The Grand Traverse Band of Ottawa and Chippewa Indians

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June 6, 2017

Hon. Raul Labrador
Chairman
Oversight & Investigations Committee
1523 Longworth House Office Building
Washington, DC 20515

Hon. A. Donald McEachin
Ranking Minority Member
Oversight & Investigations Committee
314 Cannon House Office Building
Washington, DC 20515

Re: Recent Hearing Entitled: *Examining the Impacts of Federal Natural Resources Laws Gone Astray*

Dear Chairman Labrador and Ranking Minority Member McEachin:

I am writing on behalf of the Grand Traverse Band of Ottawa and Chippewa Indians (Band) regarding our concerns about a document that was distributed at the May 24, 2017 hearing entitled "Examining the Impacts of Federal Natural Resources Laws Gone Astray." More specifically, the May 22, 2017 Oversight Hearing Memorandum ("Memorandum") criticizes the Secretary of the Interior's administration of the Indian Reorganization Act of 1934 (the "IRA"), and as an "example" suggests that the Secretary has lacked legal authority to take land into trust for the Band, which is located in Representative Jack Bergman's Congressional District in Michigan (Memorandum at 2 n. 7). I am writing to express our strong objection that this suggestion was made without any prior consultation with Representative Bergman or the Band, and made without any reasonable legal foundation. The Memorandum provides no explanation for the position it takes with regard to the Band, and runs directly contrary both to well-established law and to history.

The Memorandum apparently singles out the Band because the Band was not formally recognized by the executive branch in 1934, its administrative recognition having been improperly terminated in 1872 and not restored until 1980. Under the IRA, the Secretary may take land into trust for (among other groups) "any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 5129. In *Carcieri v. Salazar,* 555 U.S. 379 (2009), the Supreme Court held that a Tribe must have been under federal jurisdiction at the time of the IRA's enactment in 1934 in order to qualify for the benefits of the statute. The Court did so in fidelity

to the principle of statutory interpretation, fiercely propounded by the late Justice Scalia among others, that statutes must be construed according to their plain meaning. That same principle of respect for the plain language of a statute undermines any suggestion by the Memorandum that a Tribe also had to be formally recognized by the executive branch in 1934 to qualify for the IRA's benefits. The term "now" in section 479 modifies "Federal jurisdiction," but not the requirement of recognition, which appears without temporal limitation and most sensibly refers to the time of Secretarial action. Respect for the plain language of a statute does not allow the reader to pick and choose between those sections of text which the reader likes and those which the reader does not.

Indeed, this issue is already clearly decided as a matter of law. In *Confederated Tribes of the Grand Ronde Community of Oregon v. Jewell,* 830 F.3d 552, 560-63 (D.C. Cir. 2016), the United States Court of Appeals for the District of Columbia Circuit, which is the federal appeals court that has jurisdiction over federal agencies and which is commonly viewed as the most authoritative court in the land next to the Supreme Court, rejected the argument that a tribe had to be federally recognized in 1934 to qualify for the benefits of the IRA. The Supreme Court then very recently denied review of the case. 2017 WL 1199528, at *1 (April 3, 2017). That it did so is not surprising. In *Carcieri* itself, Justice Breyer, who had fully joined in the majority opinion, penned a concurrence in which he made it clear that the requirement that a tribe have been under federal jurisdiction in 1934 does not mean that it also must have been formally recognized by the federal government at that time. *Justice Breyer provided two examples of tribes that were under federal jurisdiction in 1934 even though the executive branch improperly denied recognition of them, one of which was the Grand Traverse Band, and no Justice disagreed with Justice Breyer's conclusions in this regard.* For the Memorandum to nevertheless single out the Band as ineligible for the IRA's benefits is disturbing.

The Memorandum mentions none of this case law. It likewise fails to mention that the Interior Board of Indian Appeals (IBIA) has also clearly rejected the notion that the Band is ineligible for the IRA's benefits because it was not formally recognized at the time of the IRA's enactment. *Grand Traverse County Board of Commissioners v. Acting Midwest Regional Director,* 61 IBIA 273, 280 (2015) ("We can readily dispose of Appellant's first argument, that Federal recognition of the Tribe in 1934 was required for the IRA to apply") (see attached).

Just as the Memorandum ignores well-established law, it also ignores the Band's clear history. That history has been thoroughly canvassed in various judicial decisions, including Justice Breyer's concurrence, the IBIA decision, and the decision for the United States Court of Appeals for the Sixth Circuit (which has jurisdiction over Michigan) in *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the United States Attorney for the Western District of Michigan,* 369 F.3d 960 (6th Cir. 2004). Those decisions establish beyond dispute: (1) that the Band came under federal jurisdiction through a series of treaties commencing with the 1795 Treaty of Greenville, 7 Stat. 49 (1795) which, among other things, reserved to the Band protected areas of land and hunting, fishing and gathering rights in its ceded territories; (2) that, as the Sixth Circuit has conclusively held, beginning in 1872 "the executive branch of the government *illegally* acted as if the Band's recognition had been terminated, as evidenced by its refusal to carry out any trust obligations for over one hundred years," 369 F.3d at 968 (emphasis in original); and (3) that this illegal executive branch action notwithstanding, the Band remained

in existence and subject to the continued jurisdiction of the United States until its restoration to formal recognition in 1980. Indeed, no less a figure than John Collier, the architect of the IRA, referred to the Band as being "under federal jurisdiction" in 1934. *See* May 13, 1934 Letter, Commissioner Collier to Agent Christy.

In sum, the Memorandum would accord unwarranted legal effect to the Secretary's illegal effort in the nineteenth century to terminate recognition of the Band, in derogation not only of the Band's history of continued survival under the authority of the United States but also in derogation of Congress's own prerogatives, as the law is clear that only Congress can legally terminate recognition of a Tribe once that recognition has been established through treaty or other means.

These mistakes might have been avoided had the Band or Representative Bergman's office been consulted prior to the reference to the Band being included in the Memorandum, but no such consultation took place. Consultation might also have made clear that, rather than an example of administrative decision-making gone awry, the efforts of the Band to restore some small portion of the land base promised to it by treaty but illegally taken from it have yielded significant benefits not only for the Band but also for the non-Indian communities that surround it. While the restored land base is small, the Band relies principally on economic activity taking place there, rather than on federal assistance, to sustain its governmental and social infrastructure, and that economic activity has provided the basis for the employment of large numbers of Band members and non-Indians alike, and for strong cooperation between the Band and other units of government. The Memorandum should have shown respect for this history, and for the law underlying it, rather than seeking to compound the sins of earlier, illegal federal action through casting unwarranted aspersions on the Band's eligibility for benefits under the IRA. For these reasons, the Grand Traverse Band respectfully requests that this letter, and accompanying copy of the relevant IBIA decision be included in the record of the hearing.

Sincerely,

Thurlow "Sam" McClellan
Tribal Chairman

cc: The Hon. Rob Bishop, Chairman
The Hon. Raul Grijalva, Ranking Minority Member
The Hon. Jack Bergman
The Hon. Ryan Zinke, Secretary, Department of the Interior

INTERIOR BOARD OF INDIAN APPEALS

Grand Traverse County Board of Commissioners v.
Acting Midwest Regional Director, Bureau of Indian Affairs

61 IBIA 273 (09/25/2015)

United States Department of the Interior

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

GRAND TRAVERSE COUNTY BOARD OF COMMISSIONERS, Appellant,	)	Order Affirming Decision
v.	)	
	)	Docket No. IBIA 13-130
ACTING MIDWEST REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	September 25, 2015

The Grand Traverse County Board of Commissioners (Appellant or County) appealed to the Board of Indian Appeals (Board) from a July 2, 2013, decision (Decision) of the Acting Midwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA), to accept, in trust for the Grand Traverse Band of Ottawa and Chippewa Indians (Tribe or Band), 158.91 acres of land referred to as "Parcel 82," located within the County.[1]

We affirm the Decision because Appellant has not shown that the Regional Director exceeded his authority or abused his discretion in deciding to accept the land in trust. We reject Appellant's argument that the Tribe was not under Federal jurisdiction in 1934 and therefore the Regional Director lacked statutory authority to take land into trust for the Tribe under Section 5 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. § 465. In 1934, the Tribe continued to exist and continued to have Federally preserved treaty rights protected by the jurisdiction and authority of the United States, and the fact that the Secretary of the Interior (Secretary) did not call an election for the Tribe under the IRA does not change the fact that the Tribe was, as a matter of law, under Federal jurisdiction. The historical record admittedly reflects confusion and uncertainty regarding the Tribe's eligibility to benefit from the IRA, but that appears to be largely based on the Secretary's erroneous interpretation of an 1855 treaty as having dissolved the Tribe. The historical record, viewed as a whole, and including the Tribe's treaty rights, supports a finding that the Tribe was under Federal jurisdiction in 1934. We also conclude that Appellant has not met its burden to demonstrate that the Regional Director, in deciding to accept Parcel 82 in

[1] The parcel is also sometimes referred to as the "Hoxie" property.

trust, failed to properly consider the regulatory requirements for off-reservation acquisitions.

Statutory and Regulatory Framework

The Secretary is authorized "to acquire . . . any interest in lands . . . within or without existing reservations . . . for the purpose of providing lands for Indians." 25 U.S.C. § 465. As relevant here, BIA's regulations provide that land may be acquired in trust for a tribe when the tribe already owns an interest in the land and 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)(2)-(3).

When BIA receives an application for a discretionary trust acquisition, it must provide notice to the state and local governments having regulatory jurisdiction over the land to be acquired, and give them an opportunity to submit written comments regarding the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments. 25 C.F.R. § 151.10 (on-reservation); *id.* § 151.11(d) (off-reservation). If an off-reservation acquisition is for business purposes, the tribe must provide a plan that specifies the anticipated economic benefits associated with the proposed use. *Id.* § 151.11(c).

As relevant to the issues raised in this appeal, in evaluating a tribe's application to take land into trust, BIA must consider:

> (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
>
> . . . .
>
> (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;

25 C.F.R. § 151.10 (on-reservation acquisitions); *see id.* § 151.11(a) (incorporating § 151.10 factors for off-reservation acquisitions).

In addition, for off-reservation trust acquisitions, the regulations require that the Secretary shall consider

> [t]he location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, . . . as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated

benefits from the acquisition. The Secretary shall give greater weight to the concerns raised pursuant to [§ 151.11(d)].

Id. § 151.11(b); *see id.* § 151.11(d) (notice and solicitation of comments "as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments"); *see also Jefferson County, Oregon, Board of Commissioners v. Northwest Regional Director*, 47 IBIA 187, 187-90 (2008) (describing the application of 25 C.F.R. §§ 151.10-151.11).

Under § 151.2(f), "Indian reservation" is defined to include "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction," which includes lands held in trust by the United States for a tribe. *See County of San Diego, California v. Pacific Regional Director*, 58 IBIA 11, 29 (2013); *Aitkin County, Minnesota v. Acting Midwest Regional Director*, 47 IBIA 99, 104-07 (2008).

Background

Parcel 82 is a 158.91-acre property located within Acme Township in the County. Decision at 2 (unnumbered) (Administrative Record (AR) Tab 3). The Tribe purchased Parcel 82 in 2003 and uses it for deer and coyote hunting. Resolution No. 11-29.2320, Nov. 16, 2011 at 1 (AR Tab 7-A); Phase I Environmental Site Assessment, Mar. 6, 2012, at 2-3 (unnumbered) (AR Tab 7-C). Eight years later, in November 2011, the Tribe requested that BIA accept Parcel 82 into trust. Resolution No. 11-29.2320, at 2. In its resolution supporting the trust acquisition, the Tribe stated that Parcel 82 would be used to pursue "economic development opportunities" in connection with grants from the U.S. Departments of Energy and Agriculture, as well as a site for future housing. *Id*. at 1-2.

Subsequently, the Tribe clarified that Parcel 82 was not contiguous to lands currently held in trust for the Tribe, and the Tribe agreed to have its application processed by BIA as an "off-reservation acquisition" pursuant to 25 C.F.R. § 151.11. Letter from Tribal Attorney to BIA's Michigan Agency Superintendent (Superintendent), June 15, 2012, at 1 (AR Tab 7-A). The Tribe also explained that it had "no plans in the foreseeable future" to use the property for economic development opportunities or housing. *Id*. at 2; *see also* Supplemental Request to the Secretary of the Interior for Trust Status, June 15, 2012, at 7 (AR Tab 7-A).

The Superintendent notified the State of Michigan, Acme Township, and Appellant that BIA had under consideration the Tribe's application for the acquisition of Parcel 82

into trust.[2] Appellant responded stating that property taxes for Parcel 82 in 2011 totaled $19,498.31, of which the County received $2,878.60. *See*, *e.g.*, Letter from Deputy Civil Counsel to Superintendent, Aug. 31, 2012, Enclosure at 3 (Grand Traverse County's Response to the Bureau of Indian Affairs request for Comment) (AR Tab 7-B). Appellant also described the municipal services provided by the County regarding Parcel 82, and contended that it did not receive any direct funding from the Tribe for its services. *Id*. at 3-4. Acknowledging that these services were "minimal," Appellant explained that if the property was developed, expansion of county services would be needed. *Id*. at 4. Appellant also expressed its desire to reach an agreement with the Tribe to receive payment in lieu of taxes if the property is taken into trust. *Id*. at 3. Further, Appellant noted that while Parcel 82 was currently zoned for agricultural use, it was concerned about the Tribe's future plans for the parcel. *Id*. at 5. Appellant contended that the catch-all phrase "economic development" included in the Tribe's application could "essentially provide[] opportunity for any form of development." *Id*.

The Tribe provided BIA with responses to the comments received from Appellant and others. *See*, *e.g.*, Letter from Tribal Attorney to Superintendent, Dec. 21, 2012 (AR Tab 7-B); *see also* Letter from Tribal Attorney to Superintendent, Sept. 13, 2012 (AR Tab 7-B). In contrast to Appellant's assertions, the Tribe stated that over the past 16 years, it paid approximately $2.9 million for municipal services, including direct funding to the County in the amount of $1,605,140.34. Letter from Tribal Attorney to Superintendent, Dec. 21, 2012, Enclosure at 2 (Memorandum to Superintendent from Tribal Attorney, Dec. 19, 2012) (AR Tab 7-B). The Tribe also contended that through the Indian Reservation Roads Program, it had made available over $3.5 million for County roads. *Id*. at 3. The Tribe also stated that it was willing to provide for reimbursement for law enforcement services with the County, but thus far the parties have not been able to reach an agreement. *Id*. at 4-5.

While agreeing that the Tribe had made "substantial distributions" to "community agencies within several counties," Appellant sought to "clarify" that the Tribe had made no contributions to the "County *government*." Letter from Deputy Civil Counsel to Superintendent, Sept. 28, 2012 (AR Tab 7-B) (emphasis in original). Appellant submitted a consent judgment entered in litigation to which the Tribe was a party, and contended that

[2] Letter from Superintendent to Acme Township Board, July 3, 2012 (AR Tab 7-B at 1-2 (unnumbered)); Letter from Superintendent to Governor of Michigan, July 3, 2012 (AR Tab 7-B at 6-7 (unnumbered)); Letter from Superintendent to County Commissioners, July 3, 2012 (AR Tab 7-B at 11-12 (unnumbered)).

the Tribe had failed to submit payments to the County government in accordance with the judgment.[3] *Id.*

On July 2, 2013, the Regional Director approved the Tribe's fee-to-trust application. Decision (AR Tab 3). The Regional Director first addressed BIA's statutory authority for the acquisition, finding that § 5 of the IRA, 25 U.S.C. § 465, authorizes BIA to accept title to Parcel 82 in trust for the Tribe. *Id*. at 3-4 (unnumbered). Citing *Carcieri v. Salazar*, 555 U.S. 379 (2009), the Regional Director concluded that § 5 applies to the Tribe because the Tribe was under Federal jurisdiction when the IRA was enacted in 1934.[4] *Id*. The Regional Director then concluded that each of the remaining regulatory criteria for taking land in trust favored the trust acquisition of Parcel 82 and that a categorical exclusion from further review under the National Environmental Policy Act applies to the proposed acquisition. *Id*. at 3-6 (unnumbered).

Turning to 25 C.F.R. § 151.11, the Regional Director noted that Parcel 82 is located 31 miles from the boundaries of the Tribe's proclaimed reservation. *Id*. at 7 (unnumbered). He further noted that the State, Appellant, and Acme Township had provided comments about the proposed acquisition. *Id*. The Regional Director stated that after examining these responses and the remainder of the administrative record, he found the benefits of the trust acquisition outweighed any concerns regarding Parcel 82's distance from the Reservation. *Id*.

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[3] The consent judgment provided:

> Each tribe shall determine which local unit or units of government shall receive payments and the amounts thereof; provided however, the guidelines governing tribes in making said determinations shall be based upon compensating said local units of government for governmental services provided to the tribes and for impacts associated with the existence and location of the tribal casino in its vicinity; and provided further, however, that out of said aggregate payment, each local unit of government shall receive no less than an amount equivalent to its share of ad valorem property taxes that would otherwise be attributed to the class III gaming facility if that site were subject to such taxation.

Sault Ste. Marie Tribe et al. v. Engler, Civ. No. 1:90 CV 611 (W.D. Mich. 1993) (Stipulation for Entry of Consent Judgment, ¶ 8).

[4] 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 § 5 is limited to those tribes that were "under Federal jurisdiction" at the time the IRA was enacted in June 1934. *See Carcieri*, 555 U.S. at 382.

On appeal to the Board, Appellant argues that the Regional Director lacks statutory authority to place Parcel 82 in trust. Opening Brief (Br.), Dec. 30, 2013, at 9-16. According to Appellant, the Tribe must have been both Federally recognized and under Federal jurisdiction in 1934 in order to have land taken into trust for it under the IRA, but the Secretary had "terminated" the Federal Government's relationship with the Tribe in 1872, and also did not include the Tribe in the IRA elections held pursuant to 25 U.S.C. § 478,[5] and thus did not necessarily recognize or determine in 1934 that the Tribe was under Federal jurisdiction. *Id*. at 2, 13. With respect to the regulatory criteria for off-reservation trust acquisitions, Appellant argues that the Regional Director failed to properly consider the criteria in § 151.11(b)-(c) and thus he abused his discretion in approving the Tribe's trust application.[6] *Id*. at 16-18. The Regional Director filed an answer brief. Appellant did not file a reply brief, and no other briefs were filed.

Discussion

I. Standard of Review

Where, as here, BIA's decision to take land into trust is discretionary, we do not substitute our judgment for that of BIA. *Cass County, Minnesota v. Midwest Regional Director*, 42 IBIA 243, 246 (2006). "Rather, the Board reviews such discretionary decisions to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of its discretionary authority, including any limitations on its discretion established in regulations." *Id.* (internal quotation marks omitted) (quoting *Shawano County, Wisconsin, Board of Supervisors v. Midwest Regional Director*, 40 IBIA 241, 244 (2005)). While the Regional Director must consider the relevant factors under 25 C.F.R. Part 151, "there is no requirement that BIA reach a particular conclusion with respect to each factor[,] . . . nor must each factor be exhaustively analyzed." *Aitkin County,* 47 IBIA at 104. Appellant bears the burden of proving that BIA "did not properly exercise its discretion." *Jefferson County*, 47 IBIA at 200. The Board reviews legal issues *de novo*. *State of Minnesota v. Acting Midwest Regional Director*, 47 IBIA 122, 125 (2008).

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[5] The IRA required the Secretary to call elections within one year after enactment to allow tribes to vote on whether to opt out of the applicability of the IRA to their respective reservations. *See* 25 U.S.C. § 478.

[6] In its notice of appeal, Appellant also contends, with no discussion or explanation, that the Regional Director failed to adequately consider the criteria in 25 C.F.R. § 151.10(b) through (h). *See* Notice of Appeal, Aug. 1, 2013, at 2 (unnumbered). We consider any arguments that were not developed during briefing as waived, or subject to summary rejection for failure to satisfy Appellant's burden of proof. *See Carroll County, Mississippi, Board of Supervisors v. Acting Eastern Regional Director*, 56 IBIA 194, 200 (2013).

II. Statutory Authority for the Acquisition

Appellant contends that the Regional Director lacks statutory authority to take land into trust for the Tribe pursuant to the IRA because, according to Appellant, the Tribe was not Federally recognized and not under Federal jurisdiction in 1934.[7] Appellant argues that the Secretary had terminated Federal recognition of the Tribe in 1872, and, following enactment of the IRA, did not hold an election for the Tribe to vote on whether to opt out of the IRA. Opening Br. at 2, 13 (citing *Shawano County, Wisconsin v. Acting Midwest Regional Director*, 53 IBIA 62 (2011) (*Shawano County II*); *Village of Hobart, Wisconsin v. Acting Midwest Regional Director*, 57 IBIA 4 (2013)); *see supra* note 5. Appellant construes our decisions in *Shawano County II* and *Village of Hobart*, which held that the Secretary's decision to hold an IRA election was a dispositive determination that the tribes in those cases were under Federal jurisdiction in 1934, as implying that the absence of such an election means that a tribe was *not* under Federal jurisdiction in 1934. Appellant argues that the historical evidence rebuts the Regional Director's finding that the Tribe was under Federal jurisdiction, relying on five pieces of correspondence between the Department of the Interior (Department) officials and members of Congress and others, between 1933 and 1935. *Id*. at 13-14; Exhibits (Ex.) H-L. In addition, Appellant cites the 1937 *Report on Michigan Indians*, and the May 14, 1937, *Status of Organization, Lake States*, in support of its position. *Id*. at 14-15. Appellant also takes issue with the Regional Director's finding that "[n]othing in the record indicates that Congress terminated its relationship with the Tribe," arguing that it is irrelevant. *Id*. at 15 (quoting Decision at 3 (unnumbered)).

In the Decision, the Regional Director concluded that the Tribe was under Federal jurisdiction when the IRA was enacted in 1934, in part, because the Tribe entered into treaties with the United States in 1795, 1836, and 1855. Decision at 3 (unnumbered). The Regional Director also pointed to a 1905 congressional statute authorizing the Ottawa and Chippewa Indians to file a Court of Claims petition, a subsequent judgment awarded to the groups, and the roll compiled by BIA for distribution of the judgment, as clear evidence that the Tribe was under Federal jurisdiction prior to 1934. *Id*.; Appellee's Br., Feb. 2, 2014, at 19. The Regional Director also considered correspondence between the Tribe and the Department in the 1930s. Decision at 3 (unnumbered). The Regional Director concluded that "[b]efore 1934, the United States entered into multiple treaties with the Band, engaged in extensive dealings with the Band, and enacted legislation that led to

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[7] Appellant failed to raise the issue of the Regional Director's authority in the proceedings before the Regional Director, and thus arguably waived the argument. But the Regional Director has not objected to our consideration of this issue, and because the issue has been fully briefed and the record is sufficient, we exercise our discretion to do so. *See* 43 C.F.R. § 4.318; *State of New York v. Acting Eastern Regional Director*, 58 IBIA 323, 330 (2014).

judicial recognition of [F]ederal obligations, duties, and exercise of authority over the Band by the [F]ederal government." *Id*. The Regional Director then explained that the Tribe had continuously existed prior to and subsequent to 1934, as confirmed in the Department's formal Federal acknowledgment decision issued in 1980. *Id*.

In his answer brief, the Regional Director emphasizes the finding in *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the United States Attorney for the Western District of Michigan* that the Tribe "had treaties with the United States and a prior relationship with the Secretary of the Interior at least as far back as 1795." Appellee's Br. at 15 (quoting 369 F.3d 960, 967 (6th Cir. 2004)); *see also id*. (citing the Treaty of Greenville, 7 Stat. 49 (Aug. 3, 1795); Treaty of Washington, 7 Stat. 491 (Mar. 28, 1836); Treaty of Detroit, 11 Stat. 621 (July 31, 1855)); *id*. at 16 (contending that from the 1850-1870s, BIA supported a school and Indian agent for the Tribe and noting the Court of Claims judgment).

The Regional Director acknowledges that the correspondence from the 1930s reflects confusion and in some cases conflicting views on the Tribe's status in relation to the IRA, but the Regional Director argues that the Tribe's relationship with the Federal Government, as a jurisdictional matter, remained intact. Appellee's Br. at 16. The Regional Director argues that the correspondence reflected the erroneous belief, held by the Department at the time, that the 1855 Treaty had terminated the Tribe, an idea later rejected by both the Department and the courts. *Id.* at 16, 20; *see United States v. Michigan*, 471 F. Supp. 192, 264 (W.D. Mich. 1979) and *Grand Traverse Band*, 369 F.3d at 961. In addition, the Regional Director contends that the Department's reticence to extend IRA benefits to the Tribe in the 1930s also reflected fiscal concerns. Appellee's Br. at 16, 20. The Regional Director cites the "extensive factual and historical record developed by the Department" as part of the Federal acknowledgment process, *see* 25 C.F.R Part 54 (1980),[8] which culminated in Federal acknowledgment in 1980 that the Tribe continued to exist. Appellee's Br. at 25.

We can readily dispose of Appellant's first argument, that Federal recognition of the Tribe in 1934 was required for the IRA to apply. The language of the IRA refers to "any recognized Indian tribe now under Federal jurisdiction." 25 U.S.C. § 479. The Tribe is undoubtedly Federally recognized, *see* 80 Fed. Reg. 1942, 1944 (Jan. 14, 2015), and the word "now" qualifies the phrase "under Federal jurisdiction," see 25 U.S.C. § 479. In *Carcieri*, the Supreme Court construed the word "now" solely in reference to the phrase "under Federal jurisdiction," holding that it meant in 1934, when the IRA was enacted.

[8] The current regulations on Federal acknowledgment are found at 25 C.F.R. Part 83.

The IRA does not require a tribe to have been "recognized" by the United States in 1934, formally or otherwise, in order for § 5 to apply.

We also readily reject Appellant's second argument, that the Board's holdings in *Shawano County II* and *Village of Hobart* require a finding that the Tribe was not under Federal jurisdiction in 1934 because the Secretary did not hold an IRA election for the Tribe following its enactment. The Board has made clear that:

> 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.

State of New York, 58 IBIA at 331, n.11. *See also Village of Hobart*, 57 IBIA at 23, n.26 ("the fact that the Federal government failed to afford certain tribes under Federal jurisdiction the right to opt out of the IRA does not mean that they were not under Federal jurisdiction"). Thus, it is both necessary and appropriate for the Department to consider other historical evidence to make the determination.[9]

We agree with the Regional Director that the historical record supports his finding that the Tribe was under Federal jurisdiction in 1934. The Tribe is the successor to the Grand Traverse Ottawas and Chippewas, who signed treaties with the United States reserving commercial and subsistence fishing rights. *Grand Traverse Band of Chippewa and Ottawa Indians v. Director, Michigan DNR*, 971 F. Supp. 282, 285, 288 (W.D. Mich. 1995) (Tribe's rights under 1836 and 1855 treaties), *aff'd*, 141 F.3d 635 (6th Cir. 1998). The treaty-reserved fishing rights included a servitude, or easement of access over land surrounding the Indians' traditional fishing grounds, that remained in effect even after the

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[9] This approach is also consistent with the M-Opinion, issued by the Solicitor, entitled "The Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act." Sol. Op. M-37029 (Mar. 12, 2014). The M-Opinion describes a two-step inquiry by which the agency should examine whether: 1) the United States, at or before 1934, had "taken an action or series of actions" on behalf of a tribe or tribal members, establishing or reflecting "[F]ederal obligations, duties, responsibility for or authority over the tribe by the Federal Government"; and 2) "the tribe's jurisdictional status remained intact in 1934." *Id*. at 19.

land became privately owned. 141 F.3d at 639. When the United States took action in the 1970s to protect the tribal treaty-reserved rights, it did so on its own behalf and on behalf of, i.e., as trustee for, the tribes whose rights were subject to Federal protection. *See United States v. Michigan*, 471 F. Supp. 192, 203 (W.D. Mich. 1979). The Board has previously recognized that when the United States continues to hold land in trust for a tribe or its members, it cannot reasonably be disputed that the tribe is under Federal jurisdiction. *See Village of Hobart*, 57 IBIA at 20 n.23. In the present case, in 1934, the Tribe undoubtedly held a reservation of Federally protected fishing rights and other associated property rights, and those legal rights could be neither diminished nor terminated by the Secretary's improper *de facto* "termination" of the Federal government's relationship with the Tribe, based on his erroneous interpretation of the 1855 treaty. *See Grand Traverse Band*, 369 F.3d at 968. In our view, the existence of hunting and fishing rights, reserved in and protected by Congressionally ratified treaties, and for which the United States continued to have an obligation, is as compelling and dispositive evidence to demonstrate that the Tribe was under Federal jurisdiction in 1934 as would be the case if the United States had held land in trust for the Tribe.

The absence of a reserved land base for the Tribe, and the Secretary's erroneous interpretation of the 1855 treaty as a Congressional dissolution of the Tribe, provide the context in which the Departmental correspondence on which Appellant relies, dating from the 1930s, must be examined. *See* Opening Br. at 13-15. The various pieces of correspondence and material selected by Appellant, all contained in the administrative record, undoubtedly show that confusion existed about the Tribe's status. And although some correspondence reflects a belief by some officials that the Tribe was not under Federal jurisdiction, other correspondence points in the opposite direction or is at best ambiguous. *See*, *e.g.*, Letter from Commissioner to Superintendent, May 31, 1934 (AR Tab 8-B) (referencing Tribe and asking Superintendent to inform him of any action taken by other "groups under your jurisdiction"); Letter from Superintendent to Director of Indian Education, Dec. 6, 1934 (AR Tab 8-A(14)) (contending that the IRA should be extended to the Grand Traverse Indians, although they were not under government control or on agency rolls, and discussing the acquisition of an option to purchase 7000 acres for the Tribe). In some cases, the reticence of Federal officials to recognize that the benefits of the IRA could extend to the Tribe was based more on funding considerations than on the jurisdiction and authority of the Federal government or the reach of the IRA. And as Justice Breyer explained in his concurrence in *Carcieri*, "a tribe may have been 'under Federal jurisdiction' in 1934 even though the Federal Government did not believe so at the time." 555 U.S. at 397. Here, we find little probative value in historical documents that reflect dealings based on an erroneous interpretation of the 1855 treaty, and which wholly ignored the Tribe's continuing reserved Federal treaty rights. *See Grand Traverse Band*, 369 F.3d at 968 ("executive branch of the government *illegally* acted as if the [Tribe's] recognition had been terminated"). Accordingly, we conclude that the Regional Director

correctly found that the Tribe was under Federal jurisdiction in 1934 and that § 5 of the IRA provides discretionary authority for the acquisition of Parcel 82 in trust.

III. BIA's Consideration of § 151.11(b) (Weight Given to Concerns Raised by State and Local Governments) and (c) (Business Plan)

Appellant also contends that the Regional Director failed to give "greater weight" to its expressed concerns that the Tribe was not complying with the consent judgment entered in *Sault Ste. Marie Tribe* and the lack of an agreement between the parties regarding payments to be provided by the Tribe in lieu of taxes. Opening Br. at 16-18 (citing 25 C.F.R. § 151.11(b)).

The record makes clear that the Regional Director considered the trust acquisition as subject to the off-reservation provisions in the regulations, and the Tribe agreed to have it considered under those provisions. *See, e.g.*, Letter from Tribal Attorney to Superintendent, June 15, 2012, at 1 (AR Tab 7-A). In the Decision, the Regional Director recognized his obligation to consider Appellant's concerns and stated that he had examined the comments provided by Appellant, along with those provided by the State and Acme Township. Decision at 7 (unnumbered). The Regional Director did not expressly address the consent judgment, but he did address Appellant's comments about the funding that the County was receiving from the Tribe. The Decision notes that based on the "detailed report" submitted by the Tribe, $1,605,140.34 was directly distributed to the County, and another $1,035,533.61 was distributed for police, fire, and emergency protection services. *Id*. n.17. While Appellant may have specifically denied that the Tribe was providing the allegedly required funding to the County, Opening Br. at 17, neither in its appeal to the Board, nor in its comments to the Regional Director, did Appellant provide any evidence substantiating its position that the County government was not receiving any funding from the Tribe. Nor has the County ever clarified the precise distinction it sought to make between the Tribe's admitted funding—in substantial amounts—of "community agencies" and funding provided, apparently directly, to the "County government" (although the record supports the Tribe's contention that it did both).[10] *Compare* Letter from Deputy Civil Counsel to Superintendent, Sept. 28, 2012 (AR Tab 7-B) with Opening Br. at 4, 17-18. *See also City of Moses Lake, Washington v. Northwest Regional Director*, 60 IBIA 111, 120 (2015) (brief discussion of city's concerns by regional director deemed sufficient given city's own cursory discussion); *Linabery v. Acting Great Plains Regional*

[10] Moreover, the County acknowledges that it has "not objected" to the Tribe's payments to community organizations and has "worked cooperatively with" the Tribe to use the funds for purposes such as law enforcement. Letter from Deputy Civil Counsel to Superintendent, July 20, 2012, at 3.

Director, 53 IBIA 42, 48 (2011) (bare assertions, standing alone, are insufficient to satisfy appellant's burden of showing unreasonableness). Moreover, Appellant fails to articulate in any meaningful respect how its expressed concerns about the consent judgment required any greater consideration by the Regional Director, as relevant to impacts on regulatory jurisdiction, real property taxes, and special assessments, *see* 25 C.F.R. § 151.11(b).[11] In its comments on the proposed acquisition, Appellant quoted the off-reservation regulatory criteria, but provided no discussion of these criteria or how it contended they should factor into the Regional Director's consideration of Appellant's comments. *See* Letter from Deputy Civil Counsel to Superintendent, Aug. 31, 2012, Enclosure (AR Tab 7-B). Similarly, Appellant's complaints about having no "in lieu" payment agreement in place do not warrant greater consideration under § 151.11(b). *See also Shawano County II*, 53 IBIA at 81 (tribes are under no obligation to offer compensation to offset tax losses). The Regional Director considered Appellant's concerns in the context of acknowledging the distance between Parcel 82 and the Tribe's formal reservation boundaries, and Appellant has not demonstrated that he failed to properly consider those concerns under the criteria for off-reservation acquisitions.[12]

Finally, Appellant argues that the Regional Director failed to require the Tribe to comply with § 151.11(c) because Parcel 82 allegedly will be used for business purposes and the record does not contain a plan from the Tribe specifying the anticipated economic benefits. Opening Br. at 18. In the Decision, the Regional Director recognized that the Tribe was "studying the feasibility of future economic development activities on Parcel 82." Decision at 4 (unnumbered). He then found that the Tribe's analysis of a potential wind energy project was "open and on-going" and that likewise the Tribe was studying a possible housing project. *Id*. Ultimately, however, he accepted the Tribe's statement that it has no plans in the foreseeable future to implement any economic development opportunities or housing on Parcel 82. *Id*. Appellant does not acknowledge the Regional Director's conclusions regarding the Tribe's use of Parcel 82, nor does Appellant provide any evidence that the Tribe has a current plan to develop the property. *Carroll County*, 56 IBIA at 201 (appellant failed to provide any countervailing evidence of development plans). When land is being acquired for business purposes, § 151.11(c) requires a tribe to submit a plan that

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[11] We take no position on the Tribe's compliance with the consent judgment in *Sault Ste. Marie Tribe*. As BIA points out, *see* Appellee's Br. at 32-33, this is not the forum in which such a challenge should be raised.

[12] We note that although the Regional Director measured the distance between Parcel 82 and the Tribe's "reservation" based on the boundaries of the Tribe's formal reservation, Parcel 82 is only approximately 1 mile from another parcel of land that is already held in trust for the Tribe. AR Tab 7-A. As noted, a Tribe's "reservation" includes existing trust land, within the meaning of 25 C.F.R. § 151.2.

"specifies the anticipated economic benefits associated with the proposed use." But where, as here, a tribe has no plans in the foreseeable future to develop property, § 151.11(c) could not have been intended to force the tribe to submit a "plan" for a use not yet determined, merely because the tribe has expressed a general interest in exploring the possibility of economic development on the parcel. Accordingly, we conclude that the Regional Director did not err by failing to require the Tribe to submit a business plan under § 151.11(c).

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 Decision.

I concur:

// original signed	//original signed
Steven K. Linscheid	Robert E. Hall
Chief Administrative Judge	Administrative Judge