



INTERIOR BOARD OF INDIAN APPEALS

State of South Dakota, and City of Wagner, South Dakota v.
Acting Great Plains Regional Director, Bureau of Indian Affairs

63 IBIA 179 (06/29/2016)

Related Board cases:

49 IBIA 84

53 IBIA 138



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 SOUTH DAKOTA, and)	Order Affirming Decision in Part,
CITY OF WAGNER, SOUTH)	Vacating in Part, and Remanding
DAKOTA,)	
Appellants,)	
)	
v.)	Docket No. IBIA 15-027
)	15-031
ACTING GREAT PLAINS REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	June 29, 2016

The U.S. District Court for the District of South Dakota vacated our previous decision in this case, in which we affirmed a decision of the Acting Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA) to accept approximately 39.90 acres of land (“Wagner Heights property”) in trust for the Yankton Sioux Tribe (Tribe) for housing purposes.¹ Because the State of South Dakota (State) and the City of Wagner, South Dakota (City) (collectively, Appellants) had been denied the opportunity to make additional arguments that only the Regional Director, vested with discretionary authority, could consider, the Court vacated our decision and directed us to remand the case to the Regional Director.² Neither the Court nor the Board of Indian Appeals (Board), in remanding, vacated the Regional Director’s decision, but the Court required the Regional Director to conduct a *de novo* review.³

We conclude that less was required of the Regional Director on remand than is urged here by Appellants, but more was required—by the regulations—than is

¹ *South Dakota v. U.S. Dep’t of the Interior*, 787 F. Supp. 2d 981 (D.S.D. 2011) (*South Dakota II*) (vacating *South Dakota v. Acting Great Plains Regional Director*, 49 IBIA 84 (2009) (*South Dakota I*)).

² The County of Charles Mix was also a plaintiff in the Federal court litigation, but is not an appellant in the current proceeding.

³ See *South Dakota II*, 787 F. Supp. 2d at 1002; *South Dakota v. Acting Great Plains Regional Director*, 53 IBIA 138 (2011) (*South Dakota III*) (remanding case to Regional Director pursuant to Court’s order).

demonstrated by the Regional Director’s new decision.⁴ Specifically, we reject Appellants’ argument that the *de novo* review ordered by the Court required the Regional Director to “start over” in reviewing the Tribe’s application, *see* State’s Opening Brief (Br.), Dec. 30, 2014, at 2, rather than requiring him to conduct a *de novo* review of the *additional* arguments Appellants were denied an opportunity to present to the Regional Director in the prior proceedings. We reject a new procedural challenge by Appellants to the Regional Director’s new decision because Appellants do not demonstrate that they were harmed by the alleged procedural error. And we also reject several substantive challenges to the Regional Director’s new decision because Appellants have not shown, in those cases, that the Regional Director failed to consider their objections.

But we also conclude that a remand to the Regional Director is again required because it is not apparent from the Regional Director’s new decision that he did, in fact, consider other additional arguments raised by Appellants. In deciding whether to accept land in trust for a tribe, BIA is not required to resolve objections or to rebut assertions upon which objections are based. But BIA’s consideration of comments and objections, individually or collectively, must be demonstrated in the decision or the record. Particularly where, as here, the matter was remanded because Appellants articulated specific arguments that they would have raised to BIA, had they not been denied the opportunity to do so, it was incumbent upon the Regional Director to make clear that those objections had been considered. In some cases, it is not clear. Thus, we vacate the Decision in part and remand with instructions for the Regional Director to specifically consider whether these additional arguments, considered *de novo*, would persuade him to reverse the Superintendent’s decision to accept the property in trust.

Background

The factual background of the Tribe’s application for BIA to acquire the Wagner Heights property in trust, and of Appellants’ objections, was described in detail in *South Dakota I*, 49 IBIA 84, and need not be repeated here. In 2004, the Superintendent decided to accept the property in trust for the Tribe, and in 2007, the Regional Director—relying on 23 documents not provided to Appellants—affirmed the Superintendent. We concluded that the Regional Director clearly erred in failing to provide the additional documents to Appellants, but found the error harmless. *South Dakota I*, 49 IBIA at 101 n.17, 110-13.

⁴ *See* Letter from Regional Director to Jasper, Sept. 18, 2014 (Decision) (Administrative Record (AR) at 70).

The administrative record consists of a single 3,106-page PDF that compiles the separately tabulated administrative records from all prior proceedings. The Board will therefore cite to the page number of the PDF, rather than a tab number, when referring to a document in the record.

The Court disagreed with us because the Regional Director, not the Board, is vested with discretionary decision making authority over trust acquisitions. Thus, the Board was not in a position to “cure” the Regional Director’s violation of Appellants’ procedural rights by considering Appellants’ additional arguments based on the additional documents. *South Dakota II*, 787 F. Supp. 2d at 998-99. The Court vacated our decision and ordered that the case be remanded to BIA to distribute the complete administrative record to Appellants, and conduct a *de novo* review and consider Appellants’ arguments on the 23 documents and any other documents. *Id.* at 1002. Pursuant to the Court’s order, the Board remanded the case to the Regional Director. *South Dakota III*, 53 IBIA at 139; *see also* Letter from Wilfahrt to Board, Apr. 8, 2011 (AR at 905).

After numerous requests by the Tribe, on January 3, 2014, the Regional Director issued a notice and request for comments on the proposed trust acquisition of the Wagner Heights property.⁵ *See* Letter from Chairman to Regional Director, July 24, 2013 (AR at 391); Letter from Regional Director to Maul, Jan. 3, 2014 (AR at 308). The notice enclosed the 23 documents relied on by the Regional Director that were not made available to Appellants in the prior proceeding, and additional documentation that had been added to the administrative record. Letter from Regional Director to Maul at 2 (AR at 309). The Regional Director instructed all interested parties to provide comments on the documents within 10 days pursuant to 25 C.F.R. § 2.21.⁶ *Id.*

The Tribe submitted comments and a renewed request for trust acquisition. Letter from Chairman to Regional Director, Jan. 17, 2014 (AR at 186). The State and City submitted separate comments in opposition. State’s Comments in Opposition, Jan. 21, 2014 (2014 Comments in Opposition) (AR at 130); City’s Comments in Opposition, Jan. 21, 2014 (City’s 2014 Comments in Opposition) (AR at 172). On September 18, 2014, the Regional Director issued the Decision, again affirming the Superintendent’s decision to accept the Wagner Heights property in trust. Decision at 20.

Appellants again appealed to the Board, raising both procedural and substantive challenges to the Decision. The Regional Director filed an answer brief, and Appellants filed reply briefs.

⁵ The Regional Director issued a corrected notice and request for comments on January 28, 2014, to correct “an error in the addressee.” Letter from Regional Director to Guhin, Jan. 28, 2014, at 2 (AR 125).

⁶ Section 2.21 of 25 C.F.R. provides in relevant part that when the deciding official “believes it appropriate to consider documents or information not contained in the record on appeal, the official shall notify all interested parties of the information and they shall be given not less than 10 days to comment on the information before the appeal is decided.”

Standard of Review

BIA is authorized to exercise its discretion to take land in trust, and the Board will not substitute its own judgment for that of BIA in discretionary decisions. *State of New York v. Acting Eastern Regional Director*, 58 IBIA 323, 329 (2014). The Board reviews discretionary decisions to determine whether proper consideration was given to all legal prerequisites, including any limitations established by regulation. *State of Kansas v. Acting Eastern Oklahoma Regional Director*, 62 IBIA 225, 233 (2016). Appellants bear the burden of showing that BIA did not properly exercise its discretion. *Id.*; *State of New York*, 58 IBIA at 329. The Board reviews legal issues and sufficiency-of-evidence issues *de novo*. *Picayune Rancheria of the Chukchansi Indians v. Pacific Regional Director*, 62 IBIA 103, 114 (2016).

For an on-reservation trust acquisition, the record must show that BIA considered the factors set forth in 25 C.F.R. § 151.10. There is no requirement that BIA reach a particular conclusion with respect to each factor, or that BIA weigh or balance the factors in a particular way. *Mille Lacs County, Minnesota v. Acting Midwest Regional Director*, 62 IBIA 130, 137 (2016). Nor must BIA “resolve” objections to an objector’s satisfaction. *See Desert Water Agency v. Pacific Regional Director*, 59 IBIA 119, 127-28 (2014). But the Board must be able to discern from the decision or the record that the Regional Director gave due consideration to all timely submitted comments by interested parties. *Mille Lacs County*, 62 IBIA at 137; *State of New York*, 58 IBIA at 329; *see Jefferson County, Oregon v. Northwest Regional Director*, 47 IBIA 187, 199-200 (2008).

Discussion

I. Appellants May Not Incorporate Wholesale Their Pre-Decisional Arguments and Objections

Appellants first attempt to “incorporate” all arguments raised by Appellants and the County in their various objections and statements of reasons submitted in 2004 and 2014. State’s Opening Br. at 2; City Joinder, Dec. 30, 2014. But the burden is on Appellants to clearly identify arguments they wish to raise on appeal in challenging the Regional Director’s *new decision*. Even if they contend that the new decision does not cure alleged errors in the Regional Director’s 2007 decision, they must articulate on appeal the specific errors they contend are still present. *See Shawano County, Wisconsin v. Acting Midwest Regional Director*, 53 IBIA 62, 82 (2011). Indeed, with respect to various arguments we address below, Appellants have done just that. But they cannot simply incorporate wholesale all pre-decisional arguments and objections, and failure to raise a specific argument on appeal waives the argument. *See id.*; *Mille Lacs County*, 62 IBIA at 131 n.1. Thus, we will only address the specific allegations of error made in Appellants’ briefs on appeal.

II. Appellants Have Not Shown That the Regional Director Failed to Conduct the *De Novo* Review Required on Remand

Appellants next contend that the Regional Director failed to conduct the *de novo* review required of him by the Court. According to Appellants, the Regional Director was required to “start over” in reviewing the Tribe’s application, and the fact that the Regional Director concluded by “affirming” the Superintendent’s decision, and the pervasive duplication of text in the 2014 decision from the 2007 decision, demonstrates that he did not do so. *See* State’s Opening Br. at 2-6.

We disagree. The *de novo* review required of the Regional Director did not require him to “start over” in reviewing the Tribe’s application. It did require him, in the context of Appellants’ appeals from the Superintendent’s decision, to consider, *de novo*—as the decision maker with discretionary authority to approve or not to approve the application—the arguments that Appellants were denied an opportunity to present previously to the Regional Director. The Court did not vacate the Regional Director’s decision, and thus it was not inconsistent with the remand for the Regional Director to consider Appellants’ arguments in the context of reviewing the Superintendent’s decision and in the context of issues already considered and addressed.

Moreover, there is no evidence that the Regional Director gave any deference to the Superintendent in deciding to affirm the decision to accept the land in trust. Indeed, even the Regional Director’s initial decision, issued in 2007, appears to have effectively been an exercise of *de novo* review authority, *see South Dakota I*, 49 IBIA at 102, albeit one that was defective because Appellants were prevented from making certain arguments to the Regional Director. On remand, the Regional Director allowed interested parties to make whatever arguments they wished to make. Because there were only a limited number of arguments raised that had not previously been presented to the Regional Director, it is understandable that much of the discussion could remain as it was in the 2007 decision. That is not to say that the Board “approves” of the approach taken by the Regional Director—it undoubtedly would have facilitated review if the Regional Director had issued a supplemental decision with targeted responses to the additional arguments, with a conclusion based upon consideration as a whole of all comments and arguments. But we are not convinced that the Regional Director did not exercise *de novo* review as required by the Court.

III. Appellants Have Not Demonstrated Harm Caused by Alleged New Due Process Violations by the Regional Director

Appellants argue that the Regional Director again violated their due process rights by relying on information not provided to Appellants, specifically by discussing and considering programs and services provided by BIA and the Tribe without notifying

Appellants that the Regional Director would be analyzing these services as part of his consideration of the impact of the loss of tax revenue to other parties. “For example,” argues the State, it was “unable to argue . . . that some of the services mentioned may be provided regardless of the trust status of this parcel,” and “unable to argue about the relevance of these programs, their applicability to land into trust acquisitions and whether or not the availability of these services depends on this particular property being taken into trust.” State’s Opening Br. at 6-7. According to the State, the Regional Director’s reliance on information outside the record “prevented the State from addressing or rebutting that information,” and prevented it from presenting “colorable arguments to the decision maker, therefore such error was not harmless.” *Id.* at 8-9.

But in order to demonstrate that the alleged procedural violation harmed Appellants, Appellants were required to identify the “colorable arguments” they now contend they were prevented from making to the Regional Director, e.g., not simply contend that they would have made colorable arguments regarding relevance. *See South Dakota II*, 787 F. Supp. 2d at 997 (explaining harmless error rule). Here, Appellants have failed to articulate what arguments they would have presented, i.e., what specific arguments should be remanded to the Regional Director for consideration, and thus we conclude that any error committed by the Regional Director in discussing BIA and Tribal services programs, without providing additional notice to Appellants, was harmless.⁷

IV. Appellants Do Not Succeed in Their Challenge to the Regional Director’s Consideration of the Tribe’s Need for Additional Land, 25 C.F.R. § 151.10(b)

A. Appellants Waived the Argument That the Regional Director Erred in Finding That the Tribe “May Qualify” for Additional Federal Funding if the Land Is Taken in Trust

Appellants contend that the Regional Director’s consideration of the Tribe’s need for additional land, *see* 25 C.F.R. § 151.10(b), is flawed because he made a finding that trust status “may qualify” the Tribe for additional Federal funding, and that finding is speculative. State’s Opening Br. at 9-10.

⁷ Appellants undoubtedly were on notice that the Regional Director was considering a variety of programs and services provided by BIA and the Tribe as mitigating, in some respects, the impact of the tax loss to local governments, and there is some question whether Appellants have even made a colorable argument that a procedural error occurred, particularly in light of their failure to articulate the arguments they would have made had they known precisely which programs and services would be described in the Regional Director’s decision.

This argument is raised for the first time on appeal, and is not properly before the Board. The Regional Director’s 2007 decision made the same finding, *see* 2007 Decision at 2 (AR at 1723). But Appellants did not challenge that finding in the previous appeal to the Board, either directly or as one of the arguments that they contended would have been made had the 23 additional documents been provided to them. Nor was this argument raised in the comments submitted by Appellants to the Regional Director in 2014, otherwise criticizing the 2007 decision. Thus, we conclude that the argument was waived and is not properly before us on appeal. *See Thurston County, Nebraska v. Great Plains Regional Director*, 56 IBIA 296, 301 (2013).

B. Appellants’ Argument That the Regional Director Improperly Relied on a 15% Tribal Population Increase, and Ignored Their “More Relevant” Population Statistics, Is Factually Misplaced in Part, and Fails to Demonstrate an Abuse of Discretion

Appellants next argue that the Regional Director found that the population of the Tribe “has increased by 15% in the last ten years,” but ignored the State’s argument that “the more relevant consideration is the increase in the number of tribal members in the area.” State’s Opening Br. at 10. According to the State, it argued that a comparison of “the 2000 census and the 2010 census showed the same number of American Indians living in this area.” *Id.* at 5; *see id.* at 10 (A comparison of the 2000 and 2010 census data “shows no increase in Native Americans in Charles Mix County.”). Appellants complain that the Regional Director ignored their data and “more relevant” metric.

As an initial matter, we note that while the Regional Director stated that the Tribe’s population had increased in the past 10 years, he did not, contrary to Appellants’ assertion, purport to quantify that increase or to rely on any particular percentage increase as supporting his consideration of the Tribe’s need for additional land. The Regional Director made no finding that the Tribe’s population had increased by “15%.” *See* Decision at 4.

Appellants also fault the Regional Director for ignoring the State’s allegedly “more relevant” metric—the number of tribal members living in the area—and the census data showing, according to Appellants, “no increase in Native Americans in Charles Mix County” during the period from 2000 to 2010. State’s Opening Br. at 10. But, in fact, the census data relied upon and reported by Appellants did not show “no increase,” but did show a 9% increase in the Native American population in the County in the 10-year period. *See* 2014 Comments in Opposition at 2-3 (2000 census showed that 2,633 Native Americans were living in the County; 2010 census showed that 2,878 Native Americans were living in the same region).

Appellants’ disagreement with the Regional Director’s recitation of an unspecified Tribal population increase, while purportedly “ignoring” Appellants’ proffered data—

showing a 9% increase in the local Native American population—does not, in our view, demonstrate that his consideration of the Tribe’s need for additional land was arbitrary and capricious. In this regard, we note that on appeal, Appellants do not assert that a tribal population increase is “not relevant,” only that their census data is “more relevant.” See State’s Opening Br. at 10 (Regional Director “ignored . . . the more relevant consideration,” a “comparison of the 2000 and 2010 census”). Thus, to a large extent, Appellants simply disagree with the metric referenced by the Regional Director, while supplying data that conflicts with their own assertion that no increase in the local Native American population occurred.

The determination of a tribe’s need for additional land, under 25 C.F.R. § 151.10(b), does not depend on any narrowly prescribed criteria. See *Aitkin County, Minnesota v. Acting Midwest Regional Director*, 47 IBIA 99, 108-09 (2008). Here, viewed in the context of the overall discussion of the Tribe’s need for additional land, which was based on numerous considerations, we think the Regional Director’s reference to a tribal population increase was not an impermissible consideration. Although Appellants preferred another metric, the fact that the Regional Director did not adopt that metric does not demonstrate that his decision was arbitrary and capricious.⁸

- V. Appellants Succeed, in Part, in Their Challenge to the Regional Director’s Consideration of the Impact on the State and Its Political Subdivisions Resulting from Removing the Land from the Tax Rolls, 25 C.F.R. § 151.10(e)
 - A. Appellants’ Challenges to the Tribe’s Arguments and to Nonexistent Findings Are Misplaced

In attacking the Regional Director’s consideration of the impact of the tax loss that would result from taking the land in trust, Appellants contend that while “the Tribe may argue” that the tax loss will be offset by BIA and the Tribe taking over services, “the record does not allow quantification of this offset.” State’s Opening Br. at 11. Appellants also contend that the “assertion that the BIA contributes \$38,000 per year through a contract with the County for dispatch services should not discount the tax loss impact.” *Id.*

Both of these arguments are misplaced. First, what the Tribe may or may not argue is not the focus of our review—our focus is on the Regional Director’s decision. In any case, the Regional Director is not required to “quantify” offsets or mitigation to the tax loss

⁸ To the extent Appellants intended to pursue their earlier argument that a tribal population increase is not at all “relevant” to this factor, they have not shown that such an increase is unrelated to demonstrating a tribe’s need for additional land, and thus it may be considered “relevant” to the type of discretionary consideration that the regulations require.

attributed to BIA and the Tribe taking over services now provided by the State, County, or City. Second, contrary to Appellants' assertion, the Regional Director's decision contains no finding that BIA contributes \$38,000 for dispatch services, and thus does not purport to "discount" the tax loss based on that figure. We cannot set aside a decision based upon an allegedly erroneous determination that was not made.

B. But the Regional Director Failed to Address Appellants' Argument That BIA Cannot Consider the Continuation of Fees for Services Already Provided as "Offsets" to the Tax Loss

Appellants also argue that the Regional Director failed to give proper consideration to their argument that BIA "cannot consider other fees for services provided by the State or local governments as additional offsets," and that "fees charged for services . . . do not . . . reduce the tax loss." State's Opening Br. at 11. This argument has more traction, and we conclude that Appellants have met their burden to warrant a remand.

On the one hand, we understand the basis upon which the Regional Director could reasonably consider as "offsets" against the impact of the tax loss the fact that the State and local governments will no longer need to provide services that will be provided by BIA and the Tribe if the land is taken in trust, and the fact that additional Impact Aid funding would be provided to the school system. But we agree with Appellants that the Regional Director failed to respond to their argument that the *continued* payments of fees or reimbursements, by BIA, the Tribe, or residents, to local governments or other service providers, for *continuing to provide the same services*, cannot count as an "offset" against the impact of the tax loss to the State and local governments. See Decision at 6, 15 ("residents paying for existing fees for services that will continue to be assessed" described as an "offset").

On appeal, in response to Appellants' argument, the Regional Director contends that Appellants were "able to raise through comments to the decision-maker arguments that 'BIA cannot consider other fees for services provided by the State or local governments as additional offsets.'" Answer Br. at 10. But the Regional Director does not contend that he responded to those comments, and his assertion that there are "no additional services that the Appellants claim to provide that remain unaddressed," *id.* at 11, is nonresponsive to Appellants' offsets argument. Appellants made a focused argument that payments for fees for services that will continue cannot properly count as offsets, and thus cannot be treated as reducing the impact from the tax loss. Appellants were entitled to have that objection considered, and the Regional Director's decision does not show that was done.

In a related argument, Appellants reassert their contention that the impact from the tax loss will be "staggering." State's Opening Br. at 12. The Regional Director expressly acknowledged and considered this argument, although he was not convinced that a loss, amounting to 1.7% of the County's budget, would have such an effect, characterizing it as

“minimal.” Decision at 14. But because we cannot determine to what extent the Regional Director’s conclusion was affected by his characterization of the continued payments of fees and reimbursements as “offsets,” the Regional Director must reconsider on remand his assessment of the impact on the State and its subdivisions.

In remanding this issue, however, we reject Appellants’ reliance on previous Board decisions as creating a precedent for determining whether the impact of a tax loss is or is not “minimal.” Appellants misunderstand those decisions. In one of those decisions, the Board simply recognized that BIA’s consideration of the impact from the tax loss was supported by the unrefuted conclusion that the tax loss was “significantly less than 1%” of the county’s annual revenues from taxes. *Jefferson County*, 47 IBIA at 201. And in the two other cases relied on by Appellants, the Board treated certain percentages of a county’s budget as *de minimus*, either for purposes of considering an expanded argument made on appeal or considering a calculation error by BIA. See, e.g., *Shawano County*, 53 IBIA at 80 (even assuming a static county budget, the tax loss would amount to 0.015% of the budget); *South Dakota and Moody County v. Acting Great Plains Regional Director*, 39 IBIA 283, 297 (2004) (Board declined to remand, based on erroneous calculation by BIA, because the tax loss would amount to “only a fraction of 1 percent of the County’s real property tax revenues”).

Although the Regional Director characterized the impact of the tax loss as “minimal,” there is no requirement in the trust acquisition regulations that BIA make such a finding in order to accept land in trust. In fact, the regulations do not require that the impact of the tax loss be *characterized* at all. In that respect, while the record supports the Regional Director’s characterization, it may well have been ill-advised. As the State pointed out in its prior appeal to the Board (though not in its 2014 Comments in Opposition or in this appeal), the Regional Director suggested that a \$47,000 tax loss to the County was not “significant,” but that the Tribe’s payment of the same amount adversely affected the Tribe, implying that at least in one respect, it was significant to the Tribe. Characterizations may be highly subjective. The regulations only require that the deciding official consider the impacts to programs and services that State and local governments have articulated as resulting from the tax loss.

VI. Appellants Succeed, in Part, in Their Challenge to the Regional Director’s Consideration of Jurisdictional Issues and Land Use Conflicts

A. Appellants’ Argument That the Creation of a Jurisdictional Enclave Within City Limits Is a New Jurisdictional Issue Warrants Consideration by the Regional Director

Appellants argue that the creation of trust land within Charles Mix County “will likely result in creating a purported ‘sanctuary’ for a tribal malefactor fleeing state or local

law enforcement.” State’s Opening Br. at 12; 2014 Comments in Opposition at 7. To a large extent, it is apparent from the Regional Director’s decision that he gave due consideration to Appellants’ arguments, but he concluded that the jurisdictional issues are well-known to the State and County, and adding trust land will not create new jurisdictional issues. *See generally* Decision at 8. In fact, Appellants concede this issue in part; they just disagree with the Regional Director. *See* State’s Opening Br. at 12 (jurisdictional sanctuaries characterized as “a prevalent situation within Charles Mix County already;” “[j]ust because it is already occurring, does not mean allowing it to further happen is a good idea”); 2014 Comments in Opposition at 7 (same).

But Appellants also argue that taking the Wagner Heights property in trust would create a jurisdictional enclave within the City limits, and that this creates jurisdictional issues that the City has not previously faced, and thus are new to the City. *See* State’s Opening Br. at 12-13 (creates a jurisdictional island within a city; jurisdictional issues “even more real” within the city limits); City’s 2014 Comments in Opposition at 2-3 (jurisdictional issues will now be “foisted upon” the City, which is smaller and less able to deal with them).

Unlike the general jurisdictional issues raised by Appellants, it is less clear whether the Regional Director considered the fact that taking the property in trust would apparently, for the first time, create a 40-acre jurisdictional enclave within the city limits of Wagner. The Regional Director referred to “local government entities” that are “already familiar” with and “must already deal with” checkerboard jurisdictional issues, Decision at 8, and this is undoubtedly correct with respect to the County. But it is not clear that the Regional Director considered the City’s contention that it is differently situated from the County because it has not yet had to deal with the jurisdictional issues that will arise from trust land within city limits. Because we are remanding on the related issue of the restrictive covenant, we conclude that this issue should also be remanded for clarification and consideration by the Regional Director.

B. The Regional Director Failed to Address Appellants’ Argument That the Restrictive Covenant Is Meaningless to Prevent Land Use Conflicts

Appellants contend that there is “no way to enforce the restrictive covenant,” even if the Tribe may have agreed to comply with it. State’s Opening Br. at 13-14. In his decision, the Regional Director acknowledged that the County had objected to the land as not being subject to its zoning laws, *see* Decision at 13, and responded by stating: “This is true; however, the land comes with a restrictive covenant that greatly restricts the Tribe on their structures, buildings, pets, signs, garbage, and rights of ways. . . . The Tribe accepted this restrictive covenant” *Id.* Appellants contend that the Regional Director failed to consider their argument that the restrictive covenant is, in practical effect, meaningless because it is unenforceable. In his answer brief, the Regional Director argues that he is not

required to speculate on whether the Tribe will voluntarily abide by the “zoning requirements,” though he does not specifically mention the restrictive covenant or respond to Appellants’ argument that it is meaningless. Answer Br. at 14.

Appellants’ argument that the restrictive covenant should be given no weight, because neither it nor the Tribe’s agreement to comply with it are enforceable, was raised in the prior proceedings before the Board, in the Federal court litigation, and again in the State’s 2014 Comments in Opposition. Yet the Decision simply repeats the same finding as was made in 2007—that the restrictive covenant “greatly restricts the Tribe”—without even acknowledging Appellants’ argument. Decision at 13. We do not suggest that the Regional Director is “required to speculate” on whether the Tribe will voluntarily comply with the restrictive covenant, but—particularly in the context of the remand—he was at least required to address in some respect Appellants’ argument that the restrictive covenant was essentially unenforceable, and thus by implication did not “greatly restrict” the Tribe. Because he did not do so, we must vacate the Decision with respect to this issue and remand for consideration. As noted, the Regional Director is not required to resolve the objection, or to rebut Appellants’ assertions, but he must at least consider their objection.

C. But Appellants Fail to Show That the Regional Director Equated Tribal-State Jurisdictional Issues with City-County Jurisdictional Issues

Appellants contend that the Regional Director erroneously “found that the ‘jurisdictional issues’ that would arise here are equivalent to those between the cities and counties.” State’s Opening Br. at 13; *see* 2014 Comments in Opposition at 8 (“The Tribe asserts that the ‘jurisdictional issues’ . . . are equivalent . . .”). We disagree with Appellants’ characterization of the Regional Director’s decision. The Regional Director stated that “[a]lthough there may be jurisdictional issues, just as there are between cities and counties, this property will be treated the same as other trust land located within the boundaries of the Yankton Reservation. One piece of property will not further affect the jurisdictional problems that may already exist.” Decision at 8. Appellants construe the just-as-there-are language as “equating” the jurisdictional issues that arise between tribes and states, and those that arise between cities and counties. We do not read the Regional Director’s language as finding that the jurisdictional issues were “equivalent.” We do read it as observing that jurisdictional issues of one sort or another arise in a variety of contexts between various governments, and that in this case government entities are already familiar with and must deal with the issues of so-called “checkerboard” jurisdiction—lands subject to State jurisdiction interspersed with lands subject primarily to tribal and Federal jurisdiction. On this argument, we conclude that Appellants have failed to meet their burden to show error.

VII. The Regional Director Failed to Respond to Appellants' Argument That BIA Budget Limitations Will Prevent BIA from Discharging Its Additional Duties Resulting from the Trust Acquisition

In their 2014 comments, Appellants argued that the regulations require BIA to consider the impact of additional trust land to its “already heavy burden,” and that BIA must fully consider its resources. 2014 Comments in Opposition at 10-11 (citing articles about historic underfunding of BIA); *see* State’s Opening Br. at 14-15 (same). Notwithstanding these additional arguments raised during the remand, the Regional Director’s new decision simply repeats language from the 2007 decision, which addressed the State’s previous objections based on trust fund management and law enforcement issues. But the Regional Director failed to address the State’s additional argument that BIA’s budget “will be significantly reduced in the coming year,” and that the Federal government historically underfunds Indian tribes and BIA. 2014 Comments in Opposition at 10-11. As noted above, BIA is not required to “quantify” the basis for its consideration of the various factors, but it must consider comments received and objections raised. Here, the Regional Director completely ignored Appellants’ additional arguments concerning this factor. Thus we remand this issue as well, with instructions to the Regional Director to consider Appellants’ 2014 comments and make a determination on whether, in his judgment, BIA has a sufficient ability to discharge additional duties resulting from the trust acquisition.

VIII. The State’s Objection to the Environmental Site Assessment Was Not Properly Raised on Appeal

For the first time, in its reply brief, the State objects to the Environmental Site Assessment (ESA) as outdated. To its credit, the State acknowledges that it did not raise this argument previously. As a general rule, the Board does not consider new arguments raised for the first time in a reply brief. *Aloha Lumber Corp. v. Alaska Regional Director*, 41 IBIA 147, 161 (2005). We see no reason to depart from that practice here, nor does the State argue that we are required to do so.

Conclusion

For the reasons discussed above, we affirm the Regional Director’s decision in part, but vacate it in part and remand to the Regional Director for further consideration and a response on Appellants’ arguments that (1) BIA cannot consider the continuation of fees for services already provided as offsetting the impact of the tax loss; (2) creating a jurisdictional enclave within the City limits creates new jurisdictional issues for the City; (3) the restrictive covenant and the Tribe’s agreement to comply with it are unenforceable; and (4) limitations on BIA’s budget, and historical underfunding of BIA and Indian tribes, will prevent BIA from being able to discharge its additional duties resulting from the trust

acquisition. On remand, the Regional Director shall consider each of these issues, and shall consider whether the objections and arguments that are considered on remand, viewed in the context of previously raised objections, and the Regional Director's consideration of the application as a whole, persuade the Regional Director to reverse the Superintendent's decision to accept the Wagner Heights property in trust.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director's September 18, 2014, decision in part, vacates it in part, and remands for further proceedings consistent with this decision.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge