

boundaries of the Reservation and the elimination of tax liability. Opening Br. at 51. The Village criticizes the Regional Director for not considering the relative prosperity of the Tribe and the extent of its current land holdings. Further, the Village argues that the acquisition was improper because the Tribe did not explain why it needed the land in trust status instead of fee status.

First, and contrary to the Village's assertions concerning the Tribe's "goal" of reacquiring reservation lands lost to non-Indian ownership, such a "goal" was considered by the Regional Director: She asserted that the Tribe "has established goals [to reacquire reservation lands] to further the assurance that future generations of Tribal members will have lands available [for economic, residential, and agricultural purposes]." NOD at 3 (unnumbered). Therefore, the Regional Director considered the Tribe's "goals" and found them to be appropriate. *See South Dakota*, 39 IBIA at 292. The Village apparently believes that the Tribe's goals should be considered detrimental goals by the Regional Director, but provides no support for viewing them in this negative light and we know of none.

The Village argues that the Regional Director failed to explain just what "investments" the Tribe has for which trust status is necessary to ensure they "will never be lost." Opening Br. (Docket IBIA 10-091 (Boyea)) at 50. While it would certainly not have been inappropriate for the Regional Director to elaborate, it is not required. Regardless of how "investments" might be characterized—e.g., generally, as in the actual purchase of the lands or specifically, as in the investment in agricultural/residential uses on the lands—trust status for the lands broadly ensures that the land as well as its uses remain secure for the present and for future generations. Finally, there is a significant difference between lands held in fee and lands held in trust beyond the payment of property taxes: State and local laws apply to lands held in fee; tribal laws apply to lands held in trust, subject to the plenary jurisdiction of the United States.²⁸

In its comments to the Regional Director on the proposed acquisitions, the Village did not argue that the Tribe's financial status somehow should preclude the trust acquisition of the lands, nor did the Village argue that the Tribe had failed to explain why it needed to have the lands held in trust vis-à-vis fee. Therefore, the Regional Director did not have these comments before her to consider and they are outside the scope of our review. But even if the Regional Director had overlooked such comments by the Village, they are not required considerations in the context of a fee-to-trust acquisition. *See South Dakota v.*

²⁸ The state still retains criminal jurisdiction over lands in trust for the Tribe and certain civil regulatory/prohibitory jurisdiction pursuant to Pub. L. 83-280 (codified at 18 U.S.C. § 1162 and 28 U.S.C. § 1360). *See California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987).

Acting Great Plains Regional Director, 49 IBIA 84, 104-105 (2009); *County of Sauk*, 45 IBIA at 210; *South Dakota*, 39 IBIA at 290-91; *County of Mille Lacs, Minnesota v. Midwest Regional Director*, 37 IBIA 169, 173 (2002); *see also South Dakota*, 401 F. Supp 2d at 1007. The Village also raised for the first time in its appeal to the Board that the Regional Director’s NODs failed to comply with a BIA handbook on fee-to-trust acquisitions, *Acquisition of Title to Land Held in Fee or Restricted Fee*. Not only did the Village fail to raise this argument first before the Regional Director, the Village failed to provide the Board with a copy of the handbook. *See* n.19 *supra*.²⁹ If the Village believed that these issues merited consideration by the Regional Director, it should have brought them to the Regional Director’s attention.

2. Purpose and Use — § 151.10(c)

We also affirm the Regional Director’s consideration of § 151.10(c) concerning the Tribe’s intended uses and purposes for the lands, which will remain unchanged. At the time of the applications, each of these eight properties was used for agricultural or residential purposes (or both), and the Tribe does not intend to alter the existing use(s). With the exception of the Lahay property, which we address below, the Village does not challenge the Regional Director’s consideration of this particular factor.³⁰

Concerning the Lahay property, the Village argues that there is an inconsistency between the asserted use and purpose set forth in the environmental documents (the land is leased for Tribal police storage) and that set forth in the NOD (residential use). The Tribe explains in its brief to the Board that the Lahay property is leased as a residential property, which is consistent with the Regional Director’s determination. The Tribe also explains that another property, known as the McFarlin property, is leased for Tribal police storage purposes. In its reply brief, the Village does not dispute the Tribe’s explanation, and therefore we accept the Tribe’s explanation and conclude that the Regional Director

²⁹ According to BIA’s website, this publication was superseded in July 2011 with the publication of the “Fee to Trust Handbook.” *See* <http://www.bia.gov/cs/groups/xraca/documents/text/idc-002543.pdf>.

³⁰ The Village asserted that the Regional Director should have considered the potential use of the lands for Class II or Class III gaming under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 et seq. Nothing in the record suggests that any of the subject properties will be used for gaming, and it is well established that the Regional Director is not required to engage in speculation concerning future uses to which the lands may be put. *See City of Yreka v. Pacific Regional Director*, 51 IBIA 287, 297 (2010), *aff’d*, *City of Yreka v. Salazar*, No. 10-1734, 2011 WL 2433660 (E.D. Cal. June 14, 2011), *app. dismiss’d*, No. 11-16820 (9th Cir. Feb. 21, 2013).

properly considered the purpose of the Lahay property. To the extent that the Village raises any additional arguments or concerns regarding the purpose and use for the subject properties, we have considered each one and do not find any to be persuasive.

3. BIA's Ability to Discharge Additional Responsibilities — § 151.10(g)

We also affirm the Regional Director's consideration of § 151.10(g) concerning BIA's ability to discharge additional responsibilities that may result with accepting the properties into trust. The Village claims that there is no foundation for the Regional Director's conclusion that BIA will be able to discharge any additional responsibilities because the Tribe failed to identify any additional services that it would need. According to the Village, the BIA handbook, *Acquisition of Title to Land Held in Fee or Restricted Fee*, requires a statement of "the anticipated services that [the applicant tribe] will need from BIA" for any land accepted into trust. Opening Br. at 76. Neither the Village nor the Regional Director provided the Board with a copy of this publication. See n.19 *supra*. Therefore, the Village has not supported its argument. Moreover, the Village does not argue that BIA will be unable to discharge any additional responsibilities that would attend the acquisition in trust of the subject properties. We see no reason to revisit BIA's determination on appeal to the Board. See *Kansas*, 53 IBIA at 39.

4. Tax Revenue Impact and Jurisdictional/Land Use Conflicts — § 151.10(e) & (f)

With respect to the Regional Director's consideration of § 151.10(e) and (f), we vacate each of her NODs and remand these matters so that BIA may give consideration to the Village's comments and address the facts in the record that relate to the impact of the proposed acquisitions on the Village. It is particularly striking that the Regional Director found much to discuss concerning the impact of the proposed trust acquisitions on affected local jurisdictions that did *not* submit comments. The Tribe had submitted a substantial volume of information with its applications concerning the potential impacts on local jurisdictions, including the Village, and the Regional Director appropriately considered this information with respect to the non-commenting jurisdictions but not with respect to the Village.

In *Jefferson County*, we explicitly held that "[w]hile we cannot substitute our judgment for BIA's consideration of a factor [under § 151.10], a failure to consider a factor addressed by a county commenter is not sufficient." 47 IBIA at 200. And in *Cass County*, we observed that BIA must consider all facts known to it or that should have been known to it in evaluating an application to accept land into trust. 42 IBIA at 247. Here, the Regional Director did not address the information provided to her concerning the impact on the Village (e.g., tax information, potential disruption of storm water management) and

made little, if any, attempt to identify the Village's concerns, let alone address them in any meaningful way that would inform the Village that its concerns have been heard and considered. The Village correctly pointed out in its brief to the Board that it had raised numerous concerns to BIA in its Comment Letter and "the [Regional Director] completely failed to consider those concerns." Opening Br. at 61; *see also id.* at 2, 51, 55, 57, 60. Even where the comments, as here, apply to a larger group of proposed fee-to-trust applications that includes the subset under consideration, BIA must determine whether the comments nevertheless can be applied to the subset and, if not, explain why not. We turn now to a discussion of each of these two criteria.

a. Loss of Tax Revenue — § 151.10(e)

With respect to the Village's comments about the impact of the loss of property tax revenue (§ 151.10(e)), the Regional Director found the comments to be "speculat[ive]," "unsupported," and "unpersuasive," and concluded by asserting that "the economic and social benefits of the planned use of this property outweigh any impact on the . . . local political subdivisions." NOD at 3, 4 (unnumbered). The Regional Director did not identify the Village's concerns, much less discuss them. Nor did she discuss why she believed the impact on the Village from taking these parcels into trust would be outweighed by the economic or social benefits to be gained from the agricultural and residential uses of these properties. In other words, the Regional Director did not provide any substance or context to her conclusory opinions.

The Village commented to BIA that it must continue to provide municipal services to lands held in trust (and their residents, if any) with reduced funding. It contended that it is limited in its ability to raise taxes on remaining fee lands as a result of a state-imposed cap on increases. The Village provided specific costs for the repair of three roads, which appear to be near the Boyea property though not necessarily a usual means of access for that property.³¹ The Village also asserted that the Tribe has refused to negotiate any agreement to provide "in lieu" payments, *see Shawano County*, 53 IBIA at 80, as has been done with the county and other local jurisdictions and has enacted a Tribal resolution prohibiting the Tribe from entering into any such agreements with the Village. Additionally, the Village asserted that the Tribe is in arrears on two of the parcels for assessments that have been made, and thus the Village objects to these parcels being taken into trust while there are outstanding arrearages. *See* Opening Br., Ex. Q. Finally, the Tribe submitted with its application its property tax invoices on which the Village's portion is clearly set forth. The

³¹ The Tribe avers that the Village has refused to submit any roads into the Indian Reservation Road program, which the Tribe suggests would offer relief to the Village with respect to road maintenance. *See* 25 C.F.R. Part 170.

Regional Director's NODs do not reflect consideration of any of these items, for which reason we remand each of the NODs.

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

With respect to the Village's concerns about land use and jurisdictional issues (§ 151.10(f)), the Regional Director did address law enforcement matters, noting that Wisconsin is a state covered under Pub. L. 83-280.³² However, she failed to mention, much less discuss, the Village's land use concerns regarding adjacent fee and trust lands that are subject to very different uses and zoning (e.g., the Gerbers property will continue to be used and zoned by the Tribe for agricultural and residential purposes; it is located within and adjacent to land zoned by the Village for a commercial industrial park) and the Village's concerns regarding implementation of its storm water management plan, given the increasing checkerboard geography of fee and trust land within the Village's boundaries. The Regional Director concluded her consideration of § 151.10(f) by asserting that because "the jurisdictional pattern on the reservation is well established, we have determined that no new jurisdictional problems are likely to result." NOD at 5 (unnumbered). The Village argues that the Regional Director does not explain what she means by a "jurisdictional pattern." Opening Br. at 65.

We agree that the Regional Director's failure to address the storm water management issues that may arise is sufficient to vacate and remand the NODs with respect to § 151.10(f). We are not in agreement on whether the Village has met its burden to establish that the NODs were deficient with respect to other land use and zoning conflicts that allegedly could arise from the trust acquisition. But we are in agreement that, on remand, if the Regional Director again decides to approve these trust acquisitions, she should address these issues in more detail to make clear they have been considered and to explain terms that the Village contends it does not understand.

5. Environmental Concerns — § 151.10(h) (NEPA)

Finally, and with respect to environmental issues, we note that the environmental reviews had not been completed at the time that the Village's comments on the proposed trust acquisitions were due. *See, e.g.*, Environmental Review for Lahay Property, Aug. 9, 2010 (AR Vol. 1 Tab 18) (finalized almost 2 years after the Comment Letter was

³² Public Law 83-280, enacted in 1953, grants jurisdiction to certain states, including Wisconsin, over criminal offenses and civil causes of action in Indian country. For a discussion of Pub. L. 83-280, *see* Cohen's Handbook of Federal Indian Law 544-54 (2005 ed.).

submitted). Therefore, the Village has presented its comments on the environmental reviews in the first instance to the Board. In light of our remand to the Regional Director on other issues, *see supra*, the Regional Director should also consider the arguments raised by the Village with respect to environmental concerns.

To the extent that the Village raised new arguments in its briefs to the Board with respect to these proposed acquisitions, the Regional Director should consider and address those arguments as well on remand.

Conclusion

We affirm the Regional Director's NODs as to her authority to take land into trust for the Tribe pursuant to 25 U.S.C. § 465, her consideration under 25 C.F.R. § 151.10 of the Tribe's need and purpose for the lands (§ 151.10(b) and (c)), and her consideration of whether her staff can absorb any additional duties attendant to accepting the lands into trust (§ 151.10(g)). We take no position concerning the constitutional challenges raised by the Village to § 465. Except for the Village's bias argument, which we remand to the Regional Director for her consideration in the first instance, we reject the procedural arguments raised by the Village.

We vacate and remand to the Regional Director the remainder of the NODs to reconsider the remaining criteria under § 151.10(e) and (f), including any new or expanded arguments raised by the Village in its briefs before the Board. In addition, on remand, the Regional Director should address the Village's claims of bias and the Village's NEPA concerns, which we do not here address.

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 in part, vacates in part, and remands the Regional Director's March 17, May 5, July 8, August 16, and November 23, 2010, notices of decision for further consideration consistent with this order.

I concur:

// original signed
Debora G. Luther
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge