INTERIOR BOARD OF INDIAN APPEALS

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

62 IBIA 202 (02/19/2016)

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

BIG SANDY RANCHERIA BAND OF WESTERN MONO INDIANS, Appellant,	)	Order Affirming Decision
v.	)	Docket No. IBIA 14-041
ACTING PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	February 19, 2016

The Big Sandy Rancheria Band of Western Mono Indians (Tribe or Appellant) appealed to the Board of Indian Appeals (Board) from a November 7, 2013, decision (Decision) of the Acting Pacific Regional Director (Regional Director), Bureau of Indian Affairs (BIA), declining to approve Appellant's Land Consolidation Plan (LCP), pursuant to § 2203 of the Indian Land Consolidation Act (ILCA), 25 U.S.C. § 2201 *et seq*. The Regional Director based his decision to deny the LCP on his interpretation of the intent of ILCA and the potential for the LCP to result in jurisdictional disputes.

On appeal, Appellant argues that the Regional Director abused his discretion in not approving the LCP. We conclude that the Regional Director acted within his discretion in declining approval of the LCP based on his determination that the LCP was not consistent with the intent of ILCA, and that the inclusion of off-reservation public land allotments in one tribe's LCP could result in inter-tribal jurisdictional disputes, and we will not substitute our judgment for that of the Regional Director. Although the Regional Director did not ground his decision on compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq*., both the Decision and Appellant's filings devote considerable attention to the issue of the environmental review requirements for ILCA plans, and the administrative record includes a number of documents that deal centrally with NEPA considerations. Without deciding the level of NEPA review required for approval of Appellant's LCP, or ILCA plans in general, we conclude that the Regional Director did not err in declining to approve the LCP, because as a matter of law, BIA's consideration of Appellant's request for approval of its ICLA plan is subject to the procedural requirements of NEPA and no NEPA review had been completed.

Background

On November 21, 2012, Appellant submitted a request for approval of its LCP to the Regional Director. Request for Approval (Administrative Record (AR) 1). The LCP stated that its purpose was "to provide authority to consolidate and augment the [Tribe's] land base, in accordance with the provisions of the [ILCA]." Ordinance No. 1012-01, Oct. 31, 2012, Tribal Land Consolidation Plan (Initial LCP) (AR 1). The plan's land acquisition and consolidation area included "all lands, including federally administered and public domain lands" within:

i. The boundaries of the Big Sandy Rancheria;
ii. Big Sandy "Indian Country" as defined by 18 U.S.C. § 1151;
iii. The aboriginal land area of the Big Sandy Rancheria Band of Western Mono Indians;
iv. All lands subject to the jurisdiction of the Tribe, as defined in the Constitution of the Big Sandy Band of Western Mono Indians . . . ; and
v. Such other lands designated on the map attached [indicating all land within a fifteen mile radius of the outer boundaries of the Big Sandy Rancheria].

Initial LCP at 2.

Shortly after submitting its LCP to BIA, Appellant provided the Regional Director with a copy of a legal memorandum submitted by Appellant, through its attorney, to BIA's Office of Indian Gaming, that presented Appellant's views of "the legal basis for conveying individually-owned trust land from a tribal member to the [Tribe] under [ILCA] or via a trust to trust transfer as a mandatory acquisition/transfer." Memorandum from Appellant to Office of Indian Gaming, Dec. 3, 2012, at 1 (OIG Memo) (AR 2). The memo contemplated Appellant's purchase of an individually owned off-reservation trust allotment (the McCabe Allotment) and its transfer to Appellant either as a trust-to-trust transfer or in accordance with an approved LCP pursuant to ILCA. *Id.* The McCabe Allotment was allotted out of the public domain in 1920 and placed in trust by the United States for the benefit of Mary McCabe. *Id.* at 3. It consists of 40.82 acres, and is located approximately twelve miles from the Big Sandy Rancheria. *Id.* Appellant has been pursuing the lease or purchase of the McCabe Allotment since the early 2000s, and requested approval of a management agreement for a proposed casino on the site in 2004. *See* Memorandum from Staff Attorney to Chairman, National Indian Gaming Commission (NIGC), Sept. 6, 2006, at 1 (NIGC Memo) (AR 2).

Appellant's memo also addressed the applicability of NEPA to BIA approval of an LCP under ILCA and to subsequent land transfers undertaken by the Tribe. OIG Memo at

6-9. Appellant opined that the approval of a land consolidation plan itself "may be subject to a 'Categorical Exclusion', in which case no environmental review would be required for approval of the plan."[1] *Id.* at 2. The memo also presented Appellant's position that, when a tribe had an approved LCP, BIA's approval would not be required for the subsequent purchase of land within the land consolidation area defined in the approved plan. *Id.* at 4-5 (citing 25 U.S.C. § 2204(b)(3) ("[A]pproval of the Secretary . . . shall not be required with respect to a land sale transaction initiated by an Indian tribe that has in effect a land consolidation plan that has been approved by the Secretary.")). Nor, Appellant maintained, would BIA have authority to review future development of the land by the Tribe after its acquisition if such development involved only tribal, not Federal, action. *Id.* at 7.

Appellant further opined that NEPA review would not be triggered by land sales or exchanges of tribal land made in compliance with an approved LCP because agency approval of such transactions would not be discretionary. *Id.* at 7, 10-11 (citing § 2203(b) ("The Secretary must execute such instrument of conveyance needed to effectuate a sale or exchange of tribal lands made pursuant to an approved tribal land consolidation plan unless he makes a specific finding that such sale or exchange is not in the best interest of the tribe or is not in compliance with the tribal land consolidation plan.")).

In a January 31, 2013, letter, the Regional Director informed Appellant that it had not sufficiently defined the land consolidation area in its LCP. Letter from Regional Director to Appellant (LCP Clarification Request) (AR 8). The Regional Director stated that the area shown on a map included with the Tribe's Initial LCP "encompasses areas where public domain allotments may be owned by members of the North Fork, Table Mountain and Cold Springs Rancherias, or where these tribes already own lands." *Id.* at 1. The Regional Director therefore requested "any additional documentation that identifies the aboriginal land area of the Big Sandy Rancheria as well as any known off-reservation allotments that are owned by Big Sandy tribal members." *Id.*

The BIA Pacific Regional Office held a meeting with Appellant on February 20, 2013, to discuss Appellant's LCP. Meeting Notes (AR 12). Appellant stated that the purpose of the LCP was to acquire all allotments within the Rancheria as well as off-reservation allotments owned by tribal members. *Id.* at 1. Appellant also presented draft revisions to its plan in light of the Regional Director's letter and explained that it understood BIA's concerns and had not intended to include land within the jurisdiction of other tribes in its land consolidation area. *Id.*

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[1] As explained further, *infra*, a categorical exclusion is a method of NEPA review and compliance.

Following its meeting with BIA, Appellant submitted an amended LCP that redefined its proposed land consolidation area. *See* Ordinance No. 1012-01 (2nd Amendment), Tribal Land Consolidation Plan, June 24, 2013, at 2, § 2 (Amended LCP) (AR 14). Section 2(a) of the Amended LCP defined the plan's land consolidation area as:

> (a) . . . any tract of trust or restricted land within the boundaries of the Big Sandy Rancheria and land that is otherwise subject to the jurisdiction of the Tribe within the Land Consolidation Area. The Land Consolidation Area includes lands within:
> (1) The boundaries of the Big Sandy Rancheria;
> (2) Big Sandy "Indian Country" as defined by 18 U.S.C. § 1151;
> (3) Aboriginal lands of the Big Sandy Rancheria Band of Western Mono Indians within a fifteen (15) mile radius of the outer boundaries of the Big Sandy Rancheria; and
> (4) Lands that are otherwise subject to the jurisdiction of the Tribe, as defined in the Constitution of the Big Sandy Band of Western Mono Indians, . . . and to all Indian country . . . held by or for the Tribe or any member of the Tribe, wherever located.

Id. at 2, § 2(a). The Amended LCP then specified that, outside of the Tribe's reservation, "[a]ny land . . . that is held by or for another Indian tribe sharing an Aboriginal land area with the Big Sandy Rancheria shall be excluded." *Id.* at 2, § 2(b).

On November 7, 2013, the Regional Director issued his decision declining to approve Appellant's LCP or its amendments. Decision, Nov. 7, 2013, at 4 (AR 22). He explained that "§ 2203 and § 2204 of [ILCA] are directed primarily toward the authorization of the sale or exchange of allotted and tribal lands for the purpose of land consolidation of tribal lands and eliminating fractional interests." *Id.* He stated that approval of the Tribe's LCP, "coupled with the Tribe's real intent . . . to purchase the off-reservation public domain allotment . . . for use as a gaming facility without compliance with [NEPA], . . . [would] set[] a precedent that does not, in our opinion, demonstrate consistency with the intent of ILCA." *Id.* at 3. The Regional Director noted that Appellant had submitted a gaming lease proposal to NIGC for the McCabe Allotment in 2004 and an updated business lease to BIA in 2008, and that compliance with NEPA had yet to be completed for the lease. *Id.* He also explained that Appellant could seek a trust-to-trust purchase of the McCabe Allotment without an approved ILCA plan, but that "approval would trigger compliance with NEPA." *Id.*

The Regional Director then expressed concern that approval of Appellant's ILCA plan as proposed would also be "precedent-setting" in light of the existence of numerous off-reservation allotments throughout California, "most of which have not been historically

subject to a tribe's jurisdiction." *Id.* at 4. He explained that some owners of off-reservation allotments had been disenrolled by nearby tribes, and that approving the LCP could result in additional tribal jurisdiction disputes. *Id.* The Regional Director also concluded that, in light of the possible jurisdictional conflicts, it would not be "appropriate to allow a tribe to include these off-reservation allotments in a particular tribe's ILCA plan without consulting with and obtaining the authorization of the Indian landowners." *Id.*

Appellant appealed the Regional Director's decision to the Board. Table Mountain Rancheria entered an appearance. Appellant filed an opening brief, Table Mountain Rancheria filed an answer brief, and Appellant filed a reply brief.

Standard of Review

BIA's authority to approve conveyances of trust land and consolidation plans under ILCA is discretionary. *See Van Mechelen v. Northwest Regional Director*, 61 IBIA 125, 128 (2015). We review BIA's discretionary decisions to determine whether the decision comports with the law, is supported by the record, and is adequately explained. *Id.* We do not substitute our judgment for BIA's. *Quapaw Tribal Remediation Authority of the Quapaw Tribe of Oklahoma v. Acting Eastern Oklahoma Regional Director*, 61 IBIA 55, 61 (2015). We review questions of law *de novo*. *Hardy v. Midwest Regional Director*, 46 IBIA 47, 52 (2007). The appellant bears the burden of demonstrating error in the decision being appealed. *Id.* at 53.

Discussion

Appellant contests the Regional Director's decision to deny the LCP on a number of grounds. It argues that the LCP is consistent with the purpose of ILCA, the Regional Director's discussion of NEPA was flawed, hypothetical inter-tribal jurisdictional disputes are not a lawful basis to deny approval of the LCP, and it is not necessary to obtain landowners' consent before approving the LCP. We affirm the Regional Director's decision. The Regional Director acted within his discretion in reasoning that, under the circumstances, the Tribe's LCP was inconsistent with the purpose of ILCA, and that as presently proposed, the Tribe's LCP could lead to tribal jurisdiction disputes over allotments within the land consolidation area, as defined in the plan. However, inasmuch as the Regional Director implied that it was necessary to obtain the consent of landowners within the land consolidation area before approving the LCP, we disagree. Additionally, as a matter of law, BIA cannot approve Appellant's plan prior to completing its NEPA review for the proposed action.

I. The Purpose of ILCA and Tribal Land Consolidation Plans

Appellant argues that the Regional Director mischaracterized the purpose of ILCA in justifying his denial of the Tribe's LCP. Appellant contends that 25 U.S.C. § 2203(a) "specifically contemplates that [consolidation] plans can contain provisions for the tribe's acquisition of land."[2] Opening Brief (Br.), Feb. 21, 2014, at 9. Appellant asserts that, contrary to the Regional Director's interpretation, the Board's holding in *Absentee Shawnee Tribe v. Anadarko Area Director*, 18 IBIA 156 (1990), also supports approval of the Tribe's LCP for acquisition purposes. Opening Br. at 10-11. Finally, Appellant alleges that the Regional Director erred in stating that it would be inconsistent with the purpose of ILCA to allow Appellant to circumvent NEPA review of its proposal to purchase the McCabe Allotment and construct a gaming facility. *Id.* at 15-17.

It may well be the case that an ILCA plan may contain provisions for land acquisitions, though we note that § 2203(a) and each of its five subsections refer repeatedly to the *sale or exchange of tribal lands* for other fractionated trust or restricted land as part of the process of reducing fractionation and consolidating tribal land ownership.[3] *See* 25 U.S.C. § 2203(a)(1)-(5). Specifically, ILCA provides that "any tribe, acting through its governing body, is authorized, with the approval of the Secretary to adopt a land consolidation plan *providing for the sale or exchange of any tribal lands* or interest in lands *for the purpose of eliminating undivided fractional interests in Indian trust or restricted lands or consolidating its tribal landholdings*." 25 U.S.C. § 2203(a) (emphases added). Congress's original goals in enacting ILCA were: to allow Indian tribes "to consolidate their tribal landholdings" and "to eliminate certain undivided fractionated interest in Indian trust or restricted lands." H.R. Rep. No. 97-908, at 9 (1982). The amendments to ILCA in 2000

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[2] Appellant also presents numerous arguments to support its proposition that the Regional Director erred in concluding that "ILCA plans are not suitable for planning acquisitions of off-reservation land." Opening Br. at 12. Contrary to Appellant's contention, the Regional Director did not state that off-reservation land could not be included in an ILCA plan, nor did he ground his decision not to approve Appellant's LCP on the inclusion of off-reservation land. Rather, in discussing possible conflicts regarding tribal jurisdiction over individually owned allotments, the Regional Director simply stated that §§ 2203 and 2204 "were *mainly* intended to provide a means by which tribes could consolidate interests in 'on-reservation' tracts." Decision at 4 (emphasis added).

[3] To the extent that § 2203 mentions "purchases," it is in connection with a requirement to use the proceeds from the sale of tribal land to purchase other land or interests in land. 25 U.S.C. § 2203(a)(4)-(5). It is unclear what proceeds the Tribe proposes to use to acquire the McCabe Allotment.

further clarified the purpose of the act. The Act of November 7, 2000, Pub. L. No. 106-462, 114 Stat. 1991, provides:

> It is the policy of the United States—
> (1) to prevent the further fractionation of trust allotments made to Indians;
> (2) to consolidate fractional interests and ownership of those interests into usable parcels;
> (3) to consolidate fractional interests in a manner that enhances tribal sovereignty;
> (4) to promote tribal self-sufficiency and self-determination; and
> (5) to reverse the effects of the allotment policy on Indian tribes.

Id. § 102.

Echoing the original goals of ILCA enumerated by Congress, the Regional Director characterized §§ 2203 and 2204 as "directed primarily toward the authorization of the sale or exchange of allotted and tribal lands for the purpose of land consolidation of tribal lands and eliminating fractional interests." Decision at 4. Then, referencing *Absentee Shawnee Tribe*, he reasoned that "ILCA plans are for the consolidation of tribal holdings, not for the acquisition of tribal land." *Id.* at 4; *see also Absentee Shawnee Tribe*, 18 IBIA at 163 ("[T]he ILCA provision concerning land consolidation plans[] is directed primarily toward authorizing the sale or exchange of existing tribal lands, under certain conditions, rather than toward trust acquisition of new tribal lands.").

Contrary to Appellant's contentions, *see* Opening Br. at 10-11, the Regional Director accurately portrayed the Board's reasoning and holding in *Absentee Shawnee Tribe*. The Absentee Shawnee Tribe of Indians of Oklahoma (Absentee Shawnee Tribe) submitted a proposed Land Consolidation and Acquisition Plan to BIA. *Absentee Shawnee Tribe*, 18 IBIA at 156. The Absentee Shawnee Tribe planned to extend its land acquisition area approximately thirteen miles west from its existing reservation boundary with a goal of developing economic enterprises on the new land, increasing tribal income through an increased tax base, and creating new jobs. *Id.* at 157. BIA denied the Absentee Shawnee Tribe's plan, reasoning that, pursuant to 25 U.S.C. § 2203(a), a land consolidation plan "should reflect some rational plan to consolidate land." *Id.* at 158-59. The Absentee Shawnee Tribe appealed BIA's determination to the Board, and we held that BIA erred in applying criteria derived from § 2203(a) because the plan was clearly meant as a plan for

the acquisition of land in trust status under 25 C.F.R. § 151.2(h),[4] not ILCA. *Id.* at 162-64. We explained that the Secretary has discretionary authority to approve a tribal "plan for the acquisition of land in trust status" under § 151.2(h), using reasonable criteria not derived from ILCA. *Id.* at 162.

Although Appellant's LCP, by focusing almost exclusively on land acquisition, is similar in form to the land consolidation and acquisition plan at issue in *Absentee Shawnee Tribe*, Appellant has consistently maintained that its LCP was submitted pursuant to the statutory provisions of ILCA. In its initial submission, Appellant noted that the Tribal Council had "adopted a Tribal Land Consolidation Plan pursuant to [ILCA]" and "request[ed] that the Bureau review and approve the Tribe's [LCP] pursuant to 25 U.S.C. § 2203." Request for Approval at 1. In its Amended LCP, Appellant stated that "[t]he purpose of the [LCP] is to eliminate and prevent fractionation of Big Sandy lands and to consolidate tribal landholdings by providing the Big Sandy Tribal Council authority to consolidate and augment the Big Sandy land base, *in accordance with the provisions of [ILCA]* . . . ." Amended LCP at 1, § 1(b) (emphasis added).

Because the Tribe's LCP was submitted for approval as a land consolidation plan under ILCA, unlike in *Absentee Shawnee*, the Regional Director did not err in evaluating the LCP to determine if it accorded with the purpose of ILCA. Appellant states that the intent of the LCP "is to eliminate and prevent fractionation of Big Sandy lands and to consolidate tribal landholdings." Amended LCP at 1, § 1(b). Appellant acknowledges that the McCabe Allotment "was allotted out of the public domain" in 1920 and taken into trust for an individual Indian, Mary McCabe. Opening Br. at 1. Appellant does not expressly claim that the public domain allotment was then or is currently Big Sandy tribal land, or that it was historically part of the Tribe's Rancheria. Appellant acknowledges that the McCabe Allotment is located "approximately 12 miles east of the Tribe's Rancheria." *Id.*; *see also id.* at 13 ("It is true [the McCabe Allotment] is an off-reservation allotment . . . ."). Appellant also acknowledges that beneficial ownership of the McCabe Allotment is held in trust for a single individual, a descendent of the original owner, and that ownership of the allotment is not fractionated. *See id.* at 1. Appellant contends that despite the absence of fractionation, its plan to purchase the McCabe Allotment fits within what Appellant acknowledges as § 2203's "statutory purpose of reducing fractionation," by preventing possible fractionation in the future by making the allotment tribal trust land. *Id.* at 13-14.

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[4] Section 151.2(h) defines, for purposes of 25 C.F.R. Part 151, a tribal consolidation area as "a specific area of land with respect to which the tribe has prepared, and the Secretary has approved, a plan for the acquisition of land in trust status for the tribe."

The Regional Director determined that Appellant's LCP, which appeared to focus on the purchase of the McCabe Allotment, an off-reservation public land allotment held in trust for a single owner, was inconsistent with ILCA's primary purpose of consolidating tribal lands and eliminating fractional interests. Decision at 3-4. We find no error in the Regional Director's characterization of the purpose of ILCA or his discretionary determination that the LCP submitted by Appellant did not accord with this purpose.[5]

II. Tribal Jurisdiction Disputes

Appellant contests the Regional Director's conclusion that the approval of the LCP could result in disputes of tribal jurisdiction over off-reservation trust property, and that such disputes could be addressed by obtaining the authorization of landowners for the inclusion of their land in the LCP. Opening Br. at 17-19. As an initial matter, Appellant contends that the Regional Director's concerns regarding jurisdictional disputes are an invalid basis for his decision to deny the LCP. *Id.* at 19. Appellant then argues that, because the only off-reservation land it can acquire under the LCP is land "subject to the jurisdiction of the Tribe," approval of the LCP will not affect tribal jurisdiction. *Id.* Appellant also contends that obtaining a landowner's consent will not resolve any jurisdictional uncertainty. *Id.* Furthermore, Appellant argues that there is no rationale for obtaining a landowner's consent prior to the approval of the LCP because § 2204(a)(1) of ILCA requires landowner consent before land can be purchased by a tribe. *Id.* at 18.

BIA expressed jurisdictional concerns regarding the LCP soon after it was first submitted. LCP Clarification Request at 1. The Regional Director stated that the original land consolidation area may include public domain allotments owned by members of the North Fork, Table Mountain, and Cold Springs Rancherias, or where those tribes already owned land. *Id.* The Regional Director asked Appellant to submit additional documentation of its aboriginal land area and any known off-reservation allotments owned by its tribal members. *Id.* Appellant submitted no such documentation; however it did amend the LCP to specifically exclude any land "held by or for another Indian tribe sharing an Aboriginal land area with the Big Sandy Rancheria." Amended LCP at 2, §2(b).

After considering the Tribe's amendments to the LCP, the Regional Director concluded that approval of the LCP as proposed could result in tribal jurisdiction disputes

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[5] We note that there are no regulatory criteria concerning an ILCA plan. In *Absentee Shawnee*, BIA had identified several factors derived from ILCA. 18 IBIA at 160. While we held that those factors could not be applied to a § 151.2(h) land acquisition plan, they could be of some utility in considering ILCA land consolidation plans, such as Appellant's proposed plan.

over off-reservation public domain allotments. Decision at 4. The Regional Director explained:

> We would consider our approval of the presently-proposed ILCA plan as precedent-setting as there are numerous off-reservation allotments in various locations throughout California, most of which have not been historically subject to a tribe's jurisdiction. Unfortunately, some off-reservation allotment owners have been disenrolled by nearby tribes and there continues to be animosity in these areas. . . . Accordingly, we cannot conclude that it would be appropriate to allow a tribe to include these off-reservation allotments in a particular tribe's ILCA plan without consulting with and obtaining the authorization of the Indian landowners.

Id.

ILCA authorizes a tribe's purchase of trust or restricted land that is within the boundaries of its reservation or that is otherwise subject to that tribe's jurisdiction. 25 C.F.R. § 2204(a)(1).[6] As Appellant notes, the land consolidation area identified by Appellant includes land within the boundaries of the Tribe's Rancheria, and land otherwise "subject to the jurisdiction of the Tribe." *See* Opening Br. at 19; Amended LCP at 2, § 2(a). However, the Tribe's LCP does not state what land it considers subject to the Tribe's jurisdiction, and on what grounds. Rather, the scope of the Tribe's LCP appears to extend to all "[l]ands that are otherwise subject to the jurisdiction of the Tribe, *as defined in the [Tribe's] Constitution* . . . , including . . . all Indian country . . . held by or for the Tribe or any member of the Tribe, wherever located." *Id.* (emphasis added). The Amended LCP expressly excluded only "land . . . that is held by or for another Indian tribe sharing an Aboriginal land area with the Big Sandy Rancheria." *Id.* at 2, § 2(b). While this exclusion provided some basis for determining what lands were arguably outside the Tribe's defined land consolidation area, the Regional Director was not able to identify which specific off-reservation tracts of land Appellant intended to include in its land consolidation area, or to, at least preliminarily, verify whether Appellant exercised jurisdiction over that land. Notably, the exclusion does not appear to extend to fractionated allotments where beneficial ownership could be held by members of different tribes or by individuals whose tribal membership status had changed.

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[6] We note, as did the Regional Director, that this provision authorizes purchases of land by a tribe with or without an approved ILCA plan. Decision at 3. The decision declining to approve Appellant's LCP does not, therefore, prevent the Tribe from moving forward with its plan to acquire the allotment, subject to BIA approval.

Furthermore, as the Regional Director observed, many public domain allotments located throughout California "have not been historically subject to a tribe's jurisdiction." Decision at 4. In such cases, the current tribal affiliation of one or more of the allotment owners would not, in itself, establish jurisdiction. *See, e.g.*, *Estate of Irene Leona McKinley*, 61 IBIA 218, 223-24 (2015) (finding no support for the conclusion that any tribe had jurisdiction over a public land allotment placed in trust for an individual Indian rather than a tribe, irrespective of the allotment owner's tribal affiliation). This ambiguity could be heightened, as the Regional Director surmised, in cases where the public land allotment owner had been disenrolled. It was not unreasonable for the Regional Director to conclude that uncertainty regarding tribal jurisdiction, if any, over public land allotments in the plan's land consolidation area created a potential for jurisdictional conflicts, and warranted his decision declining approval. *See* Decision at 4.

Although Appellant seems to imply that any jurisdictional questions may be resolved at a later time, *see* Opening Br. at 18-19, it is unclear why it believes BIA should be required to defer that issue, despite the clear focus of Appellant's LCP on acquisition. Pursuant to § 2204(b)(3), the approval of the Secretary "shall not be required with respect to a land sale transaction initiated by an Indian tribe that has in effect a land consolidation plan that has been approved by the Secretary under [§] 2203." Land that is not subject to Appellant's jurisdiction is, pursuant to § 2204(a)(1)(B), ineligible for this exclusion. However, the Tribe's LCP left unresolved what lands it claimed were under its jurisdiction. While it may well be that BIA could wait to obtain jurisdictional information to determine whether a purchase meets the requirements of § 2204 for the exception to Secretarial approval, we find no abuse of discretion in requiring Appellant to identify the land over which Appellant claims jurisdiction prior to approving Appellant's LCP.

We agree with Appellant that obtaining the approval of landowners within the proposed land consolidation area will not resolve any jurisdictional conflicts. As Appellant noted, a landowner's consent to a tribe's purchase of land has no impact upon a tribe's jurisdiction over the landowner's land. Opening Br. at 19. Nor would one tribe's declaration of jurisdiction through a tribal ordinance or constitutional provision, in itself, establish tribal jurisdiction over a public land allotment. Jurisdiction would still need to be determined at least initially by BIA and, as now proposed, the Tribe's LCP lacks the information required to do so. Despite the error in the Regional Director's decision concerning the utility of landowner consent, we conclude that the Regional Director was within his discretion in determining that the LCP could not be approved without some resolution of the jurisdictional status of lands included in the plan.

III. NEPA and Approval of Tribal Land Consolidation Plans

Section 102 of NEPA requires federal agencies to prepare an environmental impact statement (EIS) of any proposed "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(c); *see also State of New York v. Acting Eastern Regional Director*, 58 IBIA 323, 324 (2014). The Department's regulations implementing NEPA specify that a proposed Federal agency action that is subject to an agency's control and responsibility, and would cause effects on the human environment, is subject to NEPA's procedural requirements. 43 C.F.R. § 46.100(a). An agency considering such an action may undertake an environmental assessment (EA) and a finding of no significant impact (FONSI) or an EIS. *See State of New York*, 58 IBIA at 325-26. Certain activities may be categorically excluded from the requirement to prepare an EA or EIS.[7] *See* 40 C.F.R. § 1508.4; 43 C.F.R. §§ 46.205 and 46.210. Interior's Departmental Manual provides a list of BIA actions that are designated as categorical exclusions, *see* 516 DM 10.5, including, as relevant here, "[a]pprovals or grants of conveyances and other transfers of interests in land where no change in land use is planned," 516 DM 10.5(I). However, the Departmental Manual restricts the application of categorical exclusions to BIA activities that are "single, independent actions *not* associated with a larger, *existing or proposed*, complex or facility." 516 DM 10.5 (emphases added). *See also* 43 C.F.R. § 46.215 (list of "extraordinary circumstances" that may apply to exempt individual actions from the application of a categorical exclusion); 43 C.F.R. § 46.215(e) (including as an "extraordinary circumstance," actions that "[e]stablish a precedent for future action or represent a decision in principle about future actions with potentially significant environmental effects").

In its memo to the Office of Indian Gaming, Appellant acknowledged that there is no express categorical exclusion from the application of NEPA for BIA approval of tribal land consolidation plans under ILCA. OIG Memo at 8. Appellant opined that the categorical exclusion for land conveyances and transfers, 516 DM 10.5(I), "most closely applie[d]" to BIA's approval process for ILCA plans. *Id.* Before the Board, Appellant acknowledges that "NEPA might have its place in the Bureau's consideration whether to approve an ILCA plan—if, for instance, the Bureau finds that approving the plan without NEPA review would violate NEPA." Opening Br. at 16. Appellant further concedes that

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[7] A categorical exclusion, also known as a Cat Ex or CATEX, is defined under NEPA as a "category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations ([40 C.F.R.] § 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required." 40 C.F.R. § 1508.4; *State of New York*, 58 IBIA at 349 n.33.

"[i]f a change in land use is anticipated, then the federal action is probably not subject to a categorical exclusion from further NEPA review." *Id.* at 14.

Here, Appellant's intent to lease, or now purchase, the McCabe Allotment and construct a casino, hotel, and related facilities is a matter of public record.[8] In its memo to the Office of Indian Gaming, submitted less than a month after the request for approval of the Tribe's LCP, Appellant argued that, after the LCP was approved, Appellant could purchase the McCabe Allotment without triggering NEPA review.[9] *See* OIG Memo at 2. In its filing with the Board, Appellant reiterates that "the only land the Tribe has current plans to acquire is the McCabe Allotment." Opening Br. at 19. The Tribe's submission of its LCP, coupled with Appellant's documented plans regarding use of the McCabe Allotment, necessarily triggered environmental review obligations under NEPA.[10] Neither the Decision, nor the administrative record, indicates that BIA has determined whether the

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[8] Appellant submitted a gaming management contract between the Tribe and QBS, LLC, in 2004, *see* NIGC Memo at 1, and a lease for the McCabe Allotment for gaming purposes to BIA, both of which constituted Federal actions necessitating preparation of an EIS. *See* Notice of Intent to Prepare an Environmental Impact Statement for the Proposed Big Sandy Casino and Resort Project, Fresno County, CA, 70 Fed. Reg. 47262 (Aug. 12, 2005) (identifying NIGC as the lead agency and the proposed action as the approval of a gaming management contract between Appellant and QBS, LLC, approval of which "would result in the development of a casino, resort hotel and supporting facilities" on approximately 48 acres of allotted Indian land held in trust for a member of the Big Sandy Tribe). BIA cooperated with NIGC on the EIS preparation for its own Federal action, the proposed approval of the lease of the allotment by the Tribe for gaming purposes. *See id.* On October 19, 2007, at the request of the Tribe, the management agreement approval request was deemed withdrawn, and NIGC withdrew from participation in the EIS. 73 Fed. Reg. 19904 (Apr. 11, 2008). BIA continued preparation of the EIS for the proposed casino and hotel project as the lead agency, with the Tribe as a cooperating agency. 73 Fed. Reg. 57646 (Oct. 3, 2008). The Federal action remained approval of the lease agreement for use of the allotment for development of a casino, resort hotel, and supporting facilities. *Id.*

[9] Because we affirm the Regional Director's decision to decline approval of the Tribe's LCP, we need not, and do not, reach this issue here.

[10] The EIS process initiated in 2005 by NIGC and continued by BIA as lead agency in 2008, resulted in the release for public comment of a Draft EIS (DEIS) on January 24, 2011. *See* 76 Fed. Reg. 2703, 2704 (Jan. 14, 2011). There is no indication in the record that Appellant has withdrawn its request for BIA approval of its proposed lease of the McCabe Allotment "and subsequent construction of a casino/resort project." *Id.*

proposed action is subject to a categorical exclusion, or whether an EA and FONSI, or EIS must be conducted as part of the approval process. Under the circumstances presented here, and as Appellant recognizes, *see* Opening Br. at 14, 16, it appears likely that a more extensive NEPA review would be required prior to any approval of the LCP, and apparently no NEPA review of the proposed ILCA plan has been initiated, let alone completed.[11] Due to the lack of NEPA compliance, as a matter of law, BIA could not approve the LCP.[12]

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 November 7, 2013, decision.

I concur:

// original signed
Robert E. Hall
Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge

[11] The Board takes no position on whether, under the appropriate circumstances, a categorical exclusion may be applied by BIA in approving a tribal land consolidation plan under ILCA.

[12] In its answer brief to the Board, Table Mountain Rancheria contends that Appellant also seeks to circumvent the Indian Gaming Regulatory Act (IGRA) and the National Historic Preservation Act (NHPA). Answer Br. at 12-17. In light of our decision, we need not reach those issues.