



INTERIOR BOARD OF INDIAN APPEALS

Rodney R. Starkey and Almeda L. Starkey; and Dennis H. Berglund and Connie A. Berglund v. Pacific Regional Director, Bureau of Indian Affairs

63 IBIA 254 (07/27/2016)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
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RODNEY R. STARKEY and ALMEDA)	Order Affirming Decision and
L. STARKEY; AND DENNIS H.)	Dismissing Appeal in Part
BERGLUND and CONNIE A.)	
BERGLUND,)	
Appellants,)	
)	Docket No. IBIA 15-044
v.)	15-047
)	
PACIFIC REGIONAL DIRECTOR,)	
BUREAU OF INDIAN AFFAIRS,)	
Appellee.)	July 27, 2016

Rodney R. Starkey and Dr. Almeda L. Starkey, and Dennis H. Berglund and Connie A. Berglund (collectively, Appellants), appealed to the Board of Indian Appeals (Board) from an October 24, 2014, decision (Decision) of the Pacific Regional Director (Regional Director), Bureau of Indian Affairs (BIA), to approve the acceptance in trust of 115.24 acres, more or less, of land (the Parcel) located in the county of San Diego, California, by the United States for the La Posta Band of Mission Indians (Band). Appellants own land adjacent to the Parcel, and Rodney and Almeda Starkey (the Starkeys) also hold one or more easements across the Parcel, which they use to access their property.

On appeal to the Board, the Starkeys argue that the Regional Director failed to give adequate consideration to several of the trust acquisition criteria found under 25 C.F.R. § 151.10 in deciding to accept the Parcel in trust for the Band. For example, the Starkeys argue that the record does not support the Regional Director's determination that the Band was under Federal jurisdiction in 1934 such that she had statutory authority to take the land in trust for the Band. The Starkeys argue that the Regional Director erred in determining that the State of California would continue to exercise civil and criminal jurisdiction over the Parcel after it was transferred in trust. And the Starkeys argue that, once the land is taken in trust, they will lose access to state and Federal forums for judicial review, and will be obliged to protect their easement rights through actions brought before the tribal court or council, which, they claim, are inherently biased against them. Dennis and Connie Berglund (the Berglunds) express a variety of concerns with the Decision, including the importance of maintaining state and county jurisdiction over easements, which they do not

hold, that border or cross the Parcel, alleged discrepancies with the legal description of the Parcel, and environmental issues.

We affirm the Regional Director's decision. First, we reject the arguments that the Regional Director did not adequately consider the trust acquisition criteria found under 25 C.F.R. § 151.10. In particular, it appears that the Starkeys have misinterpreted that part of the Decision which addresses civil and criminal jurisdiction following transfer of the Parcel to trust status. We find no error in the Regional Director's statement in the Decision regarding civil and criminal jurisdiction after the land is taken in trust. Nor have Appellants demonstrated that their concerns regarding the use of their easement rights were not considered. Both the record and the Decision reflect ample consideration of the Starkeys' concerns about continued use of their easement rights to access their property after the Parcel is taken in trust. The Regional Director was not required to resolve Appellants' objections or rebut assertions raised in support of those objections to Appellants' satisfaction, as long as the record and the decision make clear that the issues raised were given consideration, individually or collectively, in making the trust acquisition decision. The record makes clear that the Starkeys' concerns over their right of access to their property were considered by the Regional Director over the long course of review of the Band's application, and the Decision directly addresses both those concerns and the Band's and BIA's efforts to resolve them. No more was required.

As noted, the Berglunds raise a number of concerns that involve public road easements, road maintenance, public safety, and generalized environmental considerations. In all cases, the legal interest at issue is either held by a party other than the Berglunds, or involves a speculative "injury" that, if it were to occur, would affect the Berglunds simply as members of the broader public, if at all. Because they fail to articulate any legal interest of their own that would be injured by the Regional Director's decision to take the land in trust, we dismiss their appeal for lack of standing.

Statutory and Regulatory Framework

Congress has granted the Secretary of the Interior (Secretary) the authority "to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians." 25 U.S.C. § 465. Fee-to-trust acquisitions are governed by BIA's regulations, codified at 25 C.F.R. Part 151.

In evaluating a tribe's request to have land taken in trust, BIA must consider certain criteria enumerated in the Department's fee-to-trust acquisition regulations, 25 C.F.R. Part 151, including, as pertinent to this appeal, the existence of statutory authority for the acquisition and any limitations contained in that authority; the purposes for which the land

will be used; and any jurisdictional problems and potential conflicts of land use which may arise. *Id.* § 151.10(a), (c), and (f).

Background

On January 24, 2001, the Regional Director received a fee-to-trust application from the Band for the Parcel. *See* Application (undated) (Administrative Record (AR) 8); Band Resolution No. 00-20-12(C), Dec. 20, 2000 (AR 11); Letter from Superintendent to Band, Jan. 26, 2001 (AR 13). The Parcel is contiguous to the south-western boundary of the Band's reservation. Application at 2. Aside from a graded dirt access road, the Parcel is "barren and unimproved." *Id.* at 4. The Band explained that it sought to have the Parcel taken in trust to further self-determination and to aid economic development. *Id.* at 3. Specifically, the Band noted that it had purchased the Parcel to provide "safe and adequate access to the western portion of the [r]eservation," which had been severed since the late 1960s from the eastern part of the reservation by the construction of Interstate 8, without an on-ramp or off-ramp within the reservation boundary. *Id.* at 3-4. The Band stated that it did not foresee any change in land use and that it would continue to use the Parcel as a route to access the reservation. *Id.* In the amended notice of application, the Band emphasized that it had "no plans to subject this land to any development, ground-disturbing activity of any kind, or other use, except road maintenance." Amended Notice of Application, May 22, 2001, at 1 (AR 75). In its transmittal letter accompanying the application, the Band declared that it "seeks to have the United States take the land into trust subject to existing legal, valid rights of way and easements, and has NO INTENTION OF INTERFERING WITH ANY EXISTING LEGAL, VALID RIGHTS-OF-WAY OR EASEMENTS." Application, Cover Letter (AR 8). An easement over the Parcel granted to the Starkeys¹ for ingress and egress for road and public utility purposes, recorded

¹ The grant deed for the easement identifies the grantees as William Ross Starkey, with an undivided ½ interest, and Rodney R. and Carlene J. Starkey, husband and wife, with an undivided ½ interest, as tenants in common. Starkey Grant Deed (AR 135). In various communications in the record, the Starkeys (Rodney and Almeda) are referred to as the landowners served by the access road crossing the Band's property, *see, e.g.*, Letter from Dr. A. Starkey to Regional Director, July 21, 2000, at 1 (AR 2), while in others, Rodney is identified as the landowner, *see, e.g.*, Letter from William N. Pabarcus, Esq., attorney for the Starkeys, to BIA, Apr. 25, 2001, at 1 (AR 59) (identifying Rodney R. and Dr. Almeda L. Starkey as his clients, and Rodney Starkey as the owner of real property adjacent to the Band's fee and trust lands). In their opening brief, Appellants state that the Starkeys' property was originally purchased by Rodney and his father, along with an easement crossing the Parcel, and that the father's interest passed to Rodney on his father's death. Opening Brief (Br.), Apr. 16, 2015, at 1-2. For the purposes of this appeal, and without
(continued...)

December 21, 1978, in the Official Records of San Diego County as file no. 78-54728, is listed in the title insurance policy accompanying the Application. *Id.*, Title Policy, at 3-4, ¶ 7.

The Band submitted an Environmental Assessment (EA) with its Application. *Id.* at 6; *see also* Draft Supplemental EA, Apr. 3, 2001 (Environmental Files AR at 462).² On April 20, 2001, the Regional Director notified the Band that BIA had reviewed and adopted the EA and determined that taking the Parcel in trust would not have a significant impact on the quality of the human environment. Letter from Regional Director to the Band (AR 54). Therefore, BIA made a Finding of No Significant Impact (FONSI). *Id.*

As noted above, the Starkeys own land adjacent to the Parcel and have easement rights over the Parcel to provide access to their land. Letter from Pabarcus to Superintendent, BIA, Mar. 21, 2001, at 1 (AR 22). In various communications with BIA, the Starkeys voiced their concern regarding how taking the Parcel in trust would affect the Starkeys' use of the access road across the Parcel to reach their ranch and protection of their easement rights. *See, e.g., id.* at 3; *see also* Letter from Dr. Almeda Starkey to Superintendent, June 18, 2001, at 1 (AR 82); Letter from Pabarcus to Superintendent, June 19, 2001, at 2-3 (AR 83) (stating that the fee-to-trust transfer could present a jurisdictional conflict regarding the easement); Letter from Pabarcus to BIA, Oct. 28, 2005, at 1-2 (AR 178) (arguing that placing the Parcel in trust would deprive the state of criminal jurisdiction over any action to block the Starkeys from using their easement across the Parcel).

The Starkeys also expressed concerns regarding the impact taking the Parcel in trust would have on environmental and historical resources. AR 59 at 4-5. The Starkeys provided comments on the Band's EA, arguing that the environmental effects of the fee-to-trust transfer would be significant and that an environmental impact statement (EIS) was therefore necessary. Letter from Johnson & Edwards LLP to Superintendent, June 14, 2001, at 1 (AR 77a); *see also* AR 2.³ Specifically, the Starkeys argued that the Band

(...continued)

advancing any opinion on the legal ownership of the land and easement(s), we refer to the Starkeys collectively as the owners of land adjacent to the Parcel and of the easement(s) across the Parcel providing access to their land.

² In addition to the individually identified and numbered documents, the administrative record includes a single file titled "Environmental Files AR" containing 1531 un-indexed pages. We refer to the location of a document within this file by its pdf page number.

³ This letter appears to be erroneously dated July 21, 2000, although the date stamp shows that BIA received the letter July 26, 2001. *See* AR 2.

demonstrated a clear intent to use the property in conjunction with its sand mining operations on the Band's reservation. AR 77a at 4. After learning that the sand mining operations had ceased, the Starkeys argued that there was no longer any need to take the Parcel, which they claim was important principally for road access for sand mining, in trust. Letter from Pabarcus to Regional Director and Superintendent, Dec. 18, 2001, at 2-3 (AR 124). The Starkeys also alleged that the Band intended to use the Parcel for gaming development, by either constructing gaming facilities on the Parcel or using the Parcel to access the reservation for gaming. AR 82 at 2; AR 83 at 2; Letter from Pabarcus to Superintendent, Aug. 6, 2001, at 1-2 (AR 99).

The Berglunds also own land adjacent to the Parcel and complained that BIA did not notify them of the Band's fee-to-trust application. Letter from Dennis Berglund to Superintendent, Apr. 18, 2001 (AR 49). The Berglunds raised a number of reasons for their opposition to the trust acquisition, including that the Parcel should remain in state and county control because it is within the 100-year flood plain, the Parcel would be used for sand and gravel operations and gaming development, and the planned increase in the Band's resident population would strain local service delivery resources, such as schools and fire departments, without the ability of increasing taxes to support those services. Letter from Dennis Berglund to Superintendent, Apr. 23, 2001, at 1-2 (AR 58); *see also* Letter from Dennis Berglund to Regional Director, Aug. 24, 2001, at 1-2 (AR 103). In a subsequent letter, the Berglunds noted that the legal description of the Parcel in the title report was incorrect and did not correspond to the legal descriptions of the neighboring properties. Letter from Dennis and Connie Berglund to Regional Director, Aug. 3, 2002 (AR 141); *see also* Letter from Dennis and Connie Berglund to Gwendolyn Parada, Band Chairperson, Jan. 26, 2005 (AR 177) (reasserting their claim that the legal description of the Parcel was erroneous).

Following submission of the Band's fee-to-trust application, it became apparent that the road used by the Starkeys to access their property was not wholly within the boundary of their recorded easement across the Parcel. The Band and the Starkeys initiated discussions to resolve the matter in April 2002, and in July of that year the Band informed the Starkeys that it was "amenable to legitimizing" the access route actually in use by recording an "amendment instrument" and that it "remain[ed] willing to address the Starkeys' concerns regarding the security of their access across the [Band's] fee land." Letter from Marta Burg to Pabarcus, July 29, 2002 at 2 (AR 140); *see also* Letter from Pabarcus to Burg, July 3, 2002 (AR 149) (referring to April meetings and subsequent communications). To facilitate negotiations, the Band passed a tribal resolution authorizing its Chairperson to amend the legal description of the Starkeys' recorded easement to conform to the current location of their access road, and affirmatively stated that the Band would continue to allow the Starkeys "unfettered access to their residence over the existing access road" until the existing easement was formally amended and

recorded in the County Recorder's Office. *See* Resolution No. 02-03-08(B), Aug. 30, 2002, at 1-2 (AR 149).

On February 3, 2003, the Band issued a formal response to the comments BIA received on its fee-to-trust application. Letter from Parada to Superintendent (Band's 2003 Response to Comments) (AR 146). The Band emphasized that the Parcel would be used to provide "regular and reliable" access to the western portion of the reservation, and that it did not have any plans to develop the Parcel beyond performing periodic maintenance on the existing roadway. *Id.* at 1. The Band also stated that it "acknowledge[d] all legal valid existing rights of way and easements across the subject property and [sought] to have the property taken into trust subject to all such encumbrances." *Id.* at Response 32. The Band specifically referenced the Starkeys' access road and acknowledged that while the road "may currently be located, in whole or in part, outside of their recorded access easement," the Band's General Council had authorized a "modification to the easement of record to secure the current location of the access road for the Starkeys' benefit," as well as issuance of a license for continued use of the access road in the interim. Band's 2003 Response to Comments at 1 & n.1. In response to comments provided by the Starkeys' legal counsel concerning the present or future effect of the proposed trust acquisition on the Starkeys' easement, the Band stated:

The La Posta Band has acknowledged and continues to acknowledge all legal valid existing rights of way and easements across the subject property and seeks to have the property taken into trust subject to all such encumbrances. In fact, the Application submitted by the [Band] clearly states that the referenced easement will remain on title when the land is taken into trust. Additionally, the [Band] has offered to modify the recorded easement document to accurately reflect the current location of the Starkeys' access road . . . to further secure their right to continue to use the road

Id. at Response 32. The Regional Director also addressed concerns raised by the Starkeys in relation to the Band's fee-to-trust application, also offering to "legitimize" their current access route, and stating that the Band had expressed its willingness to grant the Starkeys an easement conforming with the alignment of the existing access road prior to the land being accepted in trust. Letter from Regional Director to Dr. Almeda Starkey, Dec. 12, 2003 (AR 156). The Regional Director offered, as an alternative, to grant to the Starkeys an easement under Federal law after the land was accepted in trust, for which the Band had expressly given its consent, with the same terms and conditions as the Starkeys' existing easement, if they so preferred. *Id.*

In response, the Starkeys questioned the meaning of the Regional Director's offer to "legitimize [the Starkeys'] present access route," and maintained that in addition to the

recorded easement, they were also granted an “oral easement” in 1983 by the previous owner of the Parcel, and that they had used this alternative easement since that time. Letter from Pabarcus to Regional Director, Dec. 16, 2003, at 1 (emphasis supplied by Pabarcus) (AR 157). A few days later, Rodney Starkey filed litigation against the Department, Department officials, BIA, and the Band, in the U.S. District Court, District of Southern California, seeking, among other things, to bar the Department from approving the Band’s fee to trust application and taking the land in trust, and to restrain the Band from interfering with the easement rights of the Starkeys. *See* Letter from Pabarcus to Burg, Band, U.S. Attorney, and Regional Director, Dec. 22, 2003 (AR 160); Order Granting Temporary Restraining Order, *Starkey v. Norton*, No. 03-CV-2549-IEG (S.D. Cal. Dec. 23, 2003) (AR 162).

Subsequently, the Band and the Starkeys entered into negotiations to resolve the Starkeys’ complaint and BIA stayed processing of the Band’s fee-to-trust application. Letter from Acting Regional Director to Pabarcus, Jan. 23, 2004 (AR 165). A settlement resulted in an entry of judgment and court order, in accordance with a stipulation between the parties, declaring that the Starkeys and their successors have a permanent easement across the Parcel. *See* Judgment, *Starkey v. Norton*, No. 03-CV-2549 IEG (S.D. Cal. Feb. 18, 2005) (AR 184). The stipulation and judgment grant the Starkeys the right to develop a single access road through the Parcel. *See id.* at 2. An easement in favor of Rodney Starkey was recorded as file no. 2005-0188953 of the Official Records of San Diego County on March 8, 2005. *See* Title Commitment, Schedule B, Sec. 2, ¶ 13 (AR 183). The new easement would be “separate, but slightly overlapping” the Starkeys’ original easement. Letter from Burg to Lorrae Dietz, BIA Realty Specialist, May 2, 2008, at 1-2 (May 2, 2008 Letter) (AR 183).

On March 26, 2008, the Regional Director notified the Band that the Parcel had an “unresolved issue due to an inaccurate legal description.” Letter from Regional Director to Band (AR 181). On April 30, 2008, the Band passed a resolution accepting an updated title report including the new easement agreed to in the settlement of the litigation by the Starkeys. Resolution No. 08-30-04 A (AR 182). The Band also informed BIA that it had discovered that two “seemingly different” legal descriptions had been used to describe the Parcel. May 2, 2008 Letter at 2. The first description derived from the original land patent dated December 2, 1896, and described the location of the Parcel as it appeared on the original 1859 survey plat. *Id.* at 2-3. The area was subsequently resurveyed in early 1921, and new section lines were run in a slightly different location. *Id.* at 3. A 1999 survey of the Parcel referred to these alternative section lines. *Id.* at 2-3. In a subsequent review of the revised land description, BIA specialists recommended that the legal description of the Parcel be modified to refer to the current survey. *See* Memorandum from Jamie Schubert to Dietz, July 10, 2008 (AR 186); Letter from Tom Tauchus to Dietz, Aug. 4, 2008 (AR 188). BIA also revisited the April 13, 2001, EA, concluding that because no change in land

use was contemplated and the original intent of the EA had not changed, the original FONSI remained in effect. Memorandum to File, Apr. 2, 2009 (AR 192).

BIA then reissued notice of the Band's fee-to-trust application, inviting interested parties to comment. *See* Notice of Application, May 8, 2009 (AR 193). The Starkeys responded, reiterating many of the issues they had raised previously. Letter from Pabarcus to Regional Director, July 9, 2009 (AR 207). The Starkeys questioned BIA's authority to grant the fee-to-trust transfer, claimed they would be deprived of state court jurisdiction in any disputes with the Band regarding access to their property, raised other jurisdictional conflicts which would purportedly arise as a result of the transfer, challenged the Band's need for the property, claimed that BIA had not complied with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, questioned the accuracy of the property descriptions, and called for BIA to "closely scrutinize" the Band's credibility regarding its planned future use for the Parcel. *Id.* at 3-9; *see also* Letter from Pabarcus to Regional Director, July 17, 2009 (AR 212) (containing supplemental comments elaborating on the Starkeys' environmental concerns).

Citing the lapse of time since the Band's application, on September 6, 2013, the Regional Director requested an update from the Band regarding the purpose for which the land would be used, the current use of the land, an updated title commitment, and a resolution from the Tribe acknowledging title exceptions and addressing the easements across the Parcel. Letter from Regional Director to Band (AR 220). The Band responded to BIA's inquiry, explaining that there had been no change in planned land use since it first applied to have the Parcel taken in trust, that the purpose of the trust acquisition remained to secure access to the western portion of the Band's reservation, and that it did not and never had intended to engage in mining on the Parcel. Letter from Parada to Lorrae Russell, BIA Realty Specialist, June 25, 2014 (AR 222). The Band also provided an updated title insurance commitment, which listed both of the easements recorded by the Starkeys. Title Insurance Commitment, Schedule B, Sec. 2, ¶¶ 6 & 13, June 24, 2014 (AR 223).

The Regional Director approved a categorical exclusion (Cat Ex)⁴ for the proposed acquisition on September 4, 2014, concluding that an EA would not be required for approval of the fee-to-trust acquisition. Categorical Exclusion (AR 226). Attached notes

⁴ A categorical exclusion is defined as a "category or kind of action that has no significant individual or cumulative effect on the quality of the human environment," and for which neither an environmental assessment nor an environmental impact statement, is required. 43 C.F.R. § 46.205; *see also* 40 C.F.R. § 1508.4 (categorical exclusion).

reiterated that the Tribe sought to use an existing road on the Parcel to provide access to its reservation, and that no change in land use was planned. *Id.* at 2.

On October 24, 2014, the Regional Director issued her decision to accept the Parcel in trust. Decision at 12 (AR 228). The Regional Director analyzed the acquisition pursuant to the 25 C.F.R. § 151.10 factors, including the three relevant to this appeal. *Id.* at 2, 9-10.

Section 151.10(a) requires the “existence of statutory authority for the acquisition.” The Regional Director reasoned that the Parcel was eligible for trust acquisition under Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. § 465, because the Band was “under Federal jurisdiction” in 1934. Decision at 2. Specifically, she found that the Band was “originally established by an Executive Order dated December 29, 1891,” and that in an election held by the Secretary for the Band pursuant to 25 U.S.C. § 478, the Band’s voters voted to accept the provisions of the IRA. *Id.* (citing Theodore H. Haas, U.S. Indian Serv., *Ten Years of Tribal Government Under I.R.A.* 14 (1947) (Haas Report)).

Regarding the purpose for which the land was to be used, *see* 25 C.F.R. § 151.10(c), the Regional Director stated that the Parcel was “currently vacant land with no improvements or structures located on it.” Decision at 11. She concluded that the Band did not intend to change the land use and that the purpose of the acquisition was “to provide a permanent access to the western portion of the Reservation.” *Id.*

Considering “jurisdictional problems and potential conflicts of land use which may arise,” 25 C.F.R. § 151.10(f), the Regional Director addressed State and County jurisdiction, and concluded that, because no change in land use was proposed for the land, transferring the Parcel in trust would not result in any jurisdictional conflict. Decision at 12. In regard to changes to criminal and civil jurisdiction under Pub. L. No. 83-280 (codified at 18 U.S.C. § 1162 and 28 U.S.C. § 1360) resulting from transfer of the fee parcel to trust status, she reasoned that California would retain criminal jurisdiction over the Parcel and the Tribe would assert “civil/regulatory” jurisdiction. *Id.* at 11.

Finally, the Regional Director considered the impact of the acquisition on the “human environment,” under 25 C.F.R. § 151.10(h). Decision at 12. She stated that there were no hazardous materials or containments on the Parcel and that the proposed action did not require preparation of an EA or an EIS. *Id.* As “no immediate change in land use [was] planned,” the acquisition qualified for a Cat Ex. *Id.*

The Starkeys and the Berglunds appealed the Regional Director’s decision to the Board and the Board consolidated the appeals. Only the Starkeys filed an opening brief. No answer briefs were filed.

Discussion

I. Standard of Review

The standard of review in trust acquisition cases is well established. BIA's decision to take land in trust is discretionary, and the Board does not substitute its judgment for that of BIA. *Arizona State Land Department v. Western Regional Director*, 43 IBIA 158, 159-60 (2006). The Board reviews these discretionary decisions to determine whether BIA gave proper consideration to all of the legal prerequisites to the exercise of its discretionary authority, including any limitations imposed by regulation. *Id.* at 160; *Bunney v. Pacific Regional Director*, 49 IBIA 26, 30 (2009). “[P]roof that the Regional Director considered the factors set forth in 25 C.F.R. § 151.10 must appear in the record, but there is no requirement that BIA reach a particular conclusion with respect to each factor. Nor must the factors be weighed or balanced in a particular way or exhaustively analyzed.” *Bunney*, 49 IBIA at 30-31 (internal citations omitted). The appellant bears the burden of proving that BIA did not properly exercise its discretion and this burden is not met by simple disagreement or bare assertions. *Id.*

In contrast to our limited review of discretionary decisions, we have full authority to review legal issues raised in trust acquisition cases. *Id.* at 31. However, we lack the authority to review challenges to the constitutionality of laws or regulations. *Id.* It remains the appellant's burden to prove that BIA's decision was in error or not supported by substantial evidence. *Id.*

II. The Starkeys' Appeal

On appeal to the Board, the Starkeys argue that the Regional Director erred in her consideration of BIA's statutory authority to accept the Parcel in trust (§ 151.10(a)), the purpose for which the Parcel will be used (§ 151.10(c)), and jurisdictional issues arising from accepting the Parcel in trust (§ 151.10(f)). The Starkeys also contend that the Regional Director violated the Farmland Protection Policy Act (FPPA), 7 U.S.C. §§ 4201-4209, and that the Regional Director failed to consider that the Parcel is, they allege, located within a national forest. Finally, the Starkeys argue that BIA's process for reviewing fee-to-trust acquisitions is biased and that the Regional Director's decision to accept the parcel in trust was also biased. We conclude that the Starkeys have failed to meet their burden to show error in the Decision or that the Regional Director abused her discretion.

A. Statutory Authority under § 151.10(a)

The Secretary of the Interior's authority to take land in trust for an Indian tribe under the IRA is limited to tribes that were “under Federal jurisdiction” in 1934. *Carciere*

v. Salazar, 555 U.S. 379, 382 (2009). We have held that “the Secretary, by calling an election for a tribe to decide whether to opt out of the IRA, necessarily recognized and determined in 1934 that the tribe was ‘under Federal jurisdiction.’” *State of New York v. Acting Eastern Regional Director*, 58 IBIA 323, 331 (2014) (alterations and some internal quotation marks omitted) (quoting *Shawano County, Wisconsin v. Acting Midwest Regional Director*, 53 IBIA 62, 75-76 (2011)). The Secretary’s action of calling an election is “one brightline test” and is considered to be “dispositive” evidence. *Village of Hobart, Wisconsin v. Midwest Regional Director*, 57 IBIA 4, 21, 24 (2013).

The Starkeys allege that the administrative record does not support the Regional Director’s conclusion that the Band was “under Federal jurisdiction” in 1934. Opening Br. at 23. In her decision, the Regional Director cited the Haas Report as evidence that the Band had held an IRA election on June 12, 1934, and was therefore “under federal jurisdiction” in 1934. Decision at 2. She stated that the Haas Report was available on the Department of the Interior’s website and provided the web address. *See id.* Though the record did not include the Haas Report, we find no error in the Regional Director’s reliance on this publically available document.

B. Purpose For Which the Land Will Be Used under § 151.10(c)

The Starkeys contend that the Regional Director erred in relying upon the Band’s assertions that no change in land use was planned. Notice of Appeal, Nov. 17, 2014, at 7. They argue that the Band constructed and operated a gaming facility on the reservation, after “consistently represent[ing]” that it “had no intent to conduct gaming operations on the trust property,” and therefore the Band’s credibility was undermined. *Id.* The Starkeys note that the gaming facility has since closed and they do not suggest that the Parcel will be used in relation to any gaming operations. *Id.*; *see also* Opening Br. at 16-19. Rather, the Starkeys contend that “the historical use by the [Band] of the reservation and fee properties strongly suggest that at some point in time a new sand mining operation will be instituted.” Opening Br. at 19. They state that they have “observed certain activities on the trust property such as staking and surveying which is strongly suggestive [that the Band] intends to use the fee property . . . in a manner inconsistent with its current use.” Notice of Appeal at 8.

It is unclear how past actions on the Band’s trust property would suffice to indicate a future use of the Parcel that the Regional Director could have considered, and the Starkeys provide no evidence to support these assertions. Nor do the Starkeys identify any evidence in the record that the Band has any current plans to develop the property for sand mining or any other activities. The Band has consistently asserted that it intends to use the property to access the western portion of the reservation via an existing road. Because the record showed that the Band has no specific plans to develop the property, the Regional

Director was not required to consider any possible future development that might occur on the Parcel. See *Grand Traverse County Board of Commissioners v. Acting Midwest Regional Director*, 61 IBIA 273, 285 (2015) (“[W]here . . . a tribe has no plans in the foreseeable future to develop property, § 151.11(c) could not have been intended to force the tribe to submit a ‘plan’ for a use not yet determined.”).

C. Jurisdictional Issues under § 151.10(f)

The Starkeys assert that the Regional Director erred in describing the legal effect of taking the land in trust on criminal and civil jurisdiction. Opening Br. at 11-12. In her decision, the Regional Director provided the following jurisdictional assessment:

The land presently is subject to the full civil/regulatory and criminal/prohibitory jurisdiction of the State of California and San Diego County. Once the land is accepted into trust, the State of California will have the same territorial and adjudicatory jurisdiction over the land, persons and transactions on the land as the State has over other Indian lands within the State. . . . [E]xcept as otherwise expressly provided in [18 U.S.C. § 1162 and 28 U.S.C. § 1360], the State of California would retain jurisdiction to enforce its criminal/prohibitory law against all persons and conduct occurring on the land.

Thus provision of police services would continue to be the responsibility of the San Diego County Sheriff’s Department and criminal prosecutions of offences committed on the lands [sic] would continue to be brought in State Courts. The [Band] will assert civil/regulatory jurisdiction.

Decision at 11. The Starkeys quote the clause in the Regional Director’s decision that the State “will have the same territorial and adjudicatory jurisdiction over the land,” arguing that she erroneously concluded that the trust acquisition would not affect the State’s jurisdiction. Opening Br. at 16 (quoting Decision at 11). That misinterprets what the Regional Director actually concluded. The Regional Director expressly acknowledged that if the Parcel were accepted in trust, the State would have the same jurisdiction over it as it “has over *other Indian lands within the State.*” Decision at 11 (emphasis added). It is apparent that by referring to “Indian lands” the Regional Director meant trust and restricted land, and we find no error in this statement. As the Regional Director explained, the State will retain criminal jurisdiction over “all persons and conduct occurring on the land,” while ceding civil/regulatory jurisdiction to the Band. *Id.* The Starkeys have not shown legal error on the part of the Regional Director.

The Starkeys also contend that the Regional Director “gave virtually no consideration” to future jurisdictional issues that could arise regarding their easement after the Parcel was taken in trust, which they contend is required by 25 C.F.R. § 151.10(f). Opening Br. at 11, 16 (capitalization omitted). We disagree. The record includes numerous communications from the Starkeys that lay out their concerns regarding the security of their access road and enforcement of their right of access if the land is taken in trust. *See, e.g.*, AR 22 at 3; AR 82 at 1; AR 83 at 2-3; AR 178 at 1-2. BIA acknowledged the Starkeys’ concerns and explained that the Band had expressed its willingness to grant an easement for the Starkeys’ access road prior to any transfer of the Parcel to trust status. AR 156. In the alternative, the Regional Director explained, BIA could grant an easement under Federal regulations after the land was taken in trust, for which the Band had also provided consent. *Id.* And, as recounted above, the Starkeys and the Band settled Federal court litigation filed by the Starkeys to quiet title to their claimed prescriptive easement, resulting in a judgment and easement recorded on March 8, 2005, as file no. 2005-0188953. Decision at 4.

In her decision to accept the Parcel in trust, the Regional Director described the Starkeys’ comments opposing the trust acquisition made in communications in 2001 following the initial Notice of Application to take the Parcel in trust. Decision at 3-4 (listing 8 letters from the Starkeys or on their behalf from their legal counsel). In response, the Regional Director acknowledged that the Starkeys have legal access through the Parcel, detailed the efforts taken by the Band to resolve the Starkeys’ concerns including having the existing road surveyed and offering to grant a new conforming easement, and noted that the Band and the Starkeys “have agreed to the location of an easement in Mr. Starkey’s favor . . . which was recorded March 8, 2005” *Id.* at 4.

The Decision also described in detail comments made by the Starkeys’ legal counsel in a letter dated July 9, 2009. Decision at 5-6 (restating as 17 bulleted items comments made in opposition to the proposed trust acquisition). The Regional Director then responded to the issues raised by the Starkeys by drawing from written responses provided by the Band in two letters, dated February 3, 2003, and November 26, 2010. *Id.* at 6-9. The responses selected by the Regional Director address land use and consider the interplay between continued state jurisdiction over criminal offenses, Federal authority and jurisdiction over activities taking place on the land after it is taken in trust, and the strict limits to tribal jurisdiction over non-Indians generally and non-member Indians in criminal matters. *Id.* Later in the Decision, the Regional Director addressed these issues in her consideration of jurisdictional issues and potential land use conflicts under 25 C.F.R. § 151.10(f). Decision at 11-12. And while the Regional Director, after providing a statement concerning state, Federal, and tribal jurisdiction over civil and criminal matters, concluded that because no change in land use is associated with the proposed trust acquisition, “it does not appear that a transfer to trust status would result in any

jurisdictional conflict,” *id.* (emphasis added), we do not read that as failing to consider the alleged land use conflicts raised by the Starkeys. The record demonstrates quite the opposite.

Appellants have failed to show that the Regional Director failed to consider their easement rights, which rights the Band has repeatedly acknowledged, and which would be recorded as an encumbrance on the title to be acquired by the United States on behalf of the Band. The record shows that BIA considered the Starkeys’ easement rights and means of protecting them, and this consideration is reflected in the Decision as well. BIA is not required to resolve objections to the objector’s satisfaction. *State of South Dakota v. Acting Great Plains Regional Director*, 63 IBIA 179, 182 (2016) (citing *Desert Water Agency v. Pacific Regional Director*, 59 IBIA 119, 127-28 (2014)). The Regional Director’s decision identified both the 1978 easement, recorded as file no. 78-547289, and the 2005 easement, recorded as file no. 2005-0188953, and concluded, as provided in the court’s judgment, that “Mr. Starkey or his successors shall have the right to develop one access road across the fee land within the confines of either easement.” Decision at 4. The Regional Director has recognized those rights in her decision and was required to do no more.⁵

The Starkeys also contend that their easement provides the only access to their property and “if the fee property is transferred into trust and the Tribe interferes with or denies access to their easements across the fee property their ability to use and enjoy [their] property will be destroyed and they will have no judicial forum to which they can go to seek redress for deprivation of their rights, including civil rights.” Opening Br. at 4. The Starkeys rely upon a 1990 California Supreme Court case, *Boisclair v. Superior Court*, 801 P.2d 305 (Cal. 1990), for their assertion that, once the Parcel is taken into trust, the state court will have no jurisdiction over any easement dispute. See Opening Br. at 12-14.⁶ They

⁵ Compare *Bunney*, 49 IBIA at 33 (regional director’s recognition of commenters’ concerns regarding protection of easement and assurance that easement would remain in force after trust acquisition reflected sufficient consideration), with *Crest-Dehesa-Granite Hills-Harbison Canyon Subregional Planning Group v. Acting Pacific Regional Director*, 61 IBIA 208, 214-15 (2015) (remanding due to failure to address, either in the decision or in the administrative record, appellants’ concerns regarding protection of their easement rights).

⁶ The Starkeys do not acknowledge, however, the court’s analysis in *Boisclair* concerning the limited immunity of tribal officials when charged with the commission of tortious acts, in that case, the alleged interference with use of an easement across Indian and non-Indian land. See *Boisclair*, 801 P.2d at 315-16.

also argue that, under the Quiet Title Act, 28 U.S.C. § 2409a,⁷ they will have no Federal forum within which to resolve an easement dispute. *Id.* at 14. The Quiet Title Act provides a limited waiver of sovereign immunity for civil actions brought against the United States to resolve title disputes to real property in which the United States claims an interest, but which by its own terms, does not apply to trust or restricted Indian lands.⁸ 28 U.S.C. § 2409a. The Starkeys further contend that if the Band's council, or the tribal court, is the only forum with jurisdiction over claims relating to the Starkeys' easement, these forums will be inherently biased and the Starkeys will be deprived of due process.⁹ *Id.* at 19-20. Finally, the Starkeys argue that the Band's fee land should not be taken in trust because state regulations governing surface mining would no longer apply to the Parcel, should the Band resume sand mining on the reservation and the Parcel were used in conjunction with those operations. *Id.* at 16-19.

As a preliminary matter, when considering a decision to take land in trust for a tribe, BIA is not required to rebut or resolve every objection or argument raised by Appellants, although consideration of these objections and arguments, individually or globally, must be evident in the record or decision. *State of South Dakota*, 63 IBIA at 180. Nor, as relevant here, is the Regional Director required to comment on the Starkeys' legal theories concerning future litigation they may wish to bring. The Regional Director provided a clear statement concerning civil and criminal jurisdiction as it pertains to land held in trust

⁷ Section 2409a provides: "The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands" 28 U.S.C. § 2409a(a).

⁸ Since the Regional Director recognizes the Starkeys' legal right to an access road across the Parcel, and the Band acknowledges the validity of the easement and that it is an encumbrance to the title that would be acquired by the United States, it is unclear what additional interest in title the Starkeys would wish to protect by bringing suit against the United States.

⁹ It is not at all apparent from the record why the Starkeys contend that any potential conflict is more than speculative. The Starkeys make various incendiary allegations against the Band and its members, without citing any evidence in support. *See* Opening Br. at 2. The sole document in the record relied upon by the Starkeys to support their contention that "the Tribe" threatened to cut off their access, *id.* at 4, shows, at most, that an individual apparently associated with the Band opined in 2001 that an argument could be made to restrict the Starkeys to their *recorded easement*. The same document, apparently prepared for internal use only, states that "we are trying to be good neighbors." *See* Survey and Preliminary Notes for Project (AR 119).

by the United States. Decision at 11. She also provided selections from the Band's extended analysis of jurisdiction, including limits to tribal jurisdiction and the continuing jurisdiction of the state in criminal matters. *Id.* at 7-8. And while the Starkeys may prefer a particular judicial forum or regulatory authority through which they may assert their interests, they have no legally protected interest in the choice of either. See *Arizona State Land Department*, 43 IBIA at 171 (stating that appellant has no legally protected interest in the choice of regulatory authority over tribal property or right to state regulation of the tribe's activities).

The Starkeys also allege that the Regional Director erred in failing to consider the jurisdictional issues that could arise if the Parcel was used in conjunction with future sand mining operations conducted on the reservation. Opening Br. at 16-18. Specifically, they contend that, after the Parcel is taken in trust, any sand mining operations using the Parcel would not be subject to State mining laws and regulations. *Id.* As there is no evidence that the Band intends to use the Parcel for sand mining, the Regional Director did not err in not considering any jurisdictional issues arising from such hypothetical activities.

D. Farmland Protection Policy Act

“The FPPA requires federal agencies to consider the adverse effects of Federal programs on the preservation of farmland; consider alternative actions that could lessen such adverse effects; and assure that such Federal programs, to the extent practicable, are compatible with state, local and private programs and policies to protect farmland.” *Skagit County, Washington v. Northwest Regional Director*, 43 IBIA 62, 78 (2006) (citing 7 U.S.C. § 4202(b)). The Starkeys contend that their property qualifies as “farmland” under FPPA and has been designated as farmland of significance by the State of California. Opening Br. at 21. They make no specific arguments regarding why the fee-to-trust acquisition triggered the FPPA, beyond stating that the Starkeys' property qualifies as farmland. *Id.* And, the Starkeys acknowledge that “the FPPA does not give them a private right of action and is solely to be enforced by the governor of the affected state.” *Id.* at 21-22.

We have previously explained that “Congress expressly sought to make the statute unenforceable except by the governor of an affected state” and that the Administrative Procedure Act (APA), 5 U.S.C. § 702, does not provide a basis for another party to bring a claim regarding the FPPA. *Skagit County*, 43 IBIA at 78-79 (citing *United States v. S. Florida Water Mgmt. Dist.*, 847 F. Supp. 1567, 1572-73 n.4 (S.D. Fla. 1992)). “The FPPA clearly intends to preclude third party enforcement of the FPPA, except in the case of certain suits brought by governors, and it furthers this intent for the Board to preclude administrative enforcement as well.” *Id.* at 79. We therefore conclude that the Starkeys are precluded from attempting to enforce the FPPA, and we dismiss these claims for lack of jurisdiction.

E. National Forest

The Starkeys argue that a portion of the Parcel lies within the Cleveland National Forest and that the Decision does not reflect “any consultation with appropriate governmental officials nor members of Congress to effect a diminishment of that federally recognized property.” Notice of Appeal at 8. The Starkeys do not provide any further arguments or evidence in their opening brief to support this claim, and they did not raise this issue before the Regional Director.

Ordinarily, our review is limited to those issues raised before the Regional Director. See *Thurston County, Nebraska v. Acting Great Plains Regional Director*, 56 IBIA 62, 66 (2012). Therefore, we decline to address this argument as not properly before the Board.

F. Allegations of Bias

The Starkeys contend that the entire fee-to-trust “process” was biased, and they also allege that BIA’s review of the Band’s fee-to-trust application was biased in favor of the Band. Opening Br. at 23-26. They cite a number of examples of this alleged bias, however they fail to explain how these examples demonstrate actual bias in BIA’s review of the Band’s application.

The Starkeys state that “federal regulations mandat[e] preference in employment with the BIA for persons of Native American heritage” and they refer to a specific BIA realty specialist involved with the Band’s application. *Id.* at 24. This individual was allegedly quoted in an article as stating, in reference to fee-to-trust acquisitions generally, “It’s our sovereignty. It’s the restoration of the reservation.” *Id.* (emphasis omitted). The Starkeys asked for this individual to be disqualified from working on the Band’s application, but BIA allegedly refused. *Id.* As other evidence of bias, they contend that, during BIA’s consideration of the Band’s application, there was a vacancy in the fee-to-trust division of BIA and BIA invited the Band to “participate” in the selection of a new employee. *Id.*

It is well established that BIA’s policies of “tribal self-determination, Indian self-government, and hiring preferences,” are policies established by Congress, and are “reasonable and rationally designed to further Indian self-government and not violative of due process,” and also do not constitute structural bias, as to disqualify BIA from deciding fee-to-trust applications. *Roberts County, South Dakota v. Acting Great Plains Regional Director*, 51 IBIA 35, 48 (2009) (citing *State of South Dakota v. U.S. Dep’t of the Interior*, 401 F. Supp. 2d 1000, 1011 (D.S.D. 2005)); see also *Morton v. Mancari*, 417 U.S. 535, 542, 555 (1974) and *State of South Dakota v. Acting Great Plains Regional Director*, 49 IBIA 129, 144 (2009)). “It requires a substantial showing of bias to disqualify a hearing officer in administrative proceedings or to justify a ruling that a hearing was unfair.” *Roberts*,

51 IBIA at 49 (quoting *State of South Dakota*, 401 F. Supp. 2d at 1010). Therefore, we conclude that the Starkeys have not provided sufficient evidence to substantiate their claims of bias in the fee-to-trust acquisition process. Furthermore, the BIA realty specialist's general statements regarding fee-to-trust acquisitions are not evidence of any bias in the Regional Director's review of the Band's application.

The Starkeys' other allegations of bias also lack sufficient evidence and, even if accepted as true, do not constitute a substantial showing of bias. The Starkeys state that BIA denied several requests from interested parties for extensions of time to provide comments to the application. Opening Br. at 25. However, the Starkeys do not demonstrate how these denials were unreasonable or a showing of bias. They also argue that BIA sought advice regarding language to include in the Tribe's amended notice of land acquisition from a "California Indian Lands Office," which they describe as an "Indian advocacy organization." *Id.* The only evidence in the record to support this allegation is the Starkeys' own letter to BIA making the same allegation.¹⁰

Finally, they state that, through a FOIA request, they received evidence that a BIA employee stated in an email message that was copied to the Regional Director that the Band "hopes to establish some form of economic development on the property at some time in the future." *Id.* The Starkeys submit this statement as evidence that BIA knew that the real purpose of taking the land in trust was not to secure access to the western part of the reservation, but was for some undisclosed form of economic development, yet decided nevertheless to go forward with the trust transfer. *Id.* The Starkeys do not explain how an undefined aspiration for developing economic activity on the Parcel at some future time contradicts the Band's stated purpose for the trust acquisition, nor do they clarify how such a statement would demonstrate actual bias or impropriety on the part of BIA.

III. The Berglunds' Appeal

In their notice of appeal, the Berglunds express a variety of concerns regarding the fee-to-trust acquisition. Berglund Notice of Appeal, Nov. 24, 2014, at 1-2. The Berglunds' concerns involve an easement held by San Diego County that crosses the Parcel, the legal description of the Parcel, and environmental issues. Based upon their arguments before the Board, the Berglunds do not have standing to challenge the Regional Director's decision.

¹⁰ The Starkeys cite a letter they sent to the Regional Director in which they referenced the alleged communication with the California Indian Lands Office and refer to a document they allegedly received from BIA through a Freedom of Information Act (FOIA) request. *See* Opening Br. at 25 (citing AR 83). This document is apparently not part of the record and was not submitted by the Starkeys on appeal.

In order to have standing to appeal a regional director's decision to the Board, an appellant must demonstrate: (1) an injury to a legally protected interest that is concrete and particularized, as well as actual or imminent, not conjectural or hypothetical; (2) that the injury is causally connected with or fairly traceable to the actions of the appellee and not caused by the independent action of a third party; and (3) that it is likely, as opposed to speculative, that the injury will be redressed by a favorable decision. *See Preservation of Los Olivos v. Pacific Regional Director*, 58 IBIA 278, 296-97 (2014); *see also Stevens v. Acting Rocky Mountain Regional Director*, 62 IBIA 286, 298 (2016). The Berglunds either fail to allege an injury to a legally protected interest of their own, or fail to establish that the fee-to-trust acquisition would cause the alleged injury.

The Berglunds argue that the Parcel should remain under county control. They state that the Parcel is in a sensitive watershed area and therefore must remain under local public health control. Berglund Notice of Appeal at 2. They also contend that the County of San Diego must retain "civil/regulatory jurisdiction" over its easement for a public road on the western side of the Parcel as there have been traffic accidents and crime on this portion of road in the past. *Id.* at 1. The County and State have not raised any concerns regarding jurisdiction. *See* Letter from County of San Diego to Regional Director, Jun. 11, 2009 (AR 204); Letter from Caltrans to BIA, Oct. 13, 2009 (AR 216) (stating no opposition to acquisition). Despite the Berglunds' statements, it is unclear how the Berglunds would be injured if the County were to lose jurisdiction, especially in light of the Regional Director's statement that police services would continue to be the responsibility of the San Diego County Sheriff's Department.¹¹ Decision at 11.

The Berglunds then state that the legal description of the Parcel is erroneous and does not match that of neighboring properties. Berglund Notice of Appeal at 2. They offer no further explanation of the alleged error or how they would be injured by such an error.¹² *See id.*

Finally, the Berglunds state that the Parcel is "almost entirely" within the 100-year flood plain, that construction within the floodway "is not allowed by government

¹¹ The Berglunds also allege that, unless the County retains jurisdiction over the public road easement, the Band will be responsible for maintaining the road's culvert system. Berglund Notice of Appeal at 1. This is incorrect as the matter of jurisdiction is unrelated to the County's maintenance of its easement. *See* Title Insurance Commitment, Schedule B, Sec. 2, ¶ 11 (AR 152) (stating county will maintain easement).

¹² The legal description has been significantly amended since the Berglunds first asserted that it was erroneous and it appears to have been corrected so that it now corresponds to current property descriptions. *See* AR 186, 188.

regulations,” and that the Band has constructed structures within the 100-year flood plain in the past. Berglund Notice of Appeal at 2. Once again, the Berglunds do not explain how any legally protected interest they hold in relation to the flood plain, or Federal regulation of the floodway, would be injured by the trust acquisition. Assuming, for the purpose of establishing whether the Berglunds have standing, that the Band has built structures in violation of flood plain regulations while the land is in fee status, it is unclear how the transfer of the Parcel to trust status will cause any further injury. Due to the Berglunds’ failure to establish injury to a legally protected interest that is fairly traceable to the proposed fee-to-trust acquisition, we conclude that the Berglunds do not have standing to appeal the Regional Director’s decision for the claims asserted.

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 October 24, 2014, decision, and dismisses the appeal from that decision by the Berglunds for lack of standing.

I concur:

// original signed
Robert E. Hall
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge