



INTERIOR BOARD OF INDIAN APPEALS

State of Kansas v. Acting Eastern Oklahoma Regional Director, Bureau of Indian Affairs

62 IBIA 225 (02/23/2016)



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

STATE OF KANSAS,)	Order Affirming Decision
Appellant,)	
)	
v.)	
)	Docket No. IBIA 14-107
ACTING EASTERN OKLAHOMA)	
REGIONAL DIRECTOR, BUREAU)	
OF INDIAN AFFAIRS,)	
Appellee.)	February 23, 2016

The State of Kansas (Appellant) appealed to the Board of Indian Appeals (Board) from a May 21, 2014, decision of the Acting Eastern Oklahoma Regional Director (Regional Director), Bureau of Indian Affairs (BIA), which affirmed the Miami Agency Superintendent's (Superintendent) decision to accept an approximately 0.07-acre tract of land located in Wyandotte County, Kansas, in trust for the Wyandotte Nation (Nation). Appellant contends that the Regional Director erred in treating the property as "on-reservation," and that the Regional Director thus applied the wrong regulatory criteria when considering the Nation's application for trust acquisition.¹ Appellant further alleges that the substance of the Nation's application, and the Regional Director's subsequent findings, was insufficient to justify taking the property in trust.

Appellant has failed to show error in the Regional Director's approval of the trust acquisition. The Regional Director properly determined that the property was subject to the regulations governing on-reservation acquisitions, and fairly applied the regulations in exercising his discretion to take the property in trust. Appellant's disagreement with the Regional Director's conclusions, without evidence showing error in the decision, is not enough to overturn the Regional Director's valid exercise of discretion in this case, and the decision to accept the Nation's request to take the property at issue in trust is affirmed.

¹ Many of Appellant's arguments are similar to those previously made and rejected by the Board in *State of Kansas v. Acting Southern Plains Regional Director*, 53 IBIA 32 (2011) (*Kansas I*), *State of Kansas v. Acting Southern Plains Regional Director*, 56 IBIA 220 (2013) (*Kansas II*), and *State of Kansas v. Acting Southern Plains Regional Director*, 61 IBIA 18 (2015) (*Kansas III*).

Statutory and Regulatory Framework

The Secretary of the Interior (Secretary) is authorized “in [her] discretion, to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians.” Indian Reorganization Act (IRA) of 1934, 25 U.S.C. § 465. Fee-to-trust acquisitions are governed by 25 C.F.R. Part 151, which provides 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). When BIA receives an application for a fee-to-trust acquisition, it must send notice to the state and local governments with jurisdiction over the subject property, and provide them the opportunity to submit written comments regarding “the acquisition’s potential impacts on regulatory jurisdiction, real property taxes and special assessments.” 25 C.F.R. § 151.10. If any comments are received, the applicant must also be allowed a reasonable opportunity to respond. *Id.*

In evaluating a tribe’s request to accept land into trust, the Secretary must consider the following criteria for discretionary acquisitions:

- (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;
-
- (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

² Section 151.10(d) only applies to acquisitions for individual Indians.

The regulations distinguish between “on-reservation” and “off-reservation” trust acquisitions, and subject off-reservation trust acquisitions to additional scrutiny. *Compare* 25 C.F.R. § 151.10 *with id.* § 151.11. A property is on-reservation if it is “located within or contiguous to an Indian reservation,” 25 C.F.R. § 151.10, while lands “located outside of and noncontiguous to the tribe’s reservation,” *id.* § 151.11, are considered off-reservation acquisitions. With exceptions not relevant here, the regulations define “Indian reservation” as the “area of land over which the tribe is recognized by the United States as having governmental jurisdiction.” *Id.* § 151.2(f).

If the subject property is off-reservation, the Secretary must consider the criteria set forth in § 151.10 and additional criteria found in § 151.11, including the location of the land relative to state boundaries, and its distance from the requesting tribe’s reservation. *Id.* § 151.11(a)-(b). As the distance between the tribe’s reservation and the land to be acquired in trust increases, the Secretary must “give greater scrutiny to the tribe’s justification of anticipated benefits from the acquisition” and “greater weight to the concerns raised” by the State and local governments. *Id.* § 151.11(b).

Background

This is an appeal from BIA’s approval of the Wyandotte Nation’s request to accept a 0.07 acre parcel of land, known as the Arrowhead Tract, located in Wyandotte County, Kansas, in trust on behalf of the Nation. *See* Decision, May 21, 2014 (Administrative Record (AR) 52). The Nation owns a fee interest in the land, which is currently developed and used as an office building, and requests that BIA take the property in trust pursuant to its statutory authority under Section 5 of the IRA. Resolution 03-14-12 B, Mar. 14, 2012 (Resolution) (AR 29).

The Nation contends that the trust acquisition is needed “to provide lands for the future growth of the Nation’s services, housing, tribal enterprises, and cultural activities,” and that the property will be used “for the purpose of an existing office building [to] enhance tribal economic development.” *Id.* at 1-2 (unnumbered). The Nation agrees to be bound by existing leases on the property “so long as they remain effective,” Acknowledgment of Restrictions, Nov. 16, 2011, at 1 (unnumbered) (AR 15), and intends to “open new governmental offices increasing the availability and delivery of essential services to tribal members,” Statement on Long Term Business Plan for Arrowhead Building, Apr. 8, 2013, at 1 (unnumbered) (AR 41). The Nation also plans to relocate an existing tribally-owned business to the Arrowhead Building, from its current location in rented space across the street. *See id.* at Attachment. The Nation explained that it will be able to bring all non-gaming Kansas City-based ventures to the Arrowhead building, thereby reducing expenses for tribally-owned businesses. *See id.* The Nation identified no jurisdictional problems or conflicts of land use that would result from the trust acquisition, and only “minimal impact to state and local governing bodies since the [N]ation currently

provides economic opportunity and has negotiated a Memorandum of Understanding with the Unified Government of Wyandotte County/Kansas City, KS (Unified Government).” Resolution at 2 (unnumbered); *see also* Memorandum of Understanding, Sept. 26, 2007 (AR 9) (detailing the county’s responsibility for the provision of certain public services in exchange for financial compensation and the Nation’s agreement regarding land use).

BIA notified interested state and local parties of the application for trust acquisition by letter on February 17, 2012. *See generally* Notice Letters (AR 19-26). The parties were asked to provide information on taxes, special assessments, government services, and zoning regulations applicable to the Arrowhead Tract, and were given 30 days to submit written comments for the record. *See e.g.* AR 19 at 1-2. After a brief extension, the Unified Government submitted its response to the request for information, advising BIA that the Arrowhead Tract had annual taxes in the amount of \$16,288.78, which were divided between Wyandotte County and Kansas City, and that no other special assessments, services, or zoning conflicts existed with respect to the property. Letter from Unified Government to Acting Superintendent, Mar. 13, 2012, at 1-2 (unnumbered) (AR 28).

On March 20, 2012, Appellant submitted written objections to the proposed trust acquisition. Letter from State to Acting Superintendent, Mar. 20, 2012 (AR 30). Appellant’s objection was “primarily based on the concern that this property would be used for expanded gaming operation[s]” due to the proximity of the Arrowhead Tract to the Nation’s 7th Street Casino. *Id.* at 1. Appellant also argued that the property was off-reservation, and therefore the anticipated benefits of the acquisition should be subject to greater scrutiny, and that state and local government concerns should be given greater weight. *Id.* Appellant alleged that the proposed fee-to-trust acquisition “adds nothing except exemption from property taxes,” and that this benefit did not outweigh Appellant’s concerns over the resulting “patchwork regulatory issues” and potential for gaming expansion. *See id.* at 1-2.

Alternatively, Appellant also challenged the Nation’s eligibility to apply for a fee-to-trust acquisition under the IRA. *Id.* at 2. Appellant argued that the Nation was dissolved by treaty in 1855, and was not reconstituted again until 1937. *Id.*; *see also* Treaty with the Wyandotts, Jan. 31, 1855, 10 Stat. 1159, 1159 (1855 Treaty) (AR 3). Thus, Appellant maintained that the Nation “may not be eligible” for the proposed fee-to-trust acquisition under *Carciere v. Salazar*, 555 U.S. 379 (2009), which, Appellant contended, limited eligibility for trust acquisition to tribes that were federally recognized when the IRA was passed in 1934.³ AR 30 at 2.

³ To clarify, we note that the United States Supreme Court decision in *Carciere* determined that the Secretary’s authority to acquire land for Indians provided by 25 U.S.C. § 465, was limited, by the definition of “Indian” in § 479 of that title, to tribes that were “under
(continued...)

On March 26, 2012, the Kansas City Public School District (KCPS) submitted separate written objections to the proposed fee-to-trust acquisition. Letter from KCPS to Real Estate Services, Mar. 26, 2012 (AR 32). KCPS argued that “due to the loss of levied taxes from the continuation of the Neighborhood Revitalization Act couple[d] with the loss of an approximate \$5,120 in this proposal, [the trust acquisition would] negatively impact the district’s overall budget.” *Id.* KCPS also alleged that the acquisition would create an additional loss of \$640 for the public library system. *Id.*

The Superintendent issued his decision on November 13, 2013, concluding that “it is the Bureau’s decision to approve the trust acquisition request . . . in the exercise of discretionary authority that is vested in the Secretary.” Superintendent’s Decision, Nov. 13, 2013, at 2 (AR 46). Because the request was analyzed as an off-reservation acquisition, the Superintendent first applied the criteria in 25 C.F.R. § 151.10 to the Nation’s application, and found that the application met all of the necessary requirements. *See id.* at 3-6; *see also* 25 C.F.R § 151.11(a).

The Superintendent then considered the objections submitted by Appellant and KCPS in detail. The decision rejected Appellant’s argument that the land could be used to expand gaming, noting that the application was “for non-gaming purposes” and that no change in land use was proposed. Superintendent’s Decision at 4. The Superintendent also explained that the trust acquisition would allow the Nation to consolidate its business ventures under one roof, and open up additional business opportunities. *Id.* at 4, 7. This benefit was found to outweigh Appellant’s jurisdictional concerns because “[t]he surrounding area is already in trust status and no regulatory or zoning issues have been identified.” *Id.* at 4.

KCPS’s contention that the proposed trust acquisition would harm the public school and library budgets was also addressed. The Superintendent determined that “there will be minimal impact to state and local governing bodies since the Nation currently provides economic opportunity and has an existing Memorandum of Understanding . . . with the Unified Government . . . regarding contributions for the unified government and schools.” *Id.* at 5. The Superintendent also disagreed with Appellant’s suggestion that the Nation’s land was ineligible for trust acquisition, stating that “[t]he Nation [was] recognized under Federal jurisdiction on June 18, 1934, and has authority under Section 5 of the [IRA] . . . to acquire land in trust. *Carciere v. Salazar* does not apply to the Nation.” *Id.* at 4-5.

(...continued)

Federal jurisdiction” when the IRA was enacted, but did not require a tribe to have been “recognized” by the United States at that time. *See, e.g., Mille Lacs County, Minnesota v. Acting Midwest Regional Director*, 62 IBIA 130, 140 (2016); *Grand Traverse County Board of Commissioners v. Acting Midwest Regional Director*, 61 IBIA 273, 280-81 (2015).

Finally, the Superintendent questioned whether he had jurisdiction to consider Appellant's constitutional arguments, and concluded that "this acquisition . . . is not in violation of the Tenth Amendment and does not require the State's consent." *Id.* at 5.

The Superintendent then undertook to scrutinize the acquisition pursuant to the additional criteria for off-reservation acquisitions in § 151.11. *Id.* at 6-7. First, the Superintendent acknowledged the significant distance between the Arrowhead Tract and the Nation's headquarters in Oklahoma, but noted that "the Nation maintains business operations on one nearby tract and the Huron Cemetery is situated immediately adjacent and contiguous to the subject property. Both tracts are currently held in trust by the USA for the Nation, and lie within the former, historic reservation boundaries of the Nation." *Id.* at 6. The Superintendent thus concluded that despite the distance between the Arrowhead Tract and the Nation's primary reservation boundaries, "the acquisition of the land will facilitate tribal self-determination and economic development." *Id.*

Next, the Superintendent reviewed the Nation's business plan for the Arrowhead Tract acquisition. *Id.* at 7. The Superintendent described the Nation's intent to "upgrade existing facilities with no change in land use and no impact to local infrastructure," and to "relocate a current tribal owned data business center to the Arrowhead Building." *Id.* The fee-to-trust acquisition was found to be "cost-effective" and would allow the Nation to "qualify for additional opportunity." *Id.*

Appellant appealed to the Regional Director. On February 7, 2014, Appellant submitted a brief challenging the Superintendent's application of the trust acquisition criteria. Brief of Appellant, State of Kansas, Feb. 7, 2014 (AR 50). First, Appellant objected that the Nation failed to comply with § 151.11(c), which requires the Nation to submit "a plan which specifies the anticipated economic benefits associated with the proposed use" for the property. *Id.* at 2. Second, Appellant argued that the Nation's justification for the fee-to-trust acquisition was too general and non-specific to support the application, and that such "boilerplate" language "would allow any parcel of land to be taken into trust." *Id.* at 3. Third, Appellant contended that the trust acquisition would create "a patchwork of zoning" which "is by definition a problem, especially in the middle of a city." *Id.* Appellant also argued that despite the Superintendent's intent to "address the heightened concerns raised by the distance" between the Arrowhead Tract and the Nation's reservation, Appellant's "objections [were] dismissed by a mere repetition of conclusory, boilerplate justifications." *Id.* at 4. Finally, Appellant reiterated its concern that the acquisition would be used to expand gaming activities, and that other constitutional issues existed in the acquisition procedure that Appellant wished to preserve for appeal to the federal courts. *Id.* Appellant did not appeal the Superintendent's determination regarding the Nation's eligibility to apply for a fee-to-trust acquisition pursuant to *Carciere*.

On May 21, 2014, the Regional Director affirmed the Superintendent's decision to accept the Arrowhead Tract in trust on behalf of the Nation. Decision at 1. However, the Regional Director found that the Nation's application "should be considered as an on-reservation" acquisition because the subject property "is contiguous to the eastern boundary of" the Huron Cemetery, which "was reserved for the Wyandotte Nation by the Treaty of January 31, 1855," and is held in trust by the United States on behalf of the Nation. *Id.* at 3, 7 (citing as authority *Aitkin County, Minnesota v. Acting Midwest Regional Director*, 47 IBIA 99 (2008) and *Kansas II*, 56 IBIA 220). As such, the Regional Director determined that review of the trust acquisition pursuant to the off-reservation acquisition criteria in § 151.11 was not warranted, and limited the Decision to an evaluation of the application's adherence to the requirements of § 151.10. *Id.* at 3.

The Regional Director found that Section 5 of the IRA, 25 U.S.C. § 465, provided the statutory authority to acquire land in trust on behalf of the Nation, as required by § 151.10(a). *Id.* at 4. Observing that the Superintendent's decision did not specifically address the effect, if any, of *Carrieri* on the proposed trust acquisition, the Regional Director cited to the Board's holdings in *Shawano County v. Acting Midwest Regional Director*, 53 IBIA 62 (2011), and *Village of Hobart, Wisconsin v. Midwest Regional Director*, 57 IBIA 4 (2013), and explained that the Nation "was listed in a report prepared by Theodore H. Haas . . . as having voted in 1937 to not reject the IRA." *Id.* The Regional Director therefore "determined that the Wyandotte Nation was under federal jurisdiction when the IRA was passed and that the Secretary is authorized to take land into trust for the [Nation] pursuant to Section [5] of the IRA." *Id.*

The Regional Director then considered the Nation's need for additional land, and affirmed the Superintendent's conclusion that the Nation needed land "to provide for the future growth of the Nation's services, housing, tribal enterprises and cultural activities." *Id.*; see also § 151.10(b). The Regional Director further concluded that "the Tribe has a very small land base and has a need for additional land." Decision at 4.

The Regional Director also agreed that the Nation sufficiently explained its proposed use for the Arrowhead Tract, and rejected Appellant's contention that, due to its proximity to the Nation's casino, the land would be used for gaming purposes in the future. *Id.* at 4-5. He noted that the Nation's request to take the land in trust was submitted as a non-gaming application, *id.* at 5, and that "[t]he Nation . . . intends to continue to utilize the site to enhance tribal economic development through the existing office building with no change in land use," *id.* at 4. He explained that the "current zoning is a C-2 Commercial Extensive District," and that the Nation's plan to continue to use the site as an office building was therefore "consistent with the current zoning in the area." *Id.* The Regional Director concluded that the Nation's "request adequately describes the purpose for which the land will be used," pursuant to the requirements of § 151.10(c). *Id.* at 5. He noted that the Unified Government acknowledged that the Nation's stated purpose for the

Arrowhead Tract would “not conflict with existing zoning and use patterns for the area.” *Id.* at 6. He therefore also concluded that, pursuant to § 151.10(f), “the current zoning is consistent with the proposed use of the property and the acquisition of the property does not create any issues relating to ‘patchwork of zoning.’” *Id.*

Section 151.10(e) requires BIA to consider the impact of a fee-to-trust acquisition on state and local governments resulting from removal of the property from the tax rolls. 25 C.F.R. § 151.10(e). After considering the comments submitted by Appellant and KCPS, the Regional Director affirmed the Superintendent’s determination that the loss in tax revenue would result in “minimal impact to the state and local governments” and would be offset by the Nation’s contributions to economic opportunities and its support of the Unified Government and schools from the Nation’s existing gaming operations. Decision at 5. The Regional Director noted that the Arrowhead Tract was assessed \$16,641.66 for 2013, of which approximately \$5,120 went to KCPS and \$640 went to the library budget. *Id.*; AR 32. Removal of the property tax assessed against the Arrowhead Tract, he stated, would result in a reduction of 0.021 percent of Wyandotte County’s total tax assessment. Decision at 5. The Regional Director observed that the Nation had a history of working with the Unified Government, which included financial support of “\$10,000 annually to maintain, improve and protect [the Huron Cemetery],” in addition to “a percentage of the annual adjusted gross revenues for the Casino site.” *Id.* Thus the Regional Director found “that the contributions made by the Wyandotte Nation [would] offset the loss of real property taxes.” *Id.*

Finally, the Regional Director determined that BIA was equipped to discharge any additional responsibilities resulting from the acquisition of the Arrowhead Tract, and that the Nation had provided the information required for BIA to comply with all environmental requirements for this trust acquisition. *Id.* at 6; *see* 25 C.F.R. § 151.10(g)-(h). Thus, the Regional Director found that the Nation’s application was consistent with the regulatory criteria for on-reservation trust acquisitions, and “modifie[d] the Superintendent’s decision in part and affirm[ed] his decision to take the property in trust for the Wyandotte Nation.” Decision at 7.

Appellant appealed to the Board. *See* Notice of Appeal, May 30, 2014. Appellant argues that the Regional Director erred in treating the acquisition as on-reservation because the Superintendent approved the application as an off-reservation acquisition, and because the Huron Cemetery, which is contiguous to the Arrowhead Tract, is not a “reservation” as contemplated by the regulations. Opening Brief (Br.), Sept. 24, 2014, at 4. Appellant further contends that even if the acquisition was on-reservation, the Regional Director erred in his consideration of the regulatory criteria in § 151.10, particularly with respect to criteria (a), (b) and (c). *Id.* at 8-11. Appellee filed a reply brief in support of the Regional Director’s Decision. The Nation has not sought to intervene in this appeal.

Discussion

I. Standard of Review

BIA is authorized to exercise its discretion to take land into trust on behalf of Indian tribes, and we will not substitute our judgment for that of BIA. *City of Moses Lake, Washington v. Northwest Regional Director*, 60 IBIA 111, 116 (2015). The Board reviews discretionary decisions to determine whether they are in compliance with the law, including any limitations imposed by regulation. *Id.* Although “proof that the Regional Director considered the factors set forth in 25 C.F.R. § 151.10 must appear in the record,” a particular outcome is not required, “[n]or must the factors be weighed or balanced in a particular way or exhaustively analyzed.” *Kansas II*, 56 IBIA at 224 (quoting *State of South Dakota v. Acting Great Plains Regional Director*, 49 IBIA 84, 98 (2009)). The appellant bears the burden of proving that BIA failed to properly exercise its discretion and simple disagreement or bare assertions are insufficient to meet this burden. *Jefferson County, Oregon, Board of Commissioners v. Northwest Regional Director*, 47 IBIA 187, 200 (2008). In contrast, the Board maintains full authority to review *de novo* legal issues raised in trust acquisition cases, *Kansas II*, 56 IBIA at 224, except those challenging the constitutionality of laws or regulations, which the Board lacks authority to adjudicate, *Kansas III*, 61 IBIA at 25. An appellant, however, bears the burden of proving that BIA’s decision was in error or not supported by substantial evidence. *Cass County, Minnesota v. Midwest Regional Director*, 42 IBIA 243, 247 (2006).

II. Applicability of 25 C.F.R. § 151.11

Appellant argues that the Regional Director erred in considering the Nation’s application as an on-reservation acquisition because (1) the Regional Director improperly raised the issue *sua sponte*; and (2) the Regional Director erroneously based the determination on the trust status of the Huron Cemetery, the parcel of land contiguous to the Arrowhead Tract. Opening Br. at 4-8. Appellant contends that because the Nation did not appeal the Superintendent’s treatment of the application as off-reservation, the Regional Director was not authorized to consider the issue. *Id.* at 4. Appellant also alleges that the term “Indian reservation” in the regulations was not meant to include all property held in trust by the United States on behalf of an Indian tribe, and that the Huron Cemetery, which is “170 miles away” from “the Nation’s seat of government,” cannot be considered a reservation for purposes of the trust acquisition regulations. *See id.* at 5-7. To the contrary, Appellant argues that “[t]o hold that a cemetery is a reservation distorts the definition of reservation beyond its limits.” *Id.* at 7. Although Appellant acknowledges that the Board has ruled on this issue in the past, *see id.* at 5 (referencing *Aitkin County*, 47 IBIA 99, and *Kansas II*, 56 IBIA 220), Appellant claims that the Board’s precedent “is wrong as a matter of law,” *id.* at 8.

With regard to Appellant's first contention, the Regional Director had full authority to consider and change the analysis of the proposed trust acquisition from off-reservation to on-reservation. Appellant mistakenly references 43 C.F.R. § 4.318 to argue that the Regional Director is limited to considering arguments that were originally raised before the Superintendent. *See* Opening Br. at 4. Section 4.318 governs the Board's jurisdiction on appeal, and has no application in appeals before the Regional Director.⁴ To the contrary, appeals to the Regional Director are governed by 25 C.F.R. Part 2, which provides the Regional Director with broad authority to consider "any information available to the reviewing official . . . in reaching a decision whether part of the record or not." 25 C.F.R. § 2.21. Thus the Regional Director had full authority to amend the Superintendent's analysis of the proposed acquisition from off- to on-reservation.

With respect to Appellant's second argument, the Board most recently considered the regulatory definition of "reservation" in *Kansas III*. In that case, Appellant similarly argued that a tract of land that was contiguous to a tribe's existing trust land should be considered off-reservation for purposes of the trust acquisition regulations. *Kansas III*, 61 IBIA at 25. Appellant reasoned that defining such a property as "on-reservation" would create an arbitrary and capricious standard for analyzing trust acquisitions, and would allow a tribe to "buy tracts of land contiguous to its reservation and then extend trust parcels, repeatedly and progressively expanding its trust base *ad infinitum*." *Id.* at 23, 25. The Board was "unconvinced by the State's arguments," *id.* at 25, in that case for reasons that are applicable as well to the instant appeal.

Appellant acknowledges that, with exceptions not relevant here, the regulations define "Indian reservation" as "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction," Opening Br. at 5 (quoting 25 C.F.R. §151.2(f)), and does not dispute that a tribe may exercise jurisdiction over trust property, including trust property that is not itself contiguous to a tribe's "treaty reservation," *see id.* at 5-6. Instead, Appellant challenges whether in this case, the record shows that the Nation has governmental jurisdiction over the Huron Cemetery, which is held in trust on behalf of the Nation for "burying purposes only." *Id.* at 6-7. Yet as the Board held in *Aitkin*, and has consistently reaffirmed, a tribe is presumed to have jurisdiction over its trust properties. *Aitkin*, 47 IBIA at 106-107; *see also Kansas III*, 61 IBIA at 26; *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). Appellant has offered no evidence to rebut this presumption, and as we clarified in *Kansas II*, "[a] fee

⁴ Section 4.318 limits the scope of review on appeal to the Board "to those issues that were before the administrative law judge or Indian probate judge upon the petition for rehearing, reopening, or regarding tribal purchase of interests, or before the BIA official on review." 43 C.F.R. § 4.318.

parcel owned by a tribe that is contiguous to a parcel that is held in trust for the tribe is considered to be ‘contiguous to [the tribe’s] reservation’ under Part 151.” *Kansas II*, 56 IBIA at 230. In other words, property owned by a tribe that is adjacent to property over which the tribe has governmental jurisdiction is considered on-reservation for purposes of fee-to-trust acquisitions. *See id.* Nothing in the record or regulations requires that we depart from our prior holding, and as such, the Board affirms the Regional Director’s analysis of the Nation’s application as on-reservation.

III. 25 C.F.R. § 151.10 Criteria

Having determined that the proposed acquisition was subject to the criteria applicable to on-reservation fee-to-trust acquisitions, the Board now turns to a review of the substance of the Regional Director’s consideration. Appellant argues that the Regional Director erred in analyzing the requirements of 25 C.F.R. § 151.10 as they apply to the Nation’s application for fee-to-trust acquisition. Opening Br. at 8-11. In particular, Appellant challenges the Regional Director’s finding of statutory authority to acquire the land in trust pursuant to § 151.10(a), arguing that the Nation was dissolved by treaty in 1855 and was not reestablished until 1937, and is thus ineligible to apply for land to be taken in trust because it was not under Federal jurisdiction at the time the IRA was passed.⁵ *See id.* at 9; *see also Carciere*, 555 U.S. at 395. Appellant also contends that the Regional Director did not adequately explain the Nation’s need for additional land pursuant to § 151.10(b), and instead accepted a “non-specific” and “conclusory” justification that “would allow any parcel of land to be taken into trust.” Opening Br. at 10. Finally, Appellant alleges that the Regional Director’s analysis of the Nation’s statement of purpose for the Arrowhead Tract was also insufficient. *Id.* at 11.

We are not persuaded by Appellant’s arguments. First, the record supports the Regional Director’s conclusion that BIA may take land into trust for the Nation pursuant to Section 5 of the IRA. *See* Decision at 4. Although the 1855 Treaty called for dissolution of the Wyandotte tribe and the cession and distribution of the tribe’s land, the treaty left open the possibility of some members being “exempt from the immediate operation of the [dissolution]” and continuing to receive “the assistance and protection of the United States, and an Indian agent in their vicinity” for a limited period of time. 10 Stat. at 1159. In fact, and as the Court of Appeals for the Tenth Circuit explained in a case relied on by Appellant, “[t]he 1855 treaty resulted in the splintering of the Wyandottes into two groups – those who accepted citizenship and those who did not. . . . The small group (approximately 200) who did not accept citizenship and did not receive any of the ceded land were officially

⁵ BIA objects to the Board’s consideration of this argument because it was not appealed to the Regional Director. However, the Regional Director raised the issue in the Decision, and the Board finds no prejudice to BIA in reconsidering it now.

reconstituted by Congress in 1867 as the Wyandotte Tribe.” *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1254 (2001). The 1937 election referred to by the Regional Director, *see* Decision at 4, at which members of the Wyandotte Nation voted not to reject the IRA, did not “recreate[] the tribe,” as Appellant contends. *See* Opening Br. at 9. Rather, the holding of the election “afford[ed] *those tribes that were already under Federal jurisdiction* a right to opt out of the IRA, if they so chose.” *Village of Hobart, Wisconsin*, 57 IBIA at 23. Thus Appellant has not met its burden to show that the Regional Director erred in finding statutory authority for the acquisition of the Arrowhead Tract.⁶

Second, the regulations do not require anything more than the Secretary’s consideration of the tribe’s “need . . . for additional land” when determining whether to approve a fee-to-trust acquisition, *see* 25 C.F.R. § 151.10(b), and as we have previously held, a particular outcome is not required, “[n]or must the factors be weighed or balanced in a particular way or exhaustively analyzed,” *Kansas II*, 56 IBIA at 224 (internal quotation marks omitted). The Decision makes clear that the Regional Director fairly considered Appellant’s arguments regarding the alleged inadequacy of the Nation’s stated need for additional land, and ultimately disagreed with Appellant. After describing the Nation’s current landholdings in Oklahoma and Kansas, the Regional Director concluded that “[t]he Nation has identified the need for the additional land to provide for the future growth of the Nation’s services, housing, tribal enterprises and cultural activities . . . [and] the Bureau finds that the Tribe has a very small land base and has a need for additional land.” Decision at 4. Appellant objects that this determination is “non-specific” and amounts to a standardless “rubber-stamp approval” of the acquisition, Opening Br. at 10, yet offers no legal or factual basis to find that the Regional Director failed to meet his responsibility to give “proper consideration to all legal prerequisites to the exercise of BIA’s discretionary authority,” *see Kansas II*, 56 IBIA at 224. Instead, the Decision shows that the Nation’s need for the land was considered by the Regional Director, and that is enough to satisfy the requirements of § 151.10(b).

Likewise, the record clearly shows that the Regional Director considered the purpose for which the land would be used. Appellant’s primary concern is that the Nation’s “generalized” statement of purpose for the Arrowhead Tract “would justify any land being taken into trust” and “is not legally determinative of the Nation’s actual use of the land.”

⁶ Appellant apparently objects to the Regional Director’s reference to the 1947 Haas Report as evidence that the Secretary held an IRA election for the Tribe, without including the Report in the administrative record. *See* Opening Br. at 9. But Appellant does not contend that the Regional Director was incorrect in representing the content of the Haas Report, which is publicly available on the Department of the Interior website. *See* <https://www.doi.gov/sites/doi.gov/files/migrated/library/internet/subject/upload/Haas-TenYears.pdf> (last visited Feb. 22, 2016).

Opening Br. at 11. Appellant suggests that the proximity of the Arrowhead Tract to the Nation's 7th Street Casino makes it likely that the land will eventually be used to expand gaming operations. *See id.* The Regional Director addressed Appellant's concern by noting that the Nation's application was for a non-gaming acquisition and that the proposed purpose for the property remained that of an office building, the same as its current use. Decision at 5. The Regional Director found that the Nation's stated intent "to utilize the site to enhance tribal economic development through the existing office building with no change in land use" was sufficient to satisfy the requirements of § 151.10(c), and the Board agrees. *Id.* at 4-5. The record must show only that the Regional Director considered "[t]he purposes for which the land will be used," 25 C.F.R. § 151.10(c), and the regulations do not require more detailed scrutiny of the Nation's statement of intent for on-reservation acquisitions. The Board therefore finds no error in the Regional Director's consideration of § 151.10(c), or in his consideration of any of the other criteria challenged by Appellant for this on-reservation acquisition, and the Decision is affirmed.

IV. Constitutional Arguments

Appellant raises several arguments challenging the constitutionality of the IRA and the authority delegated to BIA to accept land in trust on behalf of Indian tribes. "The Board consistently has held that it lacks authority to declare an act of Congress to be unconstitutional," and therefore we do not address the various constitutional challenges raised by Appellant. *Thurston County, Nebraska v. Acting Great Plains Regional Director*, 56 IBIA 62, 66 (2012).

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 Decision of May 21, 2014.

I concur:

// original signed
Robert E. Hall
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge