



INTERIOR BOARD OF INDIAN APPEALS

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

49 IBIA 84 (04/16/2009)

Judicial review of this case:

Vacated and remanded, *State of South Dakota, County of Charles Mix, and City of Wagner v. U.S. Dept. of the Interior*, 787 F. Supp. 2d 981 (D.S.D. 2011)

On remand:

53 IBIA 138

Related Board case:

63 IBIA 179



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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STATE OF SOUTH DAKOTA,)	Order Affirming Decision
COUNTY OF CHARLES MIX, and)	
CITY OF WAGNER,)	
Appellants,)	
)	
v.)	Docket No. IBIA 07-80-A
)	
ACTING GREAT PLAINS REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	April 16, 2009

The State of South Dakota (State), the County of Charles Mix (County), and the City of Wagner (City) (collectively, Appellants), have jointly appealed the January 9, 2007, decision of the Acting Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA), approving the August 25, 2004, decision of Acting Superintendent (Superintendent), Yankton Agency, BIA, to accept 39.90 acres in trust for the Yankton Sioux Tribe (Tribe). This property, commonly referred to as the “Wagner Heights Addition,” is located in the city of Wagner, Charles Mix County, South Dakota.¹ Because

¹ The property encompasses three adjacent parcels and is legally described as:

- (1) The east four hundred ninety-seven and four tenths feet (E-497.4') of Block Six (6), of Wagner Heights Addition to the town, now city, of Wagner, Charles Mix County, South Dakota, according to the recorded plat thereof,
- (2) The east three hundred forty-three and three tenths feet (E-343.3') of Block Seven (7), of Wagner Heights Addition to the town, now city, of Wagner, Charles Mix County, South Dakota, according to the recorded plat thereof, [and]
- (3) Outlot W-5, in Wagner Heights Addition to the town, now city, of Wagner, Charles Mix County, South Dakota, according to the recorded plat thereof,

All in Section 04, Township 95 North, Range 63 West, 5th P.M., containing

(continued...)

Appellants have not shown error in the process followed by BIA, or that the Regional Director's decision was erroneous or reflected an improper exercise of her discretion, and because the administrative record demonstrates that she considered each of the relevant criteria in 25 C.F.R. § 151.10 and reasonably exercised her discretion, we affirm the Regional Director's Decision.

Statutory and Regulatory Background

Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. § 465, authorizes the Secretary of the Interior (Secretary) to acquire land for Indians in his discretion. The regulations governing acquisitions of trust land permit such action “[w]hen the Secretary determines that the acquisition . . . is necessary to facilitate tribal self-determination, economic development, or Indian housing.” 25 C.F.R. § 151.3(a)(3). In evaluating requests to acquire land located within or contiguous to an Indian reservation, BIA must consider the criteria set forth in 25 C.F.R. § 151.10(a)-(h).² 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) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;
- (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;

¹(...continued)

39.90 acres, more or less.

See Regional Director's Decision at 1.

² Requests for off-reservation trust acquisitions are controlled by 25 C.F.R. § 151.11, which requires the Secretary to consider the criteria listed in 25 C.F.R. § 151.10 plus three additional factors.

- (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 Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.
- (h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.

Factual and Procedural Background

Fee-to-Trust Application and Review by the Superintendent

By Resolution No. 2004-021, dated March 1, 2004, the Tribe's Business and Claims Committee (Committee) requested that the Superintendent approve a fee-to-trust acquisition of the 39.90-acre Wagner Heights Addition. Administrative Record (AR), Tab 36. The resolution stated that the Committee was responsible for providing suitable housing for the Tribe and its members, that the property currently contained 11 residential homes and a 20-unit elderly complex, and that the use of the property would remain the same. As directed by 25 C.F.R. § 151.10,³ by letters dated March 19, 2004, the Superintendent notified the State, the County, the City, Lawrence Township, and the Wagner Community School District that the Yankton Agency was considering an application from the Tribe to take the Wagner Heights Addition in trust. The Superintendent granted these parties 30 days in which to provide comments on the

³ In relevant part, 25 C.F.R. § 151.10 provides that

[u]pon receipt of a written request to have lands taken in trust, 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. The notice will inform the state or local government that each will be given 30 days in which to provide written comments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes, and special assessments.

The regulation also requires BIA to provide to the applicant any state or local government comments and afford the applicant an opportunity to respond to those comments or request that the Secretary issue a decision.

proposed acquisition, including the annual amount of property taxes levied on the property, the impact on them resulting from the removal of the property from the tax rolls, any special assessments and the amounts thereof currently assessed against the property, any governmental services they currently provided to the property, and if and how the property was zoned and any potential land use conflicts that might arise. AR, Tab 24.

On March 24, 2004, prior to submitting its comments, the State filed a request under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, seeking copies of the trust acquisition application, any further communications between BIA and the Tribe concerning the application, and any other documentation in the case file regarding the application. AR, Tab 23. BIA responded on April 12, 2004, providing the Yankton Sioux Resolution No. 2004-021 and copies of Abstracts of Title for the three parcels.

Appellants each provided comments opposing the trust acquisition. AR, Tab 25. The State's opposition letter raised several arguments, focusing on the Tribe's failure to supply any of the information necessary for BIA to evaluate the criteria set out in 25 C.F.R. § 151.10. The State further contended that the acquisition was an off-reservation acquisition and that the Tribe therefore was required to satisfy the additional requirements of 25 C.F.R. § 151.11, which the State contended the Tribe had failed to do. The State also requested that, if the Superintendent sought any additional information from the Tribe pursuant to 25 C.F.R. § 151.12, the State be supplied with copies of that information and afforded a reasonable amount of time to reply.

In addition to joining the State's comments, the County and City stated that the current tax levy on the property was \$42,018.16,⁴ \$9,555.52 of which went to the County and \$13,214.76 of which went to the City, with the remainder distributed to the Wagner School System (\$18,225.20), the Wagner/Lake Andes Ambulance Service (\$159.79), the Wagner Fire District (\$751.03), and the Water Conservancy (\$111.86). They contended that the loss of taxes would negatively impact their ability to provide services, including law enforcement, courts, elections, licensing, titling, recording legal documents, veterans' services, emergency disaster services, communications center (E911), public works (roads, bridges, etc.), relief for the poor, County health nurse, mental health center, and conservation. They also averred that the acquisition would defeat the City's comprehensive zoning plan and would create unspecified potential impacts. They further questioned the

⁴ Although both the County and City recited \$42,018.16 as the annual taxes for the property, subsequent comments provided by the State by letter dated March 22, 2005, indicated that the annual taxes were \$39,497. The Regional Director's decision used the more recent information provided by the State.

wisdom of considering the acquisition while the status of the affected land as Indian country was being litigated in Federal court.⁵

On August 25, 2004, the Superintendent issued identical decision letters to the State, the County, the City, Lawrence Township, and the Wagner Community School District, stating BIA's intent to acquire the Wagner Heights Addition in trust for the benefit of the Tribe. AR, Tab 26. She evaluated the factors set out in 25 C.F.R. § 151.10, finding that (1) the land was being acquired pursuant to the IRA, 25 U.S.C. § 465, which authorizes the acquisition of land in trust for the Tribe, and 25 C.F.R. § 151.3, which authorizes the acquisition of land in trust for the purpose of Indian housing; (2) the need for the acquisition was to promote the welfare and housing needs of elderly tribal members and provide affordable housing for individual tribal members, as well as to enhance the health service to the elderly, assist the Tribe in maintaining its cultural, social, and health programs, and promote self-government and self-sufficiency; (3) the land would continue to be used for housing, and trust status would render the Tribe eligible for various Federal programs requiring trust status; (4) the impact of the removal of the tax assessment on the property would be minimal and offset by the Tribe and/or BIA providing the services currently provided by the County and City and by increased Federal payments to the school district; (5) no jurisdictional problems were anticipated because the land was within the exterior boundaries of the Yankton Sioux reservation, because civil and criminal jurisdiction would be identical to that of any other tract of land held in trust, and because no potential land use conflicts would arise since the use of the land would remain the same; and (6) BIA was equipped to handle the additional responsibilities, citing the tract's proximity to BIA law enforcement headquarters and the Indian Health Service (IHS) hospital, the contractual agreement between the Tribe's Housing Authority and the Wagner Fire Department, and the technical service and support available from the Great Plains Regional Office. Accordingly, the Superintendent determined to take the land into trust for the benefit of the Tribe.⁶

⁵ Although the lawsuit was pending when these comments were submitted, the U.S. district court has now issued a ruling although its decision has been appealed. *See Yankton Sioux Tribe v. Podhradsky*, 529 F. Supp. 2d 1040 (D.S.D. 2007), *appeal pending*, No. 08-1441 (8th Cir.). The district court determined, inter alia, that land taken into trust pursuant to the IRA that is located within the original 1858 treaty boundaries of the Yankton Sioux Reservation constitute part of the Tribe's reservation and Indian country within the meaning of 18 U.S.C. § 1151(a). 529 F. Supp.2d at 1042.

⁶ The Level I Environmental Site Assessment (ESA) and categorical exclusion checklist, (continued...)

After receiving the Superintendent's decision, the State submitted a new FOIA request to BIA, dated September 1, 2004, seeking any documents of any kind added to the case file after BIA's response to the State's March 2004 FOIA request, including any supplement to the Tribe's trust application, any further communications or other communications to or from the Tribe or any other person or entity regarding the application, and any other documentation of any kind in the file relating to the application. AR, Tab 32. BIA responded on September 30, 2004, providing, according to the State, a document submitted by the Charles Mix County Abstract Company and the letters of opposition, but no additional information from the Tribe. *Id.*; *see* Appellants' Amended Appeal Brief at 4.⁷

Appeal to the Regional Director

Appellants all timely appealed the Superintendent's decision. AR, Tabs 29-31.⁸ They each filed a separate Statement of Reasons (SOR), which incorporated by reference the SORs submitted by the others. AR, Tabs 33-35. The County's and City's SORs reiterated the issues raised in their earlier comments, focusing on the ramifications of the loss of tax revenue on their ability to provide services and the negative impacts to the City's zoning plan. The County also restated its opposition to processing the application prior to resolution of the Federal lawsuit addressing the Indian country status of the land if it were placed in trust, and the City repeated its belief that placing the land in trust would cause dissension and create unlimited potential conflicts; both further averred, without discussion, that placing the land into trust would be unconstitutional. The State filed a more extensive brief, again challenging the sufficiency of the Tribe's application under 25 C.F.R. §§ 151.9

⁶(...continued)

prepared to comply with the requirements of that National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(C), identified in 25 C.F.R. § 151.10(h), were completed on September 30, 2004, subsequent to the Superintendent's decision. AR, Tab 27.

⁷ BIA's September 30 letter states that "a copy of all the records this office maintains in regard to [this] request [is enclosed]." The "records" are neither identified in nor attached to the copy of the September 30 letter in the AR.

⁸ Lawrence Township also filed a notice of appeal (AR, Tab 28) and joined in the Statement of Reasons filed by the County. *See* AR, Tab 33 at unnumbered 5.

and 151.10.⁹ The State also objected to the Superintendent's failure to respond to its arguments and comments, and disputed the Superintendent's evaluation of the factors in 25 C.F.R. § 151.10.

To facilitate consideration of the appeals, the Regional Office requested and obtained from the Superintendent additional information and documents. These submissions included statements by the Superintendent indicating that once the property had been placed in trust status, the current fire protection agreements between BIA and the cities of Wagner, Ravinia, and Lake Andes would remain in effect; that ambulance services would continue to be provided by the Wagner ambulance service in conjunction with IHS on a cost reimbursable basis; that the Tribe and its Housing Authority had set policies and procedures prohibiting junked vehicles and open burning in all Indian housing areas; and that a Statement of Work between BIA law enforcement and the County Law Enforcement Center covered 911 emergency calls. AR, Tab 13.¹⁰ The Superintendent also related that customers paid a monthly fee for 911 emergency services on both cell phones and on residential lines; that the Tribe's Constitution gave the Committee members the authority to handle business of a routine nature, which included requests to acquire lands in trust; and that the Yankton Sioux Housing Authority currently pays the monthly water bill for the elderly complexes while the residential unit owners pay their own sewer and water bills, a system that would most likely continue after the land is taken in trust. *See* AR, Tabs 4 and 5.

To further support her responses, the Superintendent provided a copy of certified tribal membership for the periods ending December 31, 1996 (9,649 enrolled members), and November 16, 2006 (11,363 enrolled members); an approved copy of the Level I ESA

⁹ In accordance with 25 C.F.R. § 151.9, a Tribe seeking to acquire land in trust must provide a written request for approval of that acquisition; that request, however, "need not be in any special form but shall set out the identify of the parties, a description of the land to be acquired, and other information which would show that the acquisition comes within the terms of this part."

¹⁰ See AR, Tab 37, for copies of the agreements cited in the Superintendent's July 28, 2005, initial response (AR, Tab 13), including the June 29, 1994, fire protection agreement between BIA and the Lake Andes-Ravinia fire district; the April 12, 1993, fire protection agreement between BIA and the Wagner fire district (which was approved on January 3, 1994); the July 29, 2004, BIA requisition form for dispatch services and housing of prisoners provided by the County Law Center; and the Statement of Work for those services, as well as the Tribe's housing policy.

and NEPA categorical exclusion prepared on September 30, 2004, and approved on May 31, 2005, along with a June 13, 2005, memorandum attesting to the continuing validity of those documents; a copy of the Tribe's agreement to be bound by the restrictive covenants attached to the property as long as they remained effective; and copies of separate letters indicating that IHS had always used the Wagner/Lake Andes Ambulance Program on a cost-reimbursement basis, that the BIA Office of Law Enforcement would have criminal jurisdiction over the property once it is placed in trust, and that approximately 33 school-age children resided on the property, which would entitle the Wagner Community School District to additional Federal impact funds of between \$6,000 and \$8,000 per year. AR, Tabs 4 and 5.

By letters dated February 16, 2005, the Regional Office requested supplemental information from the City, County, and State, including the total acreage each jurisdiction taxed and the total amount of taxes assessed and received each year, especially in 2004. AR, Tab 21.¹¹ The State and the County submitted additional information. AR, Tabs 18, 19. The County stated that its total taxable acreage was 641,000 acres, excluding city residential and commercial parcels, and that the total amount of annual taxes assessed in 2004 was \$8,150,870.05, with the County receiving \$2,744,775.00 of that amount. AR, Tab 19. The State initially noted that the 2005 assessed value of Wagner Heights Addition was \$1,746,355, and that the 2004 taxes for the property were \$39,497. *See* note 4, *supra*. The State estimated that the total taxable acreage within the County was approximately 640,000, including 638,732.13 acres of taxable land outside of municipal boundaries and roughly 2,300 acres within municipal boundaries. The State indicated that a total of \$7,764,209.80 had been paid as County taxes in 2004 and allocated as follows: \$2,653,346.98 for County taxes; \$3,904,483.88 for school taxes; \$323,911.80 for the Township; \$637,251.11 for the City; \$30,806.37 for water districts; \$21,306.95 for Tripp, Wagner, and Lake Andes Ambulance districts; and \$193,102.71 for rural fire districts. The State added that there already were 36,700 acres of trust land in the County, encompassing 5.4 percent of the County's total tax base, and that the loss of tax revenue would be permanent and cumulative if the property were taken into trust. The State also averred that the Tribe had significant annual gaming revenue, received Federal money for various services, and therefore did not need for the land to be placed in trust since it was easily able to pay the minimal taxes assessed for the property. AR, Tab 18.

¹¹ Because the record did not contain any evidence that the Tribe had been notified of and offered the opportunity to comment on the City's, County's, and State's objections, the Regional Director forwarded copies of those objections to the Tribe and granted it 30 days to respond to the objections. AR, Tab 20. No response from the Tribe appears in the record.

The Regional Director's Decision

In her January 9, 2007, decision, the Regional Director reviewed the trust acquisition request pursuant to the criteria set out in 25 C.F.R. § 151.10(a)-(c) and (e)-(h) as an on-reservation trust acquisition. AR, Tab 2.¹² As to factor (a), the statutory authority for the acquisition, she determined that the acquisition was authorized by the IRA, 25 U.S.C. § 465, and by 25 C.F.R. Part 151, which, at subsection 151.3(a)(3), permits the acquisition of land for the purpose of Indian housing. Considering factor (b), the Tribe's need for additional land, she noted that the tribal population had increased by 15 percent over the past 10 years without an increase in trust lands; that once the property had been taken into trust, the Tribe would be able to best serve the welfare and housing needs of tribal members, including those living in poverty, the elderly, and veterans; that providing housing for tribal members would prevent those least able to care for themselves from eviction should the Tribe be unable to pay local taxes; that tribal housing would assist the Tribe in maintaining its cultural, social, and health programs by allowing tribal members to live in the same area, which is in close proximity to the IHS hospital; that keeping tribal members together would aid the Tribe's attempt to save its language and cultural values from extinction; and that trust status might qualify the Tribe for additional Federal funding for important social programs not available to tribal members if the land remained in fee status. As to factor (c), the purpose for which the land would be used, she pointed out that the land would continue to be used for housing and that the Yankton Sioux Housing Authority, a sub-entity of the Tribe, would continue to manage and collect rents for the 11 houses and 20-unit elderly complex currently on the property, without BIA involvement.

Addressing factor (e), the impact on the State and its political subdivisions resulting from removal of currently unrestricted fee lands from the tax rolls, the Regional Director stated that, although the County would lose \$39,497 in tax revenue, including the \$13,214.76 distributed to the City, these losses would be mitigated by BIA's absorption of law enforcement costs and the increase in Federal impact aid distributed to the local school district once the land is in trust. As to the other services the County stated it was now providing, she noted that ambulance services and health care would continue to be provided by IHS; that BIA pays \$38,000 per year by contract to the County for dispatch services; that all residents, regardless of the trust status of the land, pay a fee for 911 services as part of their cell or land line phone service; that the Tribe, which leases land to the City for sewer purposes, also pays the City monthly water and sewer fees; that BIA would assume

¹² She did not consider factor (d) of subsection 151.10, which applies only to land acquired in trust for an individual Indian.

document recording services now provided by the County once the land is in trust; and that tribal members use IHS, not the County health nurse, for their health care. She concluded that the County and City's loss of tax income would be offset by BIA's absorption of the costs of providing some of these services, the increased school aid, and the residents' continued payment of fees for some of these services. In any event, she found that the County's annual tax budget was \$2,744,755 and therefore that the loss of \$39,497 amounted to a less than ".01 percent decrease," which was not a significant amount.¹³

Considering factor (f), jurisdictional problems and potential conflicts of land use, the Regional Director acknowledged that there would be jurisdictional issues, just as there were between cities and counties, but stated that, once the land is in trust, it would be treated the same as other trust land within the boundaries of the reservation, and that one piece of property would not further affect the existing jurisdictional problems. As to factor (g), whether BIA is equipped to discharge the additional responsibilities resulting from the acquisition of fee lands into trust status, she determined that BIA was capable of assuming those functions, pointing out that BIA law enforcement was headquartered in the City and would have a 1-3 minute response time to the property; that the IHS hospital was also within a 1-3 minute response time; that fire protection would be provided by the Wagner Fire Department pursuant to a cost reimbursable agreement with BIA; that real estate services were already provided by the Agency and Regional Office; and that the Yankton Housing Authority, not BIA, was and would continue to be responsible for billing and rental functions on the Wagner Heights Addition. Finally, addressing factor (h), NEPA compliance and hazardous substance determinations, the Regional Director concluded that, since there would be no change in land use, an environmental assessment was not required under NEPA, that the categorical exclusion satisfied NEPA requirements, and that the ESA fulfilled the hazardous substance determination obligations.

The Regional Director then evaluated the issues addressed in Appellants' comments and SORs. After noting that several issues were not addressable at the administrative level, including the constitutionality of the IRA and the on-going Federal court litigation over the definition of Indian country, she turned to the State's objections to the trust acquisition. She first responded to the State's FOIA-related arguments, concluding that the Superintendent had fully complied with FOIA and its implementing regulations at 43 C.F.R. § 2, which only require the release of the documents the agency actually has. She posited that BIA most likely was in the process of gathering the information on the fee-to-trust application and had not received all the information at the time the State made

¹³ It appears that the Regional Director's decision contains a typographical error because the loss of \$39,497 is actually less than 1.4 percent of the County's budget.

its FOIA requests, which resulted in the State not receiving all the documentation BIA eventually used to make its decision. Regardless, she pointed out that FOIA had its own administrative appeal process distinct from the trust acquisition appeal process.

The Regional Director found the State's objections to the sufficiency of the Tribe's fee-to-trust application and to the authority of the Committee to submit the application to be without merit. She stated that BIA did not interpret its regulations to require that all documentation be submitted with the application, pointing out that 25 C.F.R. § 151.12 explicitly allows the Secretary to seek more information to enable her to make an informed determination, and noting that no formal application form is required for a trust acquisition.

The Regional Director also rejected the State's claim that the criteria in 25 C.F.R. § 151.10 were not addressed, noting that both the Superintendent's decision and her decision addressed these factors. While she acknowledged that the Superintendent had not discussed the objections to the acquisition, the Regional Director pointed out that her decision had cured that omission. Specifically, as to the need for the land, the Regional Director expanded her own earlier analysis by stating that without having to pay yearly taxes, the Tribe would be better able to serve and supplement its elderly and handicapped members with subsidized housing, thereby ensuring that no home would be taken for tax forfeiture in the future. She dismissed the State's assertion that the Superintendent should have considered the cumulative tax loss from all trust lands over the long term, observing that the regulations do not require BIA to consider those losses. She found no merit in the State's contention that the Superintendent had erred in failing to consider the jurisdictional issues regarding the removal of the property from fee status and the question of whether the property would be considered Indian country, and concluded that the Superintendent had correctly determined that the acquisition was an on-reservation acquisition. She further indicated that, regardless of whether a future court order diminished the Tribe's reservation for fee-to-trust purposes, BIA considered this property to be within the boundaries of the Yankton Sioux reservation and that once the land is in trust status, it would have the same legal status as the remaining 36,741 acres of the Tribe's trust land. She also pointed out that the Tribe, County, and City already had to work together, a requirement that would not change when the land went into trust status, and that, therefore, jurisdictional issues would not increase.

The Regional Director rejected the State's claim that BIA was not equipped to manage the land once in trust, noting that the *Cobell v. Norton* lawsuit (now *Cobell v. Kempthorne*, Civil Action No. 96-1285 (JR) (D.D.C. Sept. 4, 2008) (*Cobell*), *appeal pending*, No. 08-8011 (D.C. Cir.), cited by the State, dealt with BIA's management of trust accounts and trust money while here the Tribe, not BIA, would manage rental and home

purchase funds. She further noted that the January 2002 Office of the Inspector General (OIG) Report entitled *Disquieting State of Disorder: An Assessment of Department of the Interior Law Enforcement* (OIG Report) on the inadequacies of BIA law enforcement, also cited by the State, did not reflect any specific Yankton law enforcement issues but rather was a nation-wide report. As to the purported lack of a contractual agreement with the Wagner Fire Department, evidenced by the failure to produce such an agreement in response to the State's FOIA request, the Regional Director posited that BIA simply may not have had a copy of that document in the record at the time of the request. While recognizing that the Superintendent did not address 25 C.F.R. § 151.10(h) regarding NEPA compliance, the Regional Director noted that she had addressed that factor and had concluded that the acquisition complied with NEPA. In short, based on her review of the record, which included the additional information gathered on appeal, she disagreed with the State's contention that the Superintendent's analysis was unreasonable.

The Regional Director similarly rejected the State's remaining objections. As to the State's assertion that the Tribe was attempting to establish a beachhead of tribal jurisdiction within the City, she observed that the reservation once included all of what is now the County (approximately 679,000 acres), but had subsequently been reduced to approximately 37,000 trust acres or approximately 5 percent of the former reservation, thus belying the State's claim. Although the State had suggested that 14 acres per enrolled tribal member (39,000 acres ÷ 2,633 resident tribal members) was adequate, the Regional Director noted that the State had omitted the land needs for tribal agricultural use, range use, housing, or governmental use. She further discounted the State's assertions that the Tribe's receipt of significant gaming revenues and direct Federal funds and its employment of 500 persons in the casino undermined any worry that the Tribe might not be able to pay the assessed property taxes. The Regional Director added that BIA was not required to consider such elements in a fee-to-trust acquisition. She also disputed the State's insistence that this proposed acquisition was an off-reservation transaction, citing 25 C.F.R. § 151.2(f) as support for BIA's conclusion that the acquisition was an on-reservation acquisition.¹⁴ Finally, the Regional Director denied the State's request that it be given copies of all documents gathered on all fee-to-trust transactions as unauthorized and unduly burdensome, explaining that the State was allowed to obtain the entire administrative

¹⁴ "Indian reservation" is defined in 25 C.F.R. § 151.2(f) as that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma or where 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.

record on appeal for the present fee-to-trust acquisition upon written request to the Regional Office, and to make comments on the acquisition pursuant to 25 C.F.R. § 151.10.

Turning to the County's objections, the Regional Director discounted the County's contention that removing the land from the tax base would shift the tax burden to the remaining landowners or force services to be scaled back, finding that the County had not articulated how much fees would be increased on other landowners or how any reductions would be implemented. She also dismissed the County's reference to the tax losses from other tribal trust acquisition applications as irrelevant to her consideration of the impact of the tax loss from this specific transaction. She examined each of the services the County had indicated it was providing to the property, noting that (1) some services, such as licensing and titling vehicles, require a fee payment which all persons pay regardless of whether the land is in trust; (2) that other services, including road maintenance, law enforcement, recordation of legal documents, and social services for the property, would be taken over by BIA once the land is in trust; (3) that the Wagner School District had confirmed that, once the land is in trust, it anticipated receiving an increase in Impact Aid Funding in the \$6,000 to \$8,000 range due to the 33 school-age children living on the property; (4) that the residents of the property received and would continue to receive their health care from IHS, rather than from County health nurse; (5) that, although the County asserted that it paid for 911 calls with tax money, BIA paid \$38,000 annually to the County for dispatch services and residents, including tribal members, paid 911 fees on their phone usage; (6) that tribal members normally receive welfare services from BIA or from the State, as subsidized with Federal dollars, not from the County; and (7) that veterans' services were normally, and emergency disaster services were frequently, subsidized by the Federal government. She therefore concluded that, although the County would lose tax revenue, that loss would be offset by the elimination of its responsibility for providing some costly services and by the additional dollars received by its schools once the property is in trust. As to the County's zoning concerns, she acknowledged that the land would not be subject to the City's zoning laws, but added that the land came with restrictive covenants limiting structures, buildings, pets, signs, garbage, and rights-of-way which the Tribe had accepted, and noted that the Tribe had also agreed to be bound by State health, sewage disposal, and sanitation regulations.

In response to the City's arguments that the loss of \$13,214.76 in tax revenue would affect services such as road maintenance, electricity, water and sewer services, and police services, the Regional Director explained that once the land was in trust, the City would continue to pay for maintenance of the roads remaining under the City's jurisdiction, but that she anticipated that the roads within the Wagner Heights Addition would be added to the Indian Reservation Roads system and therefore would be maintained by the Tribe or

BIA. The Regional Director also noted that electricity was provided by the Northwestern Public Service, that the Tribe would continue to pay monthly water and sewer fees to the City, and that BIA would assume law enforcement costs. She therefore concluded that, although the City's tax income would decrease, its responsibilities would decline as well.

In further support of the decision to acquire the property in trust, the Regional Director cited BIA's existing Fire Protection Agreements with the Lake Andes-Ravinia Fire District and with the Wagner Fire District to provide fire protection services on all trust lands, and the Statement of Work between BIA law enforcement and the County for detention and dispatch services. In conclusion, the Regional Director explained:

Although the Tribe participates in gaming, it should not be a factor in determining this fee-to-trust acquisition. As a general rule, there is no guarantee that gaming will continue to be a viable economic option for the Tribe in the future. If the land is brought into trust status it will provide for important housing needs for Tribal members, including the handicapped, veterans and the elderly. This will ensure that these needy tribal members will never lose their property rights and homes by tax foreclosure to the County. This trust acquisition will help ensure the survival of the Tribe as a sovereign nation by providing protected lands for their current and future generations. In addition, this trust acquisition will promote tribal self determination by allowing the Tribe to operate their own tribal housing program on the subject lands.

I have determined that the removal of this property from the County tax base will have a minimum [effect] on the County, City, and State governments. I have concluded that there is legal authority to take this subject land into trust and that this trust acquisition meets the requirements of 151.10(a)-(h), as an on-reservation fee-to-trust transaction.

Regional Director's Decision at 9. She therefore upheld the Superintendent's decision to take the property into trust status.

Appellants filed a timely notice of appeal and submitted an opening brief relying on the documents received in response to the State's previous FOIA requests. After receiving a copy of the AR, Appellants submitted an amended brief which included arguments based

on the copy of the record they had received.¹⁵ BIA filed an answer brief addressing the arguments in the amended brief. Upon receiving two additional documents inadvertently omitted from the AR originally sent to them, Appellants filed a supplement to their amended brief. Appellants subsequently submitted a reply brief responding to BIA's answer brief. Briefing is now complete and the case is ready for Board review.

Standard of Review

The standard of review in trust acquisition cases is well established. Decisions of BIA officials on requests to take land into trust are discretionary, and the Board does not substitute its judgment in place of BIA's judgment in discretionary decisions. *Arizona State Land Department v. Western Regional Director*, 43 IBIA 158, 159-60 (2006); *Cass County v. Midwest Regional Director*, 42 IBIA 243, 246 (2006). Instead, the Board reviews discretionary decisions to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of BIA's discretionary authority, including any limitations on its discretion established in regulations. *Arizona State Land Department*, 43 IBIA at 160. Thus, proof that the Regional Director considered the factors set forth in 25 C.F.R. § 151.10 must appear in the record, but there is no requirement that BIA reach a particular conclusion with respect to each factor. *See id.*; *Eades v. Muskogee Area Director*, 17 IBIA 198, 202 (1989). Nor must the factors be weighed or balanced in a particular way or exhaustively analyzed. *Jackson County v. Southern Plains Regional Director*, 47 IBIA 222, 231 (2008); *Aitkin County v. Acting Midwest Regional Director*, 47 IBIA 99, 104 (2008); *County of Sauk v. Midwest Regional Director*, 45 IBIA 201, 206-07 (2007), *aff'd sub nom. Sauk County v. U.S. Department of the Interior*, No. 07 C 0543 S (W.D. Wis. May 29, 2008). Moreover, an appellant bears the burden of proving that BIA did not properly exercise its discretion. *Aitkin County*, 47 IBIA at 104; *Arizona State Land Department*, 43 IBIA at 160; *Cass County*, 42 IBIA at 246; *South Dakota v. Acting Great Plains Regional Director*, 39 IBIA 283, 291 (2004), *aff'd sub nom. South Dakota v. U.S. Dep't. of the Interior*, 401 F. Supp.2d 1000 (D.S.D. 2005), *aff'd*, 487 F.3d 548 (8th Cir. 2007). Simple disagreement with or bare assertions concerning BIA's decision are insufficient to carry this burden of proof. *Aitkin County*, 47 IBIA at 104; *Arizona State Land Department*, 43 IBIA at 160; *Cass County*, 42 IBIA at 246-47.

¹⁵ Although both the Regional Director's decision and the Board's March 9, 2007, Notice of Docketing and Order Setting Briefing Schedule, which included a copy of the table of contents for the administrative record, advised Appellants that they could request a copy of the record, Appellants did not submit a request for the record until April 9, 2007, 21 days before their opening brief was due and 11 days before they filed their brief.

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 which the Board lacks authority to adjudicate. *Jackson County*, 47 IBIA at 227-28; *Arizona State Land Department*, 43 IBIA at 160; *Cass County*, 42 IBIA at 247. An appellant, however, bears the burden of proving that BIA's decision was in error or not supported by substantial evidence. *Arizona State Land Department*, 43 IBIA at 160; *Cass County*, 42 IBIA at 247.

Discussion

On appeal, Appellants challenge both the procedures BIA used to reach its decision and the merits of that decision. Appellants' procedural issue, which they characterize as a matter of first impression, raises the question of

whether a state, county, and city are entitled, under principles of constitutional law and the Code of Federal Regulations (1) to all of the information and documentation which BIA will consider in making its land to trust determination; (2) are entitled to it in a timely fashion prior to the decision making; and (3) are entitled to respond to any evidence submitted in support of the application.

Amended Brief at 1. As to the merits, Appellants aver that BIA made numerous errors of law and fact. We find that Appellants have failed to meet their burden of showing error in either the process used by BIA or the merits of the Regional Director's decision. We therefore affirm the Regional Director's decision.

Procedural Issues

Appellants maintain that they are entitled to all the information and documentation upon which BIA will rely in making a fee-to-trust acquisition. They assert that the process utilized by BIA, which requires a party opposing an application to submit successive FOIA requests to obtain the information in the BIA acquisition record instead of directing BIA to routinely provide all such information as it is updated, deprives them of the opportunity to address critical arguments and information. They aver that they were harmed because, since the record at the times they made their two FOIA requests did not contain the vast majority of the relevant information ultimately relied upon by the Regional Director, they were not timely provided the necessary information and thus were unable to make timely substantive arguments undermining the probity of the information. Specifically, they assert that, had they been provided with the information, they could have argued (1) that the restrictive covenant did not support the acquisition because there was no mechanism for enforcing the

covenant, which, in any event, had only been acknowledged by the Committee and not by the Tribe's General Council; (2) that the 15 percent increase in tribal population did not justify the acquisition because that number did not reflect the number of tribal residents living in the area; (3) that the Fire Protection agreements should not have been relied on because they were not before the Superintendent when she made her decision and because they were outdated and most likely needed to be revised; (4) that the Committee lacked the authority to make the fee-to-trust acquisition request because the Tribe's Constitution and Amended Bylaws only authorize it to conduct routine business and the acquisition request is not routine business; (5) that the ESA and NEPA categorical exclusion were prepared after the Superintendent made her decision and thus could not have supported that decision; (6) that the \$38,000 BIA pays to the County for dispatch services was irrelevant because the payment was for a legitimate expense which BIA was obligated to pay, not a contribution for which it deserved special credit; and (7) that no evidence supported BIA's assertion that it would take over additional road maintenance costs.

Appellants allege that constitutional principles of due process mandate that they be given adequate notice of the materials relied upon by BIA and an opportunity to comment on those materials at a meaningful time and in a meaningful manner, i.e., before BIA has made its decision. They acknowledge that they were allowed to be heard but contend that the opportunity was not meaningful because the record upon which the decision maker ultimately based his decision had not yet been compiled.¹⁶ They also aver that principles of exhaustion of administrative remedies demand that they be given a reasonable time to review and comment on any new documentation or information received by BIA prior to the time it makes a fee-to-trust acquisition determination lest they be precluded from raising those issues on judicial appeal. They claim that the Regional Director's interpretation of 25 C.F.R. § 151.10, which, inter alia, directs BIA to notify a state and local jurisdictions of a fee-to-trust application and to provide those jurisdictions 30 days to provide written comments on the proposed acquisition's potential impacts on regulatory jurisdiction, real property taxes, and special assessments, is contrary to the manifest intent of the regulatory

¹⁶ Although the Regional Director maintains that Appellants "are not entitled to make evidentiary challenges [to] or legal arguments [concerning] the information pending before the decision maker," Answer Brief at 7-8, she is clearly wrong in this regard. Appellants timely appealed the Superintendent's decision to the Regional Director pursuant to 25 C.F.R. Part 2, as they had a right to do. Nothing in 25 C.F.R. § 2.10 or Part 151 limits the arguments that these Appellants may raise before the Regional Director. While they might not prevail on those arguments, Appellants nevertheless are entitled to make whatever arguments they believe are necessary or appropriate.

scheme as expressed in the preamble to the regulations. 45 Fed. Reg. 62034 (Sept. 18, 1980).

Appellants therefore maintain that, in order to apply 25 C.F.R. § 151.10 in a manner passing constitutional muster, the regulation, which neither explicitly mandates nor precludes BIA from providing additional documentation to interested jurisdictions and letting them respond, must be interpreted as requiring that, whenever a state or local jurisdiction has made an objection or entered an appearance and BIA subsequently obtains additional information or documentation not previously supplied to them, BIA must supply that information to them and afford them the chance to make further objections and introduce further evidence.¹⁷ Since BIA did not give Appellants proper notice of the information it relied upon, which made it impossible for them to adequately respond, Appellants insist that the case should be reversed and sent back to the Superintendent with directions to follow proper notice process. We find no merit in these arguments.

Due process requires that a party alleging an impairment of legally-protected rights be given notice and an opportunity to be heard before the alleged impairment becomes *final*. As the U.S. Supreme Court has held,

[t]he essence of due process is the requirement that “a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it.” . . . All that is necessary is that the procedures be tailored, in light of the decision to be made, to “the capabilities and circumstances of those who are to be heard.” [Citations omitted]

¹⁷ Although the Regional Director asserts that she had no obligation to provide any additional information to Appellants, 25 C.F.R. § 2.21(b) directs that, when the deciding official considers documents not in the record on appeal, “the official shall notify all interested parties of the information and they shall be given not less than 10 days to comment on the information before the appeal is decided.” Thus, the Regional Director clearly erred by failing to provide Appellants with copies of the supplemental information she requested and received from the Superintendent. That error, however, was harmless and not reversible error because Appellants received a copy of the complete record on appeal to the Board and have been able to respond to the supplemental documents in their pleadings before the Board. See *Schuyler Van Gorden v. Acting Midwest Regional Director*, 41 IBIA 195, 200 (2005).

Matthews v. Eldridge, 424 U.S. 319, 348-49 (1976); see *Jackson County, Oregon v. Phoenix Area Director*, 31 IBIA 126, 133 (1997); *All Materials of Montana, Inc. v. Billings Area Director*, 21 IBIA 202, 211 (1992).

This Board has held that the Departmental regulations at 25 C.F.R. Part 2, pursuant to which parties have the opportunity to challenge a decision of a subordinate BIA official to the Regional Director by presenting evidence and arguments against that decision, provide an administrative review process that meets the requirements for due process since the Regional Director has full authority to reverse the subordinate's decision or render a new decision. See *Jackson County, Oregon*, 31 IBIA at 133; *All Materials of Montana, Inc.*, 21 IBIA at 211. The Regional Director chose here to decide the case herself, which essentially was a management decision that Appellants do not have standing to challenge. Appellants have cited no authority limiting the Regional Director's choices to just reversing and remanding the Superintendent's decision, nor is the Board aware of any such authority. As a practical matter, the Superintendent is subordinate to the Regional Director, and therefore the Regional Director may opt to either reverse (or vacate) and remand or to decide the matter herself. A party aggrieved by the Regional Director's decision has an additional right to appeal to the Board, an entity independent of BIA, in accordance with the procedures in 43 C.F.R. Part 4, Subpart D. See *Jackson County, Oregon*, 31 IBIA at 133; *All Materials of Montana, Inc.*, 21 IBIA at 211.

In this case, there is no dispute that BIA complied with the notice provisions of 25 C.F.R. § 151.10 by informing Appellants of its receipt of the Tribe's fee-to-trust acquisition application and affording them the opportunity to comment on that application. Nor is there any dispute that Appellants availed themselves of that opportunity and submitted extensive comments opposing the acquisition. Further, Appellants do not deny that they also received the Superintendent's decision and had the opportunity to appeal the Superintendent's decision to the Regional Director and to raise additional issues before her, which they did. Finally, Appellants were served with copies of the Regional Director's decision and allowed to appeal that decision to the Board, at which time they were provided the entire administrative record which enabled them to comprehensively respond to that decision and to raise any and all issues related to the decision and the underlying administrative record, including those they claim they would have raised before the Regional Director if they had received the additional information and documentation earlier. See *State of South Dakota v. Acting Great Plains Regional Director*, 39 IBIA 301, 304 (2004) (the Regional Director included in his decision information previously withheld in response to a FOIA request, thereby providing appellants with an opportunity to challenge that decision and the sufficiency of the information relied upon). Thus, Appellants have had three opportunities to comment upon and express their objections to BIA's decision to

approve the fee-to-trust acquisition. *See State of Kansas v. Acting Southern Plains Regional Director*, 36 IBIA 152, 158 (2001).

BIA's decision will not become final for the Department until the Board has issued its decision on Appellants' appeal of the fee-to-trust acquisition. 43 C.F.R. § 4.314; *Chuchua v. Pacific Regional Director*, 42 IBIA 1, 7 (2005); *Walch Logging Co., Inc. v. Acting Assistant Area Director (Economic Development)*, 12 IBIA 126, 127 (1983); *see also* 25 C.F.R. § 2.6(a). Under these circumstances, we find that the appeals to the Board provided Appellants with ample opportunity to raise any and all challenges to the appealed decision and fully protected their due process rights. *See Chuchua*, 42 IBIA at 7; *Jackson County, Oregon*, 31 IBIA at 133; *All Materials of Montana, Inc.*, 21 IBIA at 211. Accordingly, we conclude that the process BIA utilized here did not violate Appellants' due process rights.¹⁸

Merits Issues

Appellants attack several aspects of the Regional Director's consideration of the criteria set out in 25 C.F.R. § 151.10. Specifically, they argue (1) that BIA's determination regarding need is unreasonable, arbitrary, and capricious; (2) that the Regional Director's decision improperly neglects to address a known purpose for the acquisition of the land in trust; (3) that the Regional Director's failure to consider all of the tax income lost to Appellants due to all the trust land within their jurisdictions is irrational; (4) that BIA's analysis of jurisdictional issues is erroneous both as a matter of law and as an exercise of discretion; (5) that the Regional Director's conclusion that BIA was equipped to manage the lands ignores contrary evidence; and (6) that the Regional Director's determination is the result of bias and prejudice of the issues. We find none of these arguments sufficient to meet Appellants' burden of showing that BIA did not properly exercise its discretion or

¹⁸ Since Appellants have been able to raise arguments based on the documents in the administrative record, their concerns about potential failure to exhaust administrative remedies are unwarranted. Any complaints they may have relating to the FOIA process and lack of any requirement that an agency update its response to a FOIA request as it obtains additional responsive information are not within the Board's jurisdiction, but are subject to the appeal process in 43 C.F.R. Part 2, Subpart D. *See State of South Dakota*, 39 IBIA at 304. And to the extent Appellants may be questioning the validity of 25 C.F.R. § 151.10, the Board has no authority to waive or ignore a duly promulgated regulation or to declare that regulation invalid. *See Estate of Lucille Kingbird Owens*, 46 IBIA 306, 308 (2008); *Estate of Florence Ethel Boury Lane*, 46 IBIA 188, 192 (2008). Nor does the Board have the authority to demand or establish new administrative procedures for the release of fee-to-trust application information. *See State of South Dakota*, 39 IBIA at 304 n.1.

that BIA's decision was in error or not supported by substantial evidence. We will address each of the issues raised *seriatim*.¹⁹

Need - 25 C.F.R. § 151.10(b)

Appellants assert that the Regional Director's determination that the Tribe needs the acquisition in order to provide housing for tribal members to prevent those least able to care for themselves from possible foreclosure of their homes through tax eviction, should the Tribe be unable to pay the local taxes, is unjustified because the Tribe has more than sufficient annual income from gaming to pay those taxes.²⁰ Appellants maintain that if, as the Regional Director concluded, a loss of \$39,497 in taxes is not a significant amount of the County's \$2,477,775 annual tax budget, then that amount clearly is not a significant amount of the Tribe's greater than \$2.7 million budget, especially when the Tribe's \$10-25 million annual revenue from gaming is considered. Appellants contend that BIA has not refuted those statistics, which demonstrate the unlikelihood that the Tribe would default on its County tax payments, and the lack of any need for the Tribe to be free of this insignificant amount of taxes.

The short answer to this argument is that section 151.10(b) requires that BIA consider the Tribe's "need for additional land," not whether the Tribe needs the land *held in trust*, as Appellants essentially argue. See *South Dakota v. U.S. Department of the Interior*, 423 F.3d 790, 801 (8th Cir. 2005); *Jackson County*, 47 IBIA at 232; *Jefferson County, Oregon v. Northwest Regional Director*, 47 IBLA 187, 201-202 (2008). Furthermore, both this Board and the courts have rejected the arguments that a Tribe's gaming revenue,

¹⁹ Appellants raised issues (1), (3), (4), and (5) in their Amended Brief; they added issues (2) and (6) in their Supplement to the Amended Brief. We have not listed the issues in the order in which they appear in Appellants' briefs; rather, for clarity, we have arranged the issues, and our discussion, to coincide with the order in which the applicable criteria are set out in 25 C.F.R. § 151.10.

²⁰ Appellants assert that this determination is "the heart of [the Regional Director's] finding on 'need.'" Amended Appeal Brief at 25. In fact, the Regional Director determined that the Tribe had additional needs for the land, including enhancing tribal self-determination and the Tribe's ability to promote its cultural, social, and language programs, to qualify for additional Federal funding, and, given the land's proximity to the IHS hospital, to serve the health needs of its members. Appellants do not challenge these grounds for the Tribe's need for the land, and we find that these factors amply support the Regional Director's consideration of the Tribe's need for the land.

financial security, or economic success disqualifies it from further acquisition of land in trust. See *County of Sauk*, 45 IBIA at 210; *State of South Dakota*, 39 IBIA at 290-91; *County of Mille Lacs v. Midwest Regional Director*, 37 IBIA 169, 173 (2002); see also *South Dakota v. U.S. Department of the Interior*, 401 F. Supp 2d 1000 (D.S.D. 2005), *aff'd* 487 F.3d 548 (8th Cir. 2007). BIA has broad discretion in its interpretation or construction of tribal need for the land at issue. *Aitkin County*, 47 IBIA at 108. Appellants have not shown that BIA improperly exercised that discretion here.²¹

Purpose - 25 C.F.R. § 151.10(c)

Appellants argue that the Regional Director improperly failed to address a purpose for acquisition of the land which the Tribe planned and about which BIA had specific knowledge. They base this argument on an August 31, 2006, interoffice BIA email indicating that IHS had expressed an interest in building houses for IHS employees on the land once the land was brought into trust, and on the February 8, 2006, Tribal Resolution No. 2006-025, which authorizes a study of the feasibility of acquiring the land for IHS staff quarters. AR, Tabs 6 and 8. Appellants intimate that these employees may not be tribal members, which would conflict with the identified purpose of the acquisition as housing for tribal members. According to Appellants, this omission mandates reversal of the Regional Director's decision so that the parties can address the question before the initial decision-maker. We disagree.

As a general rule, BIA should discuss the facts within its knowledge that have some bearing on the actual or known present or future use of the property. *Village of Ruidoso, New Mexico v. Albuquerque Area Director*, 32 IBIA 130, 139 (1998). In this case, however, we find no error in the Regional Director's omission of any discussion of the possible future use of the land for IHS housing. Both the 2004 fee-to-trust application and the Regional Director's decision identify the purpose of the acquisition as providing housing for tribal members.²² That purpose has not changed; rather the possible use of the land for housing for IHS employees, which first surfaced in 2006, 2 years after the application was filed,

²¹ Appellants appear to claim that BIA must analyze whether payment of taxes is a hardship to the Tribe. The tax issue, however, actually relates to whether the trust acquisition will impose a hardship on the local tax base by rendering the property tax-free, an inquiry more appropriately examined under 25 C.F.R. § 151.10(e). See discussion, *infra*.

²² We note that both the Superintendent and the Regional Director mentioned the enhancement of health services as one of the needs for the acquisition and cited the proposed acquisition's proximity to the IHS facility (three blocks).

would be an additional use of the land which is not inconsistent with the use of the land for tribal housing. Appellants do not identify any injury or harm to their interests if the Wagner Heights Addition were used for IHS employee housing. Although Appellants speculate that the IHS employees might not be tribal members, they provide no evidence supporting that speculation. *See State of Iowa v. Great Plains Regional Director*, 38 IBIA 42, 53 (2002). Nor have they shown that housing for IHS employees would not be a valid purpose for a fee-to-trust acquisition under the IRA and regulations.

More importantly, no final decision has been made concerning the possible use of the land for IHS employee housing. Tribal Resolution No. 2006-025 identifies two potential sites for the IHS housing, Block 6 of the Wagner Heights Addition and another tract; thus, the use of the proposed trust acquisition for IHS employees is not certain. And use of the Wagner Heights Addition for the IHS employee housing may be a less attractive option because of possible extended litigation over the placement of the Wagner Heights Addition into trust status. *See AR*, Tab 6. Under these circumstances, we reject Appellants' challenge to the Regional Director's consideration of the purpose for the acquisition.

Tax loss - 25 C.F.R. § 151.10(e)

Appellants next contend that the Regional Director erred in refusing to consider all tax revenue lost to the County and City due to the existence of all trust land within those jurisdictions. Appellants maintain that it is not just the \$39,497 in annual tax revenue that would be lost if the Wagner Heights Addition is taken in trust, but the \$1,746,355 lost annually because of the 36,700 acres of land already in trust within the County. They insist that the Regional Director is obligated to consider the cumulative tax loss from the existing trust land, to which the \$39,497 will be added. We disagree.

Under 25 C.F.R. § 151.10(e), BIA is directed to consider the impact on the affected jurisdictions of "removal of *the* land from the tax rolls" (emphasis added). Relying on the plain language of this subsection, the Board has consistently rejected the argument that analysis of the cumulative effects of all tax revenue losses on all lands within Appellants' jurisdictional boundaries is required. *Shawano County, Wisconsin, Board of Supervisors v. Midwest Regional Director*, 40 IBIA 241, 249 (2005); *State of South Dakota*, 39 IBIA at 294-95; *Ziebach County*, 38 IBIA at 230; *County of Mille Lacs*, 37 IBIA at 172. Appellants have not convinced us that our consistent interpretation is wrong or that our precedent should be revisited. Appellants thus have failed to meet their burden of showing that the

Regional Director improperly exercised her discretion in only considering the tax loss from this particular fee-to-trust acquisition request.²³

Jurisdictional issues - 25 C.F.R. § 151.10(f)

Appellants preliminarily assert that the Regional Director erred as a matter of law when she equated the jurisdictional issues between Appellants and the Tribe with those between cities and counties because, while cities and counties are creations of the State, the Tribe has semi-sovereign status independent of the State and thus has relationships with those entities that are radically different from their relationships with each other. The Regional Director, however, did not equate the situations; rather she simply stated that these different jurisdictions currently work out their respective jurisdictional issues and that the trust acquisition of the Wagner Heights Addition would not impact these inter-governmental relationships. Such statements fall far short of constituting reversible error.

Appellants also object to the Regional Director's statement that acquiring this one parcel would not affect existing jurisdictional issues. Appellants, however, have not shown that taking the parcel into trust would, in fact, alter the current relationship between the Tribe and the City and County, or exacerbate any already extant jurisdictional matters. *See Ziebach County*, 38 IBIA at 231. Instead, they have improperly attempted to shift the burden to BIA to affirmatively show that no jurisdictional problems will occur. *See Cass County*, 42 IBIA at 249. But the burden falls on Appellants to show that the Regional Director abused her discretion by failing to consider jurisdictional issues. *Id.* While Appellants disagree with the Regional Director's statements, they have not shown that she failed to consider these jurisdictional matters or improperly exercised her discretion. *See id.*; *State of South Dakota*, 39 IBIA at 300.

Appellants' primary jurisdictional argument focuses on their objection to the Regional Director's disregard of the pending Federal court litigation in *Yankton Sioux Tribe* as relevant to the question of the legal status of the land once it is in trust status and her concomitant conclusion that the land would have the same legal status as the remaining 36,741 acres of trust land. Appellants assert that, in reaching the conclusion that all trust land is equal, the Regional Director erroneously relied on the definition of "Indian reservation" found in 25 C.F.R. § 151.2(f) rather than on the definition of "Indian

²³ Even if we were to consider a cumulative effect, we note that the record reflects that the reservation predated statehood and the establishment of the County and City. Appellants have not provided any evidence of the acreage withdrawn from taxation subsequent to the establishment of local taxation laws.

country” set out in 18 U.S.C. § 1151.²⁴ Appellants aver that the status of the trust land in the area of the Yankton reservation, and the pending litigation addressing that status, may well have an effect on the question of the status of these lands if they are taken in trust. We disagree.

The Regional Director admittedly cited the definition of “Indian reservation” in 25 C.F.R. § 151.2(f), but did so to confirm that the Superintendent had properly applied the on-reservation acquisition factors of section 151.10 rather than the off-reservation acquisition factors of section 151.11, and we find no error in her approach. In any event, Appellants have not shown how the outcome of the litigation would affect the Regional Director’s analysis or her conclusions that, regardless of that outcome, the proposed trust acquisition would have the same jurisdictional and legal status as the other IRA-acquired trust lands of the Tribe and that acquisition of the parcel would not create a new jurisdictional category. Section 151.10(f) requires the Regional Director to *consider* jurisdictional problems or potential conflicts; it does not require her to *resolve* those problems or issues. *See Arizona State Land Department*, 43 IBIA at 173. The record demonstrates that she did, in fact, consider those matters. Appellants thus have not shown error in the Regional Director’s consideration of jurisdictional issues.

Ability to discharge additional responsibilities - 25 C.F.R. § 151.10(g)

Appellants assert that the Regional Director did not respond to their evidence that BIA is not equipped to manage these lands. That evidence included *Cobell*’s findings that BIA had mismanaged Indian trust accounts and the OIG Report’s criticism of the Department’s and BIA’s law enforcement. The Regional Director did, in fact, respond to this evidence. She noted that the subject trust acquisition did not involve trust accounts and money, and that the OIG Report did not mention any law enforcement issues specific to the Yankton reservation. While Appellants continue to insist that this evidence is relevant, they have not shown that the trust account mismanagement at issue in *Cobell* or the general

²⁴ Section 1151 of 18 U.S.C. defines “Indian country” as

(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

law enforcement problems identified in the OIG report would specifically affect BIA's ability to manage the Wagner Heights Addition; instead, they attempt to transfer the burden to BIA to show affirmatively that the findings in *Cobell* and in the OIG Report will not affect BIA's ability to provide services to and for the 39.9-acre Wagner Heights Addition. The burden, however, is on Appellants to demonstrate error in the Regional Director's decision, which they have failed to do, and we find no merit in their challenge to the Regional Director's consideration of BIA's capacity to discharge the additional responsibilities associated with the acquisition of the Wagner Heights Addition in trust.

Bias and prejudice

Appellants contend that the Regional Director improperly prejudged the case. They rely on a December 9, 2006, email from the BIA Deputy Realty Officer to various Yankton Agency personnel stating that she had "a draft decision letter written on the Appeal supporting the Supts August 25, 2004, decision to bring the land into trust" and asking for additional information or documentation. AR, Tab 38. Appellants insist that this email coupled with the Regional Director's failure to address the use of the parcel for IHS employee housing, clearly manifest impermissible prejudgment of the appeal.

The critical flaw with Appellants' argument stems from their failure to produce any evidence supporting their claim that the email and lack of discussion of the possible use of the parcel for IHS employee housing manifest impermissible prejudgment. As discussed previously, the possible use of the Wagner Heights Addition for IHS employee housing is speculative at this point since no final decision on the question has been made; thus, the Regional Director's failure to address this issue does not demonstrate that she had impermissibly prejudged Appellants' appeal. Nor does the December 9, 2006, email relied upon by Appellants establish impermissible prejudgment, given that the appeal had been pending before the Regional Director since 2004 and that the Regional Office had been amassing additional information since that time, including information from Appellants themselves. And, unlike the situation in *Rio Arriba, New Mexico, Board of County Commissioners v. Acting Southwest Regional Director*, 38 IBIA 18 (2002), this is not a case in which the Regional Director made public comments outside the adjudicative process arguably reflecting a bias against Appellants; rather, the email at issue here was an internal email generated by a staff member to obtain documentation to support information already in the record. Appellants have not shown that the Regional Director failed to independently assess the application and appeal as required pursuant to 25 C.F.R. § 151.10. We therefore reject Appellants' speculation of improper prejudgment.

Other issues

In the interest of comprehensiveness, we will briefly address the issues Appellants aver they would have raised had they received all the information and documentation they requested earlier.²⁵ Appellants challenge the relevance of the restrictive covenant to the Regional Director's consideration of jurisdictional problems and potential land use conflicts under 25 C.F.R. § 151.10(f), because the Committee lacked authority to agree to the restrictive covenant and because the Tribe's sovereign immunity nullifies enforcement mechanisms. *See* Amended Appeal Brief at 7-11; Reply Brief at 20-23. The Regional Director addressed the restrictive covenant in the context of her response to the County's objection to the land's removal from the ambit of City zoning laws. Appellants have provided no evidence indicating that the Tribe will not abide by those restrictions. Nor is the Regional Director required to consider whether the Tribe's agreement to abide by the restrictive covenant can be enforced against the Tribe. We therefore find that Appellants have not shown harmful error in the Regional Director's reference to the restrictive covenant.

Appellants object to the Regional Director's recitation of the 15 percent increase in tribal membership as supporting the Tribe's need for additional land, asserting that the increase does not necessarily reflect the number of tribal residents actually living in the area. Appellants support their assertion that not all enrolled members may live in the area by citing the testimony of the Superintendent found in the transcript of a May 20, 1998, hearing in *Yankton Sioux Tribe v. Gaffey*, Civ. 98-4042 (D.S.D.). *See* Amended Brief, Ex. A. That testimony, however, does not relate to the Tribe's enrollment in 2006 or unambiguously establish that significantly fewer than all the enrolled members currently live in the area, nor do Appellants explain why it would be error for the Regional Director to consider the Tribe's total membership. We find that Appellants have not produced sufficient evidence to undermine the Regional Director's reliance on the 15 percent increase as one of the circumstances supporting the Tribe's need for the land.²⁶ In any event, even without considering the 15 percent increase in tribal membership, the Regional Director found that the Tribe needed the acquisition to provide housing for tribal members without

²⁵ While some of these issues relate to the criteria set out in 25 C.F.R. § 151.10, others do not. We have chosen to address them separately from our analysis of the regulatory criteria, as did Appellants, to ensure that Appellants can readily see that we have carefully considered all the issues they have raised.

²⁶ The increase from 9,649 in 1996 to 11,363 in 2006 is actually closer to 18 percent than to 15 percent.

fear of forfeiture, as well as to help the Tribe maintain its cultural, social, and health programs, preserve its language and cultural values, ensure its survival, and promote tribal self-determination, all of which suffice to demonstrate that she gave the requisite consideration to the Tribe's need for the additional land.

Appellants question the Regional Director's reliance on the Fire Protection agreements, asserting, first, that, since those agreements were not provided to them in response to their FOIA request and thus must not have been in the record before the Superintendent, she could not have relied on them in reaching her decision, and, second, that they are outdated and most likely need to be revised. The fact that those agreements were not in the initial record for this fee-to-trust acquisition, however, does not mean that the Superintendent was unaware of, or failed to consider, their existence. Nor does Appellants' speculation that the agreements are outdated and in need of revision undermine their validity, absent a showing that they have been cancelled or otherwise rendered ineffective or void. Appellants have neither denied that the agreements are currently valid and provide for fire protection nor produced any evidence showing that the agreements are tenuous. To the extent Appellants may be arguing that the Regional Director erred in considering additional documents not contained in the record before the Superintendent, we note that the Board has allowed records to be supplemented throughout the administrative process and has looked to the record as supplemented to determine whether BIA considered each of the criteria in 25 C.F.R. § 151.10. *See City of Eagle Butte*, 17 IBIA 192, 194, 197 (1989).

Next, Appellants contend that the Committee did not have the authority to make the fee-to-trust acquisition application because the Tribe's Constitution and Amended Bylaws only allow it to conduct routine business, which does not include the rare filing of a fee-to-trust acquisition application. Appellants' argument ignores the fact that Article II § 1 of the Tribe's Amended Constitution designates the Committee as the executive organization, i.e., governing body, of the Tribe, and that, pursuant to Article IV § 1, of the Tribe's Amended Bylaws,

[t]he Committee shall have the authority to investigate and transact all Tribal business of a routine nature and Indian legislation, including Industry, Sanitation, Housing, Redevelopment and etc., and shall also act in the capacity of a liaison delegation between the Tribe and Federal, State and local governments, and such other agencies or parties that may offer opportunities for the Tribe. It will be required of the Committee to keep members of the Tribe clearly informed during the process of investigation.

Assuming without deciding that Appellants have standing to raise this issue, we find this provision broad enough to encompass the fee-to-trust acquisition application (and the restrictive covenant acknowledgment) at issue here, which involves tribal housing and liaising with the Federal government. And the transfer of ownership of land owned by the Tribe into trust is an act furthering ownership of that land by bringing it under the Tribe's jurisdiction the same as other tribal trust land, which properly could be viewed by the Tribe as routine in nature. We therefore find no merit in Appellants' claim that the Committee was without authority to submit the application.²⁷

Appellants also aver that the ESA and NEPA categorical exclusion, which found that the use of the land for housing would remain the same and that no additional environmental impacts would be created by the acquisition, were prepared after the Superintendent issued her decision and thus could not have supported that decision. These documents were in the record reviewed by the Regional Director, who considered them in reaching her decision. Appellants do not contend that the documents' conclusions are, in fact, incomplete or wrong; rather, Appellants assert that they might have objected to some of the conclusions or investigated whether the action would have had significant impacts if they had been provided with the documents earlier. Such conjectures, however, without an actual showing of additional impacts, do not establish that the Regional Director improperly exercised her discretion in considering whether BIA fulfilled its environmental responsibilities.²⁸

Appellants object to the Regional Director's recognition that BIA pays \$38,000 for dispatch services, averring that such payment is irrelevant because it is a legitimate expense that BIA is obligated to pay. The Regional Director's observation was made in response to the County's itemization of the services it provides to the parcel that would be affected by the loss of tax dollars. The Regional Director simply noted that BIA currently pays for

²⁷ Although Appellants aver that *Yankton Sioux Tribe, Business & Claims Committee v. Chytka*, Case No. CV 20-20-00 (Northern Plains Intertribal Court of Appeals Apr. 2, 2000)(attached as Ex. E to Amended Brief), which held that the Tribal Council had not authorized the Committee to bring the lawsuit and that the Committee was not a separate legal entity entitled to bring suit in its own name (Slip Opinion at 2-3), supports their claim that the Committee lacks the authority to file the fee-to-trust application, we find the case distinguishable on its facts and therefore inapposite.

²⁸ Appellants do not dispute on appeal that the Committee's statement in its application that the use of the property would remain the same provided sufficient information to allow BIA to comply with its environmental duties. *See* 25 C.F.R. § 151.10(h).

these services and would continue to do so after the land was placed in trust. Appellants do not dispute that BIA pays for these services and their attempt to make this an issue on appeal fails.

Finally, Appellants object to the Regional Director's assertion that BIA would take over road maintenance costs for the parcel once it is placed in trust. Again, this statement was made in the context of the Regional Director's discussion of the County's enumeration of the services it provides and merely indicates her anticipation that road maintenance costs, currently absorbed by the County, would be transferred to BIA when the land was in trust. *See* 25 C.F.R. Part 170. We construe the Regional Director's decision as simply considering this intent to absorb road maintenance costs as a factor in her decision. Obviously, the Regional Director cannot guarantee appropriations for BIA's road program, and Appellants have not shown how the Regional Director's statement demonstrates that she failed to properly exercise her discretion in approving the fee-to-trust application.

Conclusion

We therefore conclude that the supplemented record before the Regional Director demonstrates that she considered each of the relevant factors in 25 C.F.R. § 151.10, and that her decision represents a reasonable exercise of her discretion. Because Appellants have not shown error in the process followed by BIA, or that the Regional Director's decision was erroneous or reflected an improper exercise of her discretion, we affirm the Regional Director's decision.

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

I concur:

// original signed
Sara B. Greenberg
Administrative Judge*

// original signed
Debora G. Luther
Administrative Judge

*Interior Board of Land Appeals, sitting by designation.