



## INTERIOR BOARD OF INDIAN APPEALS

Desert Water Agency v. Acting Pacific Regional Director, Bureau of Indian Affairs

59 IBIA 119 (09/08/2014)



# United States Department of the Interior

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

DESERT WATER AGENCY,	)	Order Affirming Decision
Appellant,	)	
	)	
v.	)	
	)	Docket No. IBIA 12-025
ACTING PACIFIC REGIONAL	)	
DIRECTOR, BUREAU OF INDIAN	)	
AFFAIRS,	)	
Appellee.	)	September 8, 2014

The Desert Water Agency (Appellant)<sup>1</sup> appealed to the Board of Indian Appeals (Board) from a September 20, 2011, decision (Decision) of the Acting Pacific Regional Director (Regional Director), Bureau of Indian Affairs (BIA), to acquire in trust approximately 5.31 acres of land, referred to as the “Mitchell parcel” and located in Riverside County, California, for the Agua Caliente Band of Cahuilla Indians (Tribe).<sup>2</sup>

We affirm the Decision because Appellant does not meet its burden to show that the Regional Director erred or abused his discretion as it contends. Appellant does not establish that the Regional Director erred in applying the criteria for on-reservation acquisitions contained in 25 C.F.R. § 151.10 to evaluate the proposed trust acquisition. Further, Appellant fails to show that it was an abuse of discretion for the Regional Director not to condition the trust acquisition on a requirement that the Tribe pay groundwater replenishment assessments to Appellant if and when the Tribe pumps groundwater from the Mitchell parcel. Finally, Appellant does not demonstrate that the Regional Director failed to adequately consider the impacts on Appellant of removing the Mitchell parcel from the tax rolls in accordance with § 151.10(e), or that the Regional Director abused his discretion by not conditioning the trust acquisition on future payment of property taxes.

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<sup>1</sup> Appellant describes itself as an independent special district of the State of California, located in Riverside County, which provides water supplies and sewage services to the City of Palm Springs and the surrounding area. Appellant’s Opening Brief (Br.) at 1.

<sup>2</sup> The legal description of the Mitchell parcel, as set forth in the Decision, was included as an attachment to the Board’s November 3, 2011, pre-docketing notice.

## Statutory and Regulatory Framework

Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. § 465, authorizes the Secretary of the Interior (Secretary) to acquire land in trust for Indians in her discretion. Under the 25 C.F.R. Part 151 regulations establishing the Department of the Interior's land acquisition policy, land may be acquired in trust status for a tribe:

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

25 C.F.R. § 151.3(a)(1)-(3). The regulations define "Indian reservation" to include "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction . . . ." *Id.* § 151.2(f).

When evaluating a tribal request for BIA to accept into trust land that is "located within or contiguous to an Indian reservation," *id.* § 151.10, BIA must consider the criteria for so-called "on-reservation" acquisitions contained in § 151.10. Specifically:

- (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
- (b) The need of 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 [BIA] 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 [Departmental Manual] 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.

*Id.* § 151.10(a)-(c) and (e)-(h).<sup>3</sup> On the other hand, if the land proposed for trust acquisition is "located outside of and noncontiguous to the tribe's reservation," *id.*

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<sup>3</sup> Criterion § 151.10(d) does not apply to tribal acquisitions.

§ 151.11, BIA must consider the on-reservation criteria and additional requirements for so-called “off-reservation” acquisitions set forth in § 151.11. *See State of New York v. Acting Eastern Regional Director*, 58 IBIA 323, 325 (2014).

### Factual Background

The Tribe acquired fee title to the Mitchell parcel in 2006. Tribe’s Fee-to-Trust Application, Jan. 13, 2009, at 1 (Administrative Record (AR) Tab 1). The parcel comprises approximately 5.31 acres, and is identified as Assessor’s Parcel Number 522-030-008. Decision at 2. The Tribe’s reservation was initially established by Executive order on May 15, 1876. *Id.* at 2. The Executive order reservation was subsequently enlarged and its boundaries are not fully described in the Decision. *See id.*

In 2009, the Tribe applied to BIA to place the Mitchell parcel into trust. AR Tab 1 at 1. The Tribe described the parcel as located “within the boundaries of the [Tribe’s] Reservation . . . .” *Id.* The Tribe stated that there were no specific proposals to develop the Mitchell parcel, but that it has the potential to be used for “highway commercial development.” *Id.* at 2.

The Regional Director subsequently issued to the California State Clearinghouse and others a notice of the Tribe’s fee-to-trust application. Notice of (Non-Gaming) Land Acquisition Application, Feb. 1, 2010 (AR Tab 11). The notice invited comments and requested specific information, including the annual amount of property taxes currently levied on the Mitchell parcel and allocated to the commenting agency, the amounts of any special assessments currently assessed against the parcel to support the commenting agency, and any government services currently provided to the property by the commenting agency. *See id.* at 1.

As relevant to this appeal, Appellant commented that it “take[s] no position on whether the Secretary should approve the Tribe’s proposed fee-to-trust conversion,” but requested that the Secretary condition any approval on the Tribe’s “continuing” payment of (1) Appellant’s assessments “for the delivery of imported water to replenish the groundwater supplies,” and (2) annual property tax levies from which Appellant repays its share of the State Water Project’s bonded indebtedness. Letter from Appellant to BIA, Feb. 25, 2010, at 2-3 (AR Tab 15). Appellant did not identify the amounts of any current assessments or taxes, or discuss what the impacts to Appellant would be if the parcel were placed into trust without the two conditions. In addition, Appellant stated that it “assume[s],” based on BIA’s notice which describes the Mitchell parcel as being located within the Tribe’s reservation and contiguous to tribal trust lands, that the proposed trust acquisition is governed by § 151.10, but that “[i]f the fee-to-trust conversion involves ‘off-

reservation' lands . . . the Tribe would be required to make the additional showings required by . . . § 151.11.” *Id.* at 2.

The County of Riverside also responded to the notice by identifying the total annual amount of property taxes levied on the Mitchell parcel and the amount of a special assessment for San Gorgonio Hospital that was included in the total amount. Letter from Deputy Treasurer-Tax Collector to BIA, Mar. 8, 2010 (AR Tab 18).

BIA provided the Tribe a copy of the comments that it received, and the Tribe responded to them. Letter from Regional Director to Tribe, Apr. 23, 2010 (AR Tab 21); Letter from Tribe to Regional Director, May 20, 2010 (AR Tab 22). In response to Appellant’s comments, the Tribe stated that Appellant appeared to confuse the Mitchell parcel with a different parcel owned by the Tribe, because there are no wells or ponds on the Mitchell parcel for pumping water, and thus the Tribe is not currently paying any “fees or assessments” to Appellant associated with the Mitchell parcel, whereas it does pay fees and assessments to Appellant for the other parcel. AR Tab 22 at 1. In response to Riverside County’s letter, the Tribe stated that it was current in its real property tax payments for the Mitchell parcel, and enclosed proof of payment of the Fiscal Year 2009-2010 property tax bill. *Id.* at 2; AR Tab 21.<sup>4</sup> The tax bill identifies a \$41.61 amount for debt service of the Desert Water Agency that was included in the total tax amount of \$710.36. AR Tab 21. Apparently in light of the Tribe’s statement that it pays no fees or assessments to Appellant, BIA then requested clarification from the Tribe of the \$41.61 amount. E-mail from BIA Realty Specialist to Tribe, June 21, 2011 (AR Tab 23). The Tribe responded that the \$41.61 amount was allocated to Appellant by the Riverside County Tax Collector. E-mail from Tribe to BIA Realty Specialist, July 26, 2011 (AR Tab 23).

On September 20, 2011, the Regional Director issued the Decision from which Appellant appeals. The Regional Director concluded that the proposed trust acquisition is authorized by the Indian Land Consolidation Act (ILCA), *see* 25 U.S.C. § 2202,<sup>5</sup> and satisfies BIA’s land acquisition policy in 25 C.F.R. § 151.3(a). Decision at 2. The Regional Director found that the Mitchell parcel “is within the exterior boundaries of the

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<sup>4</sup> The tax statement appears to have been mistakenly inserted by BIA at AR Tab 21 instead of with the Tribe’s response to comments at AR Tab 22.

<sup>5</sup> The cited provision of ILCA makes Section 5 of the IRA, 25 U.S.C. § 465, applicable to those tribes, including the Agua Caliente Band of Cahuilla Indians, that voted to opt out of the IRA in elections held thereunder. *See State of New York*, 58 IBIA at 332; Decision at 2 (citing Haas, *Ten Years of Tribal Government under I.R.A.*, United States Indian Service (1947), at 14 (copy added to appeal record)).

Agua Caliente Reservation . . . .” *Id.* The Regional Director also found that the property “is contiguous to trust lands” and “abuts to an existing Tribal trust parcel.” *Id.* at 2, 4. Based on those findings, the Regional Director determined that he need only consider the criteria for on-reservation acquisitions in § 151.10, and not the criteria for off-reservation acquisitions in § 151.11. *See id.* at 4-5.

In the Decision, the Regional Director noted Appellant’s request that the Secretary condition any approval on the Tribe’s “continuing obligation to pay [Appellant’s] assessments for water delivery service provided by [Appellant].” *Id.* at 2. The Regional Director repeated the Tribe’s response that Appellant appeared to confuse the Mitchell parcel with another parcel, because the Tribe is not currently paying any Desert Water Agency “fees or assessments” associated with the Mitchell parcel. *Id.* at 2; AR Tab 22 at 1. In addressing the impact of removing the Mitchell parcel from the tax rolls under criterion § 151.10(e), the Regional Director stated that the assessed property taxes for the Mitchell parcel, for fiscal year 2009-2010, totaled \$710.36. *Id.* at 4. The Regional Director did not mention the \$41.61 amount for Appellant’s debt service that was included in the tax bill.

Appellant appealed the Decision to the Board. Appellant filed an opening brief and a reply brief. The Tribe, as an interested party in this appeal, filed an answer brief. The Regional Director did not submit a brief in this matter.

## 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, and the Board does not substitute its judgment for BIA’s in discretionary decisions. *Shawano County, Wisconsin v. Acting Midwest Regional Director*, 53 IBIA 62, 68 (2011); *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; *State of South Dakota v. Acting Great Plains Regional Director*, 39 IBIA 283, 291 (2004), *aff’d sub nom. South Dakota v. U.S. Dep’t of the Interior*, 401 F. Supp. 2d 1000 (D.S.D. 2005), *aff’d*, 487 F.3d 548 (8th Cir. 2007). Simple disagreement with or bare assertions concerning BIA’s decisions are insufficient to carry this burden of proof. *Shawano County*, 53 IBIA at 69; *Arizona State Land Department*, 43 IBIA at 160.

The record must show that a regional director considered the criteria set forth in 25 C.F.R. § 151.10, 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. The factors need not be “weighed or balanced in any particular way or exhaustively analyzed.” *Shawano County*, 53 IBIA at 69; see *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. 07-543, 2008 WL 2225680 (W.D. Wis. May 29, 2008). The Board must be able to discern from the decision at issue, or at least from the record, that due consideration was given to timely submitted comments by interested parties. *Village of Hobart, Wisconsin v. Midwest Regional Director*, 57 IBIA 4, 13 (2013).

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. An appellant bears the burden of proving that BIA’s decision was in error or not supported by substantial evidence. *Arizona State Land Department*, 43 IBIA at 160; *Cass County, Minnesota v. Midwest Regional Director*, 42 IBIA 243, 247 (2006).

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 were not, but could have been, raised to the Regional Director. See *id.*; *Thurston County, Nebraska v. Acting Great Plains Regional Director*, 56 IBIA 62, 66, 71, 73 (2012); *State of Kansas v. Acting Southern Plains Regional Director*, 53 IBIA 32, 36 (2011).

## II. The On-Reservation Criteria Apply to the Mitchell Parcel

Appellant argues that the Regional Director’s decision does not adequately explain or substantiate his conclusion that the on-reservation criteria apply to the proposed trust acquisition, and that his conclusion also lacks any support in the record. Appellant’s Opening Br. at 3-6. Appellant challenges both of the Regional Director’s underlying findings that the Mitchell parcel is within the exterior boundaries of the Tribe’s reservation and that the parcel is contiguous to the Tribe’s reservation. *Id.* at 6-8. Because the Board reviews *de novo* the conclusion that the on-reservation criteria apply, see *Aitkin County, Minnesota v. Acting Midwest Regional Director*, 47 IBIA 99, 104 (2008), the record supports the finding of contiguity, and Appellant offers no evidence to contradict that finding, we affirm the decision to apply the on-reservation criteria.

Appellant asserts that the Mitchell parcel is not located “within . . . an Indian reservation” pursuant to 25 C.F.R. § 151.10. We agree with Appellant that the Decision and, as far as we are able to determine, the record do not support the Regional Director’s finding that the Mitchell parcel is located within the exterior boundaries of the Tribe’s reservation. Indeed, neither the Tribe nor the Regional Director defends that finding on appeal. But any error in that finding is harmless. The on-reservation criteria will be applied if the land to be acquired is located either “within *or contiguous* to an Indian reservation.” 25 C.F.R. § 151.10 (emphasis added). And, contrary to Appellant’s position, the record supports the Regional Director’s finding that the Mitchell parcel is contiguous to the Tribe’s “reservation,” which for purposes of 25 C.F.R. Part 151 is not limited to the Tribe’s Executive order reservation, and includes its trust lands.

Appellant concedes that “Indian trust lands may in many cases be considered part of an Indian reservation” under Part 151. Appellant’s Reply Br. at 4 n.1 (citing 25 C.F.R. § 151.2(f)). In *Aitkin County*, we held that, as defined in § 151.2(f), the term “Indian reservation” was not limited to a tribe’s treaty reservation, the tribe could have more than one reservation, and the tribe was presumed to exercise jurisdiction over its trust properties even though not formally proclaimed a new reservation or added to the existing reservation pursuant to 25 U.S.C. § 467. 47 IBIA at 104-07. Accordingly, when land proposed for trust acquisition is contiguous to a parcel that is held in trust for the tribe, the land is considered to be contiguous to an Indian reservation for purposes of Part 151. *Id.* at 105, 107; *see also State of Kansas v. Acting Southern Plains Regional Director*, 56 IBIA 220, 230 (2013).

Appellant disputes that any of the Tribe’s trust lands in the vicinity of the Mitchell parcel constitutes a reservation for purposes of Part 151. Appellant refers us to Tribal and Federal documents, appended to its opening brief, that depict the Tribe’s Executive order reservation relative to its “off-reservation trust land.” Appellant’s Opening Br. at 6-8 and App. 1-5. Appellant contends that these documents demonstrate a “common understanding” that the trust lands are not considered a reservation. *Id.* at 7. But the documents do not suggest that the Tribe’s trust lands are not an “Indian reservation” within the meaning of § 151.2(f). Rather, they reflect that the Tribe has an Executive order reservation as well as trust lands that possibly have not been formally proclaimed a new reservation or added to the existing reservation under 25 U.S.C. § 467. Appellant fails to show that this case is distinguishable from *Aitkin County* in that respect, and we therefore conclude that the Tribe’s trust lands are an Indian reservation for purposes of Part 151.

We agree with Appellant that the Regional Director did not provide a reasoned explanation, or citation to any documents in the record, to support his finding that the Mitchell parcel is *contiguous* to tribal trust land. But that does not require the Board to vacate the Decision and remand the issue for further consideration as Appellant contends,

because the Board may affirm a BIA finding of contiguity (or non-contiguity) where the record is sufficient to support the BIA finding as a matter of law.<sup>6</sup> *Preservation of Los Olivos v. Pacific Regional Director*, 58 IBIA 278, 311 (2014) (finding sufficient evidence in the record to support a BIA finding of contiguity as a matter of law); *cf. County of San Diego, California v. Pacific Regional Director*, 58 IBIA 11, 28 (2013) (vacating BIA decision because the regional director did not properly consider whether the parcel was contiguous to existing tribal trust lands, from which it was separated by several highways, and the record appeared to be incomplete). Appellant flatly asserts that “nothing in the record” supports a finding of contiguity. Appellant’s Reply Br. at 2. However, we find sufficient evidence in the record, unchallenged by Appellant, which shows that the Mitchell parcel is contiguous to at least one tribal trust parcel.

The term “contiguous” is not defined in Part 151, however, the Board has held that to be contiguous under Part 151, “at a minimum, the lands must touch.” *Jefferson County, Oregon, Board of Commissioners v. Northwest Regional Director*, 47 IBIA 187, 206 (2008). Parcels that “adjoin or abut” are contiguous. *Id.* at 205; *see also State of Kansas*, 56 IBIA at 230 (“Parcels that share a boundary are deemed ‘contiguous.’”). In this case, a map attached to the Tribe’s fee-to-trust application, and appearing elsewhere in the record, specifically identifies the location of the Mitchell parcel, the status of the surrounding properties owned by the Tribe, and the corresponding assessor’s parcel numbers (APN). AR Tab 1 at 46 (unnumbered); *see also* AR Tab 4, Attach. B; AR Tab 19, Attach. B. The map depicts the northern boundary of the Mitchell parcel as touching APN 516-070-022, which the map describes as being held in trust for the Tribe.<sup>7</sup> AR Tab 1 at 46 (unnumbered). As noted, Appellant does not address or counter this evidence. Therefore, we conclude that the administrative record supports the Regional Director’s finding regarding contiguity, and that Appellant fails to meet its burden of establishing error. For all of the foregoing reasons, we affirm the Regional Director’s decision to consider the proposed fee-to-trust acquisition under the on-reservation criteria in § 151.10.

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<sup>6</sup> Still, once the issue has been presented to it, BIA would do well to provide a reasoned explanation in its decision, or at least to address the issue in briefing to the Board.

<sup>7</sup> In addition, a review conducted by a GIS cartographer states that the Mitchell parcel is “adjacent” to the Tribe’s trust lands. Legal Land Description Review, Jun. 8, 2009, at 1 (unnumbered) (AR Tab 5). The Board has not held that the term “adjacent” is synonymous with “contiguous” for the purposes of § 151.10. *County of San Diego*, 58 IBIA 11 at 27-28. But maps attached to the GIS cartographer’s review confirm that the Mitchell parcel shares a boundary with the parcel identified as APN 516-070-022. *See* AR Tab 5 at 2-3 (unnumbered).

### III. Groundwater Replenishment Assessments

Appellant next argues that the Regional Director abused his discretion by not conditioning acceptance of the Mitchell parcel into trust on a requirement that the Tribe pay a groundwater replenishment assessment to Appellant, if and when the Tribe pumps groundwater on the Mitchell parcel. Appellant's Opening Br. at 8-14. We reject Appellant's argument because it rests on speculation and seeks to place on BIA a burden to prevent or resolve disputes that is not supported in the regulations.

On appeal, Appellant recognizes that the Tribe is not pumping groundwater from the Mitchell parcel and that Appellant is not assessing the Tribe for groundwater replenishment services on the parcel. Appellant now asserts that the Mitchell parcel overlies a groundwater basin and that the Tribe pumps groundwater from neighboring land, and thus "it is not inconceivable—and indeed may be highly likely—that the Tribe will pump groundwater from the Mitchell property at some time in the future . . . ." *Id.* at 13; *see also* Appellant's Reply Br. at 8. But this argument was not made to the Regional Director. The Board ordinarily will not consider for the first time on appeal matters that could have been, but were not, raised to the Regional Director. *See* 43 C.F.R. § 4.318. Moreover, Appellant presents no evidence that the Tribe has a plan to begin pumping on the Mitchell parcel, and at this time no wells or ponds are even located on the parcel. Decision at 2.

Even were we to excuse Appellant's apparent confusion about the Tribe's use of the parcel and its consequent failure to present this argument to the Regional Director, the Board has repeatedly held that BIA is not required to consider speculation about future potential loss of revenue under criterion § 151.10(e) (impact on the State and its political subdivisions resulting from removal of the land from the tax rolls). *Shawano County*, 53 IBIA at 80 (BIA is only required to "consider the present impact on the tax rolls of a proposed trust acquisition," not the revenue that might accrue based upon future activities by the tribe); *Rio Arriba, New Mexico, Board of County Commissioners v. Acting Southwest Regional Director*, 38 IBIA 18, 22 (2002) (the regional director was not required to consider the loss of gross receipts taxes for future unplanned construction or repairs on the property). Nor is BIA required to speculate about potential future changes in land use under § 151.10(c) (purposes for which the land will be used) or § 151.10(f) (jurisdictional problems and potential conflicts of land use which may arise). *State of Kansas v. Acting Southern Plains Regional Director*, 53 IBIA 32, 38 (2011) (finding that the regional director was not required to consider the appellant's fear that the property's zoning would change in the future); *City of Eagle Butte, South Dakota v. Acting Great Plains Regional Director*, 49 IBIA 75, 82 (2009) ("The Regional Director . . . has no obligation to consider [the appellant's] speculation about what might happen in the future."). Appellant does not persuade us that its concerns about possible future groundwater pumping should be treated differently.

Further, Appellant argues that the assessment is a fee, and not a tax, that it may lawfully impose anytime the Tribe pumps groundwater from the Mitchell parcel—including after the parcel is placed into trust.<sup>8</sup> Appellant’s Opening Br. at 10-12; Appellant’s Reply Br. at 6-7. If we were to assume that Appellant’s allegation is correct, it would appear that Appellant fails to articulate an adverse impact that would result from the Decision to place the parcel into trust. Appellant also asserts that, even if it has the right to impose the assessment on trust land, the Regional Director should still require the Tribe to pay the assessment “in order to avoid any future litigation” between the Tribe and Appellant. Appellant’s Reply Br. at 8. Again, Appellant did not present this argument to the Regional Director for his consideration, and thus cannot challenge the Decision on the grounds that the Regional Director failed to do so. *See* 43 C.F.R. § 4.318. Moreover, Appellant cites no authority for the proposition that BIA should prevent such disputes that might arise from a trust acquisition. In another context, we have held that BIA is only required to consider potential conflicts, and is not obligated to prevent or resolve them. *See State of New York*, 58 IBIA at 346 (potential disruption from change in regulatory jurisdiction); *Roberts County, South Dakota v. Acting Great Plains Regional Director*, 51 IBIA 35, 52 (2009), *aff’d sub nom.*, *State of South Dakota, et al. v. U.S. Dep’t of the Interior*, 775 F. Supp. 2d 1129 (D.S.D.), *appeal dismissed*, 665 F.3d 986 (8th Cir. 2012) (alleged creation of “islands of refuge” where an individual can escape from the reach of one jurisdiction). We find no error or abuse of discretion by the Regional Director in not making his approval of the trust acquisition conditional on the Tribe’s payment of possible future assessments for groundwater replenishment.<sup>9</sup> And, due to Appellant’s failure to raise its concerns about possible future groundwater pumping, assessments for replenishment, and related litigation in the first instance to the Regional Director, we find no fault on the part of the Regional Director in not directly responding to Appellant’s request for the subject condition. *See* 43 C.F.R. § 4.318.

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<sup>8</sup> Pursuant to the express terms of 25 U.S.C. § 465, trust land is exempt from state and local taxation.

<sup>9</sup> Accordingly, we need not reach the merits of Appellant’s underlying premise that BIA has discretionary authority to impose such a condition on a tribe. However, we note that Appellant mischaracterizes the Board’s decision in *Yerington Paiute Tribe v. Acting Western Regional Director*, 36 IBIA 261 (2001). In that case, the Board found that the regional director did not abuse his discretion in denying a tribe’s fee-to-trust request for failure of the tribe to show that it attempted to *negotiate* with the City of Yerington concerning an existing special use permit for the property, which included a stipulation regarding payment of property taxes. *See id.* at 261, 266. The regional director did not require, and thus the Board did not consider, a condition that the tribe pay taxes on the parcel after placement into trust.

#### IV. Appellant's Share of Property Taxes

Finally, Appellant contends that the Regional Director abused his discretion by failing to consider how the removal of the Mitchell parcel from the tax rolls will impact Appellant, and by not imposing a condition that the Tribe continue to pay the amount of the annual property tax bill that is distributed to Appellant. Appellant's Opening Br. at 15-18. We disagree.

Pursuant to criterion § 151.10(e), BIA must consider the "impact on the State and its political subdivisions resulting from removal of the land from the tax rolls." Appellant argues that the Regional Director "did not indicate the portion [of] the assessed property taxes allocable to [Appellant's] charges against parcels of property, and, more importantly, did not indicate the impact on [Appellant] if the Tribe is not required to pay such charges to [Appellant]." Appellant's Reply Br. at 10. While factually correct, that argument does not show that the Regional Director failed to adequately consider Appellant's comments or other information in the administrative record concerning the impacts to Appellant from the trust acquisition. Appellant did not identify in its comments the amount of any tax loss nor explain how it would be impacted by such loss.<sup>10</sup> According to information supplied by the Tribe, \$41.61 is the amount allocated to Appellant from property taxes, and Appellant does not dispute the amount. The Board has rejected the notion that any reduction in the tax base is inherently a significant impact. *See State of New York*, 58 IBIA at 343. Therefore, in the absence of evidence and an explanation provided to the Regional Director to show the impact resulting from the loss of revenue—and not merely the fact that some revenue would be lost—we conclude that the Regional Director's consideration of § 151.10(e) and the impacts on Appellant of removing the Mitchell parcel from the tax rolls was adequate. *See Carroll County, Mississippi, Board of Supervisors v. Acting Eastern Regional Director*, 56 IBIA 194, 201 (2013) (appellant provided no evidence to support its assertion that its tax loss would be significant and did not dispute the data provided by the tribe and relied upon by BIA); *Cass County*, 42 IBIA at 250 (appellant provided no evidence that the tax information relied upon by BIA was erroneous, or that BIA did not consider relevant information). And, for reasons we have already discussed in connection with Appellant's separate groundwater replenishment assessment, we find no abuse of discretion by the Regional Director in not conditioning acceptance of the parcel into trust on the Tribe's

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<sup>10</sup> We also note that, like the separate groundwater replenishment assessment, Appellant argues that the amount it receives through property tax collections, "although labeled a 'tax,'" is actually a "fee" or a "fixed charge," and thus "does not fall within the proscription of 25 U.S.C. § 465." Appellant's Opening Br. at 18. Here again, were we to accept that position as correct, it would appear that Appellant fails to identify an adverse impact that would result from removing the Mitchell parcel from the tax rolls. *See supra* at 128.

payment of property taxes, or in not explaining his rationale for denying Appellant's request for that condition. *See supra* at 128.

### Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director's September 20, 2011, decision.

I concur:

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// original signed  
Thomas A. Blaser  
Administrative Judge

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//original signed  
Steven K. Linscheid  
Chief Administrative Judge