



## INTERIOR BOARD OF INDIAN APPEALS

Jefferson County, Oregon, Board of Commissioners v. Northwest Regional Director,  
Bureau of Indian Affairs

47 IBIA 187 (09/02/2008)

Related Board case:  
40 IBIA 52



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
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ARLINGTON, VA 22203

JEFFERSON COUNTY, OREGON,	)	Order Vacating and Remanding Decision
BOARD OF COMMISSIONERS,	)	
Appellant,	)	
	)	
v.	)	
	)	Docket No. IBIA 06-45-A
NORTHWEST REGIONAL	)	
DIRECTOR, BUREAU OF	)	
INDIAN AFFAIRS,	)	
Appellee.	)	September 2, 2008

The Jefferson County, Oregon, Board of Commissioners (the County) appeals from a January 9, 2006, decision (Decision) of the Northwest Regional Director, Bureau of Indian Affairs (Regional Director; BIA), approving the acceptance in trust by the United States of land comprising 197 acres in Jefferson County, Oregon, for the Confederated Tribes of the Warm Springs Reservation (Tribe; Reservation). Acknowledging that the precise boundary of the Reservation in relation to the property, known as the Eyerly property, has not been determined, the Regional Director concluded that the Reservation and the Eyerly property “are in extremely close proximity,” Decision at 5, and applied the terms of 25 C.F.R. § 151.10, which establishes criteria that must be considered by the Secretary of the Interior (Secretary), through BIA as his delegate, for acquisitions of land in trust that are contiguous to a reservation. Assuming that only the criteria in 25 C.F.R. § 151.10 apply to this acquisition, we vacate the decision for failure to consider the County’s arguments with respect to one factor. But because the record reveals that a dispute exists over whether the Eyerly property is contiguous to the Reservation and provides no basis upon which to resolve that question, we vacate and remand the decision either for resolution of that dispute or for application of 25 C.F.R. § 151.11, which applies to trust acquisitions of land noncontiguous to a tribe’s reservation.

## Statutory and Regulatory Background

Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465, authorizes the Secretary to acquire land for Indians in his discretion. Rules governing such acquisitions

allow land to be taken into trust 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).<sup>1</sup> In considering requests to take land into trust on behalf of a tribe, the Secretary must evaluate any acquisition, for lands “on-reservation” or “off-reservation,” in accordance with the standards set forth in 25 C.F.R. § 150.10(a)-(c) and (e)-(h).

25 C.F.R. § 151.11(a). If the acquisition is for “off-reservation” lands, however, the regulations impose additional considerations. 25 C.F.R. § 151.11(b) and (c). In either case, “the Secretary will notify the state and local governments having regulatory jurisdiction over the land to be acquired unless the acquisition is mandated by legislation,” and the state and local governments have a 30-day period in which to provide comments. *Id.* at §§ 151.10(a) and 151.11(d).

In evaluating requests to acquire land located “within or contiguous to an Indian reservation,” the Secretary need consider only the criteria set forth in 25 C.F.R. § 151.10(a) through (h). Relevant here, these criteria are:

- (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
- (b) The need of the individual Indian or the tribe for additional land;
- (c) The purposes for which the land will be used;
- (d) . . . [<sup>2</sup>]

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<sup>1</sup> Subsection (b) addresses the policy with respect to taking land into trust on behalf of an individual as opposed to the tribe. 25 C.F.R. § 151.3(b).

<sup>2</sup> Subsection (d) addresses land to be acquired for an individual Indian. There is no dispute that this provision does not apply to the acquisition in trust of the Eyerly property.

(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[; and]

(h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations. . . .

In evaluating tribal requests for acquisitions of land in trust status, “when the land is located outside of and noncontiguous to the tribe’s reservation,” section 151.11(a) requires the Secretary to consider all of the above-cited criteria. In addition, however, the Secretary must also consider the following:

(b) The location of the land relative to state boundaries, and its distance from the boundaries of the tribe’s reservation, shall be considered as follows: as the distance between the tribe’s reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe’s justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) of this section.

(c) Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use.

25 C.F.R. § 151.11. It is clear from this regulatory structure that the comments of state and local governments with respect to acquisitions of noncontiguous lands, as articulated in the comment process described in subsection (d), must be given increasing “weight” and “scrutiny” as the distance between a tribe’s reservation and the subject land increases. The United States Court of Appeals for the First Circuit recently described this rule in *Carcieri v. Kemphorne*, 497 F.3d 15, 24 (1st Cir. 2007), *cert. granted in part*, 128 S.Ct. 1443, 170 L.Ed.2d 274 (Feb. 25, 2008): “Generally, the farther from a reservation the land is, the

greater the scrutiny the Secretary gives to the justification of anticipated benefits from the acquisition.”

### Factual Background

The Warm Springs Reservation occupies approximately 21,088 acres of land in north-central Oregon. The Reservation was established by the terms of the Treaty with the Tribes of Middle Oregon, June 25, 1855, 12 Stat. 963 (1855 Treaty). The southern portion of the Reservation is found inside the boundaries of Jefferson County and is north of the Metolius River and its current and former riverbed. For the locations at issue in this appeal, the Metolius River is now a part of Lake Billy Chinook, a man-made lake created as a part of a hydroelectric project which includes a set of three dams on the Deschutes, Crooked, and Metolius Rivers: Round Butte Dam, Pelton Dam, and the Pelton Reregulating Dam. *See generally* Supplemental Administrative Record (AR) Document D.2, Draft Pelton Round Butte Comprehensive Management Plan, October 1998, at 7.

The dams are part of the Pelton-Round Butte Hydroelectric Project (Project), currently owned jointly by the Tribe and by the Portland General Electric Company (Portland GE). AR Document 10, Letter from Warm Springs Tribal Council to Regional Director, BIA, Mar. 21, 2005, at 2. The Project was originally licensed by the Federal Energy Regulatory Commission (FERC) under the Federal Power Act, sometime in the 1950s, to a non-tribal entity. The Tribe, through Warm Springs Power Enterprises, purchased a one-third interest in the Project effective January 1, 2002. According to a Portland GE website, the Project comprises approximately 19,300 acres, with about 4,700 acres occupied by reservoirs, including Lake Billy Chinook.

Lake Billy Chinook is part of a multi-jurisdictional recreation area comprising, *inter alia*, the Cove Palisades State Park managed by the Oregon Parks and Recreation Department (OPRD). The OPRD website for Lake Billy Chinook indicates that the recreation area that comprises the lake is managed by, *inter alia*, OPRD, Portland GE, the Tribe, the County, and the U.S. Forest Service, U.S. Department of Agriculture. The Portland GE website identifies an agreement for the management of the Project signed by 22 Federal, State, local, Tribal, and private entities.

By Tribal Resolution No. 8059, on July 3, 1990, the Tribe approved and authorized the purchase of fee property owned by Jack V. Eyerly and located on the south bank of Lake Billy Chinook at the confluence of the Metolius River and the lake. AR Document 6, Resolution No. 10002, at 1. This property comprises a total of 197 acres in two parcels. The parcels are described as follows:

Parcel I: Township 11 South, Range 11 East, Willamette Meridian, Jefferson County, Oregon, section 18, lots 1,2, 4 and 5, and the southeast quarter of the southwest quarter.

Parcel II: Township 11 South, Range 11 East, Willamette Meridian, Jefferson County, Oregon, section 19, lot 6 and the northwest quarter of the northeast quarter.

Decision at 1; AR Document 6, Resolution No. 10002, at 1.<sup>3</sup> No map in the record definitively identifies the parcels. Separate maps of portions of sections 18 and 19 appear in the Administrative Record as Document 7; the table of contents indicates that these maps are “Exhibit B” to the decision. *See* Decision, at 6 (list of exhibits including Exhibit B (“Location Map”). The scales of the two maps differ, however, and the precise locations and extent of the lots are difficult to follow; the parcels are not marked, and the quarter sections are unclear. We do not know where or to what extent the tracts in the two sections converge. Moreover, it appears from these maps that the Metolius River flows into Lake Billy Chinook at the western edge of section 19. Thus, the exact extent to which Parcel 2 (section 19) borders the river at its present location, as opposed to the lake, is not possible to determine from the record.

On March 21, 2001, the Tribe issued Resolution No. 10002, noted March 28, 2001, for the purpose, *inter alia*, of amending Resolution No. 8059 to request BIA to accept the Eyerly property in trust status for the use and benefit of the Tribe. AR Document 6, Resolution No. 10002, at 2. The stated purpose was to “protect[] the property from intensive development, to protect the water resources for purposes of fisheries enhancement and water quality, and for purposes of Tribal ownership on Lake Billy Chinook in conjunction with the Round Butte Dam Hydro-Electric Project, and for other purposes.” *Id.* at 1.

On December 12, 2003, BIA issued notice, *inter alia*, to the County of BIA’s impending consideration of the proposal to take the land into trust status. Supplemental AR Document G. The County opposed the action in comments served on BIA on December 22, 2003. *Id.* at Document F. By letter dated February 3, 2004, the Tribe opposed the County’s comments. AR Document 12. On April 23, 2004, the Regional

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<sup>3</sup> The Decision contains an ambiguity regarding Parcel 1. Specifically, the Decision leaves unclear whether the “southeast quarter of the southwest quarter” of section 18 duplicates lots 1, 2, 4 and 5, or contains additional land to that in the cited lots. Based on Tribal Resolution No. 10002, it appears to be additional land.

Director issued a decision approving the acquisition of the Eyerly property in trust for the Tribe. Supplemental AR Document B. The County appealed this decision to this Board. By Motion dated June 14, 2004, BIA requested that the decision be vacated, the matter be remanded for further consideration by BIA, and the appeal dismissed. This Board granted that unopposed motion on July 12, 2004. *Jefferson County v. Acting Northwest Regional Director*, 40 IBIA 52 (2004).

The Regional Director sent a request for comment to the County in January 2005, and the County responded by letter dated January 26, 2005.<sup>4</sup> AR Document 14. (The Regional Director's letter is absent from the record but is referred to in the County's January 26, 2005, response and the Tribe's response to the County's objections. AR Documents 10 and 14.) The County again opposed BIA's decision to take the land in trust for the Tribe. The County argued that the Eyerly property is not contiguous to the reservation and should be evaluated by BIA as a noncontiguous parcel pursuant to 25 C.F.R. § 151.11. The County asserted that, despite the proximity of the Eyerly property to the Reservation across the lake, Tribal services, such as police, would be required to travel by road 35-40 miles around the lake to get to the Eyerly property and, therefore, the County will be required to perform community services for the parcel without receiving property taxes for it. The County opposed the removal of the parcel from state and county planning as resulting in inappropriate "spot planning inconsistent with the overall planning for the area . . . ." Finally, the County claimed that the reduction of \$9,054.36 in property taxes was a significant reduction in the County's budget, because so much of the land within the County's borders is non-taxable Reservation land. *See generally* AR Document 14, Letter from County to BIA, dated Jan. 26, 2005. The County asserted that neither the BIA nor the Tribe had documented any "need" for the land to be in trust status that was not already met by the Tribe's ownership of the Eyerly property in fee. *Id.* at 3-7.

The Tribe objected to the County's letter. AR Document 10, letter from Tribe to Regional Director, Mar. 21, 2005, at 1-2. The Tribe argued that its need for the Eyerly property to be held in trust derived from its needs for self-determination and for the exercise of sovereignty over its lands. The Tribe explained that it has an economic interest in the lands borne of its ownership in the Project, and that it needs to ensure that the lands will be managed consistent with the Project objectives given that the Eyerly property is partially within Project boundaries. *Id.* at 2-3. The Tribe objected to the notion that the impact of a \$9,054 annual reduction in the County's tax collections would be significant, pointing out

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<sup>4</sup> The date of this letter is January 26, 2004, but it is clear from internal pages that the year should be 2005.

that the County collected \$4,846,642 in property taxes annually, and over \$18 million in annual revenue from all sources. *Id.* at 3. The Tribe opposed the County's objection to tribal trust status when, the Tribe claimed, the County routinely exempts other organizations from tax consequences. *Id.* The Tribe asserted that the County's objections stem from the Tribe's ownership of the Project, which is also exempt from tax consequences. The Tribe pointed out that this concern is not at issue in association with acquisition in trust of the Eyerly property and that, in any event, the Project owners have agreed to a plan to make payments to the County in excess of \$4 million. *Id.* at 3-4; *see also* Supplemental AR Document D.1, "Agreement Among Jefferson County, Oregon, Portland General Electric Company and The Confederated Tribes of the Warm Springs Reservation of Oregon," Dec. 6, 2000 (2000 Agreement), at Article 5 ("Payments of Taxes or in Lieu of Taxes").

In his January 9, 2006, decision, the Regional Director rendered findings of fact and conclusions of law in support of his decision to approve the acquisition in trust of the Eyerly property. He found that the Tribe's request for approval of acquisition in trust fulfilled the requirements of 25 C.F.R. § 151.9. He decided to process the request "as an on-reservation [acquisition] under the regulations at 25 C.F.R. § 151.10," finding that the Eyerly property is contiguous to the Reservation. Decision at 2. The Regional Director explained this conclusion as follows:

By the terms of the 1855 Treaty, 12 Stat. 963, the Metolius River generally forms the southern boundary of the Warm Springs Reservation. There has never been a judicial determination of the precise boundary. The Tribe takes the position that the Reservation boundary extends to the southern shore of the river, and that the riverbed is owned by the Tribe either as a riparian owner of non-navigable water, or because it was included within the Reservation through the Treaty (Exhibit E - letter dated March 21, 2005). Whatever the ultimate outcome of this issue, as a practical matter the Eyerly property is, at it[s] most distant, immediately across the river from the Reservation; at its closest, the Eyerly property shares a boundary with the Reservation. Consequently, this property is appropriately considered contiguous to the Warm Springs Reservation.

*Id.* Based on this analysis, the Regional Director proceeded to consider the factors set forth in 25 C.F.R. § 151.10 for acquisitions contiguous to a reservation. He did not address the additional factors of 25 C.F.R. § 151.11(b) and (c) for acquisitions of land that are noncontiguous to a tribe's reservation.

In considering the factors of 25 C.F.R. § 151.10, the Regional Director explained that the Tribe's need for the land to be held in trust, *id.* at § 151.10(b), derived from the fact that the 1855 Treaty had provided rights, including an exclusive right of taking fish in the streams bordering the Reservation. Decision at 3. The Regional Director concluded that the ability to control the land use of the property adjacent to where the Metolius River enters Lake Billy Chinook is important to the Tribe. *Id.* The Regional Director also explained that ownership of the Eyerly property partially within the boundaries of the Project will assist the Tribe in meeting its goals as a Project owner. *Id.*

In consideration of the criterion at 25 C.F.R. § 151.10(c), the Regional Director concluded that the Tribe has no plan to change the use of the land. With respect to evaluating the tax consequences, 25 C.F.R. § 151.10(e), the Regional Director found that the reduction in property taxes was slight (.19% or .005%) considering the Tribe's figures for total annual County property tax and revenue collection. Decision at 4.

With respect to potential jurisdiction and land use conflicts, 25 C.F.R. § 151.10(f), the Regional Director found that "the County should have no need to increase or change the services it provides." Decision at 4. The Regional Director commented that the Tribe and the County disagree as to the nature of a conflict regarding the effect of the Pelton-Round Butte Comprehensive Plan on land-use issues, but disagreed with the County that the acquisition would adversely affect County land use goals. The Regional Director concluded:

The property lies immediately across the River from the reservation, so the adjoining property owners already are in extremely close proximity to Indian lands. The County's concern over future land use clashes is very speculative and does not justify refusing to acquire this land for the benefit of the Tribe. The record does not suggest that the[r]e will be any significant foreseeable land use conflicts if the property is acquired in trust status.

With respect to possible jurisdiction issues, we also conclude there is likely to be little practical impact due to the property's acquisition in trust status. As an existing rural developed land, there should be few jurisdictional matters that arise, and the change in ownership and responsibility will not significantly complicate the already mixed ownership pattern.

Decision at 5. The Regional Director also considered the criteria in 25 C.F.R. § 151.10(g) and (h).<sup>5</sup>

The County appealed the Decision to the Board. In its Brief, the County argues that the Regional Director erred in processing the application as an “on-reservation acquisition” and should have applied the “off-reservation” acquisition criteria in 25 C.F.R. § 151.11. The County argues that the Reservation boundary has never been established by court decision, that the Tribe’s contentions regarding the location of the boundary have been contradictory, that “close enough to be considered contiguous” is an inappropriate legal standard under 25 C.F.R. § 151.10, and that the Regional Director’s conclusion is not based on facts of record. Brief at 2-3. The County’s position is that the Eyerly property and the Reservation may meet in the middle of the river but, even if so, the Regional Director must consider the properties to be noncontiguous because the Eyerly property is miles away from the Reservation “by road” without an alternative form of “mass transportation.” *Id.* at 3. The County contends that BIA must consider the Reservation and the Eyerly property to be “45 miles by road [5-10 on gravel roads]” distant from each other. *Id.* The County argues that, because of the lack of available public transportation between the Eyerly property and the Reservation, the Regional Director erred in failing to consider that the acquisition would create an “‘isolated pocket’ of Reservation land.” *Id.*

Apparently objecting to the Regional Director’s consideration of the criterion at 25 C.F.R. § 151.10(f), the County argues that the Regional Director failed adequately to consider “jurisdictional issues.” The County asserts that “there have been serious clashes with the public where Reservation boundaries are not posted, and unsuspecting citizens wind up on Reservation Land.” Brief at 3. Asserting that such clashes result in confiscations and court issues, the County claims that creation of an “isolated pocket” of trust land, where the result is “exemption of a single parcel from the laws to which all of the surrounding properties are subject,” is “a very real and pragmatic concern for County law enforcement.” *Id.* at 4. The County asserts that “but for tribal trust status,” the Eyerly property would be subject to County zoning, and objects to any suggestion that the County’s zoning would permit “unregulated growth and sprawl,” as claimed by the Tribe, explaining that any sprawl occurred prior to current zoning restrictions. *Id.* at 4-5.

Presumably addressing the criterion at 25 C.F.R. § 151.10(e), the County further objects to any suggestion that a loss of over \$9,000 in revenues to the County is minimal and argues that “the camel’s back is breaking.” Brief at 6. The County argues that the transfer of the Project to the Tribe generated a long-term tax exemption of \$30 million

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<sup>5</sup> As his consideration of these criteria is not in dispute, we address them no further.

under the terms of a 50-year FERC license for the hydroelectric project, and that this amount was not compensated for by the 2000 Agreement among the County, Portland GE, and the Tribe, that the Project owners would pay \$4 million over the course of years. The County insists that BIA must acknowledge the loss of \$30 million in County tax base as part of the acquisition of the Eyerly tract: “While the BIA has no control over the Project acquisition, it can do something about adding non-contiguous land to the Reservation, when to do so has a significant adverse effect on a small rural county government.” Brief at 6-7. The County adds that the Project creates a burden on the County by the establishment of Lakes Billy Chinook and Simtustus, which constitute a “magnet for tourists.” According to the County, the lakes generate heavy public use and “harsh and unsustainable burdens on *County* law enforcement and road maintenance in a small rural county with a population of approximately 20,000, *nearly one fourth of which is on the Reservation and does not pay any property taxes toward County services.*” Brief at 7 (emphases in original).

The County asserts that the Regional Director did not understand the County’s tax structure. Brief at 7-8. The County claims that the Regional Director erred in concluding that the \$4 million agreed to be paid to the County was a “payment in lieu of property taxes.” The County argues that “[d]uring the first 50 years of Project licensure, not one cent was paid to the County by the licensee to cover the burgeoning law enforcement and road maintenance costs generated by the Project,” and that the 2000 Agreement of the Project owners to pay \$4 million was made to cover a portion (10%) of road maintenance costs in the Project Area, and two marine deputy positions. *Id.* at 7. Citing tribal payments to a local school district, the County complains that the Regional Director mistakenly assumed that such payments are made to the County. *Id.* at 8.

Finally, apparently to address 25 C.F.R. § 151.10(b), the County objects to any suggestion that the Tribe has a need to take the Eyerly property into trust status that is not already met by simply owning the property in fee. Brief at 8-9. The County claims that the Tribe can “work on the subject property to protect the water resource without adding it to the Reservation.” *Id.* at 8. The County concludes with the query:

if there is nothing accomplished in the issues raised by the Tribes for adding the Eyerly property to the Reservation, what is the real reason for the request? The Tribes have reversed their position on the location of the south boundary of the Reservation, and . . . the proposed addition of the Eyerly property to the Reservation raises serious questions about the possibility of the Tribes’ intent to control or cut-off use of the Metolius River by non-tribal members.”

Brief at 10.

BIA and the Tribe submitted separate Answers opposing the County's Brief. The Tribe argues that the Eyerly property on the south side of the Metolius River and the Reservation on the north side are contiguous because the 1855 Treaty should be read to have reserved ownership of the entire riverbed in the Tribe. The Treaty language, "thence down the main branch of the De Chutes River" (now, Metolius River), 12 Stat. 963, should be read, according to the Tribe, to include the entire riverbed, given that other provisions of the Treaty spoke of conveying ownership of rivers to the "middle of the channel." Tribes' Answer at 5-6 and n.1 and n.2, citing *Oneida County, N.Y. v. Oneida Indian Nation of New York State*, 470 U.S. 226, 247 (1985) (ambiguous treaty provisions should be construed liberally to benefit tribes). Acknowledging that another interpretation of the Treaty could place the Reservation's southern boundary in the middle of the Metolius River, the Tribe contends that, should the river be nonnavigable, then the owner of the Eyerly property owns riparian rights which extend to the middle of the river and, therefore, the two are contiguous in any event. Tribe's Answer at 6.

But if the 1855 Treaty only extends the Tribe's ownership to the north side or middle of the river, and the river is also navigable, the State of Oregon presumably owns the remaining portion of the riverbed to the south meander line.<sup>6</sup> The Tribe concedes that in that case 25 C.F.R. § 151.11 would apply, but argues that this application should not change the result for two reasons. First, under 25 C.F.R. § 151.11(b), the Secretary must give greater weight and scrutiny to the County's comments only as distance increases. According to the Tribe, should the State of Oregon own a portion of the riverbed between the southern boundary of the Reservation and the northern boundary of the Eyerly property, the distance would be less than 100 feet and "can have little effect on the outcome." Tribe's Answer at 7. Second, 25 C.F.R. § 151.11(c) applies only if the land is acquired for business purposes, an application not relevant here. Thus, the Tribe contends that this Board should affirm the Regional Director even if we cannot determine that the Eyerly property and the Reservation are contiguous. Tribe's Answer at 7. The Tribe contends that this Board can make either a finding that application of 25 C.F.R. § 151.11 has occurred, despite the fact that the Regional Director deliberately did not apply that section, or else a finding that section 151.11 need not be applied because its application would be no different than application of section 151.10.

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<sup>6</sup> Outside the context of Indian treaty rights, it is well established that, as against the Federal government, states acquire title to tideland and land beneath navigable water as an incident of sovereignty upon attaining statehood. *Shively v. Bowlby*, 152 U.S. 1 (1894); *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845).

BIA argues that the Board should affirm the Regional Director notwithstanding whether we could actually determine that the lands are contiguous because, given the small distance across the river, the question fundamentally does not matter. BIA explains that “neither the Regional Director’s decision nor this Answer should be read to express any position as to the boundary of the Reservation.” BIA Answer at 3 n.3. BIA acknowledges that the farthest that the Reservation and the Eyerly property would be apart “is if the river is navigable” and the Tribe did not reserve the entire riverbed by treaty. In that case, “the State [of Oregon] owns the bed of the old riverbed, and the space separating the two parcels is the width of the former river channel.” *Id.* at 3. Nonetheless, BIA contends that the parcels of land “can be contiguous if merely separated by a river” and that no precedent exists which is inconsistent with such a conclusion. *Id.*

The Tribe and BIA agree that the Regional Director properly weighed the criteria in 25 C.F.R. § 151.10 in considering the acquisition of the Eyerly property in trust. Explaining that this Board’s authority over BIA’s discretionary decisions regarding trust acquisitions is limited, they each contend that the Regional Director’s consideration of jurisdiction issues was adequate. BIA Answer at 4; Tribe’s Answer at 7-8. Similarly, both characterize the County’s various assertions, predictions and allegations as unexplained and unsupported. BIA Answer at 4; Tribe’s Answer at 7-8. The Tribe acknowledges that the Eyerly property is not entirely within the Project Area, but comments that the County does not articulate how the Regional Director erred in considering the facts regarding potential conflicts, or abused his discretion. Tribe’s Answer at 8. BIA points out that acquiring the land in trust does not change the jurisdictional authority over the land that the Tribe already owns. BIA Answer at 4-5.

Both the Tribe and BIA object to the County’s efforts to import, into the question of the proper consideration of the acquisition in trust of the Eyerly property, a consideration of the fairness of the tax-exempt status of the Project, a matter not before the Board. BIA Answer at 5-6; Tribes’ Answer at 9. As BIA explains it, the Tribe’s purchase of a share in the Project “is not the action being challenged in this appeal.” BIA Answer at 5. Both contend that the County’s arguments regarding the impact of the Project were appropriately addressed by the Regional Director and that his failure to give greater consideration to that issue could not be an abuse of his discretion under 25 C.F.R. § 151.10(f).

Finally, BIA contends that the County posits an inappropriate legal standard in arguing that the Regional Director was somehow obligated to address the Tribe’s need for the acquisition of the Eyerly property by considering why the Tribe needs the land in trust, as opposed to fee, status. BIA explains that the question under 25 C.F.R. § 151.10(b) is merely whether the Tribe needs the land, and that the Regional Director properly addressed

this question. BIA Answer at 6, citing *State of South Dakota v. Acting Great Plains Regional Director*, 39 IBIA 283, 293 (2004). The Tribe agrees with BIA, but also disputes the County's assertion that the Tribe obtains no additional value from placing land already owned by the Tribe into trust. Tribe's Answer at 10. It argues that an "important attribute of sovereignty is the ability to regulate land use" and that it has a tribal interest in "managing these lands in a way that is consistent with tribal values." *Id.* The Tribe also argues that it has an economic interest in that portion of the Eyerly property that is a part of the Project, and that the Tribe has a need to manage the "lands affected by the Project . . . in a way that is consistent with the goals of minimizing project impacts to the natural environment, mitigating for any negative impacts and enhancing recreation values associated with the Project." *Id.*

The County did not submit a reply brief.

### Discussion

#### I. The Regional Director's Consideration of Criteria in 25 C.F.R. § 151.10.

We begin with the matter well-tread before this Board which is the Regional Director's obligation to consider the criteria at 25 C.F.R. § 151.10. This is a discretionary decision and we therefore agree with the Tribe and BIA that our review of BIA's discretionary consideration of criteria required to be addressed for trust acquisitions at 25 C.F.R. Part 151 is limited. In *Cass County v. Midwest Regional Director*, 42 IBIA 243, 246 (2006), we explained:

The standard of review in trust acquisition cases is well established: Decisions of BIA officials whether to take land into trust are discretionary. The Board does not substitute its judgment in place of BIA's judgment in decisions which are based upon the exercise of BIA's discretion. Rather, the Board reviews such discretionary decisions to 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.

(Citations omitted). In *Aitkin County v. Acting Midwest Regional Director*, 47 IBIA 99, 104 (2008), we reiterated the well-established rule that

the decision must reflect that the Regional Director considered the appropriate factors set forth in 25 C.F.R. Part 151, but there is no

requirement that BIA reach a particular conclusion with respect to each factor. *Skagit County v. Northwest Regional Director*, 43 IBIA 62, 63 (2006). The factors are not weighted or balanced in any particular way, nor must each factor be exhaustively analyzed. *County of Sauk v. Midwest Regional Director*, 45 IBIA 201, 206-07 (2007).

Finally, the burden is on the appellant to show that BIA did not properly exercise its discretion. *State of South Dakota v. Acting Great Plains Regional Director*, 39 IBIA at 291 (2004). The appellant does not meet this burden with “simple disagreement . . . or bare assertions.” *Id.*

In most respects, we agree with BIA and the Tribe that the County has not met its burden with respect to its challenges to the Regional Director’s consideration of the criteria at 25 C.F.R. § 151.10. In one respect, however, we find that the Regional Director failed to consider an argument raised by the County and we therefore remand for his consideration of that issue.

Taking the criteria in the order addressed by the parties, the County argues that the Regional Director failed to consider jurisdictional problems and potential land use conflicts which may arise, under 25 C.F.R. § 151.10(f). The Regional Director considered the fact that the Eyerly property is rural developed land, addressed the fact that its rural status was unlikely to raise much by way of jurisdictional issues, and acknowledged that there was some dispute “about the proper consideration of the effect of the Pelton-Round Butte Comprehensive Plan on land-use issues with respect to this property.” Decision at 5. The Regional Director concluded that, as the Tribe intended to follow that Plan with respect to the Eyerly property, he did not see this as a reason to reject its acquisition in trust. The County has not demonstrated that the Regional Director’s conclusion on this point was improper.

On the other hand, the County complained about jurisdictional problems with respect to the obligation to provide services to the Eyerly property that would arise as a result of the change in ownership. The County argued that, due to the great distances that service providers must travel by road between that property and the Reservation, it would be almost impossible for the Tribe to provide such services. The Regional Director acknowledged the County’s argument that the “Tribe would have difficulty providing services,” but did not respond to that concern, explain why it was not warranted, or otherwise address it. *See* Decision at 5. While we cannot substitute our judgment for BIA’s consideration of a factor, a failure to consider a factor addressed by a county commenter is not sufficient. We agree with the County that the Decision does not reflect any

consideration of the Tribe's ability to provide services such as police or fire protection to the Eyerly property, or whether the County must nonetheless maintain such service obligations as a matter of public health and safety for lands owned in trust for the Tribe for which it receives no tax revenues. Therefore, we find that the County has met its burden of proof as to this jurisdictional concern and remand the matter for consideration by the Regional Director. *Cass County*, 42 IBIA at 246-47.

Conversely, we agree with the Tribe and BIA that the Regional Director's consideration of the impact on tax revenues brought about by the acquisition in trust was adequate under 25 C.F.R. § 151.10(e). The County does not refute the conclusion that the impact of the acquisition on its tax revenues is approximately \$9,054, and that this amount is significantly less than 1% of annual County revenues from property taxes. The County's entire argument is premised on the notion that this \$9,054 reduction in tax collections can only be considered as an add-on to the alleged \$30 million loss it allegedly bore from the Tribe's acquisition of an interest in the Project. Setting aside the fact that we have no evidence in this record on which to issue any decision of fact with respect to such assertions, we agree with the Tribe and BIA that this is not the issue before this Board. The decision challenged was one to approve the Government's acquisition of the Eyerly property in trust for the Tribe; there is no issue before us regarding the Project and we do not find an abuse of discretion in the Regional Director's refusal to expand the scope of his consideration to include analysis of the tax burden of a hydroelectric power project. *See Shawano County, Wisconsin, Board of Supervisors and Town of Red Springs, Wisconsin v. Midwest Regional Director*, 40 IBIA 241, 249 (2005) (BIA need not consider the cumulative effect or impact of trust acquisition on tax rolls).

We agree with BIA that we must resist the County's insistence that the Regional Director erred, when considering the needs of the Tribe under 25 C.F.R. § 151.10(b), in failing to articulate why the fee ownership status of the land was not sufficient for the Tribe's needs such that taking the land into trust was necessary. We rejected such an argument in *State of South Dakota*, 39 IBIA at 293-94, holding,

the Board concludes that subsection 151.10(b) only requires BIA to consider the applicant's need for the additional land that is subject to the trust application. Section 151.10 as a whole permits, but does not require, separate consideration of an applicant's demonstrated need to have the land held in trust as opposed to being retained in fee.

The Eighth Circuit Court of Appeals has affirmed this view. *South Dakota v. United States Department of the Interior*, 423 F.3d 790, 801 (8th Cir. 2005) ("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.”). Moreover, we agree with the Tribe that it was enough for the Regional Director to consider the Tribe’s stated need to exercise sovereign jurisdiction over the subject land.

Accordingly, we find in most instances that the County has not met its burden of proof in attacking the Regional Director’s consideration of the criteria set forth in 25 C.F.R. § 151.10. It has, however, met its burden of proof in demonstrating that the Regional Director failed to consider the argument related to the provision of services to the Eyerly property across poor and distant access roads, and vacate and remand to the Regional Director to consider that issue under 25 C.F.R. § 151.10(f).

## II. Noncontiguous Land Under 25 C.F.R. § 151.11.

The County argues that the Regional Director erred also for failing to consider the standards in 25 C.F.R. § 151.11 because the Eyerly property is not contiguous with the Tribe’s reservation. The proper construction of the terms “contiguous” and “noncontiguous” in the sections 151.10 and 151.11 is a question of law. The standard of review with respect to such questions is not so limited as our review of the Regional Director’s discretionary considerations under 25 C.F.R. § 151.10. In *Shawano County*, 40 IBIA at 245, we explained that the Board has full authority to review any legal challenges raised in a trust acquisition case. In *Maahs v. Acting Portland Area Director*, 22 IBIA 294, 295 (1992), we concluded that we had legal authority to consider the conclusion that certain land was “adjacent” to the relevant tribe’s reservation within the meaning of 25 C.F.R. § 151.3.

Turning to the question of whether the Eyerly property and the Tribe’s Reservation should be considered contiguous within the meaning of the rules, we start from the premise that BIA has not determined the precise boundary of either the Reservation or the Eyerly property, nor is it possible for it to do so on the present record.<sup>7</sup> The parties agree that the question depends on the ownership of the bed of the former Metolius River, now flooded by Lake Billy Chinook. As we understand the parties’ contentions, at least the County and BIA agree that the answer to who owns the riverbed depends on answers to two questions: (a) what is the meaning of the language of the 1855 Treaty?; and (b) was the river navigable at the time of statehood? If the river was navigable at the relevant stretches

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<sup>7</sup> As a practical matter, BIA normally would ascertain the boundaries of property it takes into trust for purposes of discharging its trust responsibilities.

through sections 18 and 19 prior to statehood, then the State of Oregon may own all or part of the riverbed, depending on the proper construction of the Treaty.<sup>8</sup> BIA acknowledges that neither the Regional Director nor BIA takes any position as to the proper ownership of the former riverbed. BIA Answer at 3 n.3. As we understand the County, it believes that the question of contiguity is to be answered based on the distance between the Eyerly property and the Reservation by road.

Accordingly, the question of law is whether the Regional Director erred in applying a regulation for “on-reservation” land acquisitions contiguous to the reservation, when the precise boundaries of the Eyerly property and the Reservation were unclear to the Regional Director. The answer, in turn, depends on the construction of the term “contiguous” for purposes of implementing 25 C.F.R. Part 151. The Regional Director concluded that the properties are close enough to be “contiguous” because the Eyerly property lies “at its most distant, immediately across the river from the Reservation.” Decision at 2. The County suggests that contiguous should mean sharing a boundary and also must depend on direct access between the parcels. The Tribe suggests that, in the worst case that the relevant lands do not share a boundary, this Board should affirm in any event because the application of 25 C.F.R. § 151.11(b) and (c) would not add anything to the Regional Director’s consideration of criteria in 25 C.F.R. § 151.10.

The terms “contiguous” or “noncontiguous” are not defined in 25 C.F.R. Part 151. The preambles to the draft and final rules reveal that the Department did not anticipate any question about the meaning of the terms, such that it attempted to define or discuss them. 60 Fed. Reg. 32874 (June 23, 1995) (final rule); 56 Fed. Reg. 32278 (July 15, 1991) (proposed rule).

The Board has not previously defined the term “contiguous” for purpose of the regulations at 25 C.F.R. Part 151, or for any other rule. The most relevant and recent case on this point is *County of Sauk v. Midwest Regional Director*, 45 IBIA 201 (2007), *aff’d*, *Sauk County v. United States Dep’t of the Interior*, No. 07-cv-543-bbc (W.D. Wisc.

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<sup>8</sup> BIA and the Tribe point out that the State of Oregon did not object to the acquisition of the Eyerly property in trust for the Tribe. We cannot infer from this fact, however, that the State would agree that it owns no interest in the riverbed of the Metolius River as it historically flowed through Township 11 South, Range 11 East, Willamette Meridian, especially given that BIA’s decision, which was served on the State, declined to determine the ownership issues in the Metolius River. Moreover, none of the parties’ briefs, in which they set forth alternative positions, was served on the State.

May 29, 2008), 2008 WL 2225680. In the Board's case, Sauk County argued on appeal that a parcel was not contiguous to the relevant tribe's reservation because it was across a major U.S. Highway, and therefore that the Midwest Regional Director had erred in failing to consider the criteria in 25 C.F.R. § 151.11. Because the County had not raised this argument before the decisionmaker, we determined that this Board need not address it. 45 IBIA at 208-09 n.11. We noted in any event that the road location was founded on a surface use easement, and concluded that the "fact that a highway easement separates the actual land surfaces of the two parcels does not render them any less contiguous for purposes of section 151.10." *Id.* at 213.<sup>9</sup> On the other hand, in *Maahs*, 22 IBIA at 296, we vacated a decision of the Area Director which concluded that land was not "adjacent" to a tribe's reservation within the meaning of 25 C.F.R. § 151.3. We explained that where "the record does not include an exact statement of the lot's location, vis-a-vis the reservation boundary, or a discussion of reasons for the Area Director's conclusion that the lot is not adjacent to the reservation, the Board cannot sustain that conclusion." *Id.* (footnote omitted). While the *Maahs* decision was decided before the adoption of the present regulations, it would suggest that the definition of governing regulatory terms should control and that the record must support a conclusion that land meets the definition.

In the only Federal court case to have mentioned the contiguity issue in relation to 25 C.F.R. § 151.11, the United States Court of Appeals for the First Circuit, in *Carcieri v. Kempthorne*, considered a challenge by the State of Rhode Island to a trust acquisition on a number of statutory and constitutional grounds. In one of a number of issues raised, the State argued that the BIA should have implemented differently the terms of 25 C.F.R. § 151.11 because a road separated the parcel from the relevant reservation. BIA argued that it properly applied that rule. Without addressing the meaning of the term "contiguous" or the ownership of the road's surface or subsurface by easement, fee, lease, or grant, the Court of Appeals affirmed BIA's decision, asserting that the State had "recognized" that any determination regarding the facts would be "insignificant to the application of either section [151.10 or 151.11] in this case, as the sections differ only slightly . . . [where the] Parcel [taken into trust] is adjacent to the Settlement Lands, but separated from them by a town road." 497 F.3d at 45 n.21. Thus, while the First Circuit affirmed BIA's implementation of 25 C.F.R. Part 151, it did not engage in the analysis we must undertake here.<sup>10</sup>

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<sup>9</sup> This issue apparently was not raised on appeal, as the District Court did not address it. *Sauk County v. United States Dep't of the Interior*, 2008 WL 2225680.

<sup>10</sup> It is clear from the Supreme Court's decision to grant *certiorari* with respect to the First Circuit's decision, that this issue will not be a subject for review. *Carcieri v. Kempthorne*, *cert. granted in part*, 128 S.Ct. 1443 (Feb. 25, 2008).

Having been unable to find a clear answer to the definition of “contiguous” in Board or Federal court cases addressing the relevant regulations, we turn to Departmental precedent. It is worth noting that the Department has long-defined “contiguous” lands in the context of the public lands to mean lands that touch and abut each other. More than 60 years ago, in *Mrs. M. H. Wildermuth*, A-27409 (Jan. 30, 1947), the Department explained that the rule that contiguous lands must abut each other had been in place since at least the end of the 19<sup>th</sup> century:

“[T]he word [contiguous] . . . used in relation to public land laws . . . means directly ‘adjoining’ or ‘abutting’. Thus, it has been held repeatedly by the Department that lands which merely corner each other are not contiguous. *Hugh Miller*, 5 L.D. 683 (1887); *Svang v. Tofley*, 6 L.D. 621 (1888); *Henry Petz et al.*, 62 I.D. 33 (1955); cf. *Ehle v. Tenny Trading Co.*, 107 P. 2d 210, 212 (Arizona 1947). Obviously, if lands which merely touch at one point are not contiguous, lands which do not touch at all cannot be said to be contiguous.” See *Malcolm McSwain*, A-26593 (February 4, 1953); *Lawrence D. Keeler*, A-26212 (December 19, 1951); *Ruth Cynthia Kress*, A-25349 (August 6, 1948); *Hales and Symons*, 51 L.D. 123, 125 (1925). Cf. *Coddington v. Northern Pacific Railway Co. et al.*, 45 L.D. 94 (1915).

In adopting this definition as precedent for the public lands, our sister Board, the Interior Board of Land Appeals (IBLA), quoted this citation and other Departmental precedent establishing that parcels that touch at a corner are not “contiguous.” *The Kemmerer Coal Company*, 5 IBLA 319, 322 n.6 (1972), citing *Charles F. McCuskey*, A-27247 (Jan. 20, 1956); *George W. Altfillisch*, Montana 013459 (S.D.) (Aug. 23, 1957). There, IBLA cited cases for the proposition that even parcels 30 feet apart cannot be defined to be contiguous. *The Kemmerer Coal Company*, 5 IBLA at 322 n.6, citing *Leonard and Geneva Pritikin*, Arizona 019518 (Feb. 12, 1960).

Thus, this Department has long construed “contiguous” to mean adjoining or abutting. This definition is similar to that in *Black’s Law Dictionary*, (8<sup>th</sup> Ed. 2004), at 338 definition 1, defining the word to mean “[t]ouching at a point or along a boundary; ADJOINING <Texas and Oklahoma are contiguous>.” We see no reason to adopt a different meaning from such common sense constructions, and therefore hold that lands which are “contiguous” for purposes of 25 C.F.R. § 151.10 are lands that adjoin or abut, and lands which are “noncontiguous” for purposes of 25 C.F.R. § 151.11 are lands which do not adjoin or abut. Because the issue is not presented, we need not resolve here whether

lands that corner each other are “contiguous” for purposes of Part 151. We merely hold that to be so defined, at a minimum, the lands must touch.<sup>11</sup>

We cannot agree with the Regional Director that lands in “close proximity” across a riverbed would fit the definition of contiguous land that is adjoining or abutting. Land in close proximity that does not touch fits the definition of “adjacent” that this Board has adopted for purposes of 25 C.F.R. § 151.3 in *Maahs*, 22 IBIA at 296. There, the Board observed, that the term “adjacent,” which is “not defined in 25 CFR Part 151, is a term of flexible meaning, as reflected in the definition in *Black’s Law Dictionary* (5th ed. 1979): ‘Lying near or close to; sometimes, contiguous; neighboring. *Adjacent* implies that the two objects are not widely separated, though they may not actually touch.’” Even in adopting that definition, however, the Board acknowledged that the two terms are distinct, defining “adjacent” land to be lands that may be, but need not be, “contiguous.” *See Maahs*, 22 IBIA at 296.<sup>12</sup> To adopt the Regional Director’s definition of “contiguous” here – lands “in extremely close proximity” – would be to construe the two different regulatory terms as synonymous. But the interpretation of one regulation should not obscure the meaning of a related regulation; moreover, regulatory construction must give effect to all language so that “[n]o clause, sentence, or word shall be construed as superfluous, void or insignificant . . . .” 2A Norman J. Singer, *Sutherland Statutes and Statutory Construction*, § 46.6, at 237-57 (7th ed. 2008); *see also id.* Volume 1A at § 31.6, at 723-24 (6th ed. 2002) (meaning of duly promulgated regulation should be determined in accordance with the rules of statutory construction). Thus, in construing the Department’s intent with respect to the acquisition regulations, we must ascribe meaning both to the word “adjacent” in section 151.3 and to “contiguous” and “noncontiguous” in sections 151.10 and 151.11.

Moreover, we do not decide to adopt a construction that allows a small separation between a parcel acquired in trust and a tribe’s reservation merely in order to permit BIA to avoid the additional requirements of 25 C.F.R. § 151.11(b) and (c). We thus avoid a path

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<sup>11</sup> Our decision to leave open the question of whether “contiguous” includes “cornering” land in the context of 25 C.F.R. Part 151 derives in part from our recognition that in at least one case, Title 25 explicitly acknowledges that contiguous lands can include lands that touch at a single point, 73 Fed. Reg. 29376 (May 20, 2008) (to be codified at 25 C.F.R. § 292.2), while rules regarding the public lands in some cases expressly define “contiguous” as “not cornering.” *E.g.*, 30 C.F.R. §§ 250.105, 250.1001.

<sup>12</sup> This construction is consistent with other Departmental regulations describing both “adjacent” and “contiguous” lands, imparting distinct meanings to each term. *E.g.*, 25 C.F.R. §§ 20.100, 26.1, and 27.1.

where which rule to apply in a given case is never clear if parcels are “near” to each other – a more likely situation to be faced by BIA than one in which potential trust lands are widely dispersed from the tribe’s reservation. The Department was free to employ the word “adjacent” in 25 C.F.R. §§ 151.10 but it did not do so. More importantly, the distance between noncontiguous parcels was expressly considered in the 1995 rulemaking that amended 25 C.F.R. Part 151, resulting in the adoption of 25 C.F.R. § 151.11(b), which provides a sliding scale of scrutiny according to the distance between an acquired parcel and the reservation. Thus, it appears clear that the Department anticipated that acquisitions of land that do not share a legal boundary with existing trust land but are located only a short distance from it should nonetheless be evaluated as “off-reservation” acquisitions and given increased scrutiny over “on-reservation” acquisitions.

For this same reason, we do not agree with the Tribe that the failure to apply the terms of 25 C.F.R. § 151.11 in a case where an acquired parcel may be noncontiguous with the tribe’s reservation can be corrected by our affirming the application of the criteria in 25 C.F.R. § 151.10 and determining in the first instance that the two additional factors of section 151.11(b) and (c) have been sufficiently addressed. We reject the Tribe’s suggestion that, under 25 C.F.R. § 151.11(b), that the lands are so close that BIA may simply ignore the “greater scrutiny” called for in that subsection. We will not construe section 151.11(b) to be meaningless in some undefined set of cases where parcels are noncontiguous but close. We think section 151.11(b) must be read to add something to the criteria in section 151.10, however small. Likewise, we will not interpret that section in the first instance on the facts of this case, as this determination is for the Regional Director to make.

This is particularly true where the issue of contiguity may bear on the “location of the land relative to state boundaries,” an issue squarely presented in the plain language of section 151.11(b). The County has raised a concern about the Tribe’s intentions to control or cut off use of a portion of Lake Billy Chinook, at its confluence with the Metolius River, by nontribal members, based on the Tribe’s assertion that it has unbroken access to the subsurface land across the lake. *See* Brief at 10; *see also* AR Document 6, Resolution No. 10002 (Tribe’s purposes for acquisition of Eyerly property in trust include “protect[ing] the water resources for purposes of fisheries enhancement and water quality”). If the lands are not contiguous, but the Tribe believes that they are, the acquisition in trust could implicate the sovereign rights of the State of Oregon, a matter to be addressed under the plain terms of section 151.11(b).

Finally, we reject the County’s proposed construction of “contiguous” as dependant on direct transportation access between two tracts. We find no basis in the rule or in precedent justifying such a construction. Were we to adopt it, lands plainly “on-

reservation” even constituting, for example, a land-locked inholding inside the reservation, could be held to be “noncontiguous” or “off-reservation” if no nearby road connected the inholding with surrounding land. Such a construction would render the terms meaningless. Consideration of such factors as the distance by road between the Reservation and the Eyerly property is properly undertaken under 25 C.F.R. § 151.10(f) where raised by a commenter. As the County properly raised this issue, and it was not adequately considered, we remand for the Regional Director to consider that issue under section 151.10(f).

On remand, the Regional Director is free to make his determination based on supported conclusions that the lands are, in fact, “contiguous” – a conclusion BIA has not made to date. Alternatively, the Regional Director may consider this acquisition pursuant to the “off-reservation” criteria of 25 C.F.R. § 151.11(b).

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, we vacate the Decision and remand it for action consistent with the reasons stated herein.

I concur:

\_\_\_\_\_/ / original signed  
Lisa Hemmer  
Administrative Judge\*

\_\_\_\_\_/ / original signed  
Debra G. Luther  
Administrative Judge

\*Interior Board of Land Appeals, sitting by designation.