



INTERIOR BOARD OF INDIAN APPEALS

Mille Lacs County, Minnesota v. Acting Midwest Regional Director,
Bureau of Indian Affairs

62 IBIA 130 (01/29/2016)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

MILLE LACS COUNTY,)	Order Affirming Decision
MINNESOTA,)	
Appellant,)	
)	
v.)	Docket No. IBIA 14-028
)	
ACTING MIDWEST REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	January 29, 2016

Mille Lacs County, Minnesota (Appellant or County) appealed to the Board of Indian Appeals (Board) from a September 12, 2013, decision (Decision) of the Acting Midwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA), to accept, in trust for the Mille Lacs Band of Ojibwe Indians (Mille Lacs Band or Band) of the Minnesota Chippewa Tribe (Tribe), 378.32 acres of land on three contiguous tracts of land referred to as the former “Sher Property.”

Appellant raises a variety of challenges to the Regional Director’s decision, many of which were raised in a previous appeal by the County of a 2001 BIA decision to acquire land in trust on behalf of the Mille Lacs Band. *See County of Mille Lacs, Minnesota v. Midwest Regional Director*, 37 IBIA 169 (2002). Appellant again challenges the constitutionality of Section 5 of the Indian Reorganization Act (IRA), codified at 25 U.S.C. § 465, the authority cited by the Regional Director for this acquisition, as well as its application in this instance. Appellant also advances legal arguments challenging both the legal interpretation and the adequacy of the Regional Director’s consideration of certain of the factors required for trust acquisition laid down in the regulations. Appellant argues that the Mille Lacs Band was not under Federal jurisdiction in 1934 and that, in light of the U.S. Supreme Court’s decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009), BIA lacked the authority required by 25 C.F.R. § 151.10(a) to take land in trust for the Band. Appellant also contends that the Regional Director erred in failing to consider adequately the criteria found in 25 C.F.R. § 151.10(b), (c), and (e). Finally, Appellant argues that the Band’s reservation was disestablished and therefore the Regional Director erred in failing to apply the criteria in 25 C.F.R. § 151.11, governing trust acquisition of off-reservation parcels.

Our review of the Decision and of the record confirms that the Regional Director carefully considered and addressed the statutory and regulatory requirements for the proposed trust acquisition and the specific concerns raised by Appellant. We conclude that the Regional Director correctly determined that the Band was under Federal jurisdiction in 1934 and that the land to be acquired in trust qualifies as an on-reservation acquisition. Appellant fails to meet its burden of showing error in the Regional Director’s decision or that it was not supported by the record.¹ We therefore affirm the Regional Director’s decision to accept the Sher Property in trust on behalf of the Band.

Statutory and Regulatory Framework

Congress has granted the Secretary of the Interior (Secretary) the authority “to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians.” 25 U.S.C. § 465. The Supreme Court has clarified that the IRA limits the Secretary’s authority to take land into trust to those Indian tribes that were under Federal jurisdiction when the IRA was enacted in June 1934. *Carciari v. Salazar*, 555 U.S. 379, 382 (2009).

Fee-to-trust acquisitions are governed by BIA’s regulations, codified at 25 C.F.R. Part 151. These regulations provide that land may be acquired in trust for a tribe when: (1) “the property is located within the exterior boundaries of the tribe’s reservation or adjacent thereto,” (2) “the tribe already owns an interest in the land,” or (3) “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).

In evaluating a tribe’s request to have land taken into trust, BIA must consider:

- (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;

. . . .

¹ Inasmuch as Appellant seeks to incorporate all other arguments raised during the course of the fee-to-trust application process, but not articulated in its brief on appeal, we conclude that arguments not properly raised before the Board are deemed waived. See *Crest-Dehesa-Granite Hills-Harbison Canyon Subregional Planning Group v. Acting Pacific Regional Director (Crest-Dehesa)*, 61 IBIA 208, 217 (2015).

- (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
- (f) Jurisdictional problems and potential conflicts of land use which may arise; and
- (g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.
- (h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.

25 C.F.R. § 151.10.² If the land to be taken into trust is “located *within or contiguous to* an Indian reservation,” BIA need only consider the above factors. *Id.* § 151.10 (emphasis added). However, “when the land is located outside of and noncontiguous to the tribe’s reservation,” BIA must also consider the criteria found in § 151.11. *Id.* § 151.11. The definition of “Indian reservation” that applies to trust acquisitions includes “that area of land over which the tribe is recognized by the United States as having governmental jurisdiction” and “where there has been a final judicial determination that a reservation has been disestablished or diminished, . . . that area of land constituting the former reservation of the tribe as defined by the Secretary.” *Id.* § 151.2(f).

Background

On October 31, 2012, the Mille Lacs Band of Ojibwe Indians submitted a fee-to-trust application to the Regional Director for the Sher Property, comprising approximately 386 acres.³ Application for Fee to Trust Acquisition (On-Reservation) at 2 (Application) (Administrative Record (AR) 29). The Band attested that the Sher Property qualified as “on reservation,” pursuant to § 151.10, because it was located within the boundaries of the Mille Lacs Indian Reservation, as established in the Treaty of 1855, 10 Stat. 1165. *Id.* at 5. The Band further noted that the Sher Property is contiguous to two parcels of land already held in trust for the Band and over which the Band exercises governmental jurisdiction. *Id.* at 6.

² Section 151.10(d) only applies to acquisitions for individual Indians and is therefore omitted here.

³ The Sher Property is located in Section 19, Township 43 North, Range 27 West, 4th Principal Meridian, Mille Lacs County, Minnesota. The specific legal description of the Sher Property is included in the Regional Director’s decision.

The Band explained that it needed to take the Sher Property into trust “to restore its depleted land base, to facilitate tribal self-determination, and to provide housing and governmental services for [its] members.” *Id.* at 7. It stated that out of the 61,014 acres of land within the Band’s historic reservation, the Band now owns 4,700 acres in fee and the United States government holds 2,621 acres in trust for the Band or the Minnesota Chippewa Tribe. *Id.* at 8. The Band stressed that its trust properties are “the only lands that are held *permanently* for the Band and on which the Band’s sovereign authority is undisputed.” *Id.* The Band also explained that much of the land currently held in trust for the Mille Lacs Band “cannot be developed due to the presence of wetlands or significant archeological considerations.” *Id.* The Band stated that it needs the Sher Property to help it establish “a reasonable, livable land base . . . that supports housing for Band members, government and community facilities, economic enterprises necessary for [the Band’s] self-support, . . . and one that facilitates the maintenance of the Band’s hunting, fishing and gathering traditions and culture.” *Id.*

The purposes identified by the Band for the trust acquisition of the Sher Property “are to provide affordable housing for Band Members and future development of governmental facilities.” *Id.* at 12. The Band noted that its population had increased 16% in less than 10 years to 4,300 members. *Id.* at 11. At the time of the Band’s application, there were 458 members of the Band on waiting lists for subsidized housing. *Id.* The Band explained that many of its members wished to live and work on the Reservation where the Band’s businesses provide employment opportunities, but were unable to do so because of the limited housing supply. *Id.* at 12.

The Band also addressed the impact on State and local tax revenue that would result from taking the Sher Property into trust. *Id.* at 13-18. Based on its tax records, the total property taxes levied by the County on the tracts comprising the Sher Property amounted, in 2012, to \$6,698.18, or approximately 0.045% of the County’s total property tax levy. *Id.* at 13. The Band estimated that it was one of the largest tax payers in the County, responsible for approximately 1.4% of the taxes levied there, and will remain so after the Sher Property has been taken in trust. *Id.* The Band also noted that, through an agreement between the Band and the State, the State receives roughly one-half of the sales tax generated by tribal businesses and that the County’s share of that revenue amounted to \$54,437 in 2011 alone. *Id.* at 13-14. Other economic benefits generated by the Band through its enterprises and tribal government, such as a contribution of \$87,103 to Onamia School District in FY 2012 and over \$4.25 million in charitable donations to organizations serving the local community and region since 2006, were also detailed. *See id.* at 14-18.

The Band opined that the loss in tax revenues that would result from placing the Sher Property in trust was “heavily outweighed by the benefits to the Band from placing the land in trust, the taxes paid by the Band and its Corporate Commission on other fee lands,

the significant State, County and local tax revenues that have been generated by the Band's economic endeavors, and the significant governmental services the Band provides at no cost to the State, the County and the Township." *Id.* at 18. Specifically, the Band argued that its casino, and other businesses owned by the Band, are significant employers in the county, and increased housing demand and tourism in the area. *Id.* at 14-16. The Band also stated that it shares costs of certain governmental services with local governments, including education, law enforcement, health and human services, water and wastewater, solid waste, and roads. *Id.* at 16.

Finally, the Band stated that it did not anticipate that taking the Sher Property into trust would create any jurisdictional problems or conflicts in land use. *Id.* at 18. The Band noted that it has its own police force that provides law enforcement services on properties owned by the Band, and that it had recently entered into a new cooperative agreement with the County regarding the provision of law enforcement services under state law. *Id.* at 19. Placing the Sher Property in trust, the Band observed, would "help resolve jurisdictional disputes that have resulted from [Mille Lacs] County's refusal to recognize [the Band's] governmental authority on fee lands within the Mille Lacs Reservation." *Id.* at 18. The Band explained that the County claimed that the Reservation was disestablished and repeatedly asserted regulatory authority over the Band's fee lands. *Id.* at 10, 19.

BIA solicited comments from the State of Minnesota and Appellant, Notice of (Non-Gaming) Land Acquisition Application, Feb. 15, 2013 (AR 26), and both the State and Appellant responded. The State's comments generally addressed environmental considerations for future development and referred BIA to the comments provided by the County for additional information. State's Comments, Mar. 20, 2013, at 2-3 (AR 23). The State did not object to the proposed acquisition, but noted that the County was opposed and requested that BIA give "due and proper consideration" to Appellant's concerns. *See id.*

In its comments on the Application, Appellant argued the Secretary lacked authority to take the land in trust under 25 U.S.C. § 465 because, it contended, the Band was not recognized as an Indian tribe and therefore was not under Federal jurisdiction in 1934, as required by the Supreme Court's ruling in *Carciere*, and that even if the Band had been Federally recognized, the Sher Property was under state jurisdiction and therefore could not be transferred into Federal jurisdiction pursuant to the Supreme Court's decision in *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009). *See* Appellant's Comments, Mar. 15, 2013, at 1-3 (unnumbered) (AR 25); Appellant's Supplemental Comments, Apr. 1, 2013, at 1-2 (unnumbered) (AR 20). Appellant also asserted that the Mille Lacs Reservation had been judicially disestablished and that the application should, therefore, be considered under the factors required for off-reservation acquisitions. Appellant's Comments at 3 (unnumbered). Appellant disputed the Band's need to have the Sher Property taken in

trust, contending that, as the 40th largest employer in the state, the Band had already attained economic self-sufficiency. Appellant's Supplemental Comments at 4 (unnumbered). Appellant asserted that, because the Band had been aware of, and failed to resolve, its housing shortage for more than 10 years, it could not now rely upon the shortage of affordable housing as an acceptable purpose for taking the Sher Property into trust. *Id.* at 3-4 (unnumbered).

On September 12, 2013, the Regional Director issued his decision approving the Band's application to have the Sher Property taken into trust. Decision (AR 3). The Regional Director first concluded that the Sher Property qualified as an on-reservation acquisition. *Id.* at 2. He acknowledged, but rejected as without merit, Appellant's contention that the Mille Lacs Reservation had been disestablished. *Id.* at 3. He cited the definition of *Indian reservation* provided at 25 C.F.R. § 151.2(f), which includes both lands over which a tribe is recognized by the United States as having jurisdiction and lands within a tribe's former reservation where there had been a final judicial determination disestablishing or diminishing that reservation. *Id.* He then referenced the Board's 2002 decision, which concluded that, regardless of whether the reservation had been disestablished, the land to be acquired in trust would be considered "on-reservation" under the definition provided by § 151.2(f). *Id.* (citing *County of Mille Lacs, Minnesota*, 37 IBIA at 172). The Regional Director also explained that the Sher Property was located contiguous to two existing parcels of land held in trust for the Band and therefore qualified as an on-reservation acquisition. *Id.*

The Regional Director then addressed each of the applicable factors in § 151.10 in turn. *Id.* 3-12. As relevant to Appellant's arguments on appeal, the Regional Director determined that the Supreme Court's 2009 decision in *Carciere*, did not deprive the Secretary of authority to take the Sher Property in trust for the Band because the numerous Federal treaties and statutes enacted on behalf of the Band, along with the voluminous supplemental information provided by the Band, demonstrated that the Band was under Federal jurisdiction in 1934. *Id.* at 3-4.

The Regional Director also addressed the Band's need for additional land and the purpose for which the Sher Property would be used. *Id.* at 4-6. He explained that most of the land suitable for development was already utilized by the Band for housing, government, cultural, recreational and community services, and that remaining lands were composed of wetlands or were unavailable due to the presence of significant archeological considerations. *Id.* at 4. The Regional Director recognized the Band's emphasis on the importance of trust status to self-governance and self-determination, and to the long-term protection of its investments. *Id.* 4-5. He concluded that the Band needed to place the Sher Property in trust for an affordable housing development and observed that the Sher

Property was near other Band-financed housing, and that it was located along a major infrastructure improvement corridor and in close proximity to utility service lines. *Id.* at 5.

The Regional Director noted that the Band had cited a 2003-2004 study in its application that documented a severe housing shortage for Band members and that since then, the Band's population had increased from 3,600 to 4,300. *Id.* at 6. He stated that the Band sought to restore its depleted land base and explained that the purpose identified by the Band for the Sher Property was to use it for an affordable housing project and future development of governmental facilities. *Id.*

Concerning the fiscal impact of the proposed acquisition, the Regional Director acknowledged the County's assertion that it was a relatively poor county and could not afford to absorb the loss of additional tax revenues. *Id.* He explained that the total property taxes levied on the parcels comprising the Sher Property in 2012 came to \$10,056. *Id.* Of this amount, the County collected \$6,620.16 in 2012 for the Sher Property, accounting for less than five one-hundredths of one percent (0.04545%) of the County's total tax levy. *Id.* at 7. The Regional Director stated that he found it difficult to credit the County's assertion that it could not sustain the loss, given the small amount of revenue at issue. *Id.*

The Regional Director acknowledged the County's contention that the cumulative effect of the loss of property taxes, assessments, jurisdictional problems and potential land use conflicts from past and future trust acquisitions should be taken into account. *Id.* (citing Appellant's Comments at 5). He explained that the regulations did not require BIA to consider the cumulative impact of all fee-to-trust acquisitions on the tax rolls. *Id.* (citing *South Dakota v. United States Dep't of the Interior*, 423 F. 3d 790, 801-02 (8th Cir. 2005)). The Regional Director considered the contributions of the Band's economic enterprises to the County's economic development, the governmental services provided by the band, as well as payments for local services and charitable contributions to agencies serving the locality and region, and concluded that the economic and social benefits of the planned use of the property outweighed any impact on the State or local governments. *Id.* at 8-9.

Appellant filed a notice of appeal and opening brief with the Board. BIA and the Band filed answer briefs, and Appellant filed a reply brief. BIA, Appellant, and the Band also filed supplemental authority to support their arguments.

Discussion

I. Standard of Review

The standard of review for trust acquisition cases is well established. The record must demonstrate that the Regional Director considered the factors set forth in 25 C.F.R. § 151.10, although BIA is not required to reach a particular conclusion with respect to each factor. *State of New York v. Acting Eastern Regional Director*, 58 IBIA 323, 329 (2014). Nor is the Regional Director required to weigh or balance the factors in a particular way. *Id.* On review, we must be able to discern from the decision or the record that the Regional Director gave due consideration to timely submitted comments. *Id.*

BIA's trust acquisition decisions are discretionary, and we do not substitute our judgment for BIA's in discretionary decisions. *Id.* Rather, we review these 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. *City of Moses Lake, Washington v. Northwest Regional Director*, 60 IBIA 111, 116 (2015). The appellant bears the burden of demonstrating that BIA did not properly exercise its discretion. *State of Kansas v. Acting Southern Plains Regional Director*, 61 IBIA 18, 24-25 (2015). We have full authority to review legal issues, though we lack the authority to review challenges to the constitutionality of laws or regulations. *Id.*

II. Constitutional Arguments

Appellant presents a variety of arguments challenging the constitutionality of the land acquisition provision of the IRA, 25 U.S.C. § 465, on which the Regional Director relied as the source of his authority to take the Sher Property into trust for the Band. Appellant first argues that any statute which attempts to remove land from state jurisdiction is an unconstitutional infringement upon the state's sovereignty. Notice of Appeal, Oct. 11, 2013, at 3 (NOA) (citing *Hawaii*, 556 U.S. 163). Appellant next contends that 25 U.S.C. § 465 is unconstitutional as applied and violates the "fundamental principle of equal sovereignty" between states because Indian reservations are found in only 25 states and therefore 25 U.S.C. § 465 disproportionately impacts those states with reservations. Opening Brief (Br.), Jan. 23, 2014, at 4-5 (unnumbered) (citing *Shelby County v. Holder*, 133 S. Ct. 2612 (2013)).⁴

⁴ We note that, while Appellant claims that § 465 unconstitutionally impinges on the State's rights, the State did not object to this trust acquisition. See State's Comments at 2 (noting *County's* opposition and requesting BIA "give due and proper consideration to the *County's* concerns" (emphasis added)). Subsequent to the filing of County's appeal in which

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The Board has held consistently that it lacks authority to declare an act of Congress to be unconstitutional, and we do so again today. *Thurston County, Nebraska v. Acting Great Plains Regional Director*, 56 IBIA 62, 66 (2012); *County of Mille Lacs, Minnesota*, 37 IBIA at 170-71. We have no jurisdiction over these constitutional challenges raised by Appellant and we will not address such challenges further.

III. Review of the Regional Director's Analysis under 25 C.F.R. § 151.10

On appeal, Appellant challenges the Regional Director's analysis of the proposed trust acquisition in regard to four of the factors provided under § 151.10: authority to take the land into trust, need for additional land, purpose for which the land will be used, and impacts resulting from removal of the land from the tax rolls, respectively subsections (a), (b), (c), and (e) of § 151.10. After reviewing Appellant's arguments, we conclude that Appellant has not met its burden of demonstrating error in the Regional Director's decision.

A. Statutory Authority for the Acquisition

Appellant contends that BIA lacked statutory authority to take the Sher Property in trust under 25 C.F.R. § 151.10(a) because the Mille Lacs Band allegedly was not a recognized Indian tribe and not under Federal jurisdiction in 1934, as required, Appellant argues, by the Supreme Court's decision in *Carciari*. NOA at 6; Opening Br. at 2-4. As we understand Appellant's argument, Appellant acknowledges that the Federal government historically recognized, negotiated with, and maintained government-to-government relations with the individual bands of Chippewa Indians residing in Minnesota, including the Mille Lacs Band, as distinct tribes or bands, as manifested through various acts of Congress and treaties entered into between the United States and the bands. Opening Br. at 3.⁵ Appellant argues, however, that with the cession of the Band's reservation lands to

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Appellant asserted that "[t]he State of Minnesota objected to removing the parcel from local property taxation," Opening Br. at 5 (unnumbered) n.15, the State Governor's Office clarified its position by stating, "[t]his office does not oppose the Bureau's September 12, 2013 decision to take the Sher Property into trust for the benefit and welfare of the Mille Lacs Band." See Letter from Office of Governor to Board, Feb. 26, 2014. Appellant does not establish that it has standing to assert the interests of the State of Minnesota.

⁵ As support for this position, Appellant holds forth the following Supreme Court cases for the cited propositions: "*Chippewa Indians of Minnesota [v. United States]*, 301 U.S. 358, 361 [(1937)] ([^]It is to these [twelve] Minnesota *bands* and reservations that this suit relates[.']) . . . *Chippewa Indians of Minnesota v. United States*, 307 U.S. 1, [5] (1939) ([^] (continued...)

the United States, the relationship between the United States and the Mille Lacs Band ceased to exist, the Band was no longer recognized by the Federal government, and the Band was therefore no longer under Federal jurisdiction. *Id.* at 3-4. Appellant appears to ground its conclusion on the absence of explicit reference to the Band in documents listing the tribes that adopted constitutions and bylaws or ratified charters in accordance with the IRA in the years immediately following its enactment in 1934, such as the 1947 Haas Report.⁶ *Id.*; see also Appellant's Comments at 1 (unnumbered) and Exhibits (Exs.) 1 and 2 (AR 25). Specifically, Appellant contends that the Mille Lacs Band was not a recognized Indian tribe under Federal jurisdiction in 1934 because, at that time, the Band was a part of the Minnesota Chippewa Tribe of the White Earth reservation. NOA at 7.⁷

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we may not assume that Congress abandoned its guardianship of the *tribe or the bands*) . . . *Wilbur v. [United States]*, 281 U.S. 206, 208-209 (1930) (“When the act of 1889 was passed, the Chippewa Indians in Minnesota comprised *eleven bands or tribes occupying ten distinct reservations* . . . [*Collectively* they were regarded as a single tribe”).” Opening Br. at 3 (emphases supplied by Appellant, internal parallel citations omitted).

⁶ See Theodore H. Haas, United States Indian Service, *Ten Years of Tribal Government Under I.R.A.* (1947) (Haas Report). Following a brief exposition on the purpose and implementation experience of the self-government provisions of the IRA, the Haas Report presents a series of tables, notably Table A, which lists Indian tribes, bands and communities that voted whether to reject the IRA (absent rejection, the IRA automatically applied), and Table B, which lists Indian tribes with a constitution or charter approved by the Secretary in accordance with the IRA. Both tables were attached as exhibits to Appellant's March 15, 2013 comments. See Appellant's Comments, Exs. 1 & 2. As relevant here, Table A indicates that elections on the IRA were held on the Fond du Lac, Grand Portage, Leech Lake, White Earth, and Nett Lake/ Boise Fort reservations under the Consolidated Chippewa Agency. Table B lists the Minnesota Chippewa Tribe as having an approved Constitution and Charter. The report specifically identifies the tribal organization of the Minnesota Chippewa as a confederacy. Haas Report at 3.

⁷ Appellant also argues that the Regional Director erred in approving the acquisition where the Band's title insurance for the Sher Property is subject to “[a]ny claim or allegation that the Secretary of the Interior lacks authority to take the land in trust because the [Band] was not under federal jurisdiction in . . . 1934, within the meaning of the ‘*Carciere* decision.’” Opening Br. at 2 (unnumbered). A similar exception is noted in relation to any claim or allegation based on the Supreme Court's decision in *Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*, 132 S. Ct. 2199 (2012). *Id.* Appellant's reasoning seems to be that these title insurance exceptions render the title to the Sher Property unmarketable under § 151.13 (governing title examination). The County lacks standing to challenge the

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Appellant misunderstands the scope of statutory authority for the acquisition of land for Indians provided by 25 U.S.C. § 465, and the clarification provided by the Supreme Court’s determination in *Carciere* that such acquisitions be made for the benefit of “persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction,” as defined by § 479 of that title. In *Carciere*, the United States Supreme Court held that the definition of the term “Indian” in 25 U.S.C. § 479⁸ limited the Secretary’s authority to take land in trust under § 465 to only those tribes under Federal jurisdiction when the IRA was enacted in 1934. 555 U.S. at 382. As we explained recently in *Grand Traverse County Board of Commissioners v. Acting Midwest Regional Director*, 61 IBIA 273, 280-81 (2015), the word “now” qualifies the phrase “under Federal jurisdiction” in § 479, but “does not require a tribe to have been ‘recognized’ by the United States in 1934, formally or otherwise, in order for [§ 465] to apply.” This understanding is consistent with the majority’s opinion in *Carciere* and with the explanation provided by Justice Breyer in his concurring opinion. 555 U.S. at 398 (“The statute [§ 479], after all, imposes no limit upon recognition.”).

The Mille Lacs Band is a Federally-recognized tribe and was included in the first official list of Federally-recognized tribes that were eligible for programs administered by BIA. See “Indian Tribal Entities That Have A Government-to-Government Relationship with the United States,” 44 Fed. Reg. 7235, 7236 (Jan. 31, 1979) (recognizing the Band as one of the six component reservations of the Minnesota Chippewa Tribe). We agree with the Regional Director that the long history of Federal treaties, statutes, congressional appropriations, and executive agency actions undertaken with or on behalf of the Mille Lacs Band prior to and contemporaneous with the enactment of the IRA leaves no question that the Mille Lacs Band was under Federal jurisdiction in 1934, and, for that matter, recognized at the time. See Decision at 4. The Regional Director “reviewed, considered and made part of the record” BIA records and the extensive documentation provided by the Band, including “copies of treaties, statutes, congressional acts and reports that show a

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trust acquisition decision as violating § 151.13. See *Crest-Dehesa*, 61 IBIA at 216 (noting that the interest protected by these title requirements is that of the United States, not the land or property interests of third parties that are not being acquired.); *Thurston County*, 56 IBIA at 68-69 (stating that the county failed to show how there was any injury to it as a result of the sufficiency or insufficiency of the title commitment in the record).

⁸ 25 U.S.C. § 479 defines “Indian” as “all persons of Indian descent who are members of any recognized Indian tribe *now under Federal jurisdiction*, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood.” (Emphasis added).

continual tribal existence and [F]ederal relationship with the U.S. government since approximately 1825.” *Id.* Appellant does not generally dispute the historical record provided by the Band or the accuracy of Regional Director’s accounting of the 7 treaties signed between the United States and the Mille Lacs Band between 1825 and 1867, *see id.* n.1, or the 12 statutes enacted by the United States Congress for the Mille Lacs Band between 1884 and 1933, *see id.* n.2.

The Supreme Court cases cited by Appellant as evidence that the United States dealt with the bands of the Chippewa of Minnesota “on a band by band basis,” *see* Opening Br. at 3, referenced *supra* n.5, also uniformly confirm that the treaty rights reserved by the bands and financial obligations undertaken by the United States for cessions of band land not reserved for individual member allotments or tribal use, were to the benefit of the bands. *See, e.g., Chippewa Indians of Minnesota*, 301 U.S. at 373 (“[I]t ha[s] long been the settled rule in respect of the Chippewa Indians in Minnesota that a band or bands occupying a separate reservation should be regarded and dealt with as having the full Indian title to the lands therein.”); *see also Chippewa Indians of Minnesota*, 307 U.S. at 5 (rejecting the petition of individual members of the Minnesota Chippewa Tribe seeking control of trust funds generated from sale of lands ceded by individual bands, and declaring that “we may not assume that Congress abandoned its guardianship of the tribe or the bands” in favor of individual Indians).⁹

The record reviewed by the Regional Director also includes abundant evidence of a continuing BIA relationship with, and Federal oversight of, the Band during the years prior to and following enactment of the IRA in 1934. For example, according to an August 27, 1934 letter from the Consolidated Chippewa Agency Superintendent to the Commissioner of Indian Affairs, members of the Band “accepted the principles of the [IRA] at [a] meeting in April.” Letter from Superintendent to Commissioner of Indian Affairs, Aug. 27, 1934 (AR 31-1). This communication clearly indicates that BIA recognized that the Band was entitled to vote on the IRA in April 1934, even though, as both Appellant and the Regional

⁹ We note that these two cases, issued by the Supreme Court in 1937 and 1939, respectively, were both decided shortly after enactment of the IRA. While neither case directly involved the Mille Lacs Band, both cases considered obligations to the bands flowing from treaties entered into individually with the bands, including the Mille Lacs Band, and specifically with the Acts of 1889 and 1890 and the related cessions and reservation of land by the individual bands. Both decisions affirm the continuing Federal trust responsibility to the bands and the continued guardianship by Congress of the bands as tribal entities. *See Grand Traverse*, 61 IBIA at 273, 281-82 (existence of continuing treaty rights is compelling and dispositive evidence that the tribe was under Federal jurisdiction in 1934).

Director acknowledge, there is nothing in the record indicating that the Band held a separate Secretarial election on whether to adopt or reject the IRA later that year. *See* Reply Br., Mar. 7, 2014, at 4-5; Answer Br., Feb. 20, 2014, at 9-10. While evidence that a Secretarial election to adopt or reject the IRA was held may be dispositive that the tribe was under Federal jurisdiction, the absence of such evidence does not compel a finding that the tribe was not under Federal jurisdiction in 1934. *See Grand Traverse County Board of Commissioners*, 61 IBIA at 281; *State of New York*, 58 IBIA at 331 n.11. To resolve any ambiguity, other historical evidence may be considered. *Grand Traverse*, 61 IBIA at 281.

The August 27, 1934 letter went on to state that Band members were “allotted on land which was purchased for this band, . . . [and] no sales or patents in fee ha[d] been issued and thus remain intact.” Letter from Superintendent to Commissioner of Indian Affairs. In *Village of Hobart, Wisconsin v. Acting Midwest Regional Director*, 57 IBIA 4 (2013), the Board recognized that “when the United States holds land in trust for a tribe or its members, that tribe is then ‘under Federal jurisdiction.’” *Id.* at 20 n.23. The Act of January 24, 1923, 42 Stat. 1174, 1191, appropriated funds for the “necessary surveys and enrolling and allotting” of lands purchased for homeless Mille Lacs Indians in accordance with the Appropriation Act of August 1, 1914, 38 Stat. 582. *See* 42 Stat. 1174 (AR 31-2). The 1914 Act appropriated up to \$40,000 to purchase land for those Mille Lacs Indians for whom allotments had not yet been made. *See* 38 Stat. at 591 (AR 31-2). Responding to a letter from United States Senator Henrik Shipstead of Minnesota seeking information on the proposal of A.P. Jorgenson to sell his property to the Government for the Mille Lacs Band of Indians, *see* Letter from Shipstead to Commissioner, Nov. 11, 1933 (AR 31-3), the Commissioner of Indian Affairs explained that the Jorgenson property was considered but not included among the 2000 acres of land purchased for the Mille Lacs Indians of Minnesota, *see* Letter from Commissioner to Shipstead, Nov. 17, 1933 (AR 31-3). According to the Senator’s letter, “all the land around [Jorgenson’s] property has been bought up and members of the Mille Lacs tribe of Indians have been settled there.” Letter from Shipstead to Commissioner at 1.

Another example of the continuing Federal jurisdiction exercised over the Mille Lacs Band is found in the Department’s involvement in a proposed sale of land bordering Lake Mille Lacs. In a letter dated June 6, 1934, the Commissioner of Indian Affairs responded to a plea by the Chairman of the Indian Relief Committee of Minneapolis that “the interests of the Mille Lacs Indians be protected” in the sale of land to a private party proposed in congressional legislation, by stating that the matter had been investigated and “reports were submitted to Congress by this Department . . . recommending that the bills be not enacted.” Letter from Commissioner to Chairman, Indian Relief Committee of Minneapolis, June 6, 1934 (AR No. 31-3). The Commissioner went on to explain that the Superintendent of the Consolidated Chippewa Agency reported that “there are many Mille Lacs families without suitable home sites and what little land they own as a tribe or band

should be retained for them. The Department also reported that the Mille Lacs Indians were not in favor of selling the land” *Id.*

Article II of the Constitution and Bylaws of the Minnesota Chippewa Tribe (Constitution) refers to “the non[-]removal Mille Lac Band of Chippewa Indians.” Constitution, art. II, § 1 (AR 31-1). Appellant’s argument that this group is a new and distinct entity from the Mille Lacs Band which existed historically and the Mille Lacs Band of Ojibwe which applied to have the Sher Property taken in trust, *see* Reply Br. at 5 & n.14, is without merit. Rather than supporting the disappearance of the Band from Federal jurisdiction in 1934, Appellant’s extended discussion on this point, which references the Tribe’s 1936 Constitution, its 1937 Charter, and the Band’s 1939 local governance charter approved under the Tribe’s Constitution, as well as case law expressly recognizing continuing Federal obligations to the Mille Lacs Band such as *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498, 507 (1913) (recognizing the Band’s continuing interest in the lands in its reservation) and *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999) (affirming the 8th Circuit’s decision that the Band’s hunting and fishing rights guaranteed by the 1837 Treaty with the Chippewa were not abrogated by the 1855 Treaty with the Chippewa or Minnesota’s admission to the Union in 1858), effectively confirms the continuity of Federal jurisdiction over the Band derived from its treaty-based obligations. *See* Reply Br. at 5-9.

Appellant has failed to meet its burden of showing error in the Regional Director’s determination that the Band was under Federal jurisdiction in 1934 as a matter of law. Appellant has also failed to show that the Regional Director abused his discretion by making this determination without substantial evidence. *See* Opening Br. at 3-4.

B. The Band’s Need for the Sher Property and the Purpose for which the Sher Property Will Be Used

Appellant contends that the Regional Director erred in determining that the Band needed additional trust land generally, and specifically, that it needed the land to be in trust to support its affordable housing program. *See* Appellant’s Comments at 4-5 (unnumbered) (AR 25); NOA at 7, 11-12. Appellant cites *South Dakota*, 423 F.3d at 799, for the proposition that the “statutory aims” of the IRA in authorizing the Secretary to acquire land for Indians were to “provid[e] lands sufficient to enable Indians to achieve self-support *and* ameliorating the damage resulting from the prior allotment policy.” *See* NOA at 7 (alteration supplied by Appellant). From this, Appellant infers that the Circuit Court also found that Congress had concluded that “once self-support had been achieved the damages associated with allotment had been remedied.” *Id.* Appellant further reasons that

“where economic life is rehabilitated to pre[-]1934 levels, and beyond, initiative has been repaired.”¹⁰ NOA at 2; *see also* Opening Br. at 5 (unnumbered) n.13 (“[W]here economic life is rehabilitated to pre[-]1934 levels, and beyond, the provisions of 25 U.S.C. § 465 no longer apply.”). We see no support for this interpretative reading in the text of the Circuit Court’s decision or in its consideration of the legislative history of the IRA. That court did not demand that BIA provide evidence that the tribe was not self-sufficient as a precondition for taking land into trust. Rather, the court found that “[t]he agency articulated a rational connection between the facts found and the choice made . . . for each of the regulatory provisions” *South Dakota*, 423 F.3d at 801. In that case, as here, the Regional Director agreed with the tribe’s assessment that the land would enhance the tribe’s economic base and its ability to be self-sufficient. *Id.*; Decision at 4-5 (“The ability of the Band to provide affordable housing to its members as well as planning for future governmental development is an essential foundation for Band self-determination and self-sufficiency.”).

The Regional Director considered a variety of factors in his review of § 151.10(b) and (c), and concluded that the Band needed to place the land in trust “to meet immediate and pressing demands for affordable housing by Band members and to meet future needs for governmental facilities,” and that the land would be used for these two purposes. Decision at 5-6. He concluded that the Band had adequately demonstrated this housing need through the 2003 and 2004 Amherst Wilder Foundation study documenting a severe housing shortage, the Band’s subsequent increase in population, and the Band’s attested 458 members currently on a waiting list for subsidized housing. *Id.* at 6; *see also* Application at 11-12 (AR 29).

Appellant contends that there is insufficient evidence that the Band is actually experiencing a housing shortage and that any alleged “future need” cannot properly be considered a “need” under § 151.10(b). NOA at 9, 11-12. In support of this proposition, Appellant references a 2012 report indicating that the median household annual income for households of three and four persons is higher for the Band’s members than for other residents of the County. Opening Br. at 6 (unnumbered) (referring to BHI Policy Study, “The Standard of Living of the Mille Lacs Band of Chippewa’s [*sic*],” July 2012). Appellant also contends that because the Band was aware of its housing shortage, and had yet to

¹⁰ Not only is this proposition without support in the opinion cited, it is also illogical to “reason” that Congress enacted legislation in 1934 authorizing the Secretary to acquire land for Indians if the objective of that legislation could be met simply by finding that a tribe had achieved “pre[-]1934 economic levels, and beyond.” Such reasoning, of course, could equally indicate that the Band would need to reacquire the entirety of its original 1855 reservation to obtain its “pre[-]1934 economic levels.”

rectify the shortage, the Band cannot cite the housing shortage as a justification for taking the Sher Property into trust. NOA at 12. Finally, Appellant asserts that, even if the Band is experiencing a housing shortage, there is no evidence that the Band would be prevented by the County from developing the Sher Property as housing if it is not taken into trust. *Id.*

We have repeatedly observed that “BIA has broad leeway in its interpretation or construction of tribal ‘need’ for the land, that flexibility in evaluating ‘need’ is an inevitable and necessary aspect of BIA’s discretion, and that it is not the role of an appellant to determine how that ‘need’ is defined or interpreted by BIA.” *State of New York*, 58 IBIA at 341 (some internal quotation marks omitted) (quoting *County of Sauk, Wisconsin v. Midwest Regional Director*, 45 IBIA 201, 209 (2007)). The Regional Director concluded that most of the Band’s existing trust land suitable for development was currently in use. Decision at 4. The Regional Director provided a reasonable explanation for his decision to acquire land in trust for Indian housing, a purpose fully consistent with the Department’s land acquisition policy. *See* 25 C.F.R. § 151.3(a)(3). Similarly, it was reasonable for the Regional Director to conclude that the acquisition of additional trust lands would be needed to meet the Band’s recognized future need for government facilities. *See* Decision at 4. The Board has consistently explained that “[n]othing in Part 151 requires the [t]ribe to limit its vision only to present needs.” *Shawano County, Wisconsin v. Acting Midwest Regional Director*, 53 IBIA 62, 79 (2011). We find no support in the regulations for interpreting the word “need” to be narrowly limited to a defined “present need,” to the exclusion of recognized prospective needs. Had the Department intended to impose a temporal limit on the word “need,” it could have done so.

Appellant’s various arguments fail to demonstrate error in the Regional Director’s decision. That the Band has been aware of its housing shortage for many years, and has yet to resolve it, does not negate the Band’s continued need for affordable housing. Nor does the study submitted by Appellant concerning median family income and household size for Chippewa and non-Chippewa families in Mille Lacs County, even if reliable, demonstrate that the need for trust land for affordable housing is not a legitimate purpose for taking the Sher Property in trust. Appellant contends that, given the economic success of the Band, the Regional Director erred in approving the Band’s application to take land in trust for affordable housing. NOA at 7-8. As the Board has noted previously, we see no such limitation to the exercise of discretion under § 465 or the Department’s regulations. *See State of South Dakota v. Acting Great Plains Regional Director*, 39 IBIA 283, 291 (2004) (citing *Avoyelles Parish, Louisiana, Police Jury v. Eastern Area Director*, 34 IBIA 149, 153 (1999) (“Nothing in 25 C.F.R. § 151.10(b) . . . suggests that the only legitimate need for additional land is one which stems from financial difficulties. A financially secure tribe might well need additional land in order to maintain or improve its economic condition if its existing land is already fully developed.”)).

Acknowledging the County's contention that the Band could build Band-member housing on fee land without putting the land in trust, the Regional Director concluded that "restoring [the Sher Property] to trust status [was] the only way to ensure that the Band, not the County, [would] be able to determine how the land [was] used and [was] the only way to ensure the permanent protection of these lands for the Band." Decision at 6. This response to Appellant's argument speaks to both the need and the purpose of taking the land in trust for the Band. Nothing more is needed. It would be an unreasonable interpretation of 25 C.F.R. § 151.10(b) to require the Secretary to detail specifically why trust status is more beneficial than fee status in any particular circumstance. *South Dakota*, 423 F.3d at 801 ("It was sufficient for the Department's analysis to express the Tribe's needs and conclude generally that IRA purposes were served.").

We are unpersuaded by Appellant's arguments and conclude that Appellant has failed to show that the Regional Director committed error, that he improperly exercised his discretion, or that the Decision is not supported by sufficient evidence.

C. The Impact on the State and County Resulting from the Removal of the Sher Property from the Tax Roll

Appellant challenges the Regional Director's consideration of 25 C.F.R. § 151.10(e), the impact on the State and County which would result from taking the Sher Property into trust. Appellant first contends that § 151.10(e) does not permit BIA to consider "any reported off setting contributions or donations" that a tribe may make. NOA at 10. Appellant then reasons that, because BIA may not consider a tribe's contributions to the State and County that do not take the form of tax payments, BIA must conclude that the removal of a property from the tax roll will result in an adverse impact on the State and County. *Id.*

We have previously held that a regional director is within his discretion in considering the degree to which the tax impact of a fee-to-trust acquisition may be offset by a tribe's other contributions to local municipalities. *See State of New York*, 58 IBIA at 344 (citing *County of Sauk*, 45 IBIA at 214-17). Here, the Regional Director concluded that, "in consideration of the governmental services provided by the Band, the enhanced tax revenues (excise taxes) generated for the State (and shared by the County) that have resulted from the Band's economic activities, and the agreement in place for fire services, the benefits from such services and contributions far outweigh the tax loss that will result from this acquisition in trust." Decision at 9. He recounted the State's and County's determination that the total annual property tax levied on the Sher Property in 2012 was \$9,930.00. *Id.* at 7; *see also* Appellant's Comments at 2 (unnumbered); State's Comments at 2. He reasoned that the loss of this amount of tax revenues, "both in absolute and relative terms," could not represent a "significant financial burden" to the County. Decision

at 7. He also noted that in 2012, the Band provided 22% of the jobs in the County, paid \$87,103.00 to the Onamia School District, paid \$29,400.00 to Garrison Fire and Rescue, and made numerous other donations to local educational, law enforcement, and medical organizations. *Id.* at 8. We find no error in the Regional Director's consideration of the tax implications resulting from the acquisition of the Sher Property in the context of the Band's total financial contributions to the community.

Appellant also contends that BIA must consider the "current, future and cumulative impact of the removal of lands and all trust lands from the tax rolls." Opening Br. at 6 (unnumbered); *see also* NOA at 10. This is simply not the case. The plain language of the statute does not reference, let alone require, such a speculative exercise. Subsection 151.10(e) requires BIA to consider, "[i]f 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." (Emphasis added.) The Board has consistently held that the analysis of the cumulative effects of tax loss on all lands within a local government's jurisdictional boundary is not required. *See, e.g., Shawano County, Wisconsin, Board of Supervisors v. Midwest Regional Director*, 40 IBIA 241, 249 (2005); *State of South Dakota*, 39 IBIA at 294-95. Nor is the Regional Director required to take into consideration the tax implications of possible future development of the land to be taken in trust, as Appellant argues. NOA at 10. The Regional Director correctly cited as authority for his position the decision in *South Dakota*, 423 F.3d at 801-02, as Appellant indirectly acknowledges. *See* NOA at 10. The Regional Director extensively reviewed the tax implications of the acquisition and responded to State and County comments in his analysis. Appellant has not met its burden of proving that the Regional Director did not properly exercise his discretion by not considering the "current, future, and cumulative impact" of the removal of all trust lands from the tax rolls.

IV. The Sher Property Qualifies as an On-Reservation Acquisition

Appellant repeatedly challenges the continuing existence of the Band's reservation and alleges that the Regional Director erred in failing to apply the off-reservation criteria contained in § 151.11. NOA at 10. Furthermore, Appellant argues that, "as only Congress has the power to diminish or disestablish a tribe's reservation," the Regional Director lacks the authority to determine whether the Tribe's reservation was diminished. *Id.* Appellant's arguments are without merit because the Regional Director neither "disestablished" the Band's reservation, nor based his decision on whether or not the reservation had been disestablished.

While Appellant is correct that only Congress has the authority to diminish or disestablish a tribe's reservation, pursuant to the Secretary's authority to take land into trust under 25 U.S.C. § 465, the Department has promulgated regulations that define the term

“Indian reservation,” *see* 25 C.F.R. § 151.2(f), for the purpose of taking land in trust.¹¹ The Regional Director determined that the Sher Property was *both* within *and* contiguous to an “Indian reservation” and thus it qualified for analysis as an “on-reservation” acquisition. Decision at 2-3. The regulations define “Indian reservation” as “that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, . . . or where there has been a final judicial determination that a reservation has been disestablished or diminished, . . . that area of land constituting the former reservation of the tribe as defined by the Secretary.” 25 C.F.R. § 151.2(f). An acquisition qualifies as “on-reservation” if the land is “located within or contiguous to an Indian reservation.” 25 C.F.R. § 151.10. We agree that under prior Board holdings, the Sher Property qualifies as on-reservation because it is within the Band’s original reservation, regardless of whether that reservation was subsequently disestablished. *See, e.g., County of Mille Lacs, Minnesota*, 37 IBIA at 172 (“Because the tract at issue here would fall within the definition of “Indian reservation” in 25 C.F.R. § 151.2(f) regardless of whether the Band’s reservation has been disestablished, the Board finds no need to address Appellant’s disestablishment argument.”).

Moreover, the Regional Director also determined that the Sher Property is located *contiguous to* two other properties held in trust for the Band and therefore qualifies under BIA’s regulations as an “on-reservation” acquisition. Decision at 3. As we have consistently held, a tribe is presumed to have jurisdiction over its trust properties. *Preservation of Los Olivos and Preservation of Santa Ynez v. Pacific Regional Director*, 58 IBIA 278, 313 (2014); *County of San Diego, California v. Pacific Regional Director*, 58 IBIA 11, 29 (2013). Thus, the Sher Property is also contiguous to an “Indian reservation,” as that term is defined in the regulations, because it is contiguous to “land over which the tribe is recognized by the United States as having governmental jurisdiction.” 25 C.F.R. § 151.2(f). Appellant does not dispute that the Sher Property is contiguous to other Band trust lands. We agree with the Regional Director that the Sher Property qualifies as an on-reservation acquisition. The Regional Director did not err in considering the application under the on-reservation factors required by 25 U.S.C. § 151.10.

¹¹ As noted earlier, § 465 authorizes the Secretary to take land in trust both within and outside of existing reservations, so the statutory authority is not at issue.

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 12, 2013, decision.

I concur:

// original signed
Robert E. Hall
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge