No. 11-16820

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CITY OF YREKA and CITY COUNCIL OF THE CITY OF YREKA,

Plaintiffs – Appellants,

v.

KENNETH SALAZAR, Secretary of the Interior; LARRY ECHOHAWK in his official capacity as Assistant Secretary for Indian Affairs of the United States Department of Interior and Bureau of Indian Affairs; AMY DUTSCHKE*, in her official capacity as the Pacific Regional Director, Bureau of Indian Affairs,

Defendants – Appellees,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF CALIFORNIA No. 2:10-cv-01734-WBS-EFB
The Honorable William B. Shubb

FEDERAL DEFENDANTS-APPELLEES' RESPONSE BRIEF

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* Pursuant to Fed. R. App. P. 43(c), the current Pacific Regional Director has been substituted for Dale Morris.

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Counsel for Federal Defendants-Appellees is not aware of any prior or related appeals.

JURISDICTIONAL STATEMENT

The City of Yreka and the City Council of the City of Yreka (collectively referred to as the "City") invoked the district court's jurisdiction under 28 U.S.C. § 1331 over its complaint challenging the decision of the Federal Defendants' Kenneth Salazar, Secretary of the Interior, Larry EchoHawk, Assistant Secretary for Indian Affairs, Amy Dutschke, Pacific Regional Director, and the Bureau of Indian Affairs (collectively "Interior"), to take a 0.9 acre parcel of land in trust for the Karuk Tribe of California ("Tribe").

The City appeals from a June 14, 2011 order of the United States District Court of the Eastern District of California granting judgment on all claims to Interior. The City filed a timely notice of appeal on July 25, 2011. Fed. R. App. P. 4(a)(1)(B). This Court's jurisdiction rests on 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The City challenges Interior's decision to acquire a 0.9 acre parcel of land in trust for the Karuk Tribe pursuant to the Indian Reorganization Act ("IRA"), 25 U.S.C. §§ 461-479, and its implementing regulations. Before reaching its decision, Interior considered regulatory factors outlined in 25 C.F.R. § 151.10-151.11 and found that the land qualified for acquisition under 25 C.F.R. §§ 151.3(a)(2) and (3) because the Tribe owns the parcel in fee and the acquisition of the land would foster tribal self-determination. The issue raised by the City's appeal is whether

Interior properly applied the relevant criteria contained in 25 C.F.R. §§ 151.3(a)(2)-(3), 151.10, and 151.11 when it decided to accept the Tribe's application to have the land acquired in trust.

STATEMENT OF THE CASE

This case concerns Interior's decision to take a 0.9 acre parcel of land in trust for the Karuk Tribe pursuant to the authority granted in Section 5 of the IRA. The parcel of land ("Parcel") is the site of the Tribe's health clinic (hereinafter, "Yreka Clinic" or "Clinic"), which is located 1.4 miles from the Tribe's existing trust land, on which tribal housing is located, within the Tribe's "ancestral territory." ER28.

In April 2003, the Tribe petitioned Interior to take the Parcel in trust. After issuing a "Notice of Off Reservation Land Acquisition Application (Non-Gaming)" and reviewing comments received from state and local governments, the Pacific Regional Director of the Bureau of Indian Affairs ("Regional Director") issued a Notice of Decision on May 14, 2008, which announced Interior's intention to take the Parcel in trust.

The City appealed the Regional Director's decision to the Interior Board of Indian Appeals ("IBIA"), arguing that Interior did not have statutory authority to take the land in trust, that the Regional Director's analysis was based on erroneous facts, and that, despite the Tribe's statements to the contrary, the land might be

developed for gaming purposes. The IBIA affirmed the Regional Director's decision. The City then filed the instant suit, seeking review under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, and alleging that the Notice of Decision constituted an abuse of the Secretary's discretion under Section 5 of the IRA and the implementing regulations found at 25 C.F.R. Part 151. After considering motions for summary judgment filed by both parties, the district court ruled in favor of Interior. The City now appeals.

BACKGROUND

A. Statutory and regulatory framework.

The IRA, 25 U.S.C. §§ 461-479, was enacted in 1934 in order to promote Indian self-determination and self-governance. Section 5 of the IRA authorizes the Secretary of the Interior ("Secretary") to acquire lands for the purpose of providing land for Indians. 25 U.S.C. § 465. Title to any lands acquired pursuant to Section 5 is "taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired." *Id.*

The IRA's implementing regulations, found at 25 C.F.R. Part 151, outline the factors the Secretary must consider before taking land in trust for a tribe. According to the implementing regulations, Interior may take land in trust for a tribe when either "the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area," "the

tribe already owns an interest in the land," or "the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 C.F.R. § 151.3(a)(1)-(3). When a written request is made to Interior for the United States to take land in trust and acquisition is not mandated by a statute other than the IRA, the regulations require the Secretary to notify the state and local governments having regulatory jurisdiction over the land to be acquired that they have 30 days to provide written comments regarding the potential impacts on "regulatory jurisdiction, real property taxes and special assessments." 25 C.F.R. §§ 151.10; 151.11(d).

In deciding whether to acquire the land in trust for a tribe, the Secretary must consider: the tribe's need for additional land; the purposes for which the land will be used; jurisdictional problems and potential land-use conflicts that may arise; the extent to which the applicant has provided the Secretary sufficient information to comply with various requirements, such as the National Environmental Policy Act; if the land to be acquired is in unrestricted fee status, the impact from the removal of the land from the tax rolls; the location of the land relative to state boundaries and the reservation; any anticipated economic benefits associated with the proposed use of the land; and whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status. 25 C.F.R. §§ 151.10 (b)-(c), (e)-(h); 151.11(a). If land is intended to

be used for gaming purposes, it must also meet specified requirements under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2702-2721.

B. The Karuk Tribe and Yreka Clinic Parcel.

The Karuk Tribe is a federally recognized tribe located in northern California. ER29, 31. Approximately 621 acres of land are held in trust for the Tribe within its ancestral territory and neighboring areas in Siskiyou and Humboldt Counties. ER29. The Tribe also operates its own Tribal Health Program, which is accredited by the Joint Commission of Healthcare Organizations and provides healthcare services to the majority of the Tribe's members. ER28.

In 1997, the Tribe submitted an application to the U.S. Department of Housing and Urban Development for a grant to build a new Tribal Wellness Center on the Tribe's existing trust land in the City of Yreka, located in Siskiyou County. ER30. However, the Tribe was unable to proceed with its building plan because of a state-issued cease and desist order affecting all new construction within Yreka due to an inadequate sanitary sewer system. *Id.* The Tribe then amended its proposal to purchase and redesign the existing Tribal Health Clinic in Yreka, which it had previously operated on a year-to-year lease. ER30-31. After purchasing the Yreka Clinic, the Tribe remodeled the building in three phases; the final phase was to be completed in June 2003. ER30.

C. The Tribe's application to have the Yreka Clinic Parcel acquired in trust and the comment process.

In April 2003, the Tribe submitted an application to the Bureau of Indian Affairs to take the 0.9 acre parcel of land on which the Yreka Clinic is situated in trust for the Tribe under the IRA. ER23-31. The Tribe addressed the relevant criteria set forth in 25 C.F.R. Part 151 in its application, explaining that acquisition of the land would further the Tribe's goals of promoting tribal self-determination, and would allow it, "as a Self-Governance Tribe, to operate all tribal programs and facilities on Tribal Land." ER28-31. The Tribe also noted that the Clinic's financial resources are limited, and that trust acquisition of the Parcel was therefore "crucial" for the tribe to "freely exercise and preserve cultural management over quality health care and self-determination." ER29.

After reviewing the Tribe's application, on June 18, 2004, pursuant to 25 C.F.R. § 151.11(d), Interior issued a "Notice of Off Reservation Land Acquisition Application (Non-Gaming)." SER1-11. Under that regulation, Interior sought comments from state and local governments specifically regarding annual property taxes levied on the property, special assessments against the property, governmental services on the Parcel, and whether the intended use was consistent with zoning restrictions. SER1-11. The City of Yreka submitted comments opposing the acquisition for a variety of reasons, including some reasons outside the scope of Interior's request for comments, on August 31, 2004, citing concerns

that the property might be used for gaming and arguing that there is no need for the property to be taken in trust. SER12-13.

On June 23, 2005, the Tribe responded to the City's comments, asserting that taking the land in trust would benefit not only the 350 members of the Tribe who lived in Yreka, but non-members as well, because members and non-members would be able to receive clinic services for a nominal fee. SER15-17. The Tribe also noted that maintaining the Yreka Clinic would create jobs in the City, that the City's concerns about future zoning and development were unsubstantiated, and that the additional restrictions the City sought to impose were legally impermissible. SER16-17.

On November 9, 2007, Interior requested additional information from the Tribe, including a statement of whether the Tribe had any intention of using the land for gaming and copies of the current property tax receipts. SER22. The Tribe responded on December 20, 2007, submitting a tribal resolution confirming that it intended the property to be acquired for non-gaming purposes. SER23-25.

D. The Regional Director's Notice of Decision.

The Regional Director issued a Notice of Decision on May 14, 2008, stating Interior's intention to take the Parcel in trust for the Tribe. ER103-10. The Notice of Decision responded to the City's comments, ER104, and addressed the factors that Interior was required to consider under 25 C.F.R. §§ 151.10 and 151.11. The

Regional Director reasoned that the proposed acquisition would enable the Tribe to "meet [its] goals of cultural and social preservation, self determination, self-sufficiency, and economic growth" and that acquiring the land would allow the Tribe to "consolidate its land holdings and exercise tribal sovereign powers over the subject property." ER105. He noted that removal of the property from the property tax rolls would have only a "de minimis" effect, ER104, which would be offset by a reduction in the need for county-sponsored welfare programs, due to the ability of low-income individuals to receive health care at the Clinic. ER106. The Regional Director also refused to impose the additional restrictions requested by the City because 25 C.F.R. Part 151 does not authorize the agency to impose such restrictions. ER104.

E. The City's appeal to the Interior Board of Indian Appeals.

The City appealed the Regional Director's decision to the Interior Board of Indian Appeals on June 20, 2008. SER30-31; *City of Yreka, Cal. & City Council of the City of Yreka, Cal. v. Pac. Reg'l Dir., Bureau of Indian Affairs*, 51 IBIA 287 (2010) (Dist. Ct. Dkt. 15-2). The IBIA affirmed the Regional Director's decision on June 7, 2010. *City of Yreka*, 51 IBIA at 297. The IBIA reasoned that the IRA authorizes Interior to take land in trust for tribes, and that taking the Parcel in trust here is consistent with 25 C.F.R. §§ 151.3, 151.10, and 151.11. Although the Parcel is not within or adjacent to the exterior boundaries of the Tribe's

reservation, the IBIA noted that the Tribe's ownership of the Parcel in fee qualifies as an ownership interest under 25 C.F.R. § 151.3(a)(2). *See* 51 IBIA at 295. The IBIA also noted that the Regional Director determined that the acquisition would foster tribal self-determination in accordance with 25 C.F.R. § 151.3(a)(3). *See* 51 IBIA at 295. The IBIA dismissed the City's concern that the Parcel might eventually be used for gaming as "entirely speculative" and not supported by the record. *Id*. at 296.

F. The District Court's Decision.

The City then filed a complaint in the district court alleging that the issuance of the Notice of Decision constituted an abuse of discretion in violation of the APA. ER132-33. Both parties moved for summary judgment. On June 14, 2011, the district court granted Interior's motion. The court noted that the IRA and implementing regulations authorize Interior to acquire land to be held in trust for Indian tribes to "rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." ER12 (internal citations omitted). According to the court, "Congress believed that additional land was essential for the economic advancement and self-support of the Indian communities." *Id.*

The court found that Interior's justification for the trust acquisition under 25 C.F.R. § 151.3(a)(3) was reasonable in light of its conclusion that "the acquisition

of the land is necessary to facilitate tribal self-determination" and "economic development." ER13. Considering Congress's "broad" goals, the court held that 25 C.F.R. § 151.3(a)(3) provides substantial discretion to Interior to determine when it is "necessary" to take land in trust, and that it is appropriate for Interior to take land in trust not only when it is "essential" for or "a sine qua non to self-determination or economic advancement," but also when Interior concludes that "the acquisition is more than merely helpful or appropriate." ER16.

Deferring to Interior's interpretation of its regulations as providing it with broad discretion, ER17, the court found reasonable Interior's decision to acquire land in trust in light of its determination that the acquisition will "assist the [T]ribe" in furthering "cultural and social preservation, self determination, self-sufficiency and economic growth." ER18-19 (citations omitted); *see also* ER13-22. In so finding, the court observed that Interior did not need to "detail specifically why trust status is more beneficial than fee status in the particular circumstance;" rather, it is enough that Interior "express[ed] the Tribe's needs and conclude[d] generally that IRA purposes were served." ER20 (*citing South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 798, 801 (8th Cir. 2005)).

As to the City's arguments that Interior was required to consider the potential for gaming on the Parcel, relying on and incorporating the IBIA's analysis, the district court held that Interior is not required under 25 C.F.R. §

151.10(c) to consider such speculative uses. ER20-21. The court found that Interior's consideration of the proposed use of the Parcel as a medical and dental clinic was reasonable and grounded in the record. ER20-22. Last, the court addressed the City's other arguments relating to 25 C.F.R. §§ 151.10 and 151.11, explaining that those arguments were made in "passing," and that the record reveals that Interior reasonably considered the criteria identified in those regulations. ER21 n.9. The City now appeals.

STANDARD OF REVIEW

The Administrative Procedure Act, 5 U.S.C. §§ 701-706, governs this Court's review of the IBIA's June 7, 2010 order affirming the Regional Director's May 14, 2008 Notice of Decision. Under 5 U.S.C. § 706(2)(A), this Court must determine, de novo, whether Interior's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See Southwest Ctr. for Biological Diversity v. U.S. Bureau of Reclamation*, 143 F.3d 515, 522 (9th Cir. 1998). "The relevant inquiry is whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Pyramid Lake Paiute Tribe v. Dep't of the Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990) (citation omitted). A court must not "substitute its judgment for that of the agency." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Instead, the court's review is "highly deferential to the agency and

presume[s] the agency action to be valid." *Center for Biological Diversity v. Kempthorne*, 588 F.3d 701, 707 (9th Cir. 2009) (internal alternations and citation omitted). "Even when an agency explains its decision with 'less than ideal clarity,'" a court "will not upset the decision on that account 'if the agency's path may reasonably be discerned.'" *Alaska Dep't of Envtl. Conservation v. U.S. EPA*, 540 U.S. 461, 497 (2004) (*quoting Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)).

SUMMARY OF ARGUMENT

Interior's determination that the Yreka Clinic Parcel qualified for trust acquisition under 25 C.F.R. §§ 151.3(a)(2) and (3) is not arbitrary and capricious. Interior reasonably concluded that the acquisition was authorized by 25 C.F.R. §§ 151.3(a)(2) and (3) because the Tribe owns the Parcel in fee and the acquisition would foster tribal self-determination and economic growth by, among other things, enabling the Tribe to continue to provide health and dental services to its members living nearby on tribal trust land.

The City has inadequately briefed, and therefore waived, its arguments relating to 25 C.F.R. § 151.10(a), (e), and (f). Regardless, the record demonstrates that Interior thoroughly considered those, and other criteria contained in 25 C.F.R. §§ 151.10 and 151.11. Interior complied with 25 C.F.R. § 151.10(a) when it considered its authority to take land in trust and the limitations on that authority.

Interior also complied with 25 C.F.R. § 151.10(b) when it considered the Tribe's need for additional land. Interior also considered the purposes for which the Yreka Clinic Parcel will be used and potential land use conflicts that might arise, in compliance with 25 C.F.R. §§ 151.10(c) and (f), as well as the minimal impacts of removing the property from the property tax rolls under 25 C.F.R. § 151.10(e). Last, Interior properly applied 25 C.F.R. § 151.11(b) by balancing the City's concerns with the Tribe's justification for the trust acquisition, while taking into account that the Yreka Clinic Parcel is located within walking distance of existing tribal trust land. Interior's decision that the Yreka Clinic property qualifies for trust acquisition under the IRA is grounded in the relevant factors and is reasonable. As such, the City cannot demonstrate arbitrary and capricious decision making.

ARGUMENT

I. INTERIOR PROPERLY DETERMINED THAT THE YREKA CLINIC PROPERTY QUALIFIED FOR TRUST ACQUISITION UNDER APPLICABLE STATUTORY AND REGULATORY AUTHORITY.

A. The IBIA decision is the final agency action that this Court must review.

The City's brief focuses exclusively on the Regional Director's May 14, 2008 Notice of Decision, ignoring the fact that the City appealed that decision to the IBIA, which issued an Order Affirming Decision on June 7, 2010 upholding the Regional Director's earlier decision. Although the Regional Director has the authority to decide whether to take land in trust, the IBIA's June 7, 2010 order constitutes Interior's final agency action on this matter. Relevant regulations

provide that a Bureau of Indian Affair's official's decision is not considered final so as to constitute agency action subject to judicial review under the APA unless it has been made effective by a decision of the IBIA pending appeal. *See* 43 C.F.R. § 4.314(a); 43 C.F.R. § 4.1(b)(1) (IBIA is final authority for Interior on administrative actions by BIA officials); *see also McAlpine v. United States*, 112 F.3d 1429, 1432 n.3 (10th Cir. 1997) (parties may seek judicial review under the APA of decisions of the IBIA before title to land is transferred to the government under the IRA). This Court may only review "final agency action." 5 U.S.C. § 704. Here, the final agency action is the IBIA's June 7, 2010 decision affirming the Regional Director's Notice of Decision.

B. Interior's decision that the Yreka Clinic Parcel is eligible for acquisition under 25 C.F.R. §§ 151.3(a)(2) and (3) is not arbitrary.

The City alleges that the May 14, 2008 Notice of Decision is defective because it does not "cite which of the three legal bases [in 25 C.F.R. § 151.3(a)] were relied upon in making the decision" to accept the property in trust and that, regardless, the Parcel did not qualify for trust acquisition under 25 C.F.R. § 151.3(a). Br. at 8-9. The City's arguments are without merit. As explained above, the IRA's implementing regulations specify that land may be taken in trust when a tribe owns an interest in the land or when the Secretary determines that acquiring the land is necessary to facilitate tribal self-determination or economic

development. Interior's decision makes clear that both of those circumstances are present here.

1. The acquisition of the Parcel is justified under 25 C.F.R. 151.3(a)(2) because the Tribe owns the Parcel in fee.

The City contends that the fact that the Tribe owns the property is not a sufficient basis for acquisition under 25 C.F.R. § 151.3(a)(2). This argument misunderstands both the applicable law and Interior's decision. Interior found that the "the acquisition [of the Yreka Clinic Parcel] fell within the policy set forth in 25 U.S.C. Part 151" in part because the Tribe owns the Parcel in fee, but also because acquisition of the Parcel would increase economic growth and self-determination. 51 IBIA at 288, 292; *see also* ER103 (Notice of Decision). The IBIA upheld the Regional Director's findings that "the Tribe's ownership of the Parcel in fee clearly qualifies as an ownership interest in the land under 25 C.F.R. § 151.3(a)(2)," which "allow[s] the land to be considered for acquisition in trust." 51 IBIA at 295; ER105 (Notice of Decision detailing that Tribe acquired property in 1997); SER28-29. The IBIA also concluded that the "Regional Director's determination that the acquisition fosters tribal self-determination squarely places the acquisition within the parameters of 25 C.F.R. § 151.3(a)(3)." 51 IBIA at 295; *see also* ER104-05 (Notice of Decision finding that the "acquisition will allow the Tribe to consolidate its land holding and exercise tribal sovereign powers over the subject property").

The City misplaces reliance on *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) to argue that the Parcel does not qualify for acquisition under 25 C.F.R. 151.3(a)(2). The City contends that *City of Sherrill* stands for the proposition that "holding title alone is insufficient for trust status to be restored." Br. at 9. But even if Interior had based its decision to take the land in trust exclusively on the fact that the Tribe owns the Parcel, such a decision would not be inconsistent with *City of Sherrill*. In *City of Sherrill*, the Supreme Court held that when a tribe acquires ownership of land, the tribe does not automatically obtain sovereign authority over the land; instead, the tribe must go through the process set forth by 25 U.S.C. § 465 and implementing regulations, 25 C.F.R. §§ 151.10-11, which require the consideration of other factors before land is taken in trust. 544 U.S. at 220-21. The Tribe here has followed those procedures, and therefore, *City of Sherrill* is irrelevant to this case. Interior properly determined that the Yreka Clinic Parcel is eligible for acquisition under 25 C.F.R. 151.3(a)(2) because the Tribe owns the Parcel in fee.[1]

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[1] The district court did not rule on whether tribal ownership of a parcel is a sufficient condition to justify acquisition under 25 C.F.R. § 151.3(a)(2), instead finding that, regardless, the parcel qualified under 25 C.F.R. § 151.3(a)(3). ER14-15.

2. *The acquisition of the Parcel is justified under 25 C.F.R. 151.3(a)(3) because the land is necessary to facilitate tribal self-determination and economic development.*

The City next argues that Interior's decision to accept the land in trust is arbitrary because acquisition of the land is not necessary to facilitate tribal self-determination or economic development under 25 C.F.R. § 151.3(a)(3). Br. at 9-10. The City claims that the acquisition of the Parcel is not necessary because the Tribe already has 620 acres in trust, and that, regardless, Interior's decision was not adequately explained in the Notice of Decision. *Id.* These assertions are without merit.

Interior based its decision to acquire the Yreka Clinic Parcel not only on the fact that the Tribe owns the land, 25 C.F.R. § 151.3(a)(2), but also because it concluded that acquisition of the land is necessary to facilitate tribal self-determination and economic growth. 25 C.F.R. § 151.3(a)(3). 51 IBIA at 292, 295-97; *see also* ER103-07. As the district court correctly held, Interior has substantial discretion under 25 C.F.R. § 151.3(a)(3) to determine when acquisition of land is "necessary" to "facilitate tribal self-determination" and "economic development" under 25 C.F.R. § 151.3(a)(3). ER15-16. The regulations do not define these terms. *See* 25 C.F.R. § 151.2; ER15. Congress's purpose in enacting the IRA was broad. "The intent and purpose of the [IRA] was to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of

oppression." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973) (quotation marks omitted). Therefore, the IRA provides Interior with substantial authority to acquire property in trust for Indian tribes. *See Sokaogon Chippewa Cmty. v. Babbitt*, 214 F.3d 941, 943 (7th Cir. 2000); *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23, 31-32 (D.C. Cir. 2008); *South Dakota v. U.S. Dep't of Interior*, 487 F.3d 548, 552 (8th Cir. 2007). As the district court explained, "[c]onsidering that the broad goal behind the IRA was to conserve and develop Indian lands and resources and Congress believed that additional land was essential for the economic advancement and self-support of the Indian communities, . . . the acquisition [of land] need not be essential or a sine qua non to self-determination or economic advancement, but [Interior] must conclude that the acquisition is more than merely helpful or appropriate." ER16 (citations omitted). "Under an arbitrary or capricious standard of review, which requires deferring to an agency's reasonable interpretation of its own regulations," ER17, this Court should defer to Interior's interpretation of its own regulations as permitting acquisition of land in trust in this situation. *See Natural Res. Def. Council, Inc. v. U.S. EPA*, 638 F.3d 1183, 1192 (9th Cir. 2011); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984); *see also City of Lincoln City v. U.S. Dep't of Interior*, 229 F. Supp. 2d 1109, 1124 (D. Or. 2002) (assuming that "necessary" in Section 151.3(a)(3) means less than essential).

This Court should also find reasonable Interior's decision that the acquisition is necessary to facilitate self determination and economic growth. Interior rejected the City's arguments that operating the Yreka Clinic on the Parcel will not promote self-determination and economic growth. 51 IBIA at 296. As the district court explained, Interior considered the fact that "while the [T]ribe once had over one million acres of aboriginal homeland along the Klamath River, the [T]ribe has been able to acquire only 620 acres, which are 'scattered' throughout Orleans in Humboldt County and Yreka in Siskiyou County." ER16 (citing ER105). Interior therefore reasonably concluded that the acquisition would allow the Tribe to "consolidate its land holdings and exercise tribal sovereign powers over the subject property." ER105.

Interior also based its decision on the fact that the Yreka Clinic provides quality health care to the majority of tribal and community members, ER28-30, 35, 107, and is one of two facilities in the City that accepts new patients who only have Medicare/MediCal coverage. 51 IBIA at 296; SER15, 21; *see also* ER17. According to Interior, no other tribal trust parcels "achieve the same objective" of providing health and dental care to tribal and community members, ER28-30, 35, 105, and acceptance of the land in trust (and the Parcel's removal from the property tax rolls) is critical to the Tribe's continued operation of the limited-budget clinic. ER29, 105; *see also* ER17. Nor would it be economical or practical

to relocate the Yreka Clinic, which the Tribe has spent more than $1.2 million renovating after its original plans to build a clinic on existing trust land were prevented by a 1998 cease and desist order prohibiting new construction due to inadequacies in the public sewer system. 51 IBIA at 290, 296; ER30.

The IBIA reasonably concluded that the City's "unsupported opinion does not undermine the Tribe's assertion—and BIA's acceptance of that assertion—that acquisition of the land is crucial to the Tribe's ability to continue to deliver culturally appropriate medical services to its members." 51 IBIA at 295. Taking land in trust because it is "critical" to the provision of health services to tribal members is consistent with both the statutory language of the IRA and the Congressional mandate to assist Indians to achieve self-determination and economic advancement. *See* ER17. Interior is not obligated to detail more specifically why trust status is more beneficial than fee status. *C.f. South Dakota*, 423 F.3d at 798, 801 (interpreting 25 C.F.R. § 151.10(b)). It is enough for Interior "to express the Tribe's needs and conclude generally that IRA purposes were served." *Id.* at 801. Interior's decision complies with the regulatory requirements of 25 C.F.R. § 151.3(a) and is reasonable.

C. Interior adequately considered the factors set out in the regulations at 25 C.F.R. §§ 151.10 and 151.11.

The IRA's implementing regulations require Interior to consider various criteria when evaluating requests for the acquisition of land in trust. *See* 25 C.F.R.

§§ 151.10-151.11. The City claims that Interior failed to properly consider and apply the criteria set forth in 25 C.F.R. §§ 151.10(a), (b), (c), (e), (f), and 25 C.F.R. § 151.11(b).[2] Br. at 10-12. These regulations are simply "factors to be considered in exercising discretion" and "do not constrain [Interior's] authority to acquire land in trust for Indians." *Florida v. U.S. Dep't of Interior*, 768 F.2d 1248, 1252-53 (11th Cir. 1985). Thus, as long as the record demonstrates that Interior has considered the relevant regulatory factors in a manner that is not arbitrary or capricious, this Court must affirm Interior's decision. The record documents Interior's extensive consideration of these factors in evaluating the Tribe's request for acquisition of the Parcel in trust.

1. Interior considered the existence of statutory authority for the acquisition and any relevant limitations.

In the section of its brief arguing that Interior failed to comply with 25 C.F.R. § 151.10(a), the City asserts that "[Interior] must comply with Part 151, 25

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[2] The City failed to develop many of these arguments both on appeal and in the district court, which found that the City made the arguments relating to 25 C.F.R. §§ 151.10(a), (b), (e), (f), and 25 C.F.R. § 151.11(b), in "passing", *see* Op. at 21 n.9. "Judges are not like pigs, hunting for truffles buried in briefs." *E.M. ex rel. E.M. v. Pajaro Valley Unified Sch. Dist. Office of Admin. Hearings*, 652 F.3d 999, 1010-11 (9th Cir. 2011) (citations omitted). Because on appeal the City has failed to adequately explain its arguments relating to 25 C.F.R. §§ 151.10(a), (e), and (f), these arguments should be treated as waived. *Indep. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) (arguments made in passing and inadequately briefed are waived).

U.S.C. § 465 and the Administrative Procedure[] Act." Br. at 11. This sentence does not explain how Interior failed to comply with 25 C.F.R. § 151.10(a), which requires Interior to consider "[t]he existence of statutory authority for the acquisition and any limitations contained in such authority." Because the argument has been made in a perfunctory manner, it has been waived. *Indep. Towers of Wash.*, 350 F.3d at 929. In any event, the record demonstrates that Interior complied with Section 151.10(a)'s requirement to consider its statutory and regulatory authority.

Interior explained in its decision that the IRA, "25 U.S.C. § 465[,] grants the Secretary broad discretion to acquire land for Indians" and the "implementing regulations augment the statute by identifying three circumstances under which land may be acquired in trust for a tribe." 51 IBIA at 295; *see also* ER103-04 (Notice of Decision); *Mescalero Apache Tribe*, 411 U.S. at 152 (IRA provides Interior with broad discretion to acquire land in trust). Interior therefore properly "identified 25 U.S.C. § 465 as the statutory authority for the acquisition," and recognized that 25 C.F.R. Part 151 provides additional criteria for the exercise of its statutory authority. 51 IBIA at 292, 295; ER103. The City has not demonstrated how Interior's consideration of the relevant statutory authority is arbitrary.

2. *Interior considered the Tribe's need for additional land.*

Section 151.10(b) requires Interior to consider "[t]he need of the individual Indian or the tribe for additional land." 25 C.F.R. § 151.10(b). The City argues that the Tribe does not need the land to be taken in trust because it already has other trust land and can operate the Yreka Clinic on the Parcel without the land being taken in trust. Br. at 11. The City's disagreement with Interior's final decision does not mean that Interior did not adequately consider the Tribe's need for the land. Interior's consideration of the Tribe's need is demonstrated by the record. ER29-30, 105; SER21.

The Tribe "once had over one million acres of aboriginal homeland along the Klamath River in Northern California," but now, 98% of the Tribe's aboriginal homeland is managed by the U.S. Forest Service as public land and 2% remains in private fee. ER105. The Tribe has only been able to acquire in trust 620 acres of the 2% of private fee lands, and that land is "scattered throughout Orleans in Humboldt County, and Yreka in Siskiyou County." ER29, 105. The Tribe has approximately 350 tribal members living in and around the City of Yreka. 51 IBIA at 292; ER28, 105; SER15. These individuals and other non-members receive health and dental services from the Yreka Clinic. 51 IBIA at 292. The IBIA found that acceptance of the land in trust is necessary to the operation of the clinic, which runs on a limited budget. 51 IBIA at 293; ER29, 105. The IBIA also found that

relocating the Yreka Clinic to another parcel of land, after the Tribe had already spent $1.2 million in renovating the Clinic, would be uneconomical and impracticable. 51 IBIA at 296; ER29-30 (discussing renovations). As the Eighth Circuit has found, "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," where, as here, the Tribe already owned the property in fee. *South Dakota*, 423 F.3d at 801. It is sufficient under the regulations for Interior "to express the Tribe's needs and conclude generally that IRA purposes were served." *South Dakota*, 423 F.3d at 801. The record demonstrates that Interior more-than-adequately complied with these requirements.

3. *Interior considered the purposes for which the land will be used and is not required to consider speculative uses, such as casino development.*

The regulations require Interior to consider "[t]he purposes for which the land will be used," 25 C.F.R. § 151.10(c), which Interior thoroughly evaluated before deciding to take the Parcel in trust. Interior considered the Tribe's proposed use of the land for the continued operation of the Yreka Clinic to provide health and dental services to members and non-members. 51 IBIA at 292, 295-96; ER105. The IBIA noted that the Tribe has consistently used the Parcel for a health clinic, first leasing the property annually, and then acquiring the property and remodeling

the Clinic. 51 IBIA at 290, 292, 296; ER28-30, 105. The IBIA also considered the fact that the Yreka Clinic is one of two clinics in the area within a 100-mile radius accepting new Medicare and MediCal patients. ER105; 51 IBIA at 292, 296.

The City asserts that it has "provided substantial evidence . . . that the eventual use of the Property will be for gaming," and that Interior's decision not to consider the impacts of the Tribe operating a casino on the Yreka Clinic Parcel renders arbitrary its decision to take the Parcel in trust. Br. at 11, 13-14. But the City has not explained the "evidence" upon which it relies[3] and the record shows that Interior considered and rejected as speculative the City's concerns that the Tribe plans to use the Parcel for gaming once it has been taken in trust. 51 IBIA at 291-92, 296-97. The Tribe passed a resolution in December 2007 stating that the Tribe has no intention of operating anything other than a health clinic on the property, 51 IBIA at 292, 297; SER23-25, and explained that the "renovated site is completely developed and could not feasibly or fiscally-responsibly be used for

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[3] The City may be referring to page 5 of its opening brief, in which it asserts that Interior's Notice of Off Reservation Land Acquisition Application sought comments on "whether the intended use was consistent with gaming." There is no such language in the Notice of Off Reservation Land Acquisition Application, *see* SER1-11, or in Interior's Answer to the City's Complaint, *see* ER135-41. Even if there was some conflicting evidence in the record to support the City's contention (which there is not), this Court should defer to both the agency's interpretation of its regulations that it need not more fully consider speculative uses and the agency's expertise in determining when it is appropriate to take land in trust. *See, e.g., Natural Res. Def. Council, Inc*, 638 F.3d at 1192; *Lands Council v. McNair*, 629 F.3d 1070, 1076-77 (9th Cir. 2010).

gaming even if the Tribe wanted it to be so used," 51 IBIA at 296-97; *see also* SER1-11, 24-25.

Interior adequately considered the City's concerns that the Parcel might be used for gaming, and, after reviewing the evidence before it, concluded that such a use was speculative and that no further consideration was required. 51 IBIA at 296-97. The Eighth Circuit has addressed this issue and held that "[i]t was reasonable for the Secretary to accept the Tribe's representations in his analysis of 25 C.F.R. 151.10(c)." *South Dakota*, 423 F.3d at 801. The court explained that Interior was "not required to seek out further evidence of possible gaming purposes in light of the Tribe's repeated assurances that it did not intend to use the land for gaming," and a letter from the then-state governor expressing his support for the acquisition and explaining that he had been assured that there would be no gaming. *Id.*; *see also City of Lincoln City*, 229 F. Supp. 2d at 1123-24 (affirming BIA decision despite presence of speculation regarding future changes in land use); ER20. Interior was not obligated to deny the trust acquisition based on the City's speculation as to future uses of the land under 25 C.F.R. § 151.10(c).

4. Interior evaluated the impacts of the acquisition that would result from the removal of the land from the property tax rolls.

25 C.F.R. § 151.10(e) provides that, "[i]f the land to be acquired is in unrestricted fee status," Interior must consider "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls." In

one sentence in its brief, the City argues that the "removal of the Property from the City's tax rolls will negatively affect the City's ability to provide public services." Br. at 11. The City does not explain how the removal of the Parcel will impact the City's ability to provide services or how Interior failed to consider this issue, and therefore has waived this argument. *See Indep. Towers of Wash.*, 350 F.3d at 929. Further, the City's assertion of negative impacts is contrary to its prior representations to Interior that it could lose the property tax revenue from the Yreka Clinic Parcel and still provide services such as police, fire, and utilities. SER13; 51 IBIA at 292.

It is also evident from the record that Interior considered the impacts of the Parcel's removal from the property tax rolls. The City's revenue for 2004-2005 was $30,905,955.73. ER106. The property tax on the Parcel was $5,610 in 2003, ER30, and $13,500.06 in 2007, 51 IBIA at 292, ER106. Interior found that the impact of the removal of the Parcel from the property tax rolls would be negligible because it "would be offset by a reduction in County-sponsored welfare programs due to the Tribe's provision of healthcare and dental services to both tribal members and non-member Medicare and MediCal patients." 51 IBIA at 292-93; ER106. The City has not shown that Interior's consideration of this issue is arbitrary.

5. *Interior considered potential conflicts of land use that could arise from the trust acquisition.*

Section 151.10(f) directs Interior to consider "[j]urisdictional problems and potential conflicts of land use which may arise" from the acquisition of the Parcel in trust. 25 C.F.R. § 151.10(f). The City complains that "BIA did not adequately respond to the City's concerns" relating to "jurisdictional problems and land-use conflicts," which would be "amplified" if the Tribe started gaming operations on the Parcel, but fails to offer further argument on this issue, which has therefore been waived. Br. at 12. *See Indep. Towers of Wash.*, 350 F.3d at 929.

Even if the Court considers this argument, it should conclude that the record shows that Interior considered the jurisdictional issue and reasonably determined that there would be no jurisdictional conflicts arising from the trust acquisition. The IBIA affirmed the Regional Director's conclusion that there would be "no jurisdictional problems or potential conflicts arising from the acquisition [] because there would be no significant structural changes to or major construction on the Parcel nor would there be any change in criminal jurisdiction." 51 IBIA at 293; ER106; SER12 (City comments that use of the Parcel for a health clinic "is an appropriate use for this location"); SER16. The IBIA further found that past land-use conflicts that arose between the City and the Tribe had been "resolved satisfactorily and amicably" and that there was no reason why any future disputes would not be able to be similarly resolved. 51 IBIA at 296; SER16. The City's

argument that Interior did not consider jurisdictional problems and land-use conflicts is without merit, as are the City's speculative concerns about possible future gaming in this regard.

6. *Interior considered the Parcel's proximity to the Tribe's trust lands, appropriately evaluated the Tribe's justification for trust acquisition, and gave sufficient weight to the City's comments.*

Interior's regulations provide that "as the distance between the tribe's reservation and the land to be acquired increases, [Interior] shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition," and "shall give greater weight to the concerns raised," 25 C.F.R. § 151.11(b), by state and local governments relating to "the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments." 25 C.F.R. § 151.11(d). The City argues that Interior gave too little weight to its concerns because the Parcel is "more than 100 miles from the Tribe's reservation." Br. at 12. This argument is contradicted by the record, which demonstrates both that (1) the Parcel is close to existing Tribal trust land; and (2) Interior gave appropriate consideration to the City's concerns.

The Parcel "[is] approximately 1.4 miles from existing tribal trust land within the ancestral territory of the Tribe as defined by the Tribe's constitution." 51 IBIA at 293; ER31, 107. Even the City's original comment letter admits that the Parcel is approximately one mile from existing trust land, though it also claims the

Parcel is 100 miles from the Karuk Tribe's "traditional tribal lands." SER12. There is no evidence in the record supporting this assertion concerning "traditional tribal lands." And, regardless, the regulation does not mandate that land proposed for acquisition be proximate to "traditional tribal lands." The regulation at 25 C.F.R. § 151.11(b) refers to the land's proximity to a "tribe's reservation," which is defined at 25 C.F.R. § 151.2(f) as "mean[ing] that area of land over which the tribe is recognized by the United States as having governmental jurisdiction." There is no support in the record for the City's assertion that the Yreka Clinic Parcel is not 1.4 miles from land over which the Tribe is recognized by the United States as having governmental jurisdiction.

The record shows that Interior considered the proximity of the Parcel to the Tribe's existing trust land. 51 IBIA at 291, 293. Interior concluded that the Parcel is close to existing tribal trust land, and, in accordance with guidelines found at 25 C.F.R. §§ 151.11(b) and (d), took this proximity into account when it weighed the City's concerns and the Tribe's requests. 51 IBIA at 293; ER107. Interior's balancing of the City's concerns with the Tribe's request is not arbitrary.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE VOLUME LIMITATION

This brief complies with the type volume limitation set forth in Rule 32(a)(7) of the Federal Rules of Appellate Procedure. Excepting the portions described in Rule 32(a)(7)(B), the brief contains 7,358 words.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Response Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 11, 2012.

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