INTERIOR BOARD OF INDIAN APPEALS

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

63 IBIA 127 (05/27/2016)

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

DESERT WATER AGENCY, Appellant,	)	Order Affirming Decision in Part, Vacating in Part and Remanding
v.	)	Docket No. IBIA 15-014
PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	May 27, 2016

The Desert Water Agency (Appellant or DWA) appealed to the Board of Indian Appeals (Board) from an August 28, 2014, decision (Decision) of the Pacific Regional Director (Regional Director), Bureau of Indian Affairs (BIA), to acquire in trust approximately 108.80 acres of land, referred to as the "Beylik property" or "Beylik Ranch," located in Riverside County, California, by the United States for the Agua Caliente Band of Cahuilla Indians (Tribe).[1]

We affirm the Regional Director's decision to take the land into trust, with one exception. We find that the Regional Director gave adequate consideration to the issues raised by Appellant in its comments regarding the trust acquisition. We also reject Appellant's contention that the Regional Director abused her discretion by declining to condition the trust acquisition on a requirement that the Tribe pay future assessments and fees to Appellant for water delivery services. To the extent that Appellant relies on arguments not previously raised to the Regional Director, we decline to consider them on appeal. Appellant's remaining argument is that the acceptance of the Beylik property into trust provides the Tribe with a "windfall" and does not serve the purposes of the Indian Reorganization Act (IRA) of 1934, 25 U.S.C. § 465. Appellant also neglected to raise this argument to the Regional Director, and even if we considered the issue, we would find it to be without merit.

We, however, agree with Appellant that neither the Decision, nor the administrative record, contains an adequate foundation to show that one of the four parcels, a 1.42-acre tract contained in the Beylik property, is contiguous to the Tribe's existing trust land. Thus, we vacate the Decision's finding of contiguity regarding Parcel No. 522-040-003-2 and

[1] The legal description of the Beylik property is more fully provided in the Decision.

remand that portion of the Decision to the Regional Director for further consideration and a new decision on this issue. If the Regional Director determines that the 1.42-acre parcel is not contiguous, she shall apply the off-reservation trust acquisition criteria to that parcel in considering Appellant's objections. If the Regional Director determines that it is contiguous, she may limit her decision to that determination.

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." 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." *Id.* § 151.10. If any comments are received, the applicant must also be allowed a reasonable opportunity to respond. *Id.*

In evaluating a tribe's application 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]

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. For purposes of trust acquisition, a property is considered 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. 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 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 having regulatory jurisdiction over the land to be acquired. *Id.* § 151.11(b).

Factual Background

In 2004, the Tribe applied to BIA to place the Beylik property into trust. Tribe's Fee-to-Trust Application, Dec. 7, 2004 (Administrative Record (AR) 1). The property is divided into four parcels, which together total 108.80 acres.[3] Decision, Aug. 28, 2014, at 1-2 (AR 64); Tribe's Land Status Map (attachment to Letter from Tribe's GIS Manager to BIA, Sept. 5, 2007 (AR 26)). The parcels are identified as Assessor's Parcel Numbers (Nos.) 516-090-010-8, 522-040-001-0, 522-040-002-1, and 522-040-003-2. Decision at 1-2; Tribe's Fee-to-Trust Application at 1. The Tribe stated that the property is within the traditional use area of the Tribe, and "abuts to an existing Tribal trust parcel." Tribe's Fee-to-Trust Application at 2. The Tribe's application cited "the need to re-establish its original

---

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

[3] Although the Decision describes the acreage for the property as 138.60 acres, it is actually approximately 108.80 acres. *See* Decision at 2; Letter from Realty Manager to Regional Director, Apr. 11, 2008, at 2 (AR 31) (correcting the Tribe's Fee-to-Trust Application); Tribe's Answer Brief (Br.), Mar. 25, 2015, at 1.

31,410 acre land base for development now, or land-banking for development by future generations." *Id*. The Tribe's application did not include a specific development proposal for the Beylik property but stated that "it has the potential for exceptional highway commercial development." *Id*.

BIA notified interested state and local parties of the application for trust acquisition of the Beylik property by letter on October 7, 2011. Letter from Regional Director to California State Clearinghouse, Oct. 7, 2011 (AR 52). On November 14, 2011, Appellant submitted comments to BIA regarding the proposed trust acquisition. Letter from Appellant to BIA's Pacific Regional Office, Nov. 14, 2011 (AR 56) (DWA Comments). Appellant describes itself as an independent special district of the State of California, located in Riverside County, which provides water supplies and sewage services to the City of Palm Springs and the surrounding area. Appellant's Opening Br., Jan. 20, 2015, at 1. In its comments, Appellant took "no position on whether the Secretary should approve the Tribe's proposed fee-to-trust conversion." DWA Comments at 2. Instead, Appellant explained that it submitted its comments "for the sole purpose of *requesting* that—if the Secretary approves the conversion—such approval *should* be conditioned on the Tribe's continuing obligation to pay assessments and fees to [Appellant] for water delivery services provided by [Appellant]." *Id*. (emphases added); *see also id*. at 3-4. Appellant also contended that the Beylik property was not within the Tribe's traditional use area or tribal consolidation area, and that it was not contiguous to the Tribe's reservation. *Id*. at 2.

BIA provided the Tribe a copy of the comments it received, and the Tribe responded to them. *See*, *e.g*., Email from Arvada Wolfin to Tribe's Director of Realty Services, Dec. 5, 2011 (AR 58); Letter from Tribe to Regional Director, Feb. 13, 2014 (AR 62) (addressing comments from Appellant, the California Department of Transportation, and the Riverside County Assessor). Considering Appellant's proposal that BIA should condition the approval of the trust acquisition on the Tribe's continued responsibility to pay fees and assessments to Appellant for water services, the Tribe questioned whether BIA has the authority to place conditions on land taken into trust. AR 62 at 1-2 (unnumbered). The Tribe also noted that it currently pays no fees or assessments to Appellant, "because there are no operating wells on the property to which such fees or assessments could be attached." *Id*. at 1 (unnumbered). The Tribe further contended that the groundwater replenishment assessment and ad valorem property tax, cited by Appellant, are taxes prohibited by Public Law 83-280[4] and the IRA. *Id*. at 2-3 (unnumbered).

---

[4] Act of August 15, 1953, Pub. L. No. 83-280, 67 Stat. 588, *as amended*, 18 U.S.C. § 1162, 28 U.S.C. 1360 (1994).

Addressing Appellant's statement regarding the location of the Beylik property, the Tribe explained that it is within the Tribe's aboriginal territory or its traditional use area, but it is not within an approved tribal land consolidation area. *Id*. at 4 (unnumbered) (citing Smithsonian Institution, *Handbook of North American Indians* (Robert F. Heizer ed., 1978); A.L. Kroeber, *Handbook of the Indians of California* 693 (Dover ed. 1976)). The Tribe also attached a map to its response, and stated that the Beylik property is "contiguous to existing trust land in Section 16, T. 3 S., R. 3 E., S.B.M." *Id*. Specifically, the Tribe identified two trust parcels, T5000 (Welmas Parcel) and T5273[5] (Snow Creek Parcel), as "immediately west of and adjacent to the subject Beylik Ranch parcels." *Id*.; Tribe's Reservation Map of Recent Trust Takings (Exhibit (Ex.) to Tribe's Answer Br.). Thus, the Tribe contended, the on-reservation criteria applied to the proposed trust acquisition. AR 62 at 5 (unnumbered). Finally, the Tribe disagreed with the proposal that the trust acquisition should be conditioned on the payment of fees and assessments to Appellant. *Id*. at 5-7 (unnumbered).

On August 28, 2014, the Regional Director issued the Decision approving the Tribe's application to have the Beylik property taken into trust. In the Decision, the Regional Director found that the parcels at issue "are contiguous to lands that are held in federal trust for the [Tribe]." Decision at 2; *see also id*. at 5-6. She concluded that the proposed trust acquisition is authorized by the Indian Land Consolidation Act (ILCA), *see* 25 U.S.C. § 2202.[6] *Id*. at 2; *see* 25 C.F.R. § 151.10(a). As relevant to this appeal, the Regional Director analyzed the Tribe's need for additional land, finding that the Tribe "rel[ies] on the highest and best use of its land resources to generate income and opportunities," and noted the Tribe's aim of re-establishing its land base for current or future development. Decision at 5-6; *see* 25 C.F.R. § 151.10(b). The Regional Director explained that the Tribe's goals for the land include:

> 1) preservation and restoration of cultural, natural[,] and scenic values[;] 2) [to] create a strong 'sense of place' that reflect[s] the cultural and natural history of the Tribe[;] 3) [to] create an interpretation of Native American history and culture[;] and 4) [to] generate sustained revenue for tribal support through public access and recreation.

---

[5] On some maps included in the administrative record, T5273 is identified as T1033. *See*, *e.g*., Tribe's Land Status Map (attachment to AR 26).

[6] The cited provision of ILCA makes Section 5 of the IRA, 25 U.S.C. § 465, applicable to those tribes, including the Tribe, that voted to opt out of the IRA in elections held thereunder. *See State of New York v. Acting Eastern Regional Director*, 58 IBIA 323, 332 (2014); Decision at 2 (citing Theodore H. Haas, U.S. Indian Service, *Ten Years of Tribal Government Under I.R.A*. (1947)).

Decision at 6. The Regional Director then addressed each of the remaining § 151.10 factors. *Id*. at 6-7.

In the Decision, the Regional Director also discussed Appellant's comments regarding the proposed trust acquisition, and summarized the Tribe's response to the comments. *Id*. at 4-5. The Regional Director included the Tribe's statement that it "now pays no such fees or assessments," because there are "no operating" wells on the Beylik property. *Id*. at 4. The Regional Director cited Section 5 of the IRA and stated that it "does not speak of conditional trust takings." *Id*. The Regional Director characterized the fees and assessments as "taxes," and found no basis for BIA, "even if such authority existed, to condition the proposed trust taking on the payment of the two taxes sought by [Appellant]." *Id*. at 4-5. The Regional Director also stated that the Beylik property is within the Tribe's aboriginal territory. *Id*. at 5. Relying on the Tribe's response, she identified two trust parcels, T5000 and T5273, as the relevant parcels demonstrating that the Beylik property is "contiguous to existing trust land in Section 16, T. 3 S., R. 3 E., S.B.M.," *id*., thus making the on-reservation criteria in § 151.10 applicable to the Beylik property.

Appellant appealed the Decision to the Board, and filed an opening brief and a reply brief. The Tribe, as an interested party in this appeal, filed an answer brief. No other briefs were submitted.

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. *Desert Water Agency v. Acting Pacific Regional Director*, 59 IBIA 119, 123 (2014) (*Desert Water Agency I*). 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." *State of Kansas v. Acting Southern Plains Regional Director*, 56 IBIA 220, 224 (2013) (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. *Desert Water Agency I*, 59 IBIA at 123. The Board has full authority to review any legal issues raised in a trust acquisition case, except those challenging the constitutionality of laws or regulations, which the Board lacks

authority to adjudicate. *Id*. at 124. An appellant, however, bears the burden of proving that BIA's decision was in error or not supported by substantial evidence. *Id*.

The scope of the Board's review ordinarily is "limited to those issues that were before the . . . BIA official on review." 43 C.F.R. § 4.318. Thus, the Board ordinarily will decline to consider for the first time on appeal matters that were not, but could have been, raised to the Regional Director. *See id.*; *Desert Water Agency I*, 59 IBIA at 124.

II. The Regional Director's Analysis of Appellant's Concerns

Appellant argues that the Regional Director abused her discretion by merely citing the Tribe's responses to Appellant's comments, and failing to perform an independent analysis of the issues raised by Appellant. Opening Br. at 4-7. In support of its argument, Appellant contends that the Regional Director erred, as a factual matter, because there are "operational" wells located on the Beylik property. *Id*. at 4-6; *see also* Appellant's Reply Br., Apr. 23, 2015, at 11 (property contains wells "capable of operation"). Further, Appellant contends that the Decision failed to examine independently whether each of the parcels at issue is contiguous to existing trust land. *Id*. at 6.

We find that Appellant has not established that the Regional Director failed to consider independently its comments or generally erred in her consideration of the factors set forth in 25 C.F.R § 151.10. The Regional Director is not required to provide exhaustive analysis of such factors. *Shawano County, Wisconsin v. Acting Midwest Regional Director*, 53 IBIA 62, 69 (2011). Instead, the Board must be able to discern from the decision at issue, or from the record, that due consideration was given to timely submitted comments by interested parties. *Village of Hobart, Wisconsin v. Midwest Regional Director*, 57 IBIA 4, 13 (2013). Here, the Regional Director met that obligation by consulting with the Tribe regarding Appellant's comments, and discussing the comments and the Tribe's responses in the Decision. Decision at 4-5. *See Jackson County, Kansas v. Southern Plains Regional Director*, 47 IBIA 222, 231 (2008) (finding regional director's analysis sufficient because it addressed the information and comments provided by the tribe, the state, and local governments); *Aitkin County*, *Minnesota v. Acting Midwest Regional Director*, 47 IBIA 99, 108 (2008) (rejecting argument that the regional director failed adequately to consider a Part 151 factor and only restated the position of the tribe). Thus, we now turn to the specific issues raised by Appellant regarding the Regional Director's findings concerning the wells located on the Beylik property and the contiguity of the property.

Appellant is correct that the administrative record contains evidence indicating that at least one of the wells on the Beylik property is operable, though not in regular use. *See, e.g.*, Consultant Phase 1 Survey Report, Mar. 14, 2008, at 5 (attachment to Phase 1 Contaminant Survey, Oct. 31, 2011 (AR 54)) ("The two water wells were not in use; one

was inoperable."); Attachment C, Parcel Site Color Photograph 5, Oct. 19, 2011 (attachment to AR 54) ("[s]howing the southern refurbished water well"); Email from Mark Dansby to John Rydzik, Oct. 24, 2011 (AR 11) (stating that test samples from the wells are monitored twice a year). It does not follow, however, that the Regional Director erred in finding that the wells are not "operating." Appellant concedes that the last significant agricultural pumping was in 2009—5 years before the Regional Director's decision. On appeal, Appellant misquotes the Regional Director as using the word "operational," rather than "operating," and then seeks to rebut the Regional Director by arguing that the wells are "capable of operation." Reply Br. at 11. We are not convinced that the Regional Director's analysis was premised on any disputed factual issue. The thrust of the Regional Director's conclusion, "that the Tribe *now* pays no such fees or assessments" for water services to the Beylik property, is not disputed by Appellant. Decision at 4 (emphasis added) (citing the Tribe's response to Appellant's comments). In its brief, the Tribe substantiated its response to Appellant's comments, explaining that "for every year since 2009, the Tribe has been a minimal pumper for these two wells, and no groundwater replenishment assessments have been due."[7] Tribe's Answer Br. at 8. Because Appellant has provided no evidence to counter this statement, it has failed to show error in the Regional Director's consideration of this matter.

In addition, we find that the administrative record supports the Regional Director's finding of contiguity in regards to Parcel Nos. 516-090-010-8, 522-040-001-0, and 522-040-002-1, and Appellant fails to meet its burden of establishing error. *Desert Water Agency I*, 59 IBIA at 126 ("the Board may affirm a BIA finding of contiguity (or non-contiguity) where the record is sufficient to support the BIA finding as a matter of law") (citations omitted). The term "contiguous" is not defined in Part 151, however, the Board has held that to be contiguous under Part 151, "at a minimum, the lands must touch." *Jefferson County, Oregon, Board of Commissioners v. Northwest Regional Director*, 47 IBIA 187, 206 (2008). Parcels that "adjoin or abut" are contiguous. *Id*. at 205; *see also State of Kansas*, 56 IBIA at 230 ("Parcels that share a boundary are deemed 'contiguous.'"). Multiple maps included in the administrative record show that these parcels are contiguous to the Welmas and Snow Creek Parcels, which are held in trust for the Tribe. *See, e.g*., Tribe's Land Status Map (attachment to AR 26) (No. 516-090-010-8 shares a boundary with the Welmas Parcel, No. 522-040-001-0 shares a boundary with and is part of the same

---

[7] *See* Cal. Wat. App. § 100-15.4(a)(5) ("'Minimal pumper' means any producer who produces 10 or fewer acre-feet in any year."); *id*. at § 100-15.4(g) ("[m]inimal pumpers . . . shall be exempt from any replenishment assessments").

tract as No. 516-090-010-8,[8] and No. 522-040-002-1 shares a boundary with the Snow Creek Parcel).[9]

In contesting the Regional Director's application of the on-reservation criteria to this trust acquisition, Appellant relies on an argument squarely rejected by the Board in *Desert Water Agency I*. Appellant contends that the Welmas, Snow Creek, and Mitchell Parcels cannot be considered a reservation under Federal law, and thus, Appellant concludes, the Regional Director erred in applying the on-reservation criteria in § 151.10. Reply Br. at 4. In *Desert Water Agency I*, however, the Board explained "when land proposed for trust acquisition is contiguous to a parcel that is held in trust for the tribe, the land is considered to be contiguous to an Indian reservation for purposes of Part 151." 59 IBIA at 125 (citing *Aitkin County*, 47 IBIA at 105, 107). The same principle applies here. Accordingly, we affirm the Regional Director's conclusion that Parcel Nos. 516-090-010-8, 522-040-001-0, and 522-040-002-1 are contiguous to the Tribe's existing trust land and thus eligible for consideration under the on-reservation criteria.

On the other hand, the Tribe, itself, describes Parcel No. 522-040-003-2 as "non-abutting" and separated on two sides by "a 60-foot wide curving strip of land" from the Snow Creek Parcel and Parcel No. 522-040-002-1. Tribe's Answer Br. at 12-13; *see also* Tribe's Land Status Map (attachment to AR 26). While the Board has recognized that contiguity can occur when a "highway easement separates the actual land surfaces of . . . two parcels," it is not evident from the record that Parcel No. 522-040-003-2 fits into this category. *County of Sauk, Wisconsin v. Midwest Regional Director*, 45 IBIA 201, 213 (2007).[10] The Tribe speculates that the property surrounding Parcel No. 522-040-003-2 "may have been intended as an easement to provide an access point to a highway." Tribe's Answer Br. at 14 (citing Interim Title Commitment, Schedule B (AR 35)). While the record does not contain sufficient evidence for us to determine the accuracy of the Tribe's speculation, it is apparent, and uncontested, that the strip of land is not owned by the Tribe

---

[8] Parcel No. 522-040-001-0 also appears to abut the Mitchell Parcel, which is held in trust for the Tribe. Tribe's Reservation Map of Recent Trust Takings (Ex. to Tribe's Answer Br.); *Desert Water Agency I*, 59 IBIA at 119 (affirming the decision to accept the Mitchell Parcel into trust).

[9] *See also* Tribe's Reservation Map of T3S R3E, Beylik Ranch Development (attachment to Taxes 2007-2008 (AR 22)); Tribe's Reservation Map of T3S R3E, Sections 9, 16 (attachment to AR 62); Attachment B, Aerial Photographs (attachment to Phase 1 Survey, Aug. 28, 2014 (AR 70)).

[10] *Aff'd sub. nom. Sauk County v. U.S. Dep't of the Interior*, No. 07-cv-543-bbc, 2008 WL 2225680 (W.D. Wis. May 29, 2008).

and is not currently in use as an easement. Accordingly, we vacate the Decision's finding of contiguity regarding No. 522-040-003-2 and remand the matter to the Regional Director for further consideration and a new decision on the issue of contiguity, and additional consideration if the Regional Director determines that this 1.42-acre parcel is not contiguous. *County of San Diego, California v. Pacific Regional Director*, 58 IBIA 11, 28 (2013) (vacating BIA decision because the regional director did not properly consider whether the parcel was contiguous to existing tribal trust lands, from which it was separated by several highways, and the record appeared to be incomplete).

III. Appellant's Request to Make the Acquisition of the Beylik Property Conditional on the Payment of Service Charges

Next, Appellant contends that the Regional Director abused her discretion by failing to condition the trust acquisition on the Tribe's "continuing obligation" to pay service charges, in the form of a groundwater replenishment assessment, a water delivery charge, and an ad valorem tax, to Appellant. Opening Br. at 8-21.

In the Decision, the Regional Director stated that Section 5 of the IRA, "25 U.S.C. § 465[,] does not speak of conditional trust takings." Decision at 4. Further, she concluded that "there is no basis for the Secretary, even if such authority existed, to condition the proposed trust taking on the payment of the two taxes[11] sought by [Appellant]."[12] *Id*. at 4-5. We proceed from this starting point, and conclude that Appellant has not shown that the Regional Director abused her discretion in declining Appellant's request to make the payment of service charges, fees, or assessments a condition of accepting the Beylik property into trust.[13] We also find that Appellant's arguments regarding potential future litigation and constitutional difficulties were not presented to the Regional Director, and offer little support for its position. Accordingly, we find that the

---

[11] Appellant disputes that its service charges should be considered taxes. *See* Opening Br. at 12-15. The characterization of Appellant's charges is not a material factor in our analysis.

[12] Appellant and the Tribe disagree on whether the Secretary would even have *authority* to impose the condition requested by Appellant, but Appellant concedes that the Regional Director declined to do so as a matter of discretion, and did not rely on a determination that she lacked authority. Reply Br. at 7.

[13] We do note that in the litigation leading to the Supreme Court's decision in *Carcieri v. Salazar*, the "Secretary [took] the position that he has no authority to impose restrictions on land taken into trust under the IRA, absent a statutory directive imposing such restrictions." *Carcieri v. Kempthorne*, 497 F.3d 15, 38 n.18 (1st Cir. 2007), *rev'd on other grounds, Carcieri v. Salazar*, 555 U.S. 379 (2009).

Regional Director did not err or abuse her discretion by failing to make the trust acquisition conditional, as urged by Appellant.

Appellant cites various cases to support its argument that the Regional Director could have and should have conditioned her approval of the trust acquisition on an obligation by the Tribe to pay future service charges, fees, or assessments. None of these, however, were presented by Appellant to the Regional Director when it made a "request" that the Regional Director "should" impose such a condition. In making its request, Appellant argued that it provided a service and that the Regional Director should require the Tribe to pay Appellant's charges as a condition of the trust acquisition. The Regional Director was not convinced, and we are not convinced she abused her discretion.

Appellant also argues that the Regional Director abused her discretion by not conditioning the trust acquisition on payment of future DWA charges in order to avoid future litigation regarding the Tribe's liability to pay the charges, and to avert the future "constitutional difficulty" that would be produced should the Regional Director construe the IRA and Public Law 83-280 in a manner that would violate Appellant's right to substantive due process. Opening Br. at 17-21. Appellant, however, did not make these arguments in its comments submitted to the Regional Director. *See* AR 56. As explained in *Desert Water Agency I*, the Board ordinarily will not consider for the first time on appeal matters that could have been, but were not, raised to the Regional Director. 59 IBIA at 127-28 (citing 43 C.F.R. § 4.318). Even if we were to consider Appellant's arguments, Appellant provides nothing to establish that BIA is required to anticipate or prevent future litigation or constitutional issues from arising between the parties. As we explained in response to a similar argument in *Desert Water Agency I*, BIA is only required to consider potential conflicts, and is not obligated to prevent or resolve them. 59 IBIA at 128 (and caselaw cited there). Thus, we conclude that the Regional Director did not abuse her discretion in declining to make the trust acquisition conditional, in an attempt to avoid potential future litigation or constitutional issues.

IV. The Regional Director's Authority to Accept the Beylik Property Into Trust

Finally, Appellant contends that BIA exceeded the authority delegated to it in the IRA, because accepting the Beylik property into trust "does not serve the purposes of Section 465." Opening Br. at 22. According to Appellant, the goal of the IRA "is to rehabilitate the Indians' economic life and to develop the initiative destroyed by . . . the prior allotment policy." *Id.* (citation omitted). In Appellant's view, the trust acquisition "would provide the Tribe with an economic windfall by providing excessive additional land beyond the [T]ribe's needs . . . ." *Id.*

As above, Appellant failed to raise this issue with the Regional Director; thus, Appellant cannot now rely on the matter to show error in the Decision. *See* 43 C.F.R. § 4.318. Further, while the regulations require that BIA consider the tribe's "need . . . for additional land," 25 C.F.R. § 151.10(b), we have explained 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." *Mille Lacs County, Minnesota v. Acting Midwest Regional Director*, 62 IBIA 130, 145 (2016) (quoting *State of New York*, 58 IBIA at 341 (additional citations omitted)). *See also State of Kansas v. Acting Eastern Oklahoma Regional Director*, 62 IBIA 225, 236 (2016) (§ 151.10(b) does not require a particular outcome or exhaustive analysis); *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."). In addition to failing to address this issue in its comments to BIA, Appellant has not shown that the Regional Director erred in her consideration of the Tribe's need for the land, *see* Decision at 5-6, improperly exercised her discretion, or exceeded the authority conferred on the Secretary by the IRA.

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 August 28, 2014, decision to acquire in trust Parcel Nos. 516-090-010-8, 522-040-001-0, and 522-040-002-1, vacates the finding of contiguity regarding Parcel No. 522-040-003-2, and remands that part of the decision for further proceedings consistent with this decision.

I concur:

// original signed	//original signed
Robert E. Hall	Steven K. Linscheid
Administrative Judge	Chief Administrative Judge