



INTERIOR BOARD OF INDIAN APPEALS

Big Sandy Rancheria Band of Western Mono Indians v.  
Pacific Regional Director, Bureau of Indian Affairs

61 IBIA 311 (09/30/2015)



# United States Department of the Interior

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

BIG SANDY RANCHERIA BAND OF  
WESTERN MONO INDIANS,  
Appellant,

Order Affirming Decision

v.

Docket No. IBIA 14-017

PACIFIC REGIONAL DIRECTOR,  
BUREAU OF INDIAN AFFAIRS,  
Appellee.

September 30, 2015

The Big Sandy Rancheria Band of Western Mono Indians (Appellant) appealed to the Board of Indian Appeals (Board) from an August 30, 2013, decision (Decision) of the Pacific Regional Director (Regional Director), Bureau of Indian Affairs (BIA), to take into trust, for the Table Mountain Rancheria (Tribe or Table Mountain), 214.8 acres of land located in Fresno County, California. Appellant contends that BIA failed to comply with the National Historic Preservation Act (NHPA), 16 U.S.C. §§ 470 *et seq.*, in reviewing the Table Mountain's fee-to-trust application, and that the Regional Director therefore erred in approving the application. We conclude that BIA satisfied the requirements imposed by the NHPA and we affirm the Regional Director's decision to accept 214.8 acres of land into trust for the Tribe.

## Background

Table Mountain Rancheria is located approximately 20 miles northeast of Fresno, California, in the central San Joaquin Valley. *See* Table Mountain Rancheria 178-Acre Fee-to-Trust Application, Feb. 2011, at 1 (Application) (Administrative Record (AR) Tab 6). By resolution No. 2010-18, the Table Mountain Rancheria Tribal Council requested that the Secretary of the Interior (Secretary) accept into trust seven parcels of land owned in fee simple (the Parcels) by the Tribe.<sup>1</sup> Tribal Council Resolution No. 2010-18, Dec. 13, 2010, at 2 (unnumbered) (AR Tab 6, Exhibit (Ex.) 3). The Parcels, which together encompass

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<sup>1</sup> The Parcels are identified in Fresno County records as Assessor's Parcel Numbers: 138-061-55; 300-240-12; 300-240-15; 300-240-18; 300-240-21; 300-240-22; 300-240-23.

roughly 214.8 acres,<sup>2</sup> are located approximately 0.7 miles from the nearest properties held in trust for the Tribe. Application at 1.

The Parcels are used primarily for rural residential purposes and contain nine structures, though all were unoccupied when the fee-to-trust transfer was under consideration.<sup>3</sup> See Notice of (Non-Gaming) Land Acquisition Application, Dec. 20, 2012, at 5 (NOA) (AR Tab 17). There are also 28 wells on the property, 22 of which are abandoned. *Id.* The surrounding land is used for recreational and rural residential purposes as well as non-native grassland habitat for cattle grazing. *Id.* In its application, the Tribe stated that it sought to have the parcels taken into trust to facilitate the exercise of self-governance and self-determination by the Tribal Government and to “preserve the integrity of the Tribe’s land for future generations.” Application at 3. The fee-to-trust application also states that “[c]urrently, land uses on the subject property are limited to rural residential structures and associated wells . . . [and] [t]he Tribe does not propose to change any use of the property or to introduce any ground disturbing activity.” *Id.*; see also Tribal Council Resolution No. 2010-18 at 1 (unnumbered) (“Table Mountain Rancheria does not propose to change any use of the property . . .”).

Appellant, State of California and Fresno County agencies, and Cold Springs Rancheria, were notified of Table Mountain’s fee-to-trust application by certified mail dated December 20, 2012.<sup>4</sup> NOA at 7-8 (Distribution List). On January 31, 2013, BIA notified

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<sup>2</sup> The Tribe originally estimated that the seven parcels constituted 178 acres, however, this estimate was later revised. Compare Application at 1, with Land Description Review—Table Mountain Rancheria—178 acres, Nov. 22, 2011, at 1 (unnumbered) (AR Tab 10).

<sup>3</sup> In its Application, the Tribe stated that one of the existing residences, associated outbuildings, and well were being used by a tribal member. See Application at 3. The Tribe later confirmed that none of the buildings were being used for residential purposes at that time. Email from Karst to Russell, Aug. 21, 2012, at 1 (unnumbered) (AR Tab 11).

<sup>4</sup> In its Notice of Appeal, Appellant states that it does not have a record of receiving the NOA for this fee-to-trust application. Notice of Appeal, Sept. 27, 2013, at 4 (unnumbered). The Distribution List for the NOA provides the certified mail tracking number for each addressee, including Appellant. See NOA, Distribution List at 8. Although the administrative record includes an email message with an attachment labeled “Certified Mail Receipt – Big Sandy.tif,” which purportedly confirms that Appellant received the certified mail envelope on December 26, 2012, a copy of the attachment itself was not included in the record. See Email from Realty Specialist, BIA, to R. Pennell, Table Mountain Rancheria, Oct. 21, 2013, (AR Tab 41). Appellant does not argue that it was  
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the State Historic Preservation Officer (SHPO) for the State of California of its desire to initiate consultation with that office pursuant to Section 106 of the NHPA regarding the proposed fee-to-trust transfer of the Parcels. Letter from BIA to SHPO, Jan. 31, 2013, at 1 (unnumbered) (AR Tab 4). The Regional Director explained that the Tribe had requested that the Parcels, currently owned by the Tribe in fee simple, be conveyed to trust status and that “once taken into trust status, the property will not undergo any change in land use.” *Id.* at 1 (unnumbered). The letter then identified the land to be transferred as the Area of Potential Effect (APE) of the proposed undertaking, described five archeological sites (all located within two of the seven parcels within the APE), and recommended that all five sites “be treated as eligible for inclusion on the [National Register of Historical Places (NRHP)].” *Id.* at 1-2 (unnumbered).<sup>5</sup> The Regional Director also stated: “Since this federal action will not result in a change of land use, the BIA has concluded that there will be No Adverse Effect as a result of this proposed federal undertaking.” *Id.* at 2 (unnumbered) (emphasis omitted). Finally, the Regional Director observed that “SHPO concurrence with this determination evidences BIA fulfillment of federal regulations pursuant to 36 C.F.R. [§] 800.4(d)(1), and in compliance with Section 106 of the NHPA.” *Id.*

The Regional Director, in a letter to the Chairperson of the Big Sandy Rancheria dated February 9, 2013, invited Appellant to participate as a consulting party in the Section 106 consultation concerning approval of the fee-to-trust application for the Parcels “with no change in land use.” Letter from BIA to Chairperson, Big Sandy Rancheria, Feb. 9, 2013 (NHPA<sup>6</sup> AR Tab 010). Appellant formally accepted the invitation to become a consulting party in a letter dated March 1, 2013. Letter from Appellant to BIA, Mar. 1, 2013, at 1 (NHPA AR Tab 017). On February 14, 2013, the SHPO informed BIA that it concurred with BIA’s “No Adverse Effect” determination, “as the undertaking proposed no change in current land use and only involves the transfer of land into Federal ownership.” Letter from SHPO to BIA, Feb. 14, 2013 at 2 (NHPA AR Tab 016).

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not aware of the application, nor is the date of notice of the application pertinent to its legal argument.

<sup>5</sup> The Regional Director enclosed a copy of the report, *A Cultural Resources Survey of 178 Acres, Fee to Trust Application*, prepared by the Tribe’s Cultural Resources Department, with the letter to the SHPO. See Letter from Regional Director to SHPO, at 1 (unnumbered).

<sup>6</sup> The Regional Director, with the Board’s concurrence, supplemented the Administrative Record in this appeal with the addition of 24 files, identified as NHPA 001 to 024, and a record index. See Order Granting Extension for Regional Director to Supplement the Record, Feb. 19, 2014.

On August 30, 2013, the Regional Director issued the decision to have the Parcels accepted by the United States in trust for the Table Mountain Rancheria, which is the subject of this appeal. Notice of Decision, Aug. 30, 2013 (AR Tab 36). In the Decision, the Regional Director explained that Federal law and related regulations authorize the Secretary of the Interior to take land in trust for the benefit of tribes

when such acquisition is authorized by an Act of Congress and (1) when such lands are within the exterior boundaries of an Indian 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 land is necessary to facilitate tribal self-determination, economic development, or tribal housing.

*Id.* at 4 (citing the Indian Land Consolidation Act of 1983, 25 U.S.C. § 2202, *et seq.*, as statutory authority for the acquisition, and the regulations at 25 C.F.R. Part 151). The Regional Director determined that accepting the land into trust would allow the Tribe to “exercise sovereign authority over all land that it owns” and would “enhance the Tribe’s self-determination and self-governance.” *Id.* at 8. The Decision addressed comments submitted by County of Fresno agencies and the State of California. *See id.* at 5-7. The Decision also recorded the comment received from the Native American Heritage Commission (NAHC)<sup>7</sup> stating that it had no objections to the proposed fee-to-trust action, which NAHC determined involved lands within the ancestral territory of the Table Mountain Rancheria. *Id.* at 5. Neither the State nor the County appealed the Regional Director’s decision.

Appellant filed a notice of appeal and opening brief. Table Mountain Rancheria filed a motion to intervene, which we approved. *See* Motion to Intervene, Oct. 23, 2013; Order Granting Motion to Intervene, Nov. 14, 2013. Table Mountain Rancheria then filed a response brief, and Appellant filed a reply to Table Mountain Rancheria’s response. BIA did not file a brief in this case.

### Standard of Review

Appellant bears the burden of proving error in the Regional Director’s decision. *Frank v. Acting Great Plains Regional Director*, 46 IBIA 133, 140 (2007). BIA’s decision on a trust acquisition is discretionary. *Kansas v. Acting Southern Plains Regional Director*,

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<sup>7</sup> The letter to the BIA states that NAHC “is the state agency responsible for the protection and preservation of Native American Cultural Resources” under California law. Letter from NAHC to BIA, Dec. 27, 2012 (AR Tab 22).

61 IBIA 18, 24 (2015). We review BIA’s discretionary decision to determine whether BIA gave proper consideration to all of the legal prerequisites to its exercise of discretionary authority, including any limitations imposed by regulation. *Id.* We do not substitute our judgment for that of BIA. *City of Moses Lake, Washington v. Northwest Regional Director*, 60 IBIA 111, 116 (2015). However, we review questions of law *de novo*. *Aitkin County, Minnesota v. Acting Midwest Regional Director*, 47 IBIA 99, 104 (2008).

## Discussion

On appeal to the Board, Appellant contends that the Regional Director’s decision approving Table Mountain’s application to take the Parcels into trust was arbitrary, capricious, and not in accordance with the law because BIA failed to consult with Appellant as required by Section 106 of the NHPA. Notice of Appeal at 2-3 (unnumbered) (“The Regional Director failed to conduct any Section 106 consultation with [Appellant] whatsoever.”). Appellant asserts that the Parcels lie within its “aboriginal territory” and that it is aware of “numerous ancestral cultural and religious sites, including potential burial sites and human remains, bed rock milling stations, house-pits, ancient trails, funerary objects, sacred objects, and other artifacts” located there. Opening Brief (Br.), Jan. 24, 2014, at 4. Appellant asserts that the BIA failed to take into account its concerns regarding the cultural and historic resources on the Parcels and to “reach an amicable solution” that cultural resources would be protected after the Parcels were accepted into trust. *Id.* at 1-2.

Appellant alleges multiple errors in BIA’s consultation efforts under the NHPA: (1) BIA failed to request information from the Tribe as to possible cultural and historic resources; (2) BIA erred in concluding that the anticipated lack of change in the use of the Parcels, and the fact that the Parcels are owned by another tribe, relieved BIA of its consultation obligations; and (3) BIA erred in failing to allow Appellant to access the cultural resources report or, in the alternative, to allow Appellant to conduct its own cultural resources study. *Id.* at 10-23. We conclude that BIA complied with its obligations under the NHPA and that Appellant’s arguments to the contrary are without merit.

### I. NHPA Requirements for Federal Undertakings

The NHPA was enacted to increase knowledge of historic resources, establish a better means of identifying and administering these resources, and encourage their preservation for future generations of Americans. 16 U.S.C. § 470(b). The NHPA requires BIA to “take into account the effect of [any] undertaking<sup>8</sup> on any district, site,

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<sup>8</sup> “Undertaking” is defined as “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by  
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building, structure, or object that is included in or eligible for inclusion in the [National Register of Historic Places (NRHP)].” 16 U.S.C. § 470f.<sup>9</sup> The acceptance of land into trust for an Indian tribe, which must conform to the procedures provided in 25 C.F.R. Part 151 and requires Secretarial approval, qualifies as a Federal “undertaking.” See 36 C.F.R. § 800.16(y).

The mandate imposed by Section 106 of the NHPA, which requires Federal agencies to “take into account” the effect of proposed undertakings on historic properties, is implemented through regulations that prescribe specific steps in what is referred to as the Section 106 process. See 36 C.F.R. Part 800 & Subpart B--The Section 106 Process. As applied to the matter under consideration here, BIA must first determine whether the proposed Federal action—taking land into trust—is an undertaking as defined by the NHPA and, if so, whether it is the type of activity that has the potential to cause effects on historic properties. 36 C.F.R. § 800.3(a). If BIA determines that “the undertaking is a type of activity that does not have the potential to cause effects on historic properties, . . . the agency official has no further obligations under [S]ection 106.” 36 C.F.R. § 800.3(a)(1). “Effect” is defined as “alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the [NRHP].” 36 C.F.R. § 800.16(i).

If the undertaking has the potential to cause effects on historic properties, BIA must identify the appropriate State Historic Preservation Officer (SHPO) and other consulting parties, determine and document the area of potential effects, review existing information on historic properties within the area of potential effects, seek information from consulting parties and other individuals, identify historic properties, and evaluate the properties’ historic significance. 36 C.F.R. §§ 800.3-800.4. BIA is required to consult with any Indian tribe that attaches religious and cultural significance to properties which may be affected by an undertaking. 16 U.S.C. § 470a(d)(6)(B); 36 C.F.R. § 800.2(c)(2)(ii)(B). This consultation must provide the Indian tribe “a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, . . . articulate its views on the undertaking’s effects on such properties, and participate in the resolution of adverse effects.” 36 C.F.R. § 800.2(c)(2)(ii)(A).

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or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval.” 36 C.F.R. § 800.16(y).

<sup>9</sup> Section § 470f was repealed by Pub. L. No. 113-287, § 7, 128 Stat. 3272 (Dec. 19, 2014), and revised as 54 U.S.C. § 306108. The revision does not change the underlying responsibility of a Federal agency, such as BIA, in regard to a Federal undertaking.

If, as a result of this consultation and review, BIA determines that there are no historic properties present, or that the undertaking will have no effect on the historic properties, BIA must provide documentation of this determination to the SHPO and notify all consulting parties of its finding. 36 C.F.R. § 800.4(d)(1). If the SHPO does not object to BIA's determination, this concludes the Section 106 consultation. *Id.* § 800.4(d)(1)(i).

If BIA determines that there are historic properties which may be affected, it must assess the possibility that these effects may be adverse. 36 C.F.R. § 800.4(d)(2). Examples of adverse effects include: physical destruction of or damage to the property; alteration to the property; removal of the property from its historic location; change of the character of the property; neglect of the property; and “[t]ransfer, lease, or sale of property out of Federal ownership or control without adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property’s historic significance.” 36 C.F.R. § 800.5(a)(2). If BIA determines that there are historic properties which may be affected, but that the undertaking will have “no adverse effect,” it must notify all consulting parties, including Indian tribes, of this determination and provide these parties an opportunity to respond. 36 C.F.R. § 800.5(c). The regulations provide further procedures for resolving adverse effects and terminating consultation. 36 C.F.R. §§ 800.6-800.7.

## II. BIA's NHPA Section 106 Review of Table Mountain's Fee-to-Trust Application

Appellant argues that the Regional Director's decision to accept into trust the seven parcels of land owned by the Table Mountain Rancheria was an abuse of discretion and should be reversed because BIA did not adequately consult with Appellant concerning cultural, religious and historical sites on Table Mountain's property prior to issuance of the Decision. Opening Br. at 6, 10-11. Appellant contends that BIA had a duty to gather information from Appellant, as a consulting party, and to conduct formal government-to-government consultations with Appellant, and failed to do so. *Id.* at 13. Appellant also claims BIA was obligated, pursuant to the NHPA, to consult extensively with Appellant in order to fully “identify all potential cultural, historical and religious sites.” *Id.* at 13-14. We disagree. BIA reviewed a cultural resources inventory and related analysis of the land proposed to be taken in trust and determined that historic properties were present. However, because the undertaking at issue was limited to the transfer of title from the Tribe, in fee, to the United States to be held in trust on behalf of the Tribe, and because no change in land use or ground-disturbing activity was planned by the Tribe, it was reasonable for the Regional Director to conclude that no historic properties would be affected by the undertaking. Under these circumstances, the more extensive consultation sought by Appellant was not required by the regulations, nor would it have contributed to the protection of cultural resources, since the undertaking at issue, the transfer of title to the United States, would have no effect on such properties.

Prior to issuing the Decision, BIA contacted the California SHPO, informing it that a cultural resources inventory was conducted on the Parcels between April 14, 2007, and November 4, 2009. Letter from BIA to SHPO at 1 (unnumbered). BIA described the various historic sites that had been identified on the Parcels and recommended that all sites be treated as eligible for inclusion on the NRHP. *Id.* at 2 (unnumbered). BIA concluded that, “[s]ince this federal action will not result in a change of land use, . . . there will be No Adverse Effect as a result of this proposed federal undertaking.” *Id.* (emphasis omitted). BIA noted that the SHPO’s concurrence with BIA’s determination would evidence BIA’s fulfillment of its obligations under 36 C.F.R. § 800.4(d)(1) and Section 106.<sup>10</sup> *Id.* On February 14, 2013, the SHPO responded to BIA’s letter stating that it had no objections to BIA’s delineation of the APE, that it found BIA’s level of effort in identifying historic properties appropriate, and that it concurred with BIA’s finding of “‘No Adverse Effect’ as the undertaking proposed no change in current land use and only involve[d] the transfer of land into Federal ownership.” Letter from SHPO to BIA (emphasis omitted). With the receipt of the SHPO’s concurrence, the BIA’s responsibilities under Section 106 were fulfilled.<sup>11</sup> *See* 36 C.F.R. § 800.4(d)(1)(i).

BIA formally invited Appellant to serve as a consulting party in BIA’s Section 106 review of the proposed fee-to-trust conveyance. Letter from BIA to Appellant, Feb. 9, 2013 (NHPA AR Tab 010). In the invitation, BIA specifically stated that it would like to include “any knowledge of, or concerns about historic properties” of religious or cultural importance to Appellant as part of the Section 106 consultation process. *Id.* BIA acknowledged the “sensitive nature of such information” and assured Appellant that any information provided would be used solely to meet NHPA requirements. *Id.* Appellant accepted the invitation, stating it “possesse[d] knowledge of, and ha[d] concerns regarding[,] significant cultural and religious sites within the proposed [fee-to-trust] land.” Letter from Appellant to BIA, March 1, 2013 (NHPA AR Tab 017); *see also* Letter from Appellant to BIA, May 7, 2013 (NHPA AR Tab 018) (a subsequent letter reiterating Appellant’s concerns).

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<sup>10</sup> It is unclear why BIA termed its § 800.4(d)(1) determination “No Adverse Effect,” rather than “no historic properties affected,” as provided in the regulation. Appellant does not allege any error in BIA’s choice of language and therefore we do not examine it further.

<sup>11</sup> BIA undertook its review and made its Section 106 determination pursuant to the requirements of § 800.4(d)(1). Because we conclude that BIA’s determination was reasonable and in keeping with the regulations, we need not address whether taking land in trust, where there is no plan for change of land use or ground-disturbing activity, is the “type of activity that does not have the potential to cause effects on historic properties,” and which, if so decided by the agency, would end the Section 106 process without involvement of the SHPO, consulting parties, or the public. *See* 36 C.F.R. § 800.3(a)(1).

There is no indication in the administrative record that, after accepting the invitation to serve as a consulting party in the Section 106 process, Appellant provided BIA with information it possessed of cultural, religious or historic sites or properties in the area proposed by the Tribe to be taken in trust. However, on June 13, 2013, the Regional Director, Deputy Regional Director for Trust Services and other BIA representatives met with Appellant at the Pacific Regional Office to discuss cultural resource issues and Appellant's concerns related to Table Mountain's fee-to-trust application. Opening Br. at 5. Appellant states that the meeting attendees discussed Appellant's legal rights regarding protection of cultural resources. *Id.* Appellant does not reference any attempt on its part to identify or provide any information on historic sites on the Parcels during this meeting with BIA, or at any other time, in writing or by other means. *See id.*

On July 1, 2013, BIA notified Appellant of its determination that taking the Parcels into trust for the Table Mountain Rancheria would have "No Adverse Effect." Letter from BIA to Appellant (NHPA AR Tab 022). BIA explained that because Table Mountain sought to bring the Parcels into trust with no change in land use, the "No Adverse Effect" determination completed the Section 106 consultation process. *Id.*

Our review of the record indicates that BIA had complied with NHPA requirements when it informed Appellant that the SHPO concurred with BIA's "no adverse effect" determination, and that the Section 106 consultation process was therefore completed. BIA communicated with the SHPO and other interested parties as required by 36 C.F.R. § 800.4. BIA contacted Appellant and invited it to comment on the Tribe's fee-to-trust application and to share information concerning historic places and sites of cultural and religious importance to Appellant on the lands considered to be taken in trust. BIA officials also met with Appellant at the BIA Regional Office, which provided Appellant another opportunity to contribute information about historic sites and to elaborate upon its concerns regarding protection of cultural resources located on the Parcels. The pertinent regulation specifies that, in identifying historic properties, "[t]he agency official shall make a reasonable and good faith effort to carry out appropriate identification efforts." 36 C.F.R. § 800.4(b)(1). BIA notified the SHPO of its delineation of the APE, the efforts taken to identify historic sites, its recommendations for listing certain sites on the NRHP, and its "No Adverse Effect" determination. Letter from BIA to SHPO. The SHPO reviewed BIA's submission and found "the Level of Effort identifying historic properties appropriate." Letter from SHPO to BIA at 2 (emphasis omitted). While the SHPO included other comments on the documentation submitted, the comments did not cabin or limit his concurrence, but only recommended greater precision in certain aspects of such documentation to be provided "in future consultations with my office." *Id.* Because the SHPO concurred with BIA's determination, this concluded BIA's obligations under § 800.4(d)(1). *See Saylor Park Village Council v. U.S. Army Corps of Engineers*, 2002 U.S.

Dist. LEXIS 26208, at \*17-18 (S.D. Ohio) (explaining that if the SHPO agrees, or fails to respond within 30 days, to an agency's 36 C.F.R. § 800.4(d)(1) determination, this terminates the Section 106 consultation process).

### III. Appellant's Remaining Arguments

Appellant raises several general objections regarding BIA's compliance with the NHPA, but fails to reference specific regulations to support its claims. Appellant states that, even though the Parcels are already owned by an Indian tribe, BIA must still comply with its obligations under the NHPA. Opening Br. at 22-23. This is undisputed, and the record makes clear that BIA has complied, as shown by communications with the SHPO and invitations to area tribes, including Appellant, to serve as consulting parties.<sup>12</sup> Appellant then contends that BIA failed to request information from Appellant regarding its knowledge of specific historic sites on the Parcels. Opening Br. at 11. Appellant considers BIA's invitation to serve as a consulting party under Section 106 as "a mere formality" that fails to satisfy BIA's "duty to gather information from [Appellant] and conduct government-to-government consultation in order to identify and establish a comprehensive inventory of all possible cultural, historical and religious sites" on the lands proposed for transfer to trust status. *Id.* at 13. Appellant fails to cite to a specific regulation which would require BIA to affirmatively, and apparently repeatedly, request this information from a consulting party, let alone carry out an exhaustive, and time-consuming, inventory of "all possible" cultural sites on the property. *See id.* Appellant does not allege that BIA was unaware of any historic site on the Parcels and it is unclear how the identification of additional historic sites would alter BIA's determination. Furthermore, BIA provided Appellant with ample opportunities to communicate any specific information regarding historic sites it wished to bring forward, both through its written correspondence and in-person meeting with Appellant.

Appellant also argues that the transfer of title would alter the applicable legal or regulatory framework and could potentially have adverse effects on historic and cultural resources. Opening Br. at 16-19. Appellant explains that currently the Parcels are "subject to state and county regulatory schemes that may be more stringent and may require approval of the state or county, or both, prior to a change in the use and development of the [lands considered to be taken in trust]." *Id.* at 18. While Appellant is correct that the Parcels will no longer be subject to state and county regulatory jurisdiction after the land is taken in trust, the Parcels will be subject to Federal jurisdiction and Federal regulations, including the NHPA, along with tribal jurisdiction and regulations, regarding historic

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<sup>12</sup> See, for example, invitations to Picayune Rancheria (NHPA AR Tab 003), and Cold Springs Rancheria (NHPA AR Tab 006), to serve as consulting parties.

preservation. Appellant's argument that the change from state and county regulation to Federal regulation constitutes a *per se* change in land use is unconvincing. *See id.* We see no basis for assuming that county and state regulation of the use and development of private land will be more stringent than Federal regulation of the use and development of Indian trust land. Appellant's unsupported contention that state and county regulatory schemes may somehow be more effective at protecting cultural resources of significance to tribes is not sufficient to meet its burden of showing error in BIA's NHPA review.

Appellant next contends that it was erroneous for BIA to rely on Table Mountain's representation that there would be no change in land use because BIA did not place any restriction on the Table Mountain Rancheria's future development of the Parcels. Opening Br. at 14-16. We have clearly established that "[i]n deciding whether to acquire land in trust, a regional director 'has no obligation to consider an appellant's speculation about what might happen in the future.'" *State of New York v. Acting Eastern Regional Director*, 58 IBIA 323, 350 (2014) (alterations omitted) (quoting *City of Eagle Butte, South Dakota v. Acting Great Plains Regional Director*, 49 IBIA 75, 82 (2009)). Furthermore, any claims grounded on the potential impact on historic sites from purely speculative future development are not yet ripe for review. Appellant's concerns regarding possible impact on cultural resources from future development of Table Mountain's trust lands may be addressed if and when such development is being proposed for BIA action, in accordance with the requirements imposed on any such undertaking by the NHPA and its implementing regulations.

Finally, Appellant states that BIA did not allow it to access the cultural resources report for the parcels, or to conduct its own cultural resources study on Table Mountain's land, prior to the decision. Opening Br. at 20. It is unclear under what authority Appellant believes BIA could have granted access to Table Mountain's private fee land to conduct such a study. Nor is it clear why Appellant believes it would need such access to conduct its own study if, as it alleges, it "possesses knowledge of . . . significant cultural and religious sites within the proposed [fee-to-trust] land." Letter from Appellant to BIA, Mar. 1, 2013.

BIA apparently initially declined requests for copies of all cultural resources reports concerning the area involved in the fee-to-trust application on the grounds that it could not release confidential cultural resource information. *See* Letter from Appellant to BIA, July 10, 2014, at 3 (NHPA AR Tab 23). Appellant recognizes that access to cultural resource information is limited by the confidentiality provisions of the NHPA, but contends that such provisions are not intended to apply to Appellant because "[t]he cultural resources sites belong to [Appellant] as they are from our ancestors." *Id.* at 4 (referring to 16 U.S.C. § 470w-3). BIA reconsidered its position and released the reports after receiving a request for the documents from Appellant on August 26, 2013. *See* Letter from BIA to

Appellant, Nov. 6, 2013 (NHPA AR Tab 24). In releasing the reports, BIA acknowledged that “[Appellant] has the right to access these reports as a consulting party.” *Id.*

NHPA regulations require that, where there are historic properties that may be affected by an undertaking, but BIA has determined that the undertaking will have no effect upon them, the agency “shall notify all consulting parties, including Indian tribes . . . , and make the documentation available for public inspection prior to approving the undertaking.” 36 C.F.R. § 800.4(d)(1). BIA’s release of the cultural resources reports occurred after issuance of the August 30, 2013, Decision. However, the regulations also provide that where, as here, the agency determines that no historic properties will be affected by the proposed undertaking, and the SHPO concurs that the agency has adequately documented its finding, the agency’s Section 106 responsibilities are fulfilled. *See* § 800.4(d)(1). Although BIA could have released the reports to Appellant earlier, Appellant does not show that the tardy release affected the outcome or prejudiced Appellant. *See State of New York*, 58 IBIA at 353-55.

### Conclusion

We conclude that, based on the record and the nature of the Federal undertaking, which involved solely a transfer of title from the Tribe to the United States to be held in trust for the Tribe, BIA effectively satisfied the requirements of the NHPA for such undertakings. We therefore affirm the Regional Director’s exercise of discretion in accepting the Tribe’s application to take the Parcels in trust on its behalf.

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 August 30, 2013, decision.

I concur:

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Robert E. Hall  
Administrative Judge

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//original signed  
Steven K. Linscheid  
Chief Administrative Judge