INTERIOR BOARD OF INDIAN APPEALS

Shawano County, Wisconsin v. Acting Midwest Regional Director,
Bureau of Indian Affairs

67 IBIA 299 (04/06/2021)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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SHAWANO COUNTY, WISCONSIN, Appellant,	)	Order Affirming Decisions
v.	)	Docket Nos. IBIA 17-095 17-100
ACTING MIDWEST REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	April 6, 2021

Shawano County, Wisconsin (Appellant or County), appealed to the Board of Indian Appeals (Board) from an April 21, 2017, decision (April 2017 Decision) and a May 11, 2017, decision (May 2017 Decision) (collectively, Decisions), of the Acting Midwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director's April 2017 Decision affirmed a September 28, 2016, decision of the Acting Superintendent, Great Lakes Agency, to accept into trust for the Stockbridge Munsee Community, Wisconsin (Tribe), five parcels totaling approximately 298.15 acres located in the Town of Bartelme, Shawano County, Wisconsin.[1] The Regional Director's May 2017 Decision affirmed a November 23, 2016, decision of the Great Lakes Agency Superintendent[2] to accept into trust five parcels totaling approximately 208.84 acres located in the Town of Red Springs, within Shawano County.[3] The Board now consolidates and

[1] The County's appeal from the April 2017 Decision was assigned Docket No. IBIA 17-095. The properties addressed in the April 2017 Decision are commonly known as the Wisnefski, Ryle Herman, Tolliver, Heiman, and Boehm parcels. The Regional Director's decision incorporates by reference the legal descriptions for these parcels contained in the Superintendent's September 28, 2016, decision. *See* April 2017 Decision at 1 (Administrative Record (AR) 17-095, Vol. 1, Tab 4).

[2] The individuals exercising the authority of the Midwest Regional Director and the Great Lakes Agency Superintendent changed during the pendency of BIA's deliberation and these appeals. Herein, we will refer to these officials, including "Acting" officials, generally as "Regional Director" and "Superintendent."

[3] The County's appeal from the May 2017 Decision was assigned Docket No. IBIA 17-100. The properties addressed in the May 2017 Decision are commonly known as the Bayer,

(continued…)

resolves both appeals. Consolidation is appropriate because, although the two Decisions involve different groups of lands, the County presents virtually identical issues and arguments in each appeal.

In these appeals, Appellant maintains that the authority on which BIA relies for taking the lands into trust, Section 5 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. § 5108 (formerly § 465), is unconstitutional. The Regional Director declined to consider this argument, and so do we, for lack of jurisdiction to review challenges to the constitutionality of statutes. Appellant also maintains that the Secretary of the Interior (Secretary) lacks authority to take land into trust for the Tribe under Section 5 of the IRA because, according to Appellant, the Tribe was not under Federal jurisdiction when the IRA was enacted. However, the Board considered and decided this issue against the County in a prior appeal, *Shawano County, Wisconsin v. Acting Midwest Regional Director*, 53 IBIA 62 (2011) (*Shawano County II*), and thus the County is precluded from relitigating it. As to Appellant's remaining arguments, including BIA's consideration of the Tribe's applications under the 25 C.F.R. Part 151 land acquisition regulations, on appeal Appellant essentially refiled the Statements of Reasons that it filed with the Regional Director. The County did not allege error in the Regional Director's responses to the County's contentions, let alone support those contentions, and thus failed to carry its burden of proof on appeal. Therefore, to the extent we have jurisdiction and the County's arguments are not precluded by administrative collateral estoppel, we affirm the Decisions.

Statutory and Regulatory Framework

Through Section 5 of the IRA, Congress authorized the Secretary, "in [her] discretion, to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing land for Indians." 25 U.S.C. § 5108. The United States Supreme Court has held that the Secretary's authority to take land into trust for Indian tribes under Section 5 is limited by Section 19 of the IRA, 25 U.S.C. § 5129, to tribes that were "under Federal jurisdiction" when the IRA was enacted in June 1934, *see Carcieri v. Salazar*, 555 U.S. 379, 382 (2009).

BIA's regulations provide that land may be acquired in trust status for a tribe when the property is located within or adjacent to the exterior boundaries of the tribe's reservation or within a tribal consolidation area; when the tribe already owns an interest in the land; or when the Secretary determines that the acquisition of the land is necessary to

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(…continued)
Becker, Tigerton, Martin, and Seroogy parcels, and their legal descriptions are included the Regional Director's decision. *See* May 2017 Decision at 1-3 (AR 17-100, Vol. 1, Tab 3).

facilitate tribal self-determination, economic development, or Indian housing. 25 C.F.R. § 151.3(a)(1)-(3). When BIA receives an application to take lands into trust, it must send notice to the state and local governments having jurisdiction over the subject property, and provide them the opportunity to submit written comments regarding "the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments." *Id.* § 151.10. If any comments are received, the applicant must also be allowed a reasonable opportunity to respond. *Id.*

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

> (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
> (b) The need of the . . . 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 [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 [BIA] to comply with 516 DM [Departmental Manual] 6, appendix 4, National Environmental Policy Act [NEPA, 42 U.S.C. § 4321 *et. seq.*] Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.

Id. § 151.10(a)-(c) and (e)-(h).[4] In order to comply with NEPA, BIA must complete a categorical exclusion determination; an environmental assessment and finding of no significant impact; or an environmental impact statement, as applicable to the proposed action. *See* 43 C.F.R. § 46.205.

Off-reservation acquisitions are evaluated pursuant to 25 C.F.R. § 151.11, which includes the factors set forth in § 151.10, plus two additional requirements. For purposes of determining which section applies, § 151.10 or § 151.11, the definition of "Indian

[4] Criterion § 151.10(d) does not apply to tribal acquisitions.

reservation" is not limited to the tribe's present-day reservation boundaries. "[W]here there has been a final judicial determination that a reservation has been disestablished or diminished, 'Indian reservation' means that area of land constituting the former reservation of the tribe as defined by the Secretary." 25 C.F.R. § 151.2(f).

Factual and Procedural Background

I. Docket No. IBIA 17-095 (April 2017 Decision)

Between February and May of 2013, the Tribe submitted five separate applications and supporting resolutions for BIA to accept the Wisnefski, Ryle Herman, Tolliver, Heiman, and Boehm parcels, owned by the Tribe in fee, into trust status under Section 5 of the IRA. *See* April 2017 Decision at 1; *see generally* Applications (AR 17-095, Vols. 2-6).[5] The Tribe described the lands as within the area of its former reservation, encompassing the Towns of Bartelme and Red Springs, and stated that it wished to acquire the lands for purposes of self-determination, self-government, and economic development. *See* April 2017 Decision at 5-6. The Tribe stated that it planned to continue to use the lands for commercial forestry, cultural, and recreational purposes. *See id.* at 6. The Tribe's application for the Wisnefski parcel also stated that the Tribe would like to create "a couple" or "a few" home sites for Tribal members on that parcel "sometime in the future." Fee-to-Trust Application (Wisnefski), May 7, 2013, at 9 (AR 17-095, Vol. 2, Tab 49).

After issuing notices of the applications to state and local governments, and after receiving comments from the County and responses from the Tribe, the Superintendent issued a combined Notice of Decision approving all the acquisitions on March 20, 2015. *See* Superintendent's Decision, Mar. 20, 2015 (AR 17-095, Vol. 2, Tab 29). The County appealed to the Regional Director and the Superintendent requested a voluntary remand of the matter for further consideration, which the Regional Director granted on January 4, 2016. *See* Letter from Regional Director to Tribe, Jan. 4, 2016 (AR 17-095, Vol. 2, Tab 16).

On remand, the Superintendent issued supplemental notices again soliciting comments from state and local governments. *See, e.g.*, Notice of (Non-Gaming) Land Acquisition Application (Wisnefski), Mar. 29, 2016 (AR 17-095, Vol. 2, Tab 15). The County identified the 2015 real property tax assessments for each parcel, but otherwise

[5] Volumes 2 through 6 of the administrative record for IBIA 17-095 are organized by parcel. Each volume includes the application and other documents utilized by BIA in deciding whether to acquire the specific parcel in trust. Volumes 2 through 6 of the administrative record for IBIA 17-100 are similarly organized.

submitted comments nearly identical to those that it had submitted prior to the Superintendent's initial decision. *Compare* County Comments (Wisnefski), Apr. 15, 2016 (AR 17-095, Vol. 2, Tab 12), *with* County Comments (Wisnefski), Sept. 12, 2014 (AR 17-095, Vol. 2, Tab 37). The County objected to each of the applications on essentially the same grounds, including the constitutionality of Section 5 of the IRA; the applicability of Section 5 to the Tribe (§ 151.10(a)); consideration of the acquisitions under the on-reservation versus off-reservation criteria; the Tribe's need for additional land (§ 151.10(b)); the purpose for which the land will be used (§ 151.10(c)); tax-related impacts (§ 151.10(e)); jurisdictional concerns (§ 151.10(f)); the sufficiency of the environmental review (§ 151.10(h)); and the accuracy of the parcels' acreage and legal descriptions. Also, in each comment letter, but pertinent only to the Wisnefski parcel, the County stated that "if a housing project were developed as represented in the application, doing so would increase services required by the Town at an additional cost to the Town." AR 17-095, Vol. 2, Tab 37 at 3.

The Superintendent invited responses from the Tribe, and the Tribe responded to the County's objections. With respect to the County's concerns about new housing, the Tribe advised that it had no plans to build any residences on the Wisnefski parcel within 5 years. Tribe's Response to County's Comments on Wisnefski Parcel, May 11, 2016, at 15 (AR 17-095, Vol. 2, Tab 7) ("While there are no current active plans within the next five (5) years to build homes, if at some point in the future, funding is secured, the Tribe remains open to the possibility of low density housing on a small portion of the subject lands."); Affidavit of Chad Miller, Apr. 25, 2016 (AR 17-095, Vol. 2, Tab 10A) (discussing a Tribal "moratorium" on groundbreaking for building residential structures on the Wisnefski parcel).

On September 28, 2016, the Superintendent issued a new combined Notice of Decision once again approving the five subject acquisitions under Section 5 of the IRA. Superintendent's Decision on Remand, Sept. 28, 2016 (AR 17-095, Vol. 2, Tab 3). The County appealed the Superintendent's decision to the Regional Director and filed a statement of reasons raising the same objections that the County had raised to the Superintendent. *See* Statement of Reasons (SOR), Nov. 9, 2016 (AR 17-095, Vol. 1, Tab 13); Notice of Appeal to Regional Director, Oct. 25, 2016 (AR 17-095, Vol. 1, Tab 17). On April 21, 2017, the Regional Director affirmed the Superintendent's decision. April 2017 Decision at 10. In approving the acquisitions, BIA considered the criteria for on-reservation tribal trust acquisitions in 25 C.F.R. § 151.10 and responded to the County's objections.

Appellant appealed the April 2017 Decision to the Board. Notice of Appeal to Board (IBIA 17-095), May 24, 2017. Appellant filed an opening brief that was virtually identical to its Statement of Reasons filed with the Regional Director. *Compare* Opening

Brief (Br.) (IBIA 17-095), Oct. 16, 2017, *with* SOR (IBIA 17-095). The Regional Director and the Tribe filed timely answer briefs. Regional Director's Answer Br. (IBIA 17-095), Nov. 20, 2017; Tribe's Answer Br. (IBIA 17-095), Oct. 30, 2017. Appellant chose to stand on the arguments in its opening brief and did not file a reply brief. *See* Letter from Appellant to Board (IBIA 17-095), Nov. 9, 2017.

II. Docket No. IBIA 17-100 (May 2017 Decision)

The factual and procedural background of Docket No. IBIA 17-100 is very similar to that of Docket No. IBIA 17-095. Between September 2012 and June 2013, the Tribe submitted five applications for BIA to accept the Bayer, Becker, Tigerton, Martin, and Seroogy parcels, owned by the Tribe in fee, into trust status under Section 5 of the IRA. *See* May 2017 Decision at 3; *see generally* Applications (AR 17-100, Vols. 2–6). The Tribe described the lands as within the area of its former reservation and stated that it wished to acquire the lands for purposes of self-determination, self-government, and economic development. *See* May 2017 Decision at 7-8. The Tribe stated that it planned to continue to use the lands for commercial forestry, agricultural, cultural, recreational, and residential purposes. *See id.* at 8. Two existing housing sites are located on the Becker and Seroogy parcels. *See id.* The Martin parcel formerly contained an individual's home site and the Tribe's application described it as suitable for another potential home site. *See* Fee-to-Trust Application (Martin), Mar. 26, 2013, at 6, 8-9, 12 (AR 17-100, Vol. 4, Tab 61).

The Superintendent issued notices of the applications to state and local governments. In response, the County raised nearly the same objections it made in connection with the Tribe's other pending applications at issue in Docket No. IBIA 17-095.[6] *See, e.g.,* County Comments (Martin), June 4, 2013 (AR 17-100, Vol. 4, Tab 53). The Town of Red Springs also submitted comments regarding several of the parcels. After considering the comments received and responses from the Tribe, the Superintendent issued a combined Notice of Decision approving the acquisitions on September 30, 2014. *See* Superintendent's Decision, Sept. 30, 2014 (AR 17-100, Vol. 4, Tab 40). Both the County and the Town of Red Springs appealed to the Regional Director. In familiar fashion, on January 4, 2016, the Regional Director granted a request by the Superintendent for a voluntary remand. *See* Letter from Regional Director to Tribe, Jan. 4, 2016 (AR 17-100, Vol. 4, Tab 19).

[6] The County did not allege any error in the acreage or legal descriptions of the parcels in IBIA 17-100.

The Superintendent issued supplemental notices to state and local governments regarding the applications[7] and received additional comments from the County but not from the Town of Red Springs. The County's comments identified the 2015 real property tax assessments for each parcel, but otherwise submitted nearly identical objections as before. *See, e.g.*, County Comments (Martin), Apr. 15, 2016 (AR 17-100, Vol. 4, Tab 13). With respect to the County's expressed concern regarding potential impacts on "the Town" resulting from development of a "housing project," *id.* at 3, the Tribe advised that while the Martin parcel could accommodate a new home site, it had no plans to build on that parcel within 5 years, *see* Tribe's Response to County's Comments (Martin), May 2, 2016, at 11 (AR 17-100, Vol. 4, Tab 9); Affidavit of Chad Miller, Apr. 25, 2016 (AR 17-100, Vol. 4, Tab 11); E-mail from Tribe to BIA, Feb. 22, 2016 (AR 17-100, Vol. 4, Tab 16).

The Superintendent again approved the Tribe's applications under Section 5 of the IRA in a combined Notice of Decision issued on November 23, 2016. *See* Superintendent's Decision on Remand, Nov. 23, 2016 (AR 17-100, Vol. 4, Tab 4). The County appealed to the Regional Director and filed a Statement of Reasons stating the same objections it had made to the Superintendent. *See* SOR, Jan. 6, 2017 (AR 17-100, Vol. 1, Tab 14); Notice of Appeal to Regional Director, Dec. 15, 2016 (AR 17-010, Vol. 2, Tab 1). On May 11, 2017, the Regional Director affirmed the Superintendent's decision. May 2017 Decision at 12 (AR 17-100, Vol. 1, Tab 3). In doing so, the Regional Director considered the § 151.10 criteria for on-reservation tribal trust acquisitions and responded to the County's objections.

Appellant appealed the May 2017 Decision to the Board. Notice of Appeal to Board (IBIA 17-100), June 6, 2017. As was the case in the companion docket, Appellant essentially re-filed its Statement of Reasons as an opening brief. *Compare* Opening Br. (IBIA 17-100), Nov. 1, 2017, *with* SOR (IBIA 17-100). Timely answer briefs were submitted by the Regional Director and the Tribe. Regional Director's Answer Br. (IBIA 17-100), Dec. 4, 2017; Tribe's Answer Br. (IBIA 17-100), Nov. 6, 2017). Appellant chose to not file a reply brief. *See* Letter from Appellant to Board (IBIA 17-100), Nov. 15, 2017.

Standard of Review

The Board's standard of review in trust acquisition cases is well established. Where, as here, BIA's decision whether to take land into trust is discretionary, we do not substitute our judgment for that of BIA. *See City of Lincoln City, Oregon v. Portland Area Director*, 33 IBIA 102, 103-04 (1999). "Rather, the Board reviews such discretionary decisions to

[7] *See, e.g.*, Notice of (Non-Gaming) Land Acquisition Application (Martin), Mar. 29, 2016 (AR 17-100, Vol. 4, Tab 15).

determine whether BIA gave proper consideration to all legal prerequisites to the exercise of its discretionary authority, including any limitations on its discretion established in regulations." *Cass County, Minnesota v. Midwest Regional Director*, 42 IBIA 243, 246 (2006) (internal quotation marks omitted) (quoting *Shawano County, Wisconsin, Board of Supervisors v. Midwest Regional Director*, 40 IBIA 241, 244 (2005) (*Shawano County I*)). While proof that BIA considered the relevant factors set forth in 25 C.F.R. Part 151 must appear in the record, there is no requirement that BIA reach a particular conclusion with respect to each factor. *Arizona State Land Department v. Western Regional Director*, 43 IBIA 158, 160 (2006). Nor must the factors be weighed or balanced in any particular way or exhaustively analyzed. *Aitkin County, Minnesota v. Acting Midwest Regional Director*, 47 IBIA 99, 104 (2008). BIA is not required to resolve objections, but the Board must be able to discern from the decision or the record that BIA gave due consideration to timely submitted comments by interested parties. *State of South Dakota v. Acting Great Plains Regional Director*, 63 IBIA 179, 182 (2016). An appellant bears the burden of proving that BIA did not properly exercise its discretion, and simple disagreement with or bare assertions concerning BIA's decision are insufficient to carry this burden of proof. *Aitkin County*, 47 IBIA at 104.

In contrast to the Board's limited review of BIA discretionary decisions, the Board has full authority to review any legal issues raised in a trust acquisition case, except those challenging the constitutionality of laws or regulations. *Shawano County II*, 53 IBIA at 69. An appellant, however, bears the burden of proving that BIA's decision was in error or not supported by substantial evidence. *Id.*

Discussion

On appeal to the Board, the County presents the same objections, essentially verbatim, that were raised to, and rejected by, the Regional Director and the Superintendent. *Compare, e.g.*, Opening Br. (IBIA 17-095)[8] *with* SOR (IBIA 17-095). Appellant challenges the constitutionality of Section 5 of the IRA; objects to the acquisitions based on the criteria in 25 C.F.R. § 151.10(a), (b), (c), (e), (f), and (h); argues that the acquisitions should be evaluated pursuant to § 151.11; and asserts that the legal descriptions and acreage of the lands at issue in Docket No. IBIA 17-095 "may not be accurate." Opening Br. (IBIA 17-095) at 5-7. We, as did BIA, decline to consider the constitutional challenge for lack of jurisdiction. We also conclude that the County is

[8] As previously mentioned, Appellant's opening briefs in each appeal are substantively identical. Because the briefs' wording, citations to authority, and pagination are the same, we cite to them collectively as "Opening Br." Where the Board intends to refer to a specific brief, we provide the corresponding docket number.

precluded from relitigating in this appeal whether Section 5 of the IRA provides statutory authority for trust acquisitions on behalf of the Tribe. In remaining part, we conclude that by essentially relying on the same Statements of Reasons that it filed with BIA, the County failed to allege error in the Regional Director's responses to its contentions, let alone support those contentions, and thus failed to meet its burden on appeal. In addition, we find that the Decisions are supported in the record. Therefore, we affirm the Regional Director's decisions.

I. Constitutionality of Section 5 of the IRA

Appellant argues that Section 5 of the IRA is unconstitutional because it "contains no meaningful standard to govern the decision concerning whether or not to transfer the land into trust and is an impermissible and unconstitutional delegation of congressional power." Opening Br. at 2. The Regional Director declined to consider this argument for lack of authority to declare any act of Congress unconstitutional. *See* April 2017 Decision at 5; May 2017 Decision at 7. As stated *supra*, the Board also lacks authority to do so. *See Shawano County II*, 53 IBIA at 69. Therefore, we affirm this portion of the Decisions and lack jurisdiction to address the County's argument in remaining part.

II. Challenges to BIA's Consideration of the Criteria in 25 C.F.R. § 151.10

A. Existence of Statutory Authority for the Acquisition – § 151.10(a)

Appellant maintains that BIA lacks statutory authority to take land into trust on behalf of the Tribe under Section 5 of the IRA because the Tribe was not under Federal jurisdiction when the IRA was enacted in 1934, as required by the Supreme Court's holding in *Carcieri*. Opening Br. at 3-5. In essence, this is a challenge to BIA's consideration, pursuant to 25 C.F.R. § 151.10(a), of the existence of statutory authority for the acquisition and any limitations contained in such authority. However, as the Regional Director correctly noted in the Decisions, the issue of whether the Tribe was under Federal jurisdiction in 1934 "was previously resolved by the [Board]" in *Shawano County II*. *See* April 2017 Decision at 4; *see also* May 2017 Decision at 6. And under the doctrine of collateral estoppel, a party, and those in privity with the party, generally may not relitigate an issue of fact or law that was actually litigated and necessarily decided against the party in a valid and final judgment. *Riggs v. Acting Pacific Regional Director*, 65 IBIA 192, 201 n.11 (2018) (citing *Citizen Potawatomi Nation v. Director, Office of Self-Governance*, 42 IBIA 160, 167-68 (2006), *aff'd*, *Citizen Potawatomi Nation v. Salazar*, 624 F. Supp. 2d 103 (D.D.C. 2009)). Collateral estoppel is intended to promote judicial or, as here, administrative economy by achieving repose on matters of dispute between the same parties. The doctrine applies where "the issue sought to be precluded [is] the same as that involved in the prior litigation; that issue [was] actually litigated; it [was] determined by a valid and final

judgment; and the determination [was] essential to the prior judgment." *Citizen Potawatomi Nation*, 42 IBIA at 167. These requirements are met here.

In *Shawano County II*, the Board rejected the County's contention that the Tribe was not under Federal jurisdiction in 1934, held that Section 5 of the IRA remains applicable to the Tribe post-*Carcieri*, and affirmed BIA's decision to take land into trust under that statutory authority. Specifically, the Board concluded that "[by] virtue of holding an election under the IRA for the [Tribe], . . . the Secretary necessarily recognized and determined in 1934 that the Tribe was 'under Federal jurisdiction.'" *Shawano County II*, 53 IBIA at 75-76; *see also Village of Hobart, Wisconsin v. Midwest Regional Director*, 57 IBIA 4, 22, 24 (2013) (reaffirming the Board's decision in *Shawano County II* that "the Secretary's action in calling an IRA election in 1934 . . . is dispositive"); Decision of the Assistant – Secretary Indian Affairs, *Shawano County, Wisconsin v. Midwest Regional Director* (Bartelme/Red Springs 2009 Property), Jan. 19, 2017, at 1 (AR 17-100, Vol. 1, Tab 13) ("[T]he Department has already concluded and I recently re-affirmed that the Tribe was under Federal jurisdiction in 1934, and therefore the Department has authority to acquire land in trust for the Tribe." (footnote omitted)). Pursuant to administrative collateral estoppel, the County is precluded from relitigating this issue. Accordingly, we affirm BIA's determination made under § 151.10(a) that Section 5 of the IRA provides statutory authority for the acquisition.

B. On-Reservation or Off-Reservation Criteria

The County appears to assert that BIA was required, but failed, to consider the Tribe's applications as for off-reservation acquisitions under 25 C.F.R. § 151.11. *See* Opening Br. at 7. However, it is undisputed that the parcels at issue in these appeals are located within the Town of Bartelme or the Town of Red Springs, and both towns are within the boundaries of the Tribe's reservation as it existed in 1856. *See Shawano County II*, 53 IBIA at 63-64 (describing the 1856 reservation). For purposes of 25 C.F.R. Part 151, "Indian reservation" includes "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction" except that, "[w]here there has been a final judicial determination that a reservation has been disestablished or diminished, 'Indian reservation' means that area of land constituting the former reservation of the tribe as defined by the Secretary." 25 C.F.R. § 151.2(f). Thus, land within the Tribe's 1856 reservation boundaries, i.e., located in either town, would fall within the definition of "Indian reservation" regardless of whether the reservation was disestablished.

Based on that reasoning, the Board previously held that BIA properly treated land within the Town of Red Springs as an on-reservation acquisition. *See Shawano County I*, 40 IBIA at 245-46. Subsequently, the Board held that BIA properly considered land within the Town of Bartelme as an on-reservation acquisition based on a judicial determination

that "the Tribe's reservation, as it existed in 1856, first was diminished by Act of Congress in 1871 and then disestablished by the Act of 1906." *Shawano County II*, 53 IBIA at 76-77 (citing *Wisconsin v. Stockbridge-Munsee Community*, 366 F. Supp. 2d 698, 779 (E.D. Wis. 2004), *aff'd*, 554 F.3d 657, 665 (7th Cir. 2009)). Therefore, we conclude that BIA properly treated the proposed acquisitions as on-reservation acquisitions and was not required to apply § 151.11.

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

Appellant argues that the Tribe failed to "adequately demonstrate" a need for housing or any other "purported reason" for the acquisitions and failed to show how the additional land would address the Tribe's stated needs. Opening Br. at 6. Appellant characterizes the Tribe's asserted needs as "not credible." *Id.* at 6-7.

BIA considered the Tribe's expressed needs and addressed the County's contentions. Concerning the Wisnefski, Ryle Herman, Tolliver, Heiman, and Boehm properties, the Regional Director found that "housing is not a stated need,"[9] rather, the Tribe's expressed needs include self-determination and economic development. April 2017 Decision at 5-6. BIA also found that the land would help address "the previous loss of tribal lands" and advance self-determination and economic development through commercial forestry, recreational activities, and cultural activities on the land. *Id.* Concerning the Bayer, Becker, Tigerton, Martin, and Seroogy parcels, the Regional Director identified the Tribe's expressed needs as self-determination, economic development, and housing, noting that there are two existing home sites on the parcels. May 2017 Decision at 7. BIA found that the additional land would "help to restore and consolidate the Tribe's land base," spur economic development through commercial forestry and agriculture, and "increase housing options for Tribal members and their families" given the unsuitability of the Tribe's existing lands for residential development. *Id.*

BIA has broad discretion in its interpretation or construction of tribal need for the land at issue. *Aitkin County*, 47 IBIA at 108. In similar circumstances, where the Tribe provided reasonable explanations in support of its asserted needs (e.g., timber harvesting is a major source of income and acquisition of forested lands will provide additional income; recreational activities will promote the health and well-being of members, etc.), we concluded that BIA was not required to demand greater proof or specificity from the Tribe. *See Shawano County II*, 53 IBIA at 78. Moreover, on appeal, the County relied on its

[9] As we explained as background, the Tribe advised BIA that, although the Wisnefski parcel could accommodate a "couple" or a "few" home sites, none were planned within 5 years. *See supra* at 303.

Statements of Reasons filed with the Regional Director and thereby failed to allege error in the Regional Director's responses to its contentions, let alone support those contentions, and thus failed to carry its burden of proof. *See, e.g., Hitchcock v. Northwest Regional Director*, 44 IBIA 172, 174-75 (2007) (Board may affirm where the appellant merely refiles or relies on the statement of reasons it filed with the Regional Director and fails to allege error in the Regional Director's responses to appellant's contentions). We therefore conclude that BIA properly considered the Tribe's need for additional land under § 151.10(b).

D. The Tribe's Purpose for the Additional Land – § 151.10(c)

Next, the County asserts that "if a housing project were developed as represented in the applications, doing so would increase services required by the Town at an additional cost to the Town." Opening Br. at 6. In the Decisions, the Regional Director described the various existing uses of the properties at issue as including commercial forestry, agriculture, recreational, cultural, and residential uses, and found that the Tribe planned to continue these uses of the properties. *See* April 2017 Decision at 6; May 2017 Decision at 8. The Regional Director addressed the County's specific concern regarding additional housing, finding that the Tribe had no current plans for additional housing on the subject parcels, that the County's concern about a "housing project" did not accurately reflect the applications and was based on speculation, and that the County failed to show that it had standing to raise any concern on behalf of the Town of Bartelme or the Town of Red Springs. April 2017 Decision at 6-7; May 2017 Decision at 8. As the County fails to allege any error in the Regional Director's responses, which are supported in the record, we conclude that the County has not met its burden on appeal and BIA properly considered the Tribe's purposes for the additional land under § 151.10(c). *See Hitchcock*, 44 IBIA at 174-75. We also affirm the Regional Director's determination that the County lacks standing to assert the interests of the Town of Bartelme or the Town of Red Springs. *See, e.g.*, *Mille Lacs County, Minnesota v. Acting Midwest Regional Director*, 62 IBIA 130, 137 n.4 (2016) (county lacked standing to assert interests of state); *Aitkin County*, 47 IBIA at 110 n.8 (county lacked standing to assert interests of state or town).

E. Impact on the County Tax Rolls – § 151.10(e)

In each appeal, the County contends that the proposed fee-to-trust acquisition will result "in a substantial loss in value and revenue" to the County and that the "aggregate effect" of "over a dozen such requests" to acquire land in trust for the Tribe "will be disastrous" to the County and its municipalities. Opening Br. at 6. The only evidence cited by the County is the amount of annual property taxes levied on the subject parcels in 2015. *See id.*

The Regional Director and the Superintendent addressed the County's contentions. In each case, BIA compared the combined amount of property taxes assessed by the County for the parcels in 2015 as compared to the total property tax assessments for the entire County. With respect to the Wisnefski, Ryle Herman, Tolliver, Heiman, and Boehm parcels, BIA found that the County would experience a combined property tax loss of $12,716.42, representing 0.08% of the total County property tax levy. *See* April 2017 Decision at 7; Superintendent's Decision on Remand (IBIA 17-095) at 7-8. Regarding the Bayer, Becker, Tigerton, Martin, and Seroogy parcels, BIA found that the County would experience an $11,607.15, or approximately 0.07%, reduction in its property tax revenue. *See* May 2017 Decision at 9; Superintendent's Decision on Remand (IBIA 17-100) at 10. BIA also considered the extent to which the County's tax loss in each case would be offset by the Tribe's financial contributions for items such as law enforcement, road improvement projects, emergency medical services, fire services, and ambulance services. *See* April 2017 Decision at 7; May 2017 Decision at 9. In each case, BIA found that the County did not provide support for its position that the reduction in tax revenue resulting from the proposed trust acquisitions would be "substantial" to the County. On appeal, the County fails to allege, much less demonstrate, any error in BIA's analysis.

With respect to the County's contention that BIA was required but failed to consider the "aggregate effect" on the County and municipalities of "over a dozen" fee-to-trust requests, we note that BIA did consolidate five trust applications in each town. Moreover, the Board has consistently rejected the argument that BIA must consider the cumulative impact of all fee-to-trust applications *pending* before BIA. *See, e.g.*, *Thurston County, Nebraska v. Great Plains Regional Director*, 56 IBIA 296, 312 n.20 (2013); *Shawano County II*, 53 IBIA at 80; *City of Eagle Butte, South Dakota v. Acting Great Plains Regional Director*, 49 IBIA 75, 81-82 (2009). While the Board has noted that it may be appropriate for BIA to consider cumulative impacts based on the tax loss from other fee-to-trust applications *decided* simultaneously or previously in the same tax year, *see Thurston County*, 56 IBIA at 312 n.20, the County has not shown that the combined tax loss resulting from the April 2017 Decision and May 2017 Decision would have significant impacts on the County. And, as previously discussed, the County has not shown that it has standing to assert the interests of its municipalities. Therefore, we conclude that the County has failed to meet its burden of showing that BIA improperly exercised its discretion in its consideration of tax-related impacts under § 151.10(e).

F. Potential Jurisdictional and Land Use Conflicts – § 151.10(f)

Appellant argues that applications for transfer of fee land into trust status must "demonstrate that there will not be any jurisdictional issues that are created by the transfer," and that the Tribe's applications fail to do so. Opening Br. at 5. The County also argues that the parcels at issue in each case are not contiguous to one another and if placed into

trust would create a "checkerboard" pattern of alternating state and tribal jurisdiction. *Id.* The County asserts that the United States Supreme Court has "mandated" that checkerboard jurisdiction is "strongly disfavored" because it creates "serious jurisdictional issues," and that BIA "should not do that which the [Supreme Court] has denounced."[10] *Id.* at 5-6 (citing *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005)).

The applicable regulation states that BIA "will consider . . . [j]urisdictional problems and potential conflicts of land use which may arise." 25 C.F.R. § 151.10(f). We have consistently held that "section 151.10(f) requires the Regional Director to *consider* jurisdictional problems or potential conflicts; it does not require [BIA] to *resolve* those problems or issues." *Roberts County, South Dakota v. Acting Great Plains Regional Director*, 51 IBIA 35, 52 (2009) (emphases in original), and cases cited therein. Nothing in § 151.10(f) requires the applicant to prove, or BIA to otherwise find, that a fee-to-trust acquisition would not create any additional jurisdictional problems or potential conflicts.

Nor does *City of Sherrill* stand for the proposition that the County asserts. That case involved an effort by the Oneida Indian Nation of New York (Nation) to bar property taxation based on its claim of sovereign authority over fee land within its reservation that it had reacquired after two centuries of non-possession. The Supreme Court stated that, under the circumstances presented in that case, a "checkerboard of alternating state and tribal jurisdiction in New York State—created unilaterally at [the Nation's] behest—would seriously burden the administration of state and local governments." *City of Sherrill*, 544 U.S. at 219-20 (internal quotation marks omitted). The Court then identified Section 5 of the IRA as a "mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well being," and referred to BIA's implementing regulations in 25 C.F.R. § 151.10 as "sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory." *Id.* at 220-21. The Court explained that, before approving an acquisition, the Secretary must consider the factors in § 151.10, including potential jurisdictional problems and land use conflicts. *Id.* at 221 (citing 25 C.F.R. § 151.10(f)). So, *City of Sherrill* did not hold that it would be an abuse of BIA's discretion to acquire land in trust if it would increase "checkerboard" jurisdiction, rather, it acknowledged that the fee-to-trust regulations are sensitive to jurisdictional issues because BIA must consider them before approving an acquisition.

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[10] The County also contends that in each case the proposed acquisition would "deprive the Town of its regulatory jurisdiction," which would impede its ability to provide "mandated services." Opening Br. at 6. As discussed previously, the County lacks standing to assert the interests of the towns.

In the Decisions, the Regional Director recognized that "[t]here is already a pre-existing checkerboard effect on the [Tribe's] reservation" and found that "the County has not shown how the acquisition of this land would exacerbate any existing problems with the pattern." April 2017 Decision at 8 (quoting Superintendent's Decision on Remand (IBIA 17-095)) at 9; May 2017 Decision at 9-10 (quoting Superintendent's Decision on Remand (IBIA 17-100)) at 12. On appeal, the County merely restates its position, offering nothing in response. Therefore, Appellant has failed to allege, much less show, that BIA erred or abused its discretion in its consideration of this factor, and we affirm the Decisions in this regard.

G. Environmental Review – § 151.10(h)

The County argues that "the applications and related environmental documentation" fail to meet "applicable statutory and regulatory requirements." Opening Br. at 7. In each case, the County challenges the sufficiency of a purported "Environmental Assessment (EA)" and "finding of no significant impact" (FONSI) that the County asserts was prepared by BIA for the proposed acquisition. *Id.* However, BIA determined that an EA and FONSI were not required for the proposed acquisitions and thus they were not prepared. *See* April 2017 Decision at 9; May 2017 Decision at 11-12. Rather, in both Decisions, the Regional Director found that the record supported the application of a categorical exclusion (CE), which exempted the Tribe's applications from further NEPA review.[11] April 2017 Decision at 9 n.56; May 2017 Decision at 11 n.52. BIA found that the Tribe was proposing no change in land use and applied a CE for "[a]pprovals or grants of conveyances and other transfers of interests in land where no change in land use is planned." April 2017 Decision at 9 n.56 (quoting 516 DM 10.5(I)); May 2017 Decision at 11 n.52 (same).

On appeal, the County does not acknowledge, much less allege error in, BIA's use of a CE. And we have previously explained that "the bare decision to take land into trust

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[11] When the Decisions were issued, "categorical exclusion" was defined in Council on Environmental Quality (CEQ) regulations for implementing NEPA as:

> [A] category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations . . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.

40 C.F.R. § 1508.4; *see also* 43 C.F.R. § 46.205 (Actions categorically excluded from further NEPA review). In 2020, CEQ promulgated revised NEPA implementing regulations. 85 Fed. Reg. 43304 (July 16, 2020).

where no change in the use of the property is planned ordinarily does not implicate environmental concerns or NEPA and is categorically excluded." *Voices for Rural Living v. Acting Pacific Regional Director*, 49 IBIA 222, 234 n.14 (2009). Therefore, we affirm the Regional Director's consideration of the § 151.10(h) criterion and use of the CE to comply with NEPA.

IV. Land Descriptions in Docket No. IBIA 17-095

The County's opening brief and its Statement of Reasons in Docket No. IBIA 17-095 contain one additional contention: "[T]he legal description and acreage of the properties may not be accurate." Opening Br. (IBIA 17-095) at 7; Statement of Reasons (IBIA 17-095) at 4. The Regional Director's decision responded that the County's contention was vague and that the legal descriptions of the five subject parcels were verified by a cadastral surveyor within the Bureau of Land Management. *See* April 2017 Decision at 8. The County has not met its burden to show error by the Regional Director. *See Watts v. Eastern Oklahoma Regional Director*, 53 IBIA 160, 165 (2011) (vague and unsupported allegations are insufficient to support an appellant's burden of showing 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 April 21, 2017, and May 11, 2017, decisions of the Regional Director.

I concur:

// original signed	//original signed
Kenneth A. Dalton	Thomas A. Blaser
Administrative Judge	Chief Administrative Judge