INTERIOR BOARD OF INDIAN APPEALS

State of New York; Franklin County, New York; and Town of Fort Covington, New York
v. Acting Eastern Regional Director, Bureau of Indian Affairs

58 IBIA 323 (06/11/2014)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

STATE OF NEW YORK; FRANKLIN COUNTY, NEW YORK; AND TOWN OF FORT COVINGTON, NEW YORK, Appellants,	)	Order Affirming Decision
v.	)	Docket Nos. IBIA 12-006 12-010
ACTING EASTERN REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	June 11, 2014

The State of New York (State), Franklin County, New York (County), and the Town of Fort Covington, New York (Town) (collectively, Appellants),[1] appealed to the Board of Indian Appeals (Board) from an August 17, 2011, decision (Decision) of the Acting Eastern Regional Director (Regional Director), Bureau of Indian Affairs (BIA), to take approximately 39 acres of land, located within the Municipalities, into trust for the Saint Regis Mohawk Tribe (Tribe), pursuant to Section 5 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. § 465.[2]

Appellants, citing *Carcieri v. Salazar*, 555 U.S. 379 (2009), argue that the Regional Director lacks statutory authority to take any land into trust for the Tribe under Section 5 of the IRA because, according to Appellants, the Tribe was under State, not Federal, jurisdiction in 1934. Appellants alternatively argue that, even if there is statutory authority for the proposed fee-to-trust acquisition, the Regional Director erroneously applied the criteria applicable to on-reservation acquisitions contained in 25 C.F.R. § 151.10. Relying on *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), Appellants

[1] In these consolidated appeals, the appeal by the State was assigned Docket No. IBIA 12-006. The appeal by the County and the Town, which we refer to jointly as the "Municipalities," was assigned Docket No. IBIA 12-010.

[2] The legal description of the property, which we refer to as the "parcel," is set forth in Exhibit A to the Regional Director's decision and was attached to the Board's October 6, 2011, pre-docketing notice and orders.

contend that the Regional Director was required to apply the off-reservation criteria in § 151.11. Appellants further contend that, to the extent that some § 151.10 and § 151.11 criteria are the same, the Regional Director did not adequately consider those criteria or Appellants' comments on them, and there is insufficient support in the record for the Regional Director's findings in favor of the acquisition. Appellants additionally assert that the Regional Director did not conduct any review, or did not conduct the appropriate level of review, under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq*. Finally, the Municipalities argue that they were denied due process because they were not given an opportunity, until this appeal, to address the Tribe's response to their comments.

We conclude that the Tribe was under Federal jurisdiction in 1934, as determined by the Secretary of the Interior (Secretary) in calling an election for the Tribe's members to vote on whether to opt out of the IRA. How the Tribe voted is irrelevant, because Congress, through the Indian Land Consolidation Act of 1983 (ILCA), 25 U.S.C. § 2201 *et seq*., extended Section 5 of the IRA to those tribes that originally voted to opt out of the IRA. Thus, the Regional Director correctly relied on Section 5 of the IRA in deciding to take the parcel into trust for the Tribe.

The Regional Director also correctly applied the on-reservation criteria to the Tribe's request. The parcel is located on the Tribe's reservation, within the meaning of 25 C.F.R. § 151.2(f) (definition of "Indian reservation"). Contrary to Appellants' position, *City of Sherrill*, which was not a fee-to-trust case and which did not construe § 151.2(f), does not require BIA to treat the parcel as off-reservation land for purposes of 25 C.F.R. Part 151. We are also unpersuaded by Appellants' arguments that the Regional Director inadequately considered the § 151.10 criteria or their comments, or that the Decision is unsupported by the record. Nor do we find error in the Regional Director's use of a categorical exclusion under NEPA as the Tribe is proposing no change in its existing use of the parcel for a tribally owned and operated solid waste transfer station and recycling facility. Finally, we reject the Municipalities' argument that BIA violated their due process rights. Therefore, we affirm the Regional Director's decision.

Statutory and Regulatory Background

The Regional Director approved the acquisition under Section 5 of the IRA, 25 U.S.C. § 465, which authorizes the Secretary to acquire land in trust for Indians in her discretion. Under the 25 C.F.R. Part 151 regulations establishing the Department's land acquisition policy, land may be acquired in trust status for a tribe:

(1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; *or*
(2) When the tribe already owns an interest in the land; *or*

(3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

25 C.F.R. § 151.3(a)(1)-(3) (emphases added).

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

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

25 C.F.R. § 151.10(a)-(c) and (e)-(h).[3]

Where the land is located outside of and noncontiguous to the tribe's reservation, BIA applies the same criteria above. *See* 25 C.F.R. § 151.11(a) (incorporating § 151.10(a)-(c) and (e)-(h)). However, as the distance between the tribe's reservation and the land to be acquired increases, BIA must give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition and must give greater weight to concerns raised by state and local governments. *Id.* § 151.11(b). And, if the land is being acquired for business purposes, the tribe must provide a plan that specifies the anticipated economic benefits associated with the proposed use. *Id.* § 151.11(c).

In addition to the applicable on- or off-reservation Part 151 regulations, BIA must also comply with NEPA, 42 U.S.C. § 4321 *et seq.*, by conducting either a categorical exclusion determination (CE); an environmental assessment (EA) and a finding of no

[3] Criterion § 151.10(d) is applicable only to acquisitions for individual Indians.

significant impact (FONSI); or an environmental impact statement (EIS), as applicable to the proposed action. *See* 40 C.F.R. § 1501.4.

Factual and Procedural Background

The Tribe purchased the parcel in 1999 at a Franklin County tax auction. Tribe's Fee-to-Trust Application, Apr. 13, 2007, at 3 (Administrative Record (AR) Tab 1). The parcel is located within the Tribe's original six mile square reservation, which was established by the Seven Nations of Canada Treaty of May 31, 1796, 7 Stat. 55. Within the 24,000-acre original reservation, the Tribe retained title to approximately 14,000 acres.[4] The 39-acre parcel is situated approximately 0.7 miles east of the 14,000 acres to which the Tribe retained title, and it is within the Tribe's land claim area. AR Tab 1 at 1, 5; AR Tab 15 at 1.

The Tribe has approximately 12,000 members, of which roughly 6,500 live on or near the Tribe's reservation. Decision at 3. In 1995 the Tribe conducted a study of its approach to solid waste management, which essentially involved reliance on residents to hire waste haulers, which were non-tribal, and, for a time, subsidization by the Tribe of those costs. *See* AR Tab 1, Ex. E, Attach. 1 at 1. The study found that approximately half of the residential respondents were burning their waste, and that 10% of the respondents were burying it on their property. *Id.* In response, between approximately 1997 and 2005, the Tribe applied for Federal grants, searched for a suitable location, and ultimately constructed a solid waste transfer station and recycling facility on the 39-acre parcel, which had been farm land. *See* AR Tab 19 at 13-16. The transfer station was constructed with funding and other involvement of the Department of Health and Human Services, Department of Agriculture, Environmental Protection Agency, and Department of

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[4] The remaining approximately 10,000 acres are the subject of pending Federal court litigation initiated by the Tribe and other Mohawks in the 1980s, in which the United States later intervened as a plaintiff, alleging that conveyances of these lands to the State in the early 19th century were made without Federal approval, in violation of Federal law, and therefore did not diminish the reservation boundaries. *See* Letter from Tribe to Regional Director, May 22, 2008, at 1 (AR Tab 15); Tribe's Response to Municipalities' Comments, Aug. 15, 2008, at 3 (AR Tab 19).

The parcel is part of the territory claimed by the Tribe and by two other interested parties that filed entries of appearance but no further filings in the present appeal: the Mohawk Council of Akwesasne, previously known as the Canadian St. Regis Band of Mohawk Indians; and the Mohawk Nation Council of Chiefs. The land claims were consolidated under the caption *Canadian St. Regis Band of Mohawk Indians, et al. v. State of New York, et al.*, Nos. 82-CV-783, 82-CV-1114, and 89-CV-829 (N.D.N.Y.).

Housing and Urban Development (HUD). *See* AR Tab 1 at 1, 4, and Ex. E (agreements and grant approvals); AR Tab 19 at 15-16. Prior to beginning construction, the Tribe prepared an EA and made it available for public review, but apparently received no comments on it from Appellants or the public. *See* AR Tab 1 at 5 and Exs. G (EA) and J (announcements); AR Tab 19 at 15 and Ex. 7 ¶¶ 3, 6. In 2001 the tribe certified the EA and a FONSI to HUD. *See* AR Tab 1 at 5 and Ex. H (FONSI); AR Tab 19 at 15 and Ex. 7 ¶ 6. The Department of the Interior was not involved in that construction project.

Operational since 2005, the transfer station occupies approximately 10 acres of the parcel. AR Tab 1 at 4. Approximately one acre is set aside for a tribal member's mobile home, and the remainder is not currently used. *Id.*

On April 13, 2007, the Tribe submitted its application to BIA to place the parcel into trust. The Tribe stated that the parcel would continue to be used for operating the solid waste transfer station and that, because the Tribe had no plans to change the current use, the fee-to-trust acquisition was subject to a categorical exclusion under NEPA. AR Tab 1 at 5. While the Tribe initially styled its fee-to-trust application as for an *off-reservation* acquisition, *see id.* at 1, in May 2008 the Tribe requested that BIA treat the parcel as within the Tribe's reservation for purposes of 25 C.F.R. Part 151, asserting that irrespective of whether the parcel is current or former reservation land, the parcel satisfies the definition of "Indian reservation" in 25 C.F.R. § 151.2(f). *See* AR Tab 15 at 1. The Tribe also asserted that the change from an off-reservation to an on-reservation application only affected the degree of scrutiny to be applied to the application, and did not warrant restarting the application process or requesting additional information from any party. *See id.* at 2.

Following receipt of the Tribe's original application, BIA issued a notice to each of the Appellants, on October 26, 2007, inviting comments on the proposed acquisition and specifically requesting information regarding potential impacts on property taxes, special assessments, and government services, and whether the intended use is consistent with current zoning. *See* Notices (AR Tab 5). The State did not submit comments or other information. The Municipalities jointly responded to the request for information and provided detailed comments opposing the acquisition under each of the trust acquisition criteria and arguing that a categorical exclusion was not applicable to the fee-to-trust acquisition. *See* Municipalities' Comments, Jan. 31, 2008 (AR Tab 13).

The Regional Director provided a copy of the Municipalities' comments to the Tribe and gave the Tribe an opportunity to respond to them, pursuant to 25 C.F.R. § 151.10.[5] Letter from Regional Director to Tribe, May 7, 2008 (AR Tab 14). The Tribe submitted a response to the Municipalities' comments, to BIA, on August 15, 2008. AR Tab 19. The Regional Director, without providing to the Municipalities a copy of the Tribe's response, issued the Decision that gave rise to Appellants' appeal. Appellants apparently were unaware, until they received the August 17, 2011, Decision, and the administrative record, that the Tribe had responded to the Municipalities' comments.

The Decision found, *inter alia*, that Section 5 of the IRA provides discretionary authority for the proposed acquisition; the parcel is within the Tribe's reservation as the term "Indian reservation" is defined in 25 C.F.R. § 151.2(f); each of the on-reservation criteria in § 151.10(a)-(c) and (e)-(h) favor trust acquisition of the parcel in this case; and a categorical exclusion applies to the proposed acquisition.

On appeal, the Municipalities moved for the Board to vacate the Decision and remand the matter for denial of due process. The Board instructed the parties to brief that issue as part of their briefing on the merits. The Municipalities filed opening and reply briefs.[6] The State filed letters that served as its opening and reply briefs, and in each the State generally deferred to the Municipalities' arguments except as to stress certain points.[7] The Tribe and the Regional Director each filed an answer brief in response to the opening briefs. The Tribe also submitted a surreply to the State's reply brief. After briefing concluded, the Municipalities submitted two new court rulings as additional authority, one of which was a magistrate judge's report and recommendation on the Tribe's land claim, and the Tribe and the Regional Director filed responses with the Board. The Municipalities next submitted the District Court's ruling in the land claim litigation, and the Tribe filed a response. Finally, the Regional Director and the Tribe jointly submitted a recent Solicitor's

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[5] Section 151.10 states in relevant part that "a copy of the [state and local government] comments will be provided to the applicant, who will be given a reasonable time in which to reply and/or request that the Secretary issue a decision."

[6] All references herein to the Municipalities' opening brief are to their amended opening brief, dated April 12, 2012.

[7] Because the State generally defers to the Municipalities' arguments, and for ease, we refer to Appellants collectively wherever possible. But because the State submitted no comments on the Tribe's application, and only the Municipalities have alleged a violation of due process, in a number of instances we refer specifically to the Municipalities.

M-Opinion interpreting the IRA, and the Municipalities responded. We now affirm the Regional Director's decision to acquire the parcel in trust.[8]

Discussion

I. 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 for BIA's in discretionary decisions. *Shawano County, Wisconsin v. Acting Midwest Regional Director*, 53 IBIA 62, 68 (2011); *Arizona State Land Department v. Western Regional Director*, 43 IBIA 158, 159-60 (2006). Instead, the Board reviews discretionary decisions to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of that discretion, including any limitations on its discretion that may be established in regulations. *Shawano County*, 53 IBIA at 68. An appellant bears the burden of proving that BIA did not properly exercise its discretion. *Id.* at 69; *Arizona State Land Department*, 43 IBIA at 160; *State of 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 decisions are insufficient to carry this burden of proof. *Shawano County*, 53 IBIA at 69; *Arizona State Land Department*, 43 IBIA at 160.

The record must show that the Regional Director considered the criteria set forth in 25 C.F.R § 151.10, but "there is no requirement that BIA reach a particular conclusion with respect to each factor." *Shawano County*, 53 IBIA at 68-69; *Arizona State Land Department*, 43 IBIA at 160. The factors need not be "weighed or balanced in any particular way or exhaustively analyzed." *Shawano County*, 53 IBIA at 69; *see County of Sauk, Wisconsin v. Midwest Regional Director*, 45 IBIA 201, 206-07 (2007), *aff'd sub nom. Sauk County v. U.S. Dep't of the Interior*, No. 07-543, 2008 WL 2225680 (W.D. Wis. May 29, 2008). We must be able to discern from the Regional Director's decision, or at least from the record, that due consideration was given to timely submitted comments by interested parties. *Village of Hobart, Wisconsin v. Midwest Regional Director*, 57 IBIA 4, 13 (2013).

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[8] We note that the administrative record contains two documents designated by BIA as privileged. BIA does not seek to rely on them in defending the Decision, and the Board has not reviewed or considered them.

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. *Shawano County*, 53 IBIA at 69. An appellant, however, bears the burden of proving that BIA's decision was in error or not supported by substantial evidence. *Arizona State Land Department*, 43 IBIA at 160; *Cass County, Minnesota v. Midwest Regional Director*, 42 IBIA 243, 247 (2006).

The scope of the Board's review ordinarily is "limited to those issues that were before the . . . BIA official on review." 43 C.F.R. § 4.318. Thus, the Board ordinarily will decline to consider for the first time on appeal matters that were not, but could have been, raised to the Regional Director. *See id.*; *Thurston County, Nebraska v. Acting Great Plains Regional Director*, 56 IBIA 62, 66, 71, 73 (2012); *State of Kansas v. Acting Southern Plains Regional Director*, 53 IBIA 32, 36 (2011).

II. Statutory Authority for the Acquisition

Appellants dispute the Regional Director's determination, made pursuant to 25 C.F.R. §§ 151.3 and 151.10(a) (existence of statutory authority and any limitations contained in such authority), that Section 5 of the IRA, 25 U.S.C. § 465, authorizes acceptance of title to the parcel in trust for the Tribe. For the first time on appeal, Appellants argue that Section 5 of the IRA does not apply to the Tribe, citing *Carcieri v. Salazar*, 555 U.S. 379 (2009). *Carcieri* was decided 2 years before the Regional Director's decision, yet Appellants seek to shift the burden to the Regional Director, and argue that it would have been "premature" for them to raise *Carcieri* before the Regional Director issued the Decision. *See* Municipalities' Reply Brief (Br.) at 19 n.7. Appellants' excuse for not raising *Carcieri* to the Regional Director is confusing, at best. If they believed that *Carcieri* was relevant to the Regional Director's decision, it was their obligation to present it promptly as supplemental authority for the Regional Director to consider. *See Thurston County*, 56 IBIA at 71. Nonetheless, because this argument concerns the existence of the Secretary's statutory authority for the Decision, the parties have developed a full record on the issue through their pleadings before the Board, and we have discretion to consider it under 43 C.F.R. § 4.318, we decide the issue in this case.

Appellants contend that the Tribe cannot receive land in trust under the IRA because the Tribe was not under Federal jurisdiction when the IRA was enacted in 1934.[9]

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[9] Appellants do not appear to dispute Federal *recognition* of the Tribe, but nonetheless we note that the Tribe is federally recognized, *see* 78 Fed. Reg. 26384, 26387 (May 6, 2013), and thus it meets the "recognized" requirement of the IRA, 25 U.S.C. § 479.

According to Appellants, "the Tribe has remained under the jurisdiction of the State of New York, not the Federal Government, for the last 200 years." Municipalities' Opening Br. at 36. We conclude that the Tribe was under Federal jurisdiction in 1934 and that, although the Tribe initially voted to opt out of the IRA, Congress extended Section 5 of the IRA to the Tribe in 1983 through Section 203 of the Indian Land Consolidation Act (ILCA), 25 U.S.C. § 2202. Thus, Section 5 of the IRA is statutory authority for the proposed acquisition.[10]

In *Carcieri* the Supreme Court held that, under one of the definitions of "Indian" in Section 19 of the IRA, 25 U.S.C. § 479, the Secretary's authority to take land into trust for tribes pursuant to Section 5 is limited to those tribes that were "under Federal jurisdiction" at the time the IRA was enacted in June 1934. *See* 555 U.S. at 382. The Court did not determine under what circumstances a tribe may be considered to have been under Federal jurisdiction. Conclusive for this case, we have held that the Secretary, by calling an election for a tribe to decide whether to opt out of the IRA, "necessarily recognized and determined in 1934 that the [t]ribe was 'under Federal jurisdiction.'" *Shawano County*, 53 IBIA at 75-76; *see id.* at 72 ("That is the crux of our inquiry, and we need look no further to resolve this issue."). Thus, *Shawano County* identifies "one brightline test for determining whether a tribe was 'under Federal jurisdiction' in 1934." *Village of Hobart*, 57 IBIA at 21 (also holding that the Secretary's action in calling an IRA election was dispositive that a tribe was under Federal jurisdiction in 1934); *see also Thurston County, Nebraska v. Great Plains Regional Director*, 56 IBIA 296, 306 n.12 (2013).[11]

On June 8, 1935, the Secretary held an election pursuant to Section 18 of the IRA, 25 U.S.C. § 478, allowing the Tribe's adult members to vote whether to opt out of the

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[10] Appellants also argue that the "Tribe . . . was never subject to the General Allotment Act, [Act of Feb. 8, 1887, 24 Stat. 388,] and the property . . . was not an 'allotment' as that term is defined under that statute." Municipalities' Opening Br. at 30. This argument is immaterial, as the IRA was not limited to tribes that had lost lands to allotment. *See, e.g., State of Kansas v. Acting Southern Plains Regional Director,* 36 IBIA 152, 155 (2001) (IRA not limited to "landless Indians"); *Shawano County*, 53 IBIA at 75 (IRA also not limited to tribes that had a reservation in 1934).

[11] While the question of whether an IRA election was called for a tribe is conclusive of Federal jurisdiction over the tribe if answered in the affirmative, it is not a brightline test if answered in the negative. *See Village of Hobart*, 57 IBIA at 23 n.26 (citing *Carcieri*, 555 U.S. at 397-98 (Breyer, J., concurring) ("We know . . . that [the Department] wrongly left certain tribes *off* the list." Emphasis added.). In that situation, BIA must also consider other indicia of whether a tribe was under Federal jurisdiction, unless another definition of "Indian" under the IRA or another statute authorizes the trust acquisition.

IRA.[12] *See* Haas, *Ten Years of Tribal Government Under I.R.A.*, United States Indian Service (1947), at 18 (Regional Director's Answer Br., Ex. B). The calling of the election conclusively establishes that the Secretary recognized and determined that the Tribe was under Federal jurisdiction in 1934. Further, although the Tribe voted to opt out of the IRA, in 1983 Congress extended Section 5 of the IRA, through Section 203 of ILCA, to all tribes that in Section 18 elections voted to opt out of the IRA. Section 203 of ILCA states that "[t]he provisions of [Section 5] of this title shall apply to all tribes notwithstanding the provisions of [Section 18] of this title." 25 U.S.C. § 2202. As construed by the Supreme Court, "§ 2202 by its terms simply ensures that tribes may benefit from [Section 5 of the IRA] even if they opted out of the IRA pursuant to [Section 18]." *Carcieri*, 555 U.S. at 394-95. Contrary to what Appellants argue, the Court's holding that Section 203 of ILCA extended Section 5 of the IRA to tribes that voted to opt out of the IRA—rather than to all tribes generally—was not an "implicit" holding by the Supreme Court "that there may be" voting tribes that were unqualified to vote. Municipalities' Opening Br. at 34. To the extent that *Carcieri* speaks to the issue, Justice Breyer's concurring opinion unambiguously expresses that the opposite is true, i.e., the Federal government failed to afford certain tribes under Federal jurisdiction the right to opt out of the IRA. *See supra* note 11. Accordingly, we conclude that Section 5 of the IRA is authority for the proposed acquisition.[13]

While the Tribe's vote is dispositive, Appellants make numerous ancillary arguments that the Tribe was not under Federal jurisdiction in 1934. To the extent that Appellants' arguments, which we would consider in cases where no vote was called, have any merit, they actually support the conclusion that the Tribe was under Federal jurisdiction. For example, Appellants contend that whether Federal jurisdiction existed over a tribe in 1934 depends on whether the tribe had a reservation that was under Federal jurisdiction. The

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[12] As originally enacted, Section 18 provided that the IRA "shall not apply to any reservation wherein a majority of the adult Indians, voting at a special election duly called by the Secretary of the Interior, shall vote against its application." 25 U.S.C. § 478. Elections were to be called "within one year after June 18, 1934." *Id.* An amendment, not important here, extended the voting deadline and changed the majority vote requirement. *See id.* § 478a.

[13] In their Statement of Reasons, the Municipalities assert, without argument, that the Regional Director erred in determining that Section 203 of ILCA applies to the Tribe when the Tribe has no land held in trust. The Municipalities do not raise this issue in their briefs and we consider the argument to have been abandoned. We note, however, that at least one Federal court has rejected the argument apparently implied in the Municipalities' Statement of Reasons. *See State of New York v. Salazar*, No. 08-CV-644, 2009 WL 3165591 at *13-15 (N.D.N.Y. Sept. 29, 2009).

pertinent definition of "Indian" in Section 19 of the IRA requires Federal jurisdiction over a "tribe," not land. *See* 25 U.S.C. § 479. But we would agree that the existence of land set apart by the Federal government for the use of a tribe indicates Federal jurisdiction over the tribe. Here, the Tribe's original reservation was established by the Seven Nations of Canada Treaty of May 31, 1796 (Treaty), 7 Stat. 55.[14] Appellants' claim that the Treaty created for the Tribe's benefit "a New York State reservation, not a Federal reservation," Municipalities' Opening Br. at 41, is unfounded. The Treaty was made "with the approbation of the [United States] commissioner," and signed by him. 7 Stat. 55-56. The United States Senate advised and consented to ratification of the Treaty, and the President proclaimed it on January 31, 1797. *See id.* In continuance of the Federal jurisdiction embodied by the Treaty, in 1938, the United States filed a suit "on its own behalf and *on behalf and as trustee and guardian* of the St. Regis Tribe or Band of Indians" against the State and County, among others, seeking to enjoin taxation of several parcels of land located within the Tribe's reservation. Complaint in *United States v. Franklin County,* No. 90-2-5-56 (N.D.N.Y.), at 1 (Municipalities' Reply Br., App. A) (emphasis added).[15]

Appellants also cite statements by Department personnel or officers in the early part of the 20th century as proof that the Tribe was under the exclusive jurisdiction of the State. *See* Municipalities' Opening Br. at 37-39. Those statements acknowledge that the State had been exercising jurisdiction while the Federal government "to a large extent" had not done

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[14] A subsequent treaty, the Treaty of Buffalo Creek, Jan. 15, 1838, 7 Stat. 550, apparently was intended to remove the St. Regis Indians from New York to Kansas. However, that treaty was supplemented to provide that the St. Regis would not be compelled to be removed and could remain on their reservation. *See* Supplemental Article to Treaty of Buffalo Creek, Feb. 13, 1838, 7 Stat. 561.

[15] The District Court dismissed the complaint, not based upon any supposed lack of Federal trusteeship as Appellants assert, but upon its conclusion that the Nonintercourse Act of March 30, 1802, 2 Stat. 139 (codified as reenacted and amended at 25 U.S.C. § 177), did not apply to New York State and thus did not require Federal consent to extinguish Indian title. *See United States v. Franklin County*, 50 F. Supp. 152, 156 (N.D.N.Y. 1943). Further, that conclusion regarding the Nonintercourse Act was later overruled by the Supreme Court. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974) ("The rudimentary propositions that Indian title is a matter of federal law and can be extinguished only with federal consent apply in all of the States, including the original 13."); *see also Canadian St. Regis Band of Mohawk Indians v. State of New York*, 146 F. Supp. 2d 170, 188-91 (N.D.N.Y. 2001) (discussing *Franklin County* and *Oneida*). As we explained *supra* as background, following *Oneida*, in the 1980s, the Tribe filed land claims against Appellants and others, asserting violations of the Nonintercourse Act, and in 1998 the United States filed a complaint in intervention. *See also* AR Tab 13 at 6-9.

so (and that without appropriations the Department could not exert "active jurisdiction"). *See* Report from John R. T. Reeves to Commissioner of Indian Affairs, Dec. 26, 1914; Letter from John R. T. Reeves to Secretary of the Interior, Nov. 8, 1923; and Letter from Secretary of the Interior to Senator Lynn J. Frazier, Oct. 12, 1929 (Letter from Alan R. Peterman to Board, Apr. 17, 2012, Encl.). Rather than disprove Federal jurisdiction over the Tribe, the statements confirm Federal jurisdiction, albeit limited in its execution during that time period. In *Village of Hobart* we said that a statement made by the Commissioner of Indian Affairs in 1934 that a tribe was "not in any real way under Federal jurisdiction" could be construed as recognition that the tribe was under Federal jurisdiction, but that active Federal involvement with the tribe had waned due to allotment. 57 IBIA at 25. Here, the record is well supported that, although the State may largely have filled a de facto jurisdictional void, and sought legislation confirming primary jurisdiction in the State, Congress did not give it. *See* Tribe's Answer Br. at 14-20 and Ex. B. Moreover, in *Shawano County* we said that "even if the [s]tate's jurisdiction had gone unchecked at times, and even if Federal supervision had not been continuous, that did not destroy the Federal government's jurisdiction over the [t]ribe." 53 IBIA at 74 (citing *United States v. John*, 437 U.S. 634, 650 n.20, 652-53 (1978)).[16]

In sum, we conclude that the calling of an IRA election for the Tribe establishes that the Tribe was under Federal jurisdiction in 1934, and therefore Section 5 of the IRA provides discretionary authority for the proposed acquisition. Had we a need to consider them, Appellants' ancillary arguments would lead us to the same conclusion.[17]

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[16] We also note that, in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), the Supreme Court discussed periods of Federal inattention to another New York tribe. *See id.* at 214 ("From the early 1800's into the 1970's, the United States largely accepted, or was indifferent to, New York's governance of the land in question . . . ."). Far from suggesting that this history reflected an end to Federal jurisdiction over the tribe, the Court stated that "Section 465 provides the proper avenue for [the tribe] to reestablish sovereign authority over territory last held by the [tribe] 200 years ago." *Id.* at 221.

[17] After the conclusion of briefing and during our consideration of this appeal, the Regional Director and the Tribe jointly submitted an M-Opinion entitled "The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act." Sol. Op. M-37029 (Mar. 12, 2014). We have reviewed the M-Opinion and the Municipalities' response to the submission (the State did not submit a response), and find that the M-Opinion is consistent with Board precedent and that our analysis, *supra*, is consistent with the M-Opinion, which is binding on the Board. *See Chemehuevi Indian Tribe v. Western Regional Director*, 52 IBIA 192, 209 n.15 (2010) ("The Solicitor's 'M-Opinions' are binding on the Board."), *aff'd*, *Chemehuevi Indian Tribe v. Salazar*, No. 11-4437 (C.D. Cal. Aug. 6, 2012), *appeal pending*, No. 12-56836 (9th Cir.).

(continued…)

III. Applicable Standard – On-Reservation or Off-Reservation

Appellants contend that, pursuant to the regulations governing land acquisitions in 25 C.F.R. Part 151 and the Supreme Court's decision in *City of Sherrill*, the Regional Director was required to review the application under the off-reservation criteria in 25 C.F.R. § 151.11, which incorporates the on-reservation factors but under which BIA must give additional weight to concerns raised by state and local governments. *See* 25 C.F.R. § 151.11(a) and (b). We conclude that the Regional Director correctly limited his consideration to the on-reservation criteria.

(…continued)

We reject, as meaningless to the binding effect of the M-Opinion on the Board, a distinction that the Municipalities attempt to draw between the M-Opinion that we found binding on the Board in *Chemehuevi* and the M-Opinion regarding the IRA. The Secretary's delegation of authority to the Board excludes authority "[t]o overrule, modify, or disregard formal legal interpretations (M-Opinions) issued by the Solicitor . . . , which are binding on all Departmental offices and officials, as provided in 209 DM 3.2A(11)." 212 DM 13.8(c). "Formal legal interpretations" includes an M-Opinion's interpretation of a Federal statute, and it is irrelevant whether the interpretation is made in the context of a specific case or not. The Solicitor's Opinion in *Chemehuevi* interpreted a Federal statute in the context of a particular matter, and the Board found that it was bound by that interpretation in deciding a different matter before it. *See* 52 IBIA at 208-09.

Moreover, the Municipalities accept that the Solicitor's recent M-Opinion and our decision in *Shawano County* are in lockstep that a tribe's vote whether to opt out of the IRA establishes that the tribe was under Federal jurisdiction in 1934, without any need for examination anew of the tribe's history at or before 1934. *See* Municipalities' Response to Joint Filing of Supplemental Authority, Apr. 29, 2014, at 8. They incorrectly assert that the Assistant Secretary – Indian Affairs (Assistant Secretary) took a different approach in a fee-to-trust decision for the Cowlitz Tribe and that the Board is bound to follow that approach in this case. *See id.* at 9. Consistent with the M-Opinion and *Shawano County*, the Assistant Secretary stated in his decision: "For some tribes, evidence of being under federal jurisdiction in 1934 will be unambiguous (e.g., tribes that voted to accept or reject the IRA following the IRA's enactment, etc.), thus obviating the need to examine the tribe's history prior to 1934." Record of Decision, 151.87-Acre Trust Acquisition and Reservation Proclamation for the Cowlitz Tribe, at 95 n.99 (April 2013) (copy added to appeal record). The relevant difference between the two tribes' applications, which the Municipalities ignore, was that the Cowlitz Tribe did not vote on the IRA. Thus, our holding today that the Tribe's vote on the IRA proves that it was under Federal jurisdiction in 1934 is in accordance with the binding M-Opinion, our precedent, and the post-*Carcieri* decision of the Assistant Secretary.

As a threshold matter, the Regional Director determined that the acquisition would satisfy with the land acquisition policy in 25 C.F.R. § 151.3(a)(1) because the property is located within the exterior boundaries of the Tribe's reservation.[18] Decision at 2. In accordance with that determination, and pursuant to the definition of "Indian reservation" in 25 C.F.R. Part 151, the Regional Director applied the criteria for on-reservation acquisitions in § 151.10.

The Regional Director correctly determined that the parcel is located on the Tribe's reservation because it "is within that area confirmed to the Tribe by the United States by the [Treaty], which set aside a 6 square mile reservation," and "[t]here has not been a subsequent treaty or act of Congress diminishing the . . . reservation." Decision at 2. As defined for purposes of trust acquisitions under 25 C.F.R. Part 151, unless another definition is required by Federal legislation authorizing the acquisition, an "Indian reservation" is

> *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.

25 C.F.R. § 151.2(f) (first emphasis added).[19]

Appellants contend that *City of Sherrill* precludes the United States from recognizing the Tribe as having governmental jurisdiction over the parcel, and that the former-reservation exception does not apply because there has been no final judicial determination that the reservation has been diminished or disestablished. Thus, according to Appellants, the *City of Sherrill* decision created a gap in § 151.2(f), the parcel falls into that gap, and the off-reservation criteria must be applied.

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[18] While the land acquisition policy in § 151.3(a)(1)-(3) is disjunctive, the Regional Director also found that the acquisition would satisfy § 151.3(a)(3) (the acquisition is necessary to facilitate tribal self-determination, economic development, or Indian housing). We address Appellants' challenge to that finding *infra*.

[19] The Regional Director also concluded that, even if the Tribe's reservation had been diminished or disestablished, the on-reservation criteria would nonetheless apply because the term "Indian reservation" is defined to include a tribe's *former* reservation. Decision at 2-3. Because we conclude that the parcel fits the first part of the definition of "Indian reservation," and affirm the Regional Director's decision on that ground, we need not consider the exception covering former reservations.

We disagree. Appellants misapprehend *City of Sherrill* and its progeny. The parcel is within that area of land, i.e., its reservation, over which the Tribe is recognized by the United States as having governmental jurisdiction. *City of Sherrill* did not create a gap in the trust acquisition regulations, because its holding does not conflict with the Secretary's continued recognition of the jurisdictional consequences of reservation boundaries for purposes of implementing the trust acquisition regulations and policies, even if judicial remedies against third parties may be constrained.

Appellants misread *City of Sherrill* as creating an exception to the rule that a reservation remains intact unless Congress diminishes or disestablishes the reservation. *See Solem v. Bartlett*, 465 U.S. 463, 470 (1984) ("Once a block of land is set aside for an Indian reservation, and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise."). In *City of Sherrill* the Supreme Court held that, for equitable reasons, the Oneida Indian Nation of New York (OIN) could not obtain the judicial remedy that it sought to bar property taxation based on its claim of sovereign authority over parcels of reservation land that it had reacquired after two centuries of non-possession. *See* 544 U.S. at 216-17 ("This long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude OIN from gaining the disruptive remedy it now seeks."). The Court's ruling highlighted a critical distinction between asserting a right in a claim and vindicating that right with a judicial remedy. *See id.* at 213 (""The substantive questions whether the plaintiff has any right or the defendant has any duty, and if so what it is, are very different questions from the remedial questions whether this remedy or that is preferred, and what the measure of the remedy is."") (quoting D. Dobbs, Law of Remedies § 1.2 (1973)).

In keeping with the right/remedy distinction, the Court expressly did not determine that the Oneidas' reservation was disestablished. *City of Sherrill*, 544 U.S. at 215 n.9. And "[i]t remains the law of th[e Second] Circuit that the Oneidas' reservation was not disestablished." *Oneida Indian Nation of New York v. Madison County*, 665 F.3d 408, 443 (2d Cir. 2011) (internal quotation marks omitted). Further, the Secretary's recognition that the Tribe has jurisdictional rights within its reservation, unless and until the boundaries are disestablished or diminished by Congress, is fully consistent with the purpose and intent of the trust acquisition regulations, which is the limited context in which we address the issue. Even assuming that *City of Sherrill* created an ambiguity that did not previously exist in the trust acquisition regulations, we would resolve it in favor of including the Tribe's reservation as a current reservation. To do otherwise would create the anomalous situation in which a parcel that is within an undiminished reservation boundary (i.e., this parcel) must be considered under policies and criteria intended for "off-reservation" parcels assumed to be geographically separate from the reservation, while a contiguous parcel—undisputedly outside a tribe's reservation boundaries—is treated as "on-reservation" under

the regulations. In short, *City of Sherrill* was not a reservation boundary case, it was not a fee-to-trust case, and it does not require BIA to apply the off-reservation criteria to land located within a tribe's reservation.[20]

City of Sherrill's progeny also do not support Appellants' arguments. Appellants cite decisions subsequent to *City of Sherrill* that applied the so-called "*Sherrill* laches" doctrine to certain tribal land claims and to certain disputes over local governance in New York.[21] However, those decisions extended *Sherrill* laches to additional types of claims that the courts considered disruptive, *without* purporting to negate the right/remedy distinction. In particular, Appellants refer us to a recent District Court ruling in the Tribe's pending land claim lawsuit. But that decision is even less helpful to Appellants, because the District Court rejected the position that *City of Sherrill* forecloses the possibility of a successful "ancient" Indian land claim and allowed part of the Tribe's claim to proceed. *See* Corrected and Clarified Mem. Decision and Order in *Canadian St. Regis Band of Mohawk Indians v. New York*, No. 82-CV-783, 2013 WL 3992830 (N.D.N.Y. July 23, 2013), at 29-39 (Letter from Alan R. Peterman to Board, Aug. 5, 2013, Encl.). The post-*City of Sherrill* decisions do not inhibit our conclusion that, even if certain "disruptive" claims are barred by *Sherrill* laches, the boundaries of the Tribe's reservation is a separate legal matter, the boundaries are not changed merely by judicial application of *Sherrill* laches, and the

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[20] The Supreme Court did recognize in *City of Sherrill* that the fee-to-trust regulations "are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory." 544 U.S. at 220-21 (citing 25 C.F.R. § 151.10(f) (jurisdictional problems and potential conflicts of land use that may arise)). In that regard, nothing of substance would be gained by subjecting the Tribe's application to the off-reservation standard of § 151.11, because it would not expand the catalog of interjurisdictional concerns that BIA must already consider under the on-reservation criteria. *See* 25 C.F.R. § 151.11(a) (incorporating § 151.10(f) and other on-reservation criteria).

[21] *See Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir. 2005); *Onondaga Nation v. State of New York*, No. 05-CV-314, 2010 WL 3806492 (N.D.N.Y. Sept. 22, 2010), *aff'd*, 500 Fed. Appx. 87 (2d Cir. 2012), *cert. denied*, 132 S.Ct. 419 (2013); *Oneida Indian Nation of New York v. New York*, 500 F. Supp. 2d 128 (N.D.N.Y. 2007), *aff'd in part and rev'd in part*, *Oneida Indian Nation of New York v. County of Oneida*, 617 F.3d 114 (2d. Cir. 2010); *Shinnecock Indian Nation v. State of New York*, No. 05-CV-2887, 2006 WL 3501099 (E.D.N.Y Nov. 28, 2006); *Seneca-Cayuga Tribe of Oklahoma v. Town of Aurelius*, 233 F.R.D. 278 (N.D.N.Y. 2006); *Cayuga Indian Nation of New York v. Village of Union Springs*, 390 F. Supp. 2d 203 (N.D.N.Y. 2005).

Secretary may continue to recognize the Tribe's jurisdiction for purposes of interpreting and applying the trust acquisition regulations.

Having duly considered *City of Sherrill* and its progeny, we hold that, for purposes of § 151.2(f), the United States recognizes the Tribe as having governmental jurisdiction within the boundaries of its reservation, including all those lands that are the subject of the Tribe's land claim lawsuit in which the United States is intervener-plaintiff. We need not and do not decide whether equitable considerations, in another context, would bar the Tribe from exercising, in whole or in part, governmental jurisdiction over certain reservation parcels unless those lands are placed into trust status for the Tribe, because the only question that BIA or the Board must decide for purposes of § 151.2(f) is whether the parcel to be acquired in trust status is within the current boundaries of the Tribe's reservation as recognized by the United States. This parcel is.[22]

IV. Review of the Regional Director's Analysis under 25 C.F.R. § 151.10

Decisions concerning whether to take land into trust are discretionary, and Appellants bear the burden of proving that BIA did not properly exercise its discretion. *See, e.g., Shawano County*, 53 IBIA at 69. On appeal, Appellants principally challenge the Regional Director's analysis for the proposed trust acquisition under three of the criteria listed in 25 C.F.R. Part 151—sections 151.10(b) (Tribe's need for additional land), 151.10(e) (impacts resulting from removal of the land from the tax rolls), and 151.10(f) (jurisdictional problems and potential conflicts of land use)—and compliance with NEPA.[23]

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[22] Because, for purposes of § 151.2(f), the parcel need only be located within "that area of land" over which the Tribe is recognized by the United States as having governmental jurisdiction, i.e., within its reservation, we need not consider Appellants' argument that this individual parcel is not currently "Indian country" within the meaning of 18 U.S.C. § 1151.

In addition, we reject Appellants' argument that the Tribe (in its initial application), the United States (in a criminal case), and an individual plaintiff in another case previously stipulated that this parcel or similarly situated land is located off-reservation. The statements were mistakes and have been corrected, or they are otherwise not binding on the Board. *See, e.g., United States v. Wilson*, 69 F.3d 235, 239 n.1 (2d Cir. 2012); Brief of the United States in *United States v. Wilson*, No. 11-915 (2d Cir.), filed July 11, 2011, at 12 (Tribe's Answer Br., Ex. T).

[23] To the extent that Appellants also challenge the Regional Director's analysis of § 151.10(c) (purposes for which the land will be used) and (g) (whether BIA is equipped to discharge the additional responsibilities resulting from the trust acquisition), we have considered those challenges and reject them in the context of addressing Appellants' challenges under the other § 151.10 criteria, *infra*.

We are not persuaded by Appellants' arguments, and conclude that Appellants have failed to show that the Regional Director did not properly exercise his discretion, that he committed error, or that the Decision is not supported by substantial evidence. We affirm the Decision.

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

Appellants challenge the Regional Director's consideration of the criterion in § 151.10(b) ("[t]he need of the . . . tribe for additional land") and his finding that the acquisition would satisfy the land acquisition policy in § 151.3(a)(3) ("the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing"), without distinguishing between them. Appellants have not shown that the Regional Director failed to properly consider the Tribe's need for additional land, and we conclude that it was unnecessary for the Regional Director to have made any determination under § 151.3(a)(3).

As an initial matter, Appellants argue for a definition of "need" that is not found in either § 151.3(a) or § 151.10(b). According to Appellants, the Decision and the record do not show that the Tribe "needed" the parcel such that the Tribe "could not have built" the transfer station on its reservation lands to which it retained title. Municipalities' Reply Br. at 48-49. In support of their position, Appellants argue that the tribe in *City of Yreka, California v. Pacific Regional Director*, 51 IBIA 287 (2010), demonstrated that it "truly needed" additional land under § 151.3(a)(3) by showing that it could not have operated a medical clinic on its existing land base, and that the Tribe's application should be held to that standard. Municipalities' Reply Br. at 48-49.

At the outset, the land at issue in *City of Yreka* was located *off-reservation* and thus, unlike in this case, the acquisition did not satisfy § 151.3(a)(1), and instead the regional director relied on § 151.3(a)(3). *See City of Yreka*, 51 IBIA at 295. Because here § 151.3(a)(1) is satisfied by virtue of the parcel being within the Tribe's reservation, and because the subsections of § 151.3(a) are disjunctive, it is immaterial whether the proposed acquisition is "necessary" to facilitate tribal self-determination or economic development under § 151.3(a)(3). Moreover, in an appeal from the Board's decision in *City of Yreka*, the District Court rejected the argument that the term "necessary" in § 151.3(a)(3) requires a showing that the acquisition is "essential or a sine qua non to self-determination or economic advancement." *City of Yreka v. Salazar*, No. 10-CV-1734, 2011 WL 2433660 at *7 (E.D. Cal. June 14, 2011), *appeal dism'd*, No. 11-16820 (9th Cir. Feb. 21, 2013). The Court reasoned that such a strict application of § 151.3(a)(3) would be inappropriate "[c]onsidering that the broad goal behind the IRA was to conserve and develop Indian lands and resources, and [that] Congress believed that additional land was essential for the

economic advancement and self-support of the Indian communities." *Id.* (internal quotation marks omitted).[24]

Nor does criterion § 151.10(b), which is separate from the land acquisition policy, severely constrain BIA's discretion. Our decisions have repeatedly observed that "BIA has broad leeway in its interpretation or construction of tribal 'need' for the land," that "flexibility in evaluating 'need' is an inevitable and necessary aspect of BIA's discretion," and that it is "not the role of an appellant to determine how that 'need' is defined or interpreted by BIA." *County of Sauk*, 45 IBIA at 209; *cf.* 25 C.F.R. § 151.10(d) (only where the acquisition is for an individual Indian must BIA consider "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").

In arguing that the record does not support the Tribe's need to site the transfer station on this parcel instead of within its reservation lands that are not part of the land claim, Appellants miss the point. The Tribe has already constructed and is operating the transfer station on the parcel, and the existing use will not change. The Regional Director's consideration of the Tribe's need in this case is properly focused on the land as developed with the existing transfer station. BIA is not required under § 151.10 to revisit previous choices made by a tribe to develop property for which trust acquisition is sought. *Cf. Shawano County*, 53 IBIA at 79 ("Nothing in Part 151 requires the [t]ribe to limit its vision only to present needs nor, more importantly, does Part 151 permit BIA to second-guess or substitute its judgment for that of the [t]ribe in determining the planned uses for land that is the subject of a trust acquisition application."). And the judgments of several other Federal agencies that provided funding for construction of the transfer station on the parcel are fully consistent with the Tribe's determination of its need, and the Regional Director's consideration of that need.

Appellants would also have the Tribe justify acre-by-acre the need for the acquisition, arguing that because every acre of the parcel is not used by the transfer station, the Tribe must not need the remaining acreage. But the Board has rejected such an inflexible standard whereby the Tribe must justify and have a plan in place for each acre that it seeks to put into trust: "The Tribe is not required to show that trust status for the land is required for the Tribe to achieve its stated needs, much less justify, acre-by-acre, the need for trust status. There simply is no requirement in the IRA or in the regulations that

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[24] The Court construed the term "necessary" in § 151.3(a)(3) to mean that "the Secretary must conclude that the acquisition is more than merely helpful or appropriate." *City of Yreka*, 2011 WL 2433660 at *7. As it is immaterial whether § 151.3(a)(3) is met here, we address Appellants' arguments in relation to that subsection no further.

requires the Tribe to make this showing or for BIA to opine on it." *Shawano County*, 53 IBIA at 78 (rejecting the argument that a tribe might actually "require" only 100 out of 400 acres proposed for such general purposes as housing, forestry, parks and recreation, and governmental facilities); *see South Dakota v. U.S. Dep't of the Interior*, 423 F.3d 790, 801 (8th Cir. 2005) ("it would be an unreasonable interpretation of 25 C.F.R. § 151.10(b) to require the Secretary to detail specifically why trust status is more beneficial than fee status in the particular circumstance").

Notwithstanding that he was not required to consider the Tribe's need for the parcel *in trust*, the Regional Director concluded that "[a]cquisition of the land *in trust* will help address the Tribe's current and near term need for a solid waste disposal facility." Decision at 3 (emphasis added). In a different context, Appellants agree that management of solid waste "is a valid exercise of [governmental] power which . . . further[s] significant health and environmental benefits upon a [government's] citizens." Municipalities' Opening Br. at 97. The Regional Director also found that trust acquisition of the parcel is "supportive of the Tribe's ability to exercise governmental authority over its lands and its uses for the purpose of promoting the health, welfare, and social needs of its members and their families," and "will also provide diversity to the Tribe's economy and land base." Decision at 3.[25] The Regional Director's findings are sufficient to show that he considered the Tribe's need for additional land under § 151.10(b), which is all that he was required to do. *See Shawano County*, 53 IBIA at 68-69 ("there is no requirement that BIA reach a particular conclusion with respect to each factor," and the factors need not be "weighed or balanced in any particular way or exhaustively analyzed").

B. Tax Impacts – § 151.10(e)

Section 151.10(e) provides that, "[i]f the land to be acquired is in unrestricted fee status," BIA must consider "the impact on the State and its political subdivisions resulting from removal of the land from the tax rolls." Appellants dispute the Regional Director's finding that, assuming the parcel is currently in unrestricted fee status, the loss of real property taxes resulting from acquisition of the parcel in trust "will not have a significant detrimental effect on the existing level of services currently being provided by the state and its political subdivisions." Decision at 6. Appellants have not shown that the Regional

[25] And the Regional Director found, in connection with his determination under § 151.3(a)(3), that the acquisition would facilitate tribal self-determination and economic development because it would "increase the tribal land base, clarify tribal jurisdiction over the property[,] and provide a needed governmental service to [tribal] members while also realizing a valuable economic opportunity from the processing and sale of recyclables." Decision at 2.

Director failed to properly consider the impact on Appellants of removing the parcel from the tax rolls.

Based on comments supplied by the Municipalities (as the State provided no comments), the Regional Director found that the 2008 tax assessment for the parcel was $2,646.81. *See* Decision at 5. The only special assessment for the parcel in 2008 was a charge of $82.81 for fire and emergency services that are provided by the Town. *See id.* Compared to the total County and Town budget for FY 2008, the Regional Director found that the annual tax loss from the parcel would be less than 0.003%. *See id.* at 6.[26]

Among the Municipalities' comments regarding the services they provide, the Regional Director found that "[n]o specific impacts from the lack of tax revenue collection were identified." Decision at 5. He was not mistaken. As he stated, the Municipalities only generally asserted that the impacts would be "significant because it impacts both the quality of services supported by real property taxes and the extra burden placed on the taxpayers and residents of the County." *Id.*; *see* AR Tab 13 at 12, 15, 19. On appeal, Appellants repeat the same general argument, which does not identify any reduction in services that would result from the less than 0.003% tax loss, *see* Municipalities' Opening Br. at 12, 93, and we reject the notion that any reduction in the tax base or budget is inherently a significant impact. *See, e.g., Roberts County, South Dakota v. Acting Great Plains Regional Director*, 51 IBIA 35, 42, 51 (2009), *aff'd*, *State of South Dakota, County of Roberts, et al. v. U.S. Dep't of the Interior*, 775 F. Supp. 2d 1129 (D.S.D.), *appeal dism'd.*, 665 F.3d 986 (8th Cir. 2012) (the Board upheld a regional director's finding that a fractional reduction in the tax base would not cause economic distress); *State of South Dakota*, 39 IBIA at 297 (although the regional director should have considered additional

[26] The parties make opposing arguments that the history of tax assessments and collections or non-collections for the parcel supports their respective positions regarding the Decision. Appellants also argue that tribal members owe taxes on other lands. We need not address those arguments, because it is sufficient that the Regional Director considered the tax loss attributable to this parcel based on the Municipalities' 2008 tax assessment. *See Shawano County*, 40 IBIA at 249 (BIA need only consider the tax loss based on taxes assessed and paid for the land to be acquired). Although not relevant to § 151.10(e), we note that the Tribe subsequently paid the assessment. Municipalities' Opening Br. at 11; *see Avoyelles Parish, Louisiana, Police Jury v. Eastern Area Director*, 34 IBIA 149, 153-54 (1999) (whether or not the tribe is current in its property tax payments at the time of BIA's decision is not one of the factors that BIA must consider under § 151.10).

information, her "bottom line" that the tax impact was only a fraction of 1% was sufficient to sustain the decision).[27]

The Regional Director also considered that, like the Municipalities, the Tribe provides a variety of services, which have the effect of easing the Municipalities' burden to provide services.[28] *See* Decision at 6. The Tribe's services include a tribal police force whose members are certified to enforce State law, whereas the County and Town do not maintain their own police forces. *See id.* at 5-6. Appellants do not dispute that the Tribe provides this and other services. *See* Municipalities' Opening Br. at 13.[29]

In addition, the Regional Director considered "the degree to which the Tribe's direct and indirect payments to the State and local governments offset the loss of real property taxes that would occur even if taxes are due and owing." Decision at 6. For example, the Regional Director considered that in 2005 the Tribe paid more $11.2 million in wages to residents of the County and that the Tribe purchased $3.3 million in goods and services from vendors in the County. *See id.* Appellants assert that the Tribe's economic contributions, such as wages it pays to its employees, cannot be considered offsets to the loss because the services provided by the Municipalities are funded by real property taxes and not income taxes. We reject that position. The Regional Director was within his discretion to consider the degree to which the tax impacts, which he already considered to be minimal, would be offset by the financial contributions and benefits the Tribe provides to the County and/or to the Town. *See County of Sauk*, 45 IBIA at 214-17; *Rio Arriba, New*

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[27] For the first time in their opening brief, the Municipalities assert that a State law enacted in 2011 limits real property tax increases to 2% per year and thereby makes it "more difficult" for the County to raise taxes to cover lost revenue. Municipalities' Opening Br. at 5; *but cf.* Tribe's Answer Br. at 51 and Ex. S (the Tribe responded that the cap may be waived by the County). Even assuming that the Municipalities could not have first raised this issue with the Regional Director prior to his 2011 Decision, they have not shown a specific impact to services that would result from removing this parcel from the tax rolls.

[28] Although the Regional Director stated that the Tribe budgets $4 million for the services it provides, *see* Decision at 6, according to the record the Tribe's budget is significantly larger. *See* AR Tab 19 at 7 and Ex. 3 ¶ 8.

[29] Appellants contend that tribal police have reduced traffic fine revenues by allowing motorists to resolve tickets in tribal court instead of municipal court. *See* Municipalities' Opening Br. at 14, 49. But they fail to quantify the alleged loss much less articulate how such independent actions by the Tribe are relevant to this case, e.g., how they relate to specific impacts resulting from the real property tax loss if the parcel is placed into trust.

Mexico, Board of County Commissioners v. Acting Southwest Regional Director, 38 IBIA 18, 25-26 (2002).

Finally, the Regional Director considered that the Tribe has an agreement with the State to share revenue from the Tribe's gaming enterprise, and that the Municipalities have utilized some of that revenue to develop their own infrastructure. *See* Decision at 6. The Municipalities do not dispute that they received the Tribe's payments, only that the payments were received through the State and not directly from the Tribe. While the Municipalities also assert that State law prevents them from using the Tribe's payments for routine government operations, the Tribe contends that they have used the payments for those purposes, including for roads and government buildings. We need not resolve that dispute, because how the Municipalities used (or received) the Tribe's payments is not material to the Decision. The Regional Director maintains that what is relevant about the Tribe's payments is that they provided additional funds to the Municipalities. *See* Regional Director's Answer Br. at 31. The Municipalities argue that the payments stopped in 2010, apparently unbeknownst to the Regional Director at the time of his Decision, due to a dispute between the State and Tribe under the agreement. However, that does not negate the revenue sharing payments made up to that time[30] or any of the other prior and continuing contributions by the Tribe to the Municipalities. On the record before him, the Regional Director's consideration of these payments was appropriate and the Municipalities have not shown that the suspension of payments, if known to the Regional Director, might have altered his overall analysis or conclusion that the benefits of the acquisition to the Tribe outweigh the potential impacts to Appellants stemming from the tax loss.

C. Jurisdictional Impacts – § 151.10(f)

Appellants disagree with the Regional Director's consideration of various jurisdictional concerns but do not demonstrate that the Regional Director failed to adequately consider those issues under § 151.10(f). The Regional Director found "no substantial problems or potential conflicts of land use resulting from the proposed use of the property . . . that cannot be resolved *either* through the existing jurisdictional scheme *or* by cooperative agreement with the local authorities." Decision at 8 (emphases added). Appellants ignore the first disjunctive clause and contend that the Regional Director did not consider that, in light of past disputes with the Tribe regarding jurisdiction over the parcel, voluntary resolution of future disputes is unlikely. Appellants also contend that the Regional Director erred in his finding, based on the Tribe's record of environmental

[30] In 2005, the State received over $3 million, the County received over $250,000, and the Town received over $100,000. *See* AR Tab 19, Ex. 3 ¶ 9. In 2007, these amounts were even greater. *See id.*

management, that placement of the parcel into trust "is not expected to have a detrimental effect on environmental oversight." *Id.* at 7. And Appellants contend that the Regional Director did not adequately consider potential conflicts concerning rights-of-way on the parcel, the County solid waste flow control law, and security at the International Boundary. We address each contention in turn.

First, as a point of clarification, the Regional Director need not have made any finding on whether potential jurisdictional or land use conflicts could be resolved. Contrary to Appellants' argument to the Regional Director and on appeal, BIA has no obligation to both "consider *and prevent*" any disruption that would result from a change in regulatory jurisdiction. AR Tab 13 at 6 (emphasis added); Municipalities' Opening Br. at 45 (emphasis added). "[S]ection 151.10(f) requires the Regional Director to *consider* jurisdictional problems or potential conflicts; it does not require [him] to *resolve* those problems or issues." *Roberts County*, 51 IBIA at 52, and cases cited therein.

Appellants claim that the Regional Director failed to properly consider that from the time the Tribe purchased the parcel in 1999 the Tribe has been non-cooperative with the Municipalities. In particular, they argue that the Tribe has unilaterally asserted jurisdiction over the fee simple parcel since 1999 and did not agree to obtain a building permit until 2005 despite being asked to do so by the Town in 2001. *See* Municipalities' Reply Br. at 53-54. But Appellants do not identify any evidence that the Regional Director failed to consider. The Municipalities discussed past jurisdictional disputes in their comments, *see* AR Tab 13 at 9-10, and the Regional Director states that he considered the disputes in the context of the 2005 *City of Sherrill* decision and Appellants' arguments regarding the effect of that ruling. *See* Regional Director's Answer Br. at 33. Further, the Tribe obtained a building permit and a certificate of occupancy from the Town, resolving those particular disputes concerning the transfer station prior to the fee-to-trust request. *See* AR Tab 1 at 4 and Ex. F; AR Tab 19, Ex. 41. And in light of their argument that the Tribe has been asserting jurisdiction, it is unclear from Appellants' submissions what new jurisdictional disputes would result from transfer of title to the parcel to the United States in trust.

The Regional Director found that the trust acquisition would preclude the State and local governments from exercising jurisdiction over the parcel (thus sanctioning tribal jurisdiction that Appellants argue the Tribe has been asserting unilaterally since 1999), except that 25 U.S.C. §§ 232 (State jurisdiction over offenses committed by or against Indians on Indian reservations) and 233 (jurisdiction of State courts in civil actions and proceedings between Indians or between Indians and non-Indians) would continue to apply. *See* Decision at 7. The Municipalities have acknowledged that "[t]he Tribe recognizes the District Attorney's jurisdiction with respect to criminal investigation and prosecution on the Reservation and willingly cooperates to process all criminal matters pursuant to the New York State Penal Law." AR Tab 13 at 12. The Regional Director

also found that the transfer station does not conflict with existing zoning, because according to Appellants there is no applicable zoning code. *See* Decision at 7; AR Tab 13 at 17.

Appellants dispute the Regional Director's finding that, in view of the Tribe's record of environmental management, trust acquisition of the parcel is not expected to have a detrimental effect on environmental oversight. However, Appellants do not identify problems in the Tribe's prior use or management of the parcel that should have been but were not considered. For example, Appellants claim that BIA staff found an electrical transformer "laying on the transfer station property," and that this demonstrates lax management of the parcel by the Tribe and also calls into question BIA's ability to administer the parcel once acquired in trust, averring that BIA staff did not require the Tribe to address the purported issue. Municipalities' Opening Br. at 67, 89. But this and other claims of environmental mismanagement by the Tribe are unsupported by the administrative record whereas the record supports the Tribe's explanation that the transformer was affixed to a pole. *See* Tribe's Answer Br. at 37-38; Level 1 Contaminant Survey, Aug. 13, 2008 (Letter from Regional Director to Tribe, Aug. 20, 2008, Encl.) (AR Tab 20).

Appellants also contend that the Regional Director overlooked easements or rights-of-way on the parcel as a source of potential future conflicts.[31] But Appellants did not raise this issue to the Regional Director and on appeal Appellants seek to shift the burden to BIA and the Tribe to show that the proposed acquisition will not have any impact on Appellants' use of the easements or rights-of-way. *See* Municipalities' Reply Br. at 53. In asserting that "it is unclear whether the easement[s] will remain on the property," *id.*, Appellants ignore the warranty deed, which states that the parcel would be conveyed to the United States in trust "*subject to* any valid, existing lease or right-of-way thereon." Warranty Deed (Letter from Rosebud Cook to Regional Director, Mar. 31, 2010, Encl.) (AR Tab 25) (emphasis added). Further, as the Regional Director correctly observed in his Decision, the title review for the parcel is not one of the factors that BIA must consider under § 151.10. Decision at 9. Instead, the title review is required under 25 C.F.R. § 151.13 and need only be completed *after* a decision to acquire land in trust. *Thurston County*, 56 IBIA at 69 n.9. Appellants have not shown that the Regional Director failed to consider potential conflicts identified by any of Appellants asserting the easements or rights-of-way.

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[31] Appellants refer to two highway rights-of-way granted to the Franklin County Highway Department and to a telephone easement granted to the New York Telephone Company. We need not address, and do not decide, Appellants' individual standing to raise these issues.

Next, Appellants take issue with a statement by the Tribe in its application, which the Regional Director repeated in his Decision in the context of describing the Tribe's purpose for using the parcel, that the transfer station is used both by tribal members and "also . . . by residents from the Town of Fort Covington and Franklin County." Decision at 4; AR Tab 19 at 16. According to Appellants, non-Indian use of the transfer station would conflict with the County's solid waste flow control law, because under that law all solid waste generated within the County must be delivered to the County landfill, whereas the Tribe directs solid waste it receives to a landfill in another county. *See* Local Law No. 3 for the Year 2007 (Flow Control Law) (Letter from Alan R. Peterman to Board, Apr. 17, 2012, Encl.). But Appellants fail to show how the alleged conflict would result from accepting the parcel into trust, or how this apparent conflict between the Municipalities and its non-Indian residents demonstrates any error in the Regional Director's conclusion regarding potential land use and jurisdictional conflicts. Moreover, we note that Appellants argue that the record *does not* support the Tribe's statement that non-Indians use the transfer station, thus undermining their own suggestion of a potential conflict. *See* Municipalities' Opening Br. at 86, 97. The Regional Director anticipated that there may be jurisdictional problems and conflicts of land use due to a change in jurisdictional authority, but he also found that the potential for conflict does not outweigh his findings in support of the acquisition. *See* Decision at 9.

Lastly, Appellants argue that the Regional Director failed to properly consider that acquiring the parcel in trust will adversely impact security at the International Boundary. This argument repeats comments that the Municipalities made to the Regional Director. *Compare* Municipalities' Opening Br. at 16-18 *with* AR Tab 13 at 13-14. The Regional Director found that the parcel is approximately one mile from the Canada-United States border and stated that, even if the parcel was on the border, the Tribe has been committed in multi-agency efforts to address border security. *See* Decision at 7-8. Appellants fail to articulate how trust acquisition of the parcel would result in additional jurisdictional conflicts with respect to border security, or how the Regional Director's consideration of their comments (assuming they were relevant) was inadequate. The Regional Director is required only to consider potential jurisdictional problems and is not required to resolve them. *Roberts County*, 51 IBIA at 52.

In sum, Appellants do not meet their burden on appeal to show that the Regional Director did not properly consider the § 151.10 criteria, that he committed error warranting a remand of the Decision, or that the Decision is not supported by substantial evidence.

V. Compliance with NEPA

Under 25 C.F.R. § 151.10(h), BIA must consider the extent to which the applicant has provided information that enables BIA to comply with 516 DM 6, appendix 4, NEPA Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.[32] Although the Regional Director made a categorical exclusion (CE)[33] determination under NEPA for the proposed action to acquire title to the parcel in trust, Appellants contend that the Regional Director "refus[ed] to conduct any [NEPA] review at all." Municipalities' Reply Br. at 44. Appellants also contend that the CE cannot be applied to the proposed action, and that an Environmental Assessment (EA) or an Environmental Impact Statement (EIS) must be prepared. Appellants have not met their burden to show error.

A CE *is* a method of NEPA review and compliance. The Regional Director found that a CE was appropriate under exclusion category 516 DM 10.5(I), which applies to "[a]pprovals or grants of conveyances and other transfers of interests in land where no change of land use is planned." *See* Decision at 9; CE Checklist, Aug. 26, 2008 (AR Tab

[32] The Regional Director found that an Environmental Site Assessment (ESA) was prepared in compliance with 602 DM 2 and approved on November 4, 2010, and showed no environmental problems on the parcel. Decision at 9; ESA, Oct. 28, 2010 (AR Tab 29). The ESA is not required under NEPA, and was instead done for the purpose of determining risk of exposing the *Department* to liability for environmental cleanup costs and damages associated with acquisition of title to the real property. *See* 602 DM 2.1. An initial BIA inspection found that the property was "for the most part . . . clean and well maintained with minimal corrective actions needed." AR Tab 20 at 1. And the ESA found that, prior to a second site inspection in 2010, the Tribe had cleaned up the remainder of the property as requested. *See* AR Tab 29 at 4. Even assuming that Appellants would have standing to challenge the ESA—i.e., to assert the Department's interests in avoiding potential liability—they have not shown that BIA's findings are not supported by the record.

[33] A CE (also known as a Cat Ex or CATEX) is defined under NEPA as a "category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations (§ 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required." 40 C.F.R. § 1508.4; *see also* 43 C.F.R. § 46.205.

21).[34] Although Appellants first concede that the Tribe is not using, "nor does it have any planned used for," the undeveloped portion of the parcel, Municipalities' Opening Br. at 8, Appellants later assert that the record does not support the Regional Director's reliance on the Tribe's statement that it plans no change in use. Appellants argue that because the transfer station occupies less than the entire parcel, the Tribe must not need all of the land—an argument we addressed *supra*—or it must have plans to develop the remaining acreage. They also argue that a prior EA—which the Tribe prepared to obtain Federal funding to construct the transfer station—stated that the Tribe planned to "include enough room to accommodate a third future modular TransStor unit" and reserved up to 1/4 acre "for the future addition of a composting facility." Municipalities' Opening Br. at 61 (citing EA at 7 (AR Tab 1, Ex. G)).

In deciding whether to acquire land in trust, a regional director "has no obligation to consider [an appellant's] speculation about what might happen in the future." *City of Eagle Butte, South Dakota v. Acting Great Plains Regional Director*, 49 IBIA 75, 82 (2009). And the possibility of future development does not preclude the use of a CE: "It is unrealistic to expect land to be conveyed with no plan whatsoever for its future use. Whether or not the conveyance may be categorically excluded is a matter of judg[]ment by the BIA official responsible for NEPA compliance as to how well the plan is established." 61 Fed. Reg. 67845, 67845 (Dec. 24, 1996); *see id.* at 67846 (the BIA official must decide "whether or not plans for development or physical alteration are established to the point where NEPA review of the proposed activity should be done in conjunction with the land transfer").

The Regional Director maintains that there is no post-construction evidence in the record that indicates the Tribe is still considering the additions to the transfer station, or is anticipating any changes in its use of the parcel that would make the CE inapplicable, and thus the record does not contradict the Tribe's statement in its application that it plans no change in use. *See* Regional Director's Answer Br. at 24. Appellants rely on *City of Isabel, South Dakota v. Great Plains Regional Director*, 38 IBIA 263 (2002), but that decision is inapposite because, there, the applicant informed BIA that she intended to build another house on her lot. *See id.* at 263. Appellants bear the burden to show that the Tribe's

[34] Although the Decision and the CE Checklist cite to 516 DM 10.5(D), the Regional Director clarified in his answer brief that he intended to rely on 516 DM 10.5(I). That is supported by the Tribe's statement in its application that BIA should apply 516 DM 10.5(I), *see* AR Tab 1 at 5, and by narrative in the CE Checklist identifying the current use of the parcel and stating that there will be no change in land use, *see* AR Tab 21 at 1.

statements to BIA are not entitled to reliance, and they have not done so. *See, e.g., State of Kansas*, 36 IBIA at 158.[35]

We also reject Appellants' contention that "extraordinary circumstances," which would make a CE inapplicable, *see* 40 C.F.R. § 1508.4 and 43 C.F.R. § 46.215, exist for the proposed action and that the Regional Director failed to consider them. Appellants essentially argue that a CE is insufficient because environmental issues may arise from construction and operation of solid waste transfer facilities. For example, Appellants argue that the Departmental Manual states that an EIS is normally required for "*[c]onstruction* of a solid waste facility for commercial purposes," 516 DM 10.4 (emphasis added), and that "the same standard *should* apply to an existing facility." Municipalities' Opening Br. at 64 (emphasis added). Appellants cite no authority for that proposition. In fact, because the facility already exists and is operational, placement of the parcel into trust is an independent action—not a "connected action"—under NEPA and thus, for purposes of considering whether there are extraordinary circumstances, the proposed action is only transfer of title to the parcel in trust.[36] Appellants have not shown any likelihood that the transfer station could not continue to operate were the parcel to remain in fee status. *See* Municipalities' Reply Br. at 42; AR Tab 13 at 26; *see also* AR Tab 19 at 27 (the Tribe acknowledged that if State law applied the facility would need to be registered but would not require additional permits). Appellants also contend that an EA that was prepared for the initial construction and operation of the transfer station was deficient, and that BIA's fee-to-trust decision may be the only opportunity for a proper review. But it is not for BIA or the Board to decide the sufficiency of that prior review, which was unrelated to a fee-to-trust acquisition. Concerns about that EA, which was made available for public review, should have been raised before now and in a different forum.

Further, Appellants contend that they

> do not ask that the BIA or the IBIA accept Appellants' environmental concerns at face value (which stem from state and federal law and related guidance), but, rather, that the BIA conduct a NEPA review which actually

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[35] Although the Regional Director stated that any "[f]uture changes from the current use of the property would require an [EA] of the impacts," Decision at 9, and that statement was overbroad as not all changes would necessarily involve a Federal action requiring NEPA review, it is harmless error because the Tribe has no plans for additional development of the parcel.

[36] A "connected action" is defined, in part, as an action that is "closely related" to the proposed action because it "[c]annot or will not proceed unless other actions are taken previously or simultaneously." 40 C.F.R. § 1508.25(a)(1)(ii).

> considers the *environmental factors associated with operation of a solid waste transfer station which, once taken in trust, will be formally exempted from local and state oversight*.

Municipalities' Reply Br. at 42 (emphasis added); *see id.* at 44 (Appellants argue that "the trust decision will determine the ultimate environmental regulatory authority" for the parcel). This argument seeks to shift onto BIA Appellants' burden on appeal to identify the purported environmental consequences from the trust acquisition that BIA allegedly failed to consider. *See Voices for Rural Living v. Acting Pacific Regional Director*, 49 IBIA 222, 234 n.14 (2009) ("[T]he bare decision to take land into trust where no change in the use of the property is planned ordinarily does not implicate environmental concerns or NEPA and is categorically excluded."). Appellant's speculation that the change in regulatory control, which they appear to concede is more form than substance with respect to the de facto status quo, is insufficient to demonstrate that the Regional Director erred in concluding that the acquisition falls within a CE. For all of the foregoing reasons, Appellants have not shown error in the Regional Director's use of the CE.[37]

VI. Due Process

At the outset of the appeal, the Municipalities filed a motion to vacate the Decision and remand the matter based on denial of due process. The Municipalities argued that, prior to receiving the administrative record of the Decision, they lacked knowledge of and an opportunity to address the Tribe's August 2008 response to the Municipalities' comments on the application. Municipalities' Motion to Vacate and Remand Decision to Reopen Record, Dec. 28, 2011, at 2-3 (unnumbered). The Board, in a January 9, 2012, order, allowed the parties to brief the issue as part of their briefs on the merits. Having considered the parties' briefs, while it may have been advisable for the Regional Director to provide the Municipalities with a copy of the Tribe's response and an opportunity to reply, to the extent it appeared that the parties disputed various facts, we conclude that vacatur and remand is unwarranted because the Municipalities have not shown that any error was prejudicial.

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[37] The Regional Director contends that Appellants have not established standing to challenge his compliance with NEPA. The speculative nature of Appellants' allegations that the Regional Director failed to consider environmental consequences associated with taking the parcel into trust, thereby formalizing what apparently is the de facto regulatory scheme, might well implicate their NEPA standing. However they are viewed, and even assuming they are sufficient to meet the minimum requirements of standing, we conclude that Appellants' allegations are insufficient to demonstrate error.

The Municipalities rely on *South Dakota v. U.S. Dep't of the Interior*, 787 F. Supp. 2d 981 (D.S.D. 2011). There, a regional director, who was considering an appeal from a superintendent's decision to acquire land in trust, considered a number of additional documents not previously identified, and which the regional director did not provide to the appellants while the matter was pending before BIA. The Court held that this was a violation of 25 C.F.R. § 2.21(b), which governs appeals of a subordinate BIA official's administrative action, and a denial of the appellants' due process rights, and that the error was not rendered harmless by virtue of an administrative appeal to the Board because the Board does not review a discretionary BIA decision *de novo*. 787 F. Supp. 2d at 996-99. The Regional Director and the Tribe argue that *South Dakota* is distinguishable from this appeal. We agree.

Unlike in *South Dakota*, § 2.21(b) is not applicable to the Regional Director's decision and, to the extent the Municipalities contend that BIA violated any procedural requirement of 25 C.F.R. Part 151 regarding local government input on the application, they are mistaken. The regulations required that the Municipalities be given an opportunity to comment on the Tribe's application and that the Tribe be permitted to respond to those comments. *See* 25 C.F.R. § 151.10. Both procedural requirements were met. "[T]he fee-to-trust application process is not intended to be an adjudicatory process." *Thurston County*, 56 IBIA at 304 n.11. Accordingly, there is no procedural rule that BIA, prior to issuing a decision on an application, must give state and local governments an opportunity to address the applicant's response to comments, much less, as the Municipalities suggest, an opportunity to review and comment on the entire administrative record.

Further, although a denial of due process could occur even in the absence of a violation of a procedural rule, it still does not necessarily warrant a remand to the agency. "The harmless error rule applies to agency action because if the agency's mistake did not affect the outcome, if it did not prejudice the petitioner, it would be senseless to vacate and remand for reconsideration." *Jicarilla Apache Nation v. U.S. Dep't of the Interior*, 613 F.3d 1112, 1121 (D.C. Cir. 2010) (internal quotation marks and brackets omitted); *see* 5 U.S.C. § 706 ("due account shall be taken of the rule of prejudicial error"). The burden to demonstrate prejudicial error is on the party challenging the agency action. *Jicarilla*, 613 F.3d at 1121. If the prejudice is obvious, the party need not demonstrate anything further. *Id*. But if the prejudice is not obvious, the "party must indicate with reasonable specificity what portions of the documents it objects to and how it might have responded if given the opportunity and show that on remand the party can mount a credible challenge to the agency's reliance on the supporting documents." *County of Charles Mix v. U.S. Dep't of the Interior*, 799 F. Supp. 2d 1027, 1042 (D.S.D. 2011), *aff'd*, 674 F.3d 898 (8th Cir. 2012) (internal quotation marks and brackets omitted); *see South Dakota*, 787 F. Supp. 2d at 997 (error is more than harmless if it "precludes an interested party from presenting certain colorable arguments to the ultimate decision maker").

In *South Dakota*, the prejudice to the appellants was not obvious notwithstanding that the additional documents constituted a significant portion of the factual material on which BIA relied in deciding to approve the trust acquisition. *See* 787 F. Supp. 2d at 996-97. The Court held that the error was prejudicial only after considering, *inter alia*, five additional arguments that the appellants contended they would have made to the regional director had they had the opportunity. *See id.* at 996-98.

In this case, we find no obvious prejudice nor have the Municipalities demonstrated prejudice. In their opening brief, the Municipalities base their due process challenge on a single exhibit to the Tribe's response, and we conclude that the Municipalities have not met their burden to show that they were prejudiced by not being able to reply to it earlier.[38]

The Municipalities cite one paragraph in a declaration by Tribal Chief James Ransom (Ransom Declaration). *See* Municipalities' Opening Br. at 26-27; Municipalities' Reply Br. at 12 (citing Ransom Declaration ¶ 3 (AR Tab 19, Ex. 3)). The Ransom Declaration states in pertinent part that

> [t]he Tribe operates and funds the Hogansburg Volunteer Fire Department . . . located in the Hogansburg Triangle[39] land claim area . . . [and] provides fire and rescue services, not only to the reservation, but . . . also to the Hogansburg Triangle . . . . The Tribe's Fire Department is also part of the Franklin County Mutual Assistant network responding to 911 calls . . . [which] would allow the Tribe to respond to any calls in the Fort Covington area.

AR 19, Ex. 3 ¶ 3; *see also* AR Tab 19 at 7-8. The Municipalities assert that the Regional Director relied on the Ransom Declaration in making conclusions regarding the degree to which fire and emergency services and other contributions by the Tribe would offset the impacts of removing the parcel from the tax rolls. *See* Municipalities' Reply Br. at 12. The Municipalities contend that they "would have demonstrated to the [Regional] Director that the Property is not located in the Bombay Triangle, and that the Bombay Triangle is not

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[38] In their motion, the Municipalities listed seven other factual disputes concerning the Tribe's response. *See* Municipalities' Motion to Vacate and Remand Decision to Reopen Record at 2-3 (unnumbered). The Municipalities did not assert those other disputed facts in their opening brief as grounds for their due process claims and we therefore do not consider them as such.

[39] The Hogansburg Triangle is also referred to as the Bombay Triangle; Hogansburg is a hamlet within the Town of Bombay. For ease, we refer to the area as the Hogansburg Triangle except where we quote material that refers to it as the Bombay Triangle.

located in the Town of Fort Covington." Municipalities' Opening Br. at 27; *see* Municipalities' Reply Br. at 12.

However, the Regional Director clearly apprehended that the Tribe's fire department is located outside the Town. The Decision adopts, nearly verbatim, the Municipalities' January 2008 comments in finding that "Fire Protection and Emergency Services in the Town are provided exclusively by . . . the Fort Covington Volunteer Fire Department at the rate of $36,800 per year," and that "[t]he fire district charge for this parcel . . . for 2008 is $82.81." Decision at 5; *see* AR Tab 13 at 15. It cannot reasonably be disputed that the services the Tribe provides in the Hogansburg Triangle—which *is* within the County—are relevant to the degree to which impacts to the State, County, *or* Town would be offset. *See* 25 C.F.R. § 151.10(e). And the Municipalities do not dispute the Regional Director's finding that the Tribe's fire department, as part of the County Mutual Assistance Network, is available to be dispatched by the County. Decision at 5, 6. Because the Municipalities have not presented any colorable arguments opposing the Regional Director's reliance on the Tribe's response, they have not met their burden to demonstrate that BIA's not providing the Municipalities with the Tribe's response was prejudicial to them. *See South Dakota*, 787 F. Supp. 2d at 997.[40]

[40] Except to the extent addressed *infra*, Appellants' remaining arguments in this appeal have been considered and rejected.

For the first time in their reply brief, the Municipalities make several additional due process arguments, including that the Regional Director did not notify them of the Tribe's May 2008 request to treat the application as for an on-reservation acquisition, he did not notify them that he was applying a categorical exclusion, and they received certain photos of the parcel after they filed their opening brief. The Board generally will not consider arguments raised by an appellant for the first time in a reply brief. *See, e.g., Citation Oil & Gas Corp. v. Acting Navajo Regional Director*, 57 IBIA 234, 245 n.13 (2013); *Rosebud Indian Land and Grazing Ass'n v. Acting Great Plains Regional Director*, 50 IBIA 46, 56 n.10 (2009). The Board sees no reason here to depart from that practice, and even were we to consider the arguments we would reject them. There was no procedural requirement to provide the Municipalities with such notices. Nor can they show prejudice, given the fact that we review the on-reservation/off-reservation issue *de novo* and the Municipalities concede that they "could (and did)" comment on the Tribe's assertion, in its application, that BIA should apply the CE. Municipalities' Opening Br. at 56 (citing AR Tab 1 at 5); *see* AR Tab 13 at 27. And the Municipalities identify nothing new in the photos, which were summarized in a BIA site inspection report that the Municipalities had discussed in their opening brief. *See* Municipalities' Opening Br. at 66 (citing AR Tab 20).

Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director's August 17, 2011, decision to acquire approximately 39 acres in trust for the Saint Regis Mohawk Tribe.

I concur:

// original signed
Thomas A. Blaser
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge