INTERIOR BOARD OF INDIAN APPEALS

State of South Dakota v. Great Plains Regional Director, Bureau of Indian Affairs

66 IBIA 305 (08/12/2019)

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, Appellant,	)	Order Affirming Decision
v.	)	
	)	Docket No. IBIA 17-006
GREAT PLAINS REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	August 12, 2019

The State of South Dakota (State or Appellant) appealed to the Board of Indian Appeals (Board) from an August 23, 2016, decision (Decision) of the Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director affirmed a June 15, 2015, decision by BIA's Rosebud Agency Acting Superintendent (Superintendent) to accept into trust for the Rosebud Sioux Tribe of the Rosebud Indian Reservation, South Dakota (Tribe), approximately 0.402 acres of land. The property is known as the Tribal/Swift Bear Community property and is in Mellette County, South Dakota. On appeal, the State argues that BIA did not adequately consider the regulatory criteria for trust acquisitions and its objections, the Decision is unsupported by the administrative record, and the Regional Director improperly relied on information outside the record.

We affirm the Decision. The State's arguments concerning the Tribe's need for additional land and the tax-related impacts of the trust acquisition are based on incorrect standards and thus are rejected. We also conclude that BIA adequately considered the State's concerns regarding jurisdictional problems. With respect to the State's contention that the Regional Director relied on extra-record information when considering BIA's ability to discharge the additional responsibilities resulting from acquisition of the land in trust status, the State does not show that it was denied due process or was prejudiced by the alleged denial.

Legal Framework

The Regional Director approved the acquisition under Section 5 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. § 5108, which authorizes the Secretary of the Interior (Secretary) to acquire land in trust for Indians in his discretion. Under the

25 C.F.R. Part 151 regulations establishing the Department of the Interior's (Department) land acquisition policy, land may be acquired in trust status for a tribe:

> (1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or
> (2) When the tribe already owns an interest in the land; or
> (3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

25 C.F.R. § 151.3(a)(1)-(3).

When evaluating tribal requests to acquire land located within or contiguous to an "Indian reservation" as defined in 25 C.F.R. § 151.2(f), i.e., an on-reservation acquisition, BIA must consider the following regulatory criteria in § 151.10:

> (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
> (b) The need of the . . . tribe for additional land;
> (c) The purposes for which the land will be used;
> . . . .
> (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
> (f) Jurisdictional problems and potential conflicts of land use which may arise; and
> (g) If the land to be acquired is in fee status, whether the [BIA] is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.
> (h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 [Department Manual] 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 [Department Manual] 2, Land Acquisitions: Hazardous Substances Determinations.

25 C.F.R. § 151.10(a)-(c) and (e)-(g).[1] Additional criteria apply to the trust acquisition of land located outside of and noncontiguous to the tribe's reservation, i.e., an off-reservation acquisition. *See* 25 C.F.R. § 151.11.

[1] Criterion (d) is only applicable to acquisitions for individual Indians.

Background

On December 10, 2013, the Tribe submitted an application to BIA to place the Tribal/Swift Bear Community property (Property), which it owns in fee, into trust.[2] Letter from Fredericks to Superintendent, Dec. 10, 2013 (Administrative Record (AR) 41). The Tribe enclosed an authorizing resolution stating that it planned to continue the existing use of the Property for a Tribal community building. Tribal Resolution No. 2013-156, Aug. 15, 2013, at 2 (Tribal Resolution) (AR 41). The Tribal Resolution further states that acquisition of the Property in trust status is necessary to replace Tribal lands lost through the allotment process; promote Tribal self-sufficiency, self-determination, and self-governance; ensure the use of the Property for future generations of Tribal members; and advance Tribal economic development. *Id.*

The State submitted comments in opposition to the proposed acquisition. Letter from State to Superintendent, June 16, 2014 (AR 28). The Tribe submitted a comprehensive response to the State's comments. Tribe's Response to State's Comments, Aug. 21, 2014 (AR 23). On June 15, 2015, the Superintendent approved the trust acquisition under the 25 C.F.R. § 151.10 criteria for on-reservation acquisitions. Letter from Superintendent to State, June 15, 2015 (Superintendent's Decision) (AR 15).

The State appealed the Superintendent's decision to the Regional Director, Notice of Appeal to Regional Director, July 10, 2015 (AR 12), and subsequently filed arguments in support, Statement of Reasons to Regional Director, Sept. 18, 2015 (AR 6). On August 23, 2016, the Regional Director issued his Decision affirming the Superintendent's decision.

The State appealed to the Board and filed an opening brief. Opening Brief (Br.), Nov. 29, 2016. The Regional Director filed an answer brief, Answer Br., Jan. 17, 2017, to which the State replied, Reply Br., Feb. 8, 2017.

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[2] The legal description of the Property is set forth in the Regional Director's decision as follows:

> Lots 1, 2, 3, 4 & 5 in Block 4 of the original town site of White River, Mellette County, South Dakota, as set out in Book 1 Plats on Page 3, located in the NW¼SW¼ of Sec[tion] 35, T[ownship] 42 N[orth], R[ange] 29 W[est], 6th Principal Meridian, Mellette County, South Dakota, containing 0.402 acres, more or less.

Standard of Review

The Board's standard of review in trust acquisition cases is well established:

> 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. The Board reviews discretionary decisions to determine whether proper consideration was given to all legal prerequisites, including any limitations established by regulation. [An] [a]ppellant[] bear[s] the burden of showing that BIA did not properly exercise its discretion. The Board reviews legal issues and sufficiency-of-evidence issues *de novo*.
>
> 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. Nor must BIA "resolve" objections to an objector's satisfaction. 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.

State of South Dakota v. Acting Great Plains Regional Director, 63 IBIA 179, 182 (2016) (internal citations omitted).

Discussion

I. Appellant's Arguments on Appeal

On appeal to the Board, the State argues that BIA did not reasonably consider the factors in § 151.10(b) (applicant's need for additional land), (e) (impacts on the State and its political subdivisions resulting from removal of the land from the tax rolls), (f) (potential jurisdictional problems and land use conflicts), and (g) (BIA's ability to discharge the additional responsibilities resulting from the trust acquisition).[3] The State further argues that the Regional Director failed to consider all of its objections, the Regional Director's decision is not supported by the administrative record, and the Regional Director violated the State's due process rights by considering information under § 151.10(g) that is not

[3] In its appeal to the Regional Director, the State also challenged the sufficiency of BIA's consideration of § 151.10(c) (purpose for which the land will be used), but it did not raise that challenge on appeal to the Board.

contained in the record. Below we address the State's arguments as they relate to each of the factors in § 151.10(b), (e), (f), and (g). We conclude that the State has not met its burden to show that BIA failed to properly exercise its discretion. Nor has the State shown that it was denied due process or was prejudiced by the alleged denial. Therefore, we affirm the Decision.

II. The Tribe's Need for Additional Land – § 151.10(b)

The Superintendent found, under 25 C.F.R. § 151.10(b), that acquisition of the Property "in trust status is necessary to and will advance Tribal economic development and its ability to be self-sufficient." Superintendent's Decision at 2 (unnumbered) (quoting Tribal Resolution at 2). The Regional Director affirmed this finding and cited as support the Tribal Resolution and the Tribe's response to the State's comments. Decision at 4-5. In addition, the Regional Director recited portions of the Tribal Resolution stating that the trust acquisition is necessary to "insure use of the land for future generations" and to "reestablish Tribal sovereign authority . . . and ameliorate damage to Tribal self-determination and self-governance resulting from diminishment of the Tribal land base." *Id.* at 4 (quoting Tribal Resolution at 2). On appeal, the State argues that statements in the Tribal Resolution on which BIA relied are not supported by the record. Opening Br. at 3; Reply Br. at 2. The State errs.

First, the State contends that "nothing included in the administrative record connects placing this parcel into trust with the advancement of Tribal economic development." Opening Br. at 3. Specifically, the State asserts that there were no property taxes payable in the 2015 tax year based on the use of the Property for a community building, and thus "the Tribe will be saving no tax money that could be otherwise used for economic development should the property be placed into trust." *Id.*

But BIA's finding that the acquisition is needed to advance Tribal economic development is not based on removal of the Property from the tax rolls. Relevant to economic development, the Tribal Resolution states that the Tribe seeks to consolidate its fee lands and existing trust lands and that land consolidation will increase the economic viability of Tribal land for non-gaming economic development purposes. *See* Tribal Resolution at 2; *see also* Tribe's Response to State's Comments at 4 (identifying existing trust lands it seeks to consolidate). On appeal, the State does not address this expressed need for placing the Property in trust, *see* Opening Br. at 3-4; Reply Br. at 1-2, and thus its argument does not show error by BIA.

Next, the State contends that "the record in this matter does not contain information connecting placement of the subject property into trust with Tribal self-governance, self-determination or restoration of [the] land base (the Tribe already owns this property in fee)." Opening Br. at 3-4; *see also* Statement of Reasons to Regional Director at

3 ("Because the Tribe already owns this parcel in fee, acquisition of the parcel into trust provides the Tribe with no 'additional land.'"). The State's position is contrary to law and the record, including its own statements about the trust acquisition.

The trust acquisition regulations expressly permit the acquisition in trust by the United States of fee lands owned by Indian tribes. 25 C.F.R. § 151.4; *see Aitkin County, Minnesota v. Acting Midwest Regional Director*, 47 IBIA 99, 108 (2008). And, as the State acknowledged in its appeal to the Regional Director, § 151.10(b) by its terms "requires that [BIA] consider 'the Tribe's need for additional land, not whether the Tribe needs the land held in trust[.]'"[4] Statement of Reasons to Regional Director at 3 (quoting *State of South Dakota v. Acting Great Plains Regional Director*, 49 IBIA 84, 104 (2009)). While BIA has discretion to do so, it is not required to consider a tribe's demonstrated need to have land held in trust as opposed to being retained in fee. *Aitkin County*, 47 IBIA at 109; *see also County of Sauk, Wisconsin v. Midwest Regional Director*, 45 IBIA 201, 209 (2007) ("BIA has broad leeway in its interpretation or construction of tribal 'need' for the land.").

In this case, BIA considered the Tribe's need for the land in trust status. As explained above, the Regional Director found that acquisition of the Property in trust would, among other things, "reestablish Tribal sovereign authority" and "ameliorate damage to Tribal self-determination and self-governance resulting from diminishment of the Tribal land base." Decision at 4. Contrary to the State's argument that this is not supported in the record, in response to the State's comments, the Tribe provided evidence (which the State has not disputed) that the community building is located on former allotted land. *See* Tribe's Response to State's Comments at 3 & Exhibit (Ex.) B (AR 23). In connection with other § 151.10 factors, the State itself asserts that "the entirety of

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[4] In *South Dakota v. U.S. Dep't of Interior*, 487 F.3d 548 (8th Cir. 2007), the Court rejected the State's assertion that, because the tribal applicant for trust acquisition already owned the land in fee, it did not need the land for "self-support." 487 F.3d at 552 n.3. The Court explained that

> In *South Dakota* [*v. U.S. Dep't of the Interior*, 423 F.3d 790 (8th Cir. 2005)], we recognized that "most of the land currently taken into trust has been previously purchased by a tribe. . . ." 423 F.3d at 798. We concluded that "it would be an unreasonable interpretation of 25 C.F.R. § 151.10(b) to require the Secretary to detail specifically why trust status is more beneficial than fee status in the particular circumstance." *Id.* at 801. Instead, it is sufficient for the Secretary to "express the Tribe's needs and conclude generally that the IRA purposes were served." *Id.*

Id.

Mellette County was formerly part of the Rosebud Reservation."[5] Opening Br. at 5. We conclude that the State has failed to show that BIA did not reasonably consider the Tribe's need under § 151.10(b).

III. Tax-Related Impacts – § 151.10(e)

Turning to BIA's consideration of the tax-related impacts of the trust acquisition, as explained above, due to the Tribe's use of the Property for a community building, the Property is not currently taxed. Opening Br. at 4; Reply Br. at 2. The State allows that under § 151.10(e) "this may seem to weigh in favor of taking the property into trust because the local taxing districts would not lose funds." Opening Br. at 4. The State argues that the absence of taxation means that "there is no financial incentive for the Tribe to take the property into trust." *Id.* at 5. We rejected that argument as peripheral to the Tribe's need for additional land under § 151.10(b). We now reject the argument under § 151.10(e) because it seeks to impose a consideration that is not found in the regulation.

The regulation requires that BIA consider, "[i]f the land to be acquired is in unrestricted fee status, the impact *on the State and its political subdivisions* resulting from the removal of the land from the tax rolls." 25 C.F.R. § 151.10(e) (emphasis added). By its terms, § 151.10(e) does not require BIA to consider whether the trust acquisition would provide a tax benefit to the Tribe. Rather, "[t]he 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." *State of South Dakota*, 63 IBIA at 188. In this case, the State acknowledges that there would be no loss of tax revenue from the Property. Thus, the Regional Director's finding that the State did not show that removal of this property from the Mellette County tax base will have more than a "minimum effect on the State, County, and City governments," Decision at 11, is supported in the record.[6]

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[5] The State also indirectly acknowledges, by asserting that transfer of the Tribe's fee title to the United States in trust status will create jurisdictional problems, *see* Opening Br. at 5-6, that acquisition of the Property in trust would accomplish the Tribe's stated need to "reestablish Tribal sovereign authority."

[6] The State contends that the Regional Director stated without factual support that Mellette County "may benefit from the land being placed into trust because 'the County may be eligible for more federal and school funding if the property is put in trust.'" Opening Br. at 5 (quoting Decision at 6); Reply Br. at 2 (same). But the statement identifies only the possibility of additional funding and it is ancillary to the Regional Director's finding that there would be no tax loss from the trust acquisition. Thus, the statement requires no support additional to that which is discussed and cited in the Decision. *See* Decision at 6-7.

The State also argues that BIA should consider the "cumulative impact" of taking land into trust on Mellette County's ability to finance programs and services.[7] Opening Br. at 5. However, under the plain language of § 151.10(e), BIA is required to consider the impact of removal of "the land" from the tax rolls. As the Regional Director's decision observes, the Board has long held that the regulation does not require analysis of the cumulative effects of tax loss on all lands within a local government's jurisdictional boundary. Decision at 6 (citing *State of Kansas v. Acting Southern Plains Regional Director*, 53 IBIA 32, 37 (2011)); *see also City of Eagle Butte, South Dakota v. Acting Great Plains Regional Director*, 49 IBIA 75, 81-82 (2009). The State does not convince us that our precedent should be revisited. Moreover, because there is no loss of tax revenue from this acquisition, it could not contribute to any cumulative tax-related impact to the County. Therefore, we conclude that the Regional Director's consideration of § 151.10(e) was satisfactory.

IV. Potential Jurisdictional Problems – § 151.10(f)

The State's challenge to the sufficiency of BIA's consideration of "jurisdictional problems and potential conflicts of land use which may arise," 25 C.F.R. § 151.10(f), is based on two concerns. The State asserts that the Rosebud Sioux Tribal Code contains "no regulatory scheme applicable to, for example, restaurants (one of the latest uses of this property)," and posits that, "[s]hould this property once again be used as a restaurant, the operator may take the position that no State health-code standards apply." Opening Br. at 6. The State also asserts that the trust acquisition "will create a jurisdictional island within the City [of White River] limits" that "could become a 'sanctuary' for a tribal malefactor fleeing state or local law enforcement." *Id.* at 7. The State argues that the Regional Director failed to address the concerns it raised. *Id.* at 6-7. We conclude that the Regional Director adequately considered them under § 151.10(f).

The Regional Director's decision acknowledged, and correctly rejected as "speculation," the notion that the Property might in the future be used as a restaurant and that the operator might be subject to no health regulations.[8] Decision at 7-8. The State does not dispute the Regional Director's finding under § 151.10(c) (purposes for which the land will be used) that the Tribe plans to continue the existing use of the Property for the Tribal community building. The Decision also correctly found that the State did not show

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[7] We will assume, without deciding, that the State may raise arguments on behalf of the County.

[8] While we agree that this concern is speculative in nature, we do not adopt the Regional Director's characterizations of the State's sincerity in raising it. *See* Decision at 8. Such characterizations are themselves based on assumptions and may be counterproductive.

that taking the Property into trust would "alter" the existing jurisdictional pattern or "worsen any existing problems with the pattern." *Id.* at 8. To the contrary, the Regional Director found that the Tribe "is exploring options to develop stronger working arrangements with local and state law enforcement agencies to enhance overall safety in all areas currently served by [Tribal law enforcement]."[9] *Id.*; *see also* Tribe's Response to State's Comments at 5.

The Board has consistently held that BIA is not required to consider an appellant's speculation about what might transpire in the future. *See, e.g.*, *Desert Water Agency v. Acting Pacific Regional Director*, 59 IBIA 119, 127 (2014); *State of New York v. Acting Eastern Regional Director*, 58 IBIA 323, 350 (2014); *State of Kansas v. Acting Southern Plains Regional Director*, 53 IBIA 32, 38 (2011); *City of Eagle Butte, South Dakota v. Acting Great Plains Regional Director*, 49 IBIA 75, 82 (2009). Nor is BIA required to resolve jurisdictional problems or potential conflicts. *State of South Dakota*, 63 IBIA at 182; *Roberts County, South Dakota v. Acting Great Plains Regional Director*, 51 IBIA 35, 52 (2009). We conclude that BIA adequately considered the jurisdictional issues raised by the State.

V. BIA's Ability to Discharge Additional Duties – § 151.10(g)

Finally, the State argues that the Superintendent made a "conclusory" finding under § 151.10(g) that BIA is equipped to discharge the additional responsibilities resulting from the acquisition of the Property in trust status, the Regional Director affirmed this finding based on extra-record information, and thereby the State was denied due process. Opening Br. at 8; Reply Br. at 4. In the Decision, the Regional Director determined that the Superintendent's finding is "supported by the record and by the . . . Superintendent's own firsthand knowledge of the BIA's ability to assume any additional duties and what those duties will require." Decision at 9. The Regional Director also discussed various BIA and/or Tribal services, and found that these services were "known to [the Superintendent] from firsthand knowledge" and "stated in the administrative record." *Id.* at 9-10.

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[9] The State argues that this case is analogous to *State of South Dakota v. Acting Great Plains Regional Director*, 63 IBIA 179 (2016). *See* Opening Br. at 7. We disagree. In that case, the Board remanded the matter to BIA because it was unclear from BIA's response to arguments raised by the appellant State and local governments that BIA had considered the City of Wagner's discrete contention that it had no prior experience dealing with jurisdictional issues that would arise from trust land within that city's limits. 63 IBIA at 189. But in the present case, the Decision is solely in response to an appeal by the State, and the record documents that trust land already exists within the City of White River limits. *See* Tribe's Response to State's Comments at 4 & Ex. F.

The State avers that a "'party is entitled . . . to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it.'" Opening Br. at 8-9 (quoting *South Dakota v. U.S. Dep't of the Interior*, 787 F. Supp. 2d 981, 996 (D.S.D. 2011)). The State argues that it cannot respond to "firsthand knowledge," Opening Br. at 8, that it did not "know[] that the Regional Director would utilize these services in making a decision," Reply Br. at 4, and that the mentioned services are not adequately supported in the record, *id.* at 3-4. The State asserts that it "cannot prepare and articulate arguments against including those services in addressing the application." *Id.* at 4.

The Board is not convinced that there was a due process violation, much less that the State was harmed by any alleged violation. As noted, the State relies on *South Dakota v. U.S. Dep't of the Interior*. There, a regional director, who was considering an appeal from a superintendent's decision to acquire land in trust, obtained and considered additional documents not previously identified, without providing the documents to the plaintiffs while the matter was pending before BIA. 787 F. Supp. 2d at 986-88. The Court found that the regional director's actions resulted in a violation of due process "because [p]laintiffs' lack of access to twenty-three documents in the administrative record precluded [p]laintiffs from addressing or rebutting before the [regional director] a significant portion of the factual material on which the [regional director] relied in deciding to accept the [land] into trust." *Id.* at 996. The Court reasoned that "the nature of some of the documents, the volume of the documents relative to the entire file, the use of the documents in the [regional director's] decision, and [p]laintiffs' identification of five additional arguments they would have made before the [regional director] had [p]laintiffs had the opportunity suggests more than 'harmless error.'" *Id.* at 997-98. The present case is readily distinguishable.

The Board has previously explained that "the determination of whether BIA can handle the additional duties is a managerial judgment that falls within BIA's administrative purview and we do not construe § 151.10(g) to necessarily require BIA to include evidence of such ability in the record." *State of Kansas v. Acting Southern Plains Regional Director*, 56 IBIA 220, 228 (2013) (brackets and internal quotation marks omitted). In *State of Kansas*, the Board found that BIA's findings were supported by information provided by the tribe and by "the [s]uperintendent's own firsthand knowledge of BIA's ability to assume any additional duties and what those duties will require." *Id.* at 229. Here, the Tribe stated in its response to the State's comments that BIA already provides support to trust lands in Mellette County, including administrative functions and fire protection. Tribe's Response to State's Comments at 16. The Tribe further stated that law enforcement and ambulance services are not provided directly by BIA, and that "any increased burden for the BIA should be minimal." *Id.* at 5, 16. In response to the State's assertion that the Superintendent's finding was "conclusory," Statement of Reasons to Regional Director at 6, the Regional Director's decision provided a more specific description of BIA and

Tribal services that were known to the Superintendent, without adding new documents to the record, *see* Decision at 9-10. These services were adequately supported in the record that was before the Superintendent. *See State of Kansas*, 56 IBIA at 228; Tribe's Response to State's Comments at 16 & Exs. H-K.

In our view, this case is more analogous to *State of South Dakota v. Acting Great Plains Regional Director*, 63 IBIA 179 (2016), where we found that any error committed by the regional director in discussing BIA and tribal services as mitigating the impact of tax loss to local governments, without providing additional notice to the appellants, was harmless. Here, as in that case, the State surely was on notice that BIA was considering under § 151.10(g) programs and services provided by BIA and/or the Tribe. *See id.* at 184 n.7. And, in both cases, the State identified no arguments that it would have made to the Regional Director had it known precisely which programs and services would be described in the Regional Director's decision. *See id.* at 184. Thus, we are not convinced that any alleged procedural violation amounted to more than harmless error.

Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director's August 23, 2016, decision.

I concur:

// original signed	//original signed
Thomas A. Blaser	Robert E. Hall
Chief Administrative Judge	Administrative Judge