EXHIBIT A

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

VILLAGE OF HOBART, WISCONSIN, Appellant,	)	Order Affirming Decision
v.	)	
	)	Docket No. IBIA 17-054
ACTING MIDWEST REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	September 21, 2023

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The Village of Hobart, Wisconsin (Village), seeks review by the Board of Indian Appeals (Board) of a January 19, 2017, decision (Remand Decision) of the Acting Midwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA), to accept eight properties, known as the Hobart Parcels, into trust on behalf of the Oneida Nation (Nation).[1] The Remand Decision was issued after the Board affirmed in part, and vacated in part, the original six Notices of Decision (NODs) issued by the Midwest Regional Director and Acting Midwest Regional Director between March and November 2010, and remanded the case to the Regional Director for further consideration. *Village of Hobart, Wisconsin v. Midwest Regional Director*, 57 IBIA 4, 5 (2013) (*Hobart I*). On appeal now from the Remand Decision, the Village argues that the Regional Director again failed to address its concerns regarding: (1) the tax loss to the Village; (2) land use and jurisdictional conflicts; (3) the sufficiency of BIA's environmental review; and (4) the existence of bias in the Midwest Regional Office. We affirm the Remand Decision because the Village has not met its burden to show that the Regional Director erred.[2]

Background

I. The Board's Decision in *Hobart I*

The facts of this case are not in dispute. For a more detailed explanation of the factual and procedural background, *see Hobart I*, 57 IBIA at 5-11. In 2010, the Regional Director issued six NODs to accept the Hobart Parcels into trust on behalf of the Nation.[3] *See id.* at 5 & n.5; *see generally*, Notices of Decision (Administrative Record (AR) Volume (Vol.) 7, Tab 73).[4]

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[1] The Nation's official name was changed from the Oneida Tribe of Indians of Wisconsin to the Oneida Nation in 2016. Remand Decision at 1 n.1.

[2] The Regional Director in *Hobart I* was female. For ease of reference, this decision uses female pronouns.

[3] The decisions were issued by both the Regional Director and the Acting Regional Director, but because all six NODs were issued under the authority of the Midwest Regional Director, we will refer in our decision to both the Acting Midwest Regional Director and the Midwest Regional Director as "Regional Director."

[4] The administrative record submitted by BIA in this appeal comprises 41 binders, labeled Volumes 1 through 41, with consecutively numbered tabs. The documents in the record are also bates stamped. When referencing a document, we cite to the volume and tab number. Where multiple documents are located behind one tab, we will also cite to the bates stamp for ease of reference.

The Hobart Parcels are made up of 8 properties,[5] consisting of 21 parcels and approximately 499.022 acres of land within the boundaries of the Village of Hobart, Brown County, Wisconsin. *See* 57 IBIA at 5; *see also* Opening Brief (Br.), Sept. 21, 2017, at 3. The Village appealed those Notices to the Board, the appeals were consolidated, and the Board affirmed in part, vacated in part, and remanded the matter to the Regional Director for further consideration.

Where a trust acquisition is not mandatory and the land is located within or contiguous to an Indian reservation, BIA's regulations require it to consider seven criteria before it takes land into trust on behalf of an Indian tribe. *See Hobart I*, 57 IBIA at 8-9. The seven criteria are:

> (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
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> (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 Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status[; and]
>
> (h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures [NEPA], and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.

25 C.F.R. § 151.10.[6]

In *Hobart I*, the Village challenged the Regional Director's consideration of these criteria and also raised several procedural and Constitutional challenges. After considering

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[5] The properties are known as the Boyea, Buck, Calaway, Catlin, Cornish, DeRuyter, Gerbers, and Lahay properties.

[6] Section 151.10(d) only applies to acquisitions for individual Indians and is therefore omitted here.

the effect of the Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009),[7] the Board affirmed the Regional Director's determination that she had authority to take land into trust for the Nation under the Indian Reorganization Act (IRA), 25 U.S.C. § 465 (now recodified as 25 U.S.C. § 5108), 57 IBIA at 18-25, and declined to consider the constitutionality of the IRA because the Board lacks jurisdiction to hear such Constitutional challenges, *id.* at 18. The Board then concluded that the Regional Director had properly considered three of the seven applicable factors set out in § 151.10: the need for the land (§ 151.10(b)), the purpose for and use of the land (§ 151.10(c)), and BIA's ability to discharge any additional responsibilities that might result from the acquisition (§ 151.10(g)). *Id.* at 11. The Board rejected the Village's procedural arguments, concluding that it was given enough time to submit comments. *Id.* at 14. The Board also denied the Village's motion to strike the Nation's brief on appeal. *Id.* at 15.

The Board concluded, however, that the Regional Director failed to adequately consider the Village's comments concerning tax loss, potential land use conflicts, and jurisdictional problems that could result from these trust acquisitions. *See id.* at 28-30. On potential tax losses, the Board found that "[t]he Regional Director did not identify the Village's concerns, much less discuss them." *Id.* at 29. The Board concluded that the Regional Director "did not provide any substance or context to her conclusory opinions" that the Village's tax concerns were "speculative," "unsupported," and "unpersuasive," "[n]or did she discuss why she believed the impact on the Village . . . would be outweighed by the economic or social benefits to be gained" from the acquisition. *Id.* Because the NODs did not "reflect consideration of any of" the Village's specific comments on tax impacts, the Board vacated the NODs and remanded them for further consideration.[8] *Id.* at 30. The Board also vacated the NODs for the Regional Director's failure to address the Village's concerns about stormwater management, and directed the Regional Director to also address, on remand, the other land use and zoning concerns raised by the Village. *Id.*

The Village raised two significant new arguments for the first time on appeal to the Board in *Hobart I*. First, the Village argued that BIA staff were biased in favor of approving these trust acquisitions because their positions were funded under a "consortium agreement" that allowed participating tribes to direct Federal funding back to BIA to expedite the processing of fee-to-trust applications. *Id.* at 15. Second, the Village raised

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[7] *Carcieri* addressed BIA's authority under 25 U.S.C. §§ 5108 (formerly § 465) and 2202 to accept land into trust for tribes. It was issued while the applications for the Hobart Parcels were pending before the Regional Director.

[8] *See Hobart I*, 57 IBIA at 29-30, for the Board's summary of the Village's comments to the Regional Director.

certain environmental concerns that it had not been able to raise fully in its comments because those comments had been submitted before BIA completed its environmental review. *Id.* at 30-31. The Board instructed the Regional Director to address these new issues on remand in the first instance since the NODs were already being remanded to the Regional Director for further review. *Id* at 16, 31.

II. Review and Reconsideration on Remand

On remand, BIA solicited updated comments from the Village on the specific issues remanded by the Board through supplemental Notices of Application (NOAs). *See* Email from Rosen to Baker, Aug. 9, 2015 (AR Vol. 12, Tab 132) (forwarding an August 2, 2013, email discussing supplemental NOAs). The supplemental NOAs were issued on August 6, 2013. Supplemental NOAs (AR Vols. 7 & 8, Tabs 81-88). The NOAs acknowledged that the Board found that the Regional Director "insufficiently addressed the information provided to her concerning the impacts relating to the Village," and that the Notices "did not address the Village's concerns in a way that would inform the Village that [they] have been heard and considered." *See, e.g.*, Supplemental NOA for DeRuyter Property, Aug. 6, 2013, at 2 (AR Vol. 7, Tab 81). The Village was advised that BIA was "soliciting the Village's comments, if any, on the remanded portions of the" NODs.[9] *Id.* at 1.

The NOAs specifically asked the Village to "explain its relationship with the County vis-à-vis taxes" and to "provide any further tax or land use information" that it believed would be relevant. *Id.* at 2. The NOAs also invited the Village to submit any additional information that it believed would aid the Regional Director in her reconsideration of its concerns about potential jurisdictional and land use conflicts, including "concerns regarding adjacent fee and trust land that are subject to . . . different zoning and uses." *Id.* And they asked the Village "to articulate its specific environmental concerns for BIA's consideration." *Id.*

In response to each of the NOAs, the Village submitted a standardized three-page summary of its comments on the proposed acquisitions, changing only the parcel numbers for each of its eight responses. *See, e.g.*, Letter from Kowalkowski to Rosen re: HB-520-1, Sept. 5, 2013 (AR Vol. 13, Tab 142 at VOH 04116); Letter from Kowalkowski to Rosen re: HB-328, Sept. 5, 2013 (Response to Supp. NOA) (AR Vol. 13, Tab 142 at VOH

[9] The NOAs were issued by the Chairman of the Nation on behalf of BIA. *See* Supplemental NOA for DeRuyter Property at 2 (explaining that on January 25, 1996, the Department granted a waiver under 25 C.F.R. § 1.2 of the requirement in 25 C.F.R. § 151.10 that the Secretary issue notices to state and local governments of applications for trust acquisitions).

04202). After quoting the Board's decision at length, the Village opined that "[i]t is important to note that the [Board] did not vacate the [NODs] because it felt that the [Regional Director] did not have enough information, or lacked information, on the Village's concerns." Response to Supp. NOA at 2. Instead, the Village explained, the NODs were vacated because they did not show that the Regional Director had considered the Village's comments. *See id.* As such, "the Village [stood] by its previously submitted comments, objections, and briefing" regarding its tax loss, zoning, bias, and environmental concerns. *See id.*

The Village did provide some new information for BIA's consideration. *See id.* at 2-3. The Village explained that it was a party to a lawsuit before the Seventh Circuit Court of Appeals involving stormwater management assessments on the Nation's trust land, and enclosed copies of its briefs to that court for the Regional Director's review. *Id.* at 2. Regarding its environmental concerns, the Village noted that Environmental Compliance Memorandum No. ECM-10-2, issued by the Secretary of the Interior on June 16, 2010, "is mandatory," but did not elaborate further. *Id.* at 3. The Village also updated its tax loss calculations and enclosed a spreadsheet showing the tax loss "associated with the [Nation's] simultaneous trust applications for approximately 142 parcels of land . . . within the Village," arguing that it would be "extremely detrimental to the Village . . . given the [Nation's] stated goal to reacquire the entire historic reservation . . . and given the fact the Village receives no money in lieu of this tax loss." *Id.* The Village closed by "maintain[ing] its position that the [Nation] must reinstate the entire fee to trust process, including the submission of a new application" because the "decision relating to this parcel was vacated." *Id.*

Over the next few years, BIA updated the tax information and completed the environmental record for the Regional Director's consideration. The agency collected tax bills for the Hobart Parcels for the period following remand of the NODs. *See* AR Vol. 8, Tabs 99-106 (2013 tax information); Vol. 7, Tab 77 (2014 tax bills); Vol. 1, Tabs 6-7 (2015 tax information). On July 7, 2015, the Midwest Regional Office concluded that the proposed trust acquisitions would not affect historic properties. *See, e.g.*, Memorandum from Kitto to Doig, Apr. 29, 2016, at 1 (2016 Compliance Memo) (AR Vol. 3, Tab 27).[10] In March 2016, the U.S. Fish and Wildlife Service (FWS) confirmed that only one threatened or endangered species might reside within the reservation boundaries. *See* Email from Hartman to Kitto, Mar. 16, 2016 (attaching FWS letter to Nation) (AR Vol. 6, Tab 54). In April, FWS forwarded the Official Species List for each parcel in compliance

[10] The Board was unable to locate the July 7, 2015, determination regarding National Historic Preservation Act (NHPA) compliance in the record.

with the Endangered Species Act (ESA), 87 Stat. 884, 16 U.S.C. § 1531 *et seq.* *See, e.g.*, AR Vol. 5, Tabs 45-47 (emails from FWS forwarding Official Species List).

In April 2016, BIA also began updating the Phase I environmental site assessments for the Hobart Parcels. Updates for seven of the eight parcels were completed in April 2016; the last update, for the Lahay parcel, was completed in June 2016. *See* AR Vols. 2-5, Tabs 17-18, 24, 27-37 (updated Phase I ESAs and related documents). The environmental protection specialist assigned to the updates determined that nothing further was required to comply with NEPA, the NHPA, or the ESA. *See e.g.*, 2016 Compliance Memo at 1.

III. The Remand Decision

The Regional Director issued her Remand Decision on January 19, 2017. Remand Decision (AR Vol. 1, Tab. 5). She considered "the comments from the Village of Hobart contained within its replies to the original Notices of Application, its filings with the [Board], and its reply to the supplemental Notice of Application." Remand Decision at 2.

A. Bias in the Fee-to-Trust Process

In *Hobart I*, the Board instructed the Regional Director to consider the Village's allegations of bias and to explain the relevance, if any, of an investigation by the Department of the Interior's Office of the Inspector General (IG) referenced in a 2006 Government Accountability Office (GAO) report. *See Hobart I*, 57 IBIA at 15-16. The Regional Director was also ordered to describe any corrective actions taken in response to the IG investigation. *Id.*

In the Remand Decision, the Regional Director began by noting that the Village did not allege actual bias by the Regional Director or any BIA employee, but instead alleged that the whole fee-to-trust process was tainted by a series of "consortium" agreements between the Midwest Regional Office and several participating tribes, including the Nation. *See* Remand Decision at 17-18; *see also* Memorandum of Understanding Between Oneida Tribe of Indians of Wisconsin and the Bureau of Indian Affairs–Midwest Regional Office (Midwest MOU) FY 2005–FY 2007 (AR Vol. 33, Tab 215 at VOH 12066); Midwest MOU FY 2008–FY 2010 (AR Vol. 21, Tab 196 at VOH 7125). These agreements established a "Midwest Fee to Trust Consortium" (Consortium) so that participating tribes could "reprogram" certain Federal funds to BIA's Midwest Regional Office, which BIA then used to hire additional employees to help process fee-to-trust applications. *See* Remand Decision at 20-21; Midwest MOU FY 2005–FY 2007 at 1. Those employees made up the Midwest Regional Office's Division of Fee-to-Trust. The Village argued that, because these trust acquisitions were processed by employees whose jobs were funded by the Nation, they were "not the product of a neutral, independent decision maker" and violated the Village's

right to due process. *See* Remand Decision at 18. The Regional Director reviewed the Village's bias claims and concluded that it had failed to meet its burden of proof. *Id.* at 24-25.

1. 2006 IG Report

The result of the IG's investigation into the use of these consortiums was set out in a final report. U.S. Dept. of the Interior, Office of Inspector General, Report of Investigation: California Fee to Trust Consortium MOU, Case No. PI-PI-06-0091-I (Sept. 20, 2006) (Opening Br., Ex. 5 at 102-114) (IG Report). On remand, the Regional Director reviewed that report. Remand Decision at 19-20. The Regional Director noted that the IG Report focused on a consortium established by BIA's Pacific Regional Office, but found that neither the Pacific MOU nor the Midwest MOU was unlawful or inconsistent with Government ethics rules. *See id.* at 20. The Regional Director also explained that the IG Report found no instances of actual bias under either MOU and that it expressly pointed out that the Midwest MOU was implemented after review by the Office of the Solicitor. *See id.* For those reasons, the Regional Director concluded that the IG investigation had "no bearing" on the Village's allegations of bias in this case. *Id.* The Regional Director also emphasized that the Midwest MOU in effect at the time of the IG investigation was replaced by the FY 2008–FY 2010 MOU, which was in effect when the NODs were issued. *Id.* "Based on these circumstances," the Regional Director found that the IG investigation did not create a conclusive presumption of actual bias. *Id.*

2. The Structure of the Midwest MOU

The Regional Director then examined whether the structure of the consortium agreement itself created a conclusive presumption of bias. The Regional Director explained that the original consortium agreement was implemented in 2004 "to address the growing backlog of fee-to-trust applications caused by limited BIA funding," and that funds reprogrammed through the consortium "are federal appropriations" that the Regional Director is authorized to reallocate within the BIA accounting system to address a tribe's needs. *See id.* at 21-22. The 2004 consortium agreement was "revised and replaced" by the FY 2008–FY 2010 Midwest MOU. *Id.* at 23. The revised agreement "clarifies" that BIA employees funded through the consortium "are . . . federal employees subject to Title 5 of the United States Code and supervised by BIA staff outside the Division [of Fee-to-Trust]."[11] *Id.* at 23-24. The revised agreement also states that "Division staff must comply

[11] The Regional Director explains that the Midwest MOU established a Division of Fee-to-Trust within the Midwest Regional office to process fee-to-trust applications submitted by tribes participating in the consortium. Remand Decision at 22.

with all requirements of 25 C.F.R. Part 151," and "mak[es] clear that only BIA officials with the delegated authority may exercise inherent federal functions." *Id.* at 24. The Regional Director concluded that "the Midwest MOU [thus] ensures against the appearance of bias or conflict of interest" and that its terms did not create an inference of bias that could overcome the presumption of honesty and integrity that applies to BIA employees.[12] *See id.* at 20, 24.

3. Regional Director's Conclusion Regarding Bias

Having considered the Village's comments, the IG Report, and the record, the Regional Director concluded that the Village's allegations of bias did "not satisfy the 'difficult burden' of overcoming the presumption that [she] discharged her duties properly in approving the Nation's applications." *Id.* at 24. She found that the Village had not shown actual bias, that her decision was based on information outside the administrative record, or that she failed to review the materials prepared by Division employees objectively. *Id.* at 24-25. The Regional Director also found that, even if the Village had shown "possible bias by BIA employees of the Division," it had failed to show that "the Regional Director's independent review of the materials did not cure any such bias." *Id.* at 25. For these reasons, the Regional Director concluded that the Village had failed to meet its burden of proof to show bias in the agency's approval of these trust acquisitions. *See id.*

B. 25 C.F.R. § 151.10(e) – Impact on the Village Tax Rolls

Next, the Regional Director considered the impacts of these trust acquisitions on the Village's tax rolls. She began by rejecting the Village's argument that BIA was required to consider "the cumulative and aggregate impact" of all of the Nation's pending trust applications, concluding instead that it "need only consider the impact on the tax rolls of a specific proposed acquisition." *Id.* at 5-6. Turning, then, to the specific proposed acquisition (i.e., the acquisition of the Hobart Parcels), the Regional Director estimated that, based on tax information for fiscal year 2015, these acquisitions would cause the Village to lose $3,997.90, or 0.1443% of its tax levy. *Id.* at 6. With respect to stormwater management fees for the Hobart Parcels, the Regional Director clarified that "any overdue or unpaid assessments on these parcels must be paid, or otherwise resolved, prior to

[12] The Regional Director also rejected the Village's contention that the Midwest MOU was invalid for its failure to address *Carcieri*, which held that the Secretary's authority to acquire land in trust under the Indian Reorganization Act (IRA) was limited to those tribes that were under Federal jurisdiction when the IRA was enacted in 1934. Remand Decision at 24. The Regional Director concluded that there "is no reason for the Midwest MOU to expressly address *Carcieri*." *Id.*

acceptance into trust." *Id.* The Regional Director also acknowledged that these acquisitions would result in the loss of $8,294.50 in taxes for the school district, but found that "no school districts submitted comments or objection[s] . . . and the Village has not explained how a loss of revenue to a school district would impact the Village's budget or operations." *Id.* at 7.

The Regional Director found that some of the financial burden imposed on the Village by these tax losses would be offset by services provided by the Nation to both tribal and non-tribal residents, and by the availability of Federal funding for other municipal services. *Id.* at 7-8. The Regional Director explained that policing and emergency services are provided by the Oneida Nation Police Department to tribal and non-tribal residents of the Oneida reservation, and that the Nation similarly provides utility services and recreation areas for all residents of the reservation. *Id.* at 8. Tribal members and their families also benefit from waste and recycling pickup, health care, various social services, housing, and public transportation provided by the Nation. *See id.* at 7-8. The Regional Director acknowledged that fire protection would continue to be provided by the Village, and that, absent an intergovernmental agreement, the Village "could go uncompensated" for those services. *Id.* at 8. Nonetheless, she found that this situation was not unlike other tax-exempt properties within the Village, such as churches and schools, and that the Village had not provided "specific information regarding the cost of fire protection." *Id.* The Regional Director also explained that while the cost of maintenance and repair of three roads identified by the Village (St. Josephs St., Shenandoah St., and Westfield Rd.) would be ineligible for Federal funding, they "do not directly service any of the proposed acquisitions currently under consideration," and "several other nearby roadways . . . are on the Indian Reservation Road Inventory (IRR), and are eligible for BIA funding . . . [which] partially offsets the Village's financial burden for road maintenance." *Id.*

Finally, the Regional Director determined that some of the Village's allegations were speculative and thus outside the scope of the Regional Director's consideration. *See id.* at 8-9. For example, the Village argued that the Nation was attempting "to thwart" its plans for industrial and economic development, depriving it of future tax revenue, and that it could not recoup future tax losses due to a state law limiting its ability to raise its taxes above a 2% levy limit. *Id.* at 8. The Regional Director concluded that BIA was not obligated to consider the Village's speculation about potential future losses, and that, in any event, the Village had not provided enough information to analyze such concerns. *Id.*

C. 25 C.F.R. § 151.10(f) – Jurisdictional and Land Use Conflicts

Turning to the Village's land use and jurisdictional concerns, the Regional Director compiled a detailed comparison of the zoning classifications of the Hobart Parcels. *See id.* at 9-10. The Regional Director found that "[o]f the 21 parcels under consideration here, the Village's zoning classification and the Nation's zoning classification are in concordance for all but three." *Id.* at 9. She found that two of those three (the Cornish and Lahay parcels) had similar zoning classifications and thus would present "a low probability for conflict in land use." *See id.* at 9.

This left the Gerbers parcel, which was zoned "A1 - Agricultural" by the Nation, but "L1 - Limited Industrial" by the Village. *Id.* The Gerbers property is located "within and adjacent to land zoned by the Village for a commercial industrial park," and the Regional Director determined that "there is a potential for land use conflict where industrial development and agriculture exist side by side." *Id.* Nonetheless, the Regional Director concluded that the Village had "failed to provide evidence" that the Nation's zoning classification for this parcel was "completely inconsistent" with the Village's development plans, and also noted that it is "not unique" to have different zones located next to each other. *See id.* The Regional Director emphasized that the Nation had not proposed a change in land use for any of the Hobart Parcels, including the Gerbers property, and that "the Village has not raised any material conflict between existing land uses and Village zoning." *Id.* at 10. The current uses of the parcels, the Regional Director found, "are also generally consistent with the Village's draft future land use map." *Id.*

Next, the Regional Director addressed potential jurisdictional conflicts over stormwater management. As the Regional Director noted, the Seventh Circuit held that the Nation is not required to pay the Village's stormwater assessments on trust land because it is the equivalent of a local tax and the Village may not impose local taxes on trust land. *See id.* at 11; *see also Oneida Tribe of Indians v. Village of Hobart*, 732 F.3d 837, 842 (7th Cir. 2013). The Regional Director acknowledged the Village's concern that the "checkerboard pattern of trust land"[13] resulting from these trust acquisitions would hurt its ability to

[13] In *Hobart I*, the Board ordered the Regional Director "to explain terms that the Village contends it does not understand." *Hobart I*, 57 IBIA at 30. The Village had complained to the Board that the phrase "jurisdictional pattern" as used in the original NODs was unclear. In the Remand Decision, the Regional Director explained that the phrase referred to the "checkerboard pattern of jurisdiction" that results when trust land is "scattered throughout the village," resulting in "Indian and non-Indian properties [forming] an irregular checkerboard pattern." Remand Decision at 12 (quoting *Oneida Tribe of Indians*, 732 F.3d at 842). The Village does not challenge this explanation on appeal.

manage stormwater. In light of the Seventh Circuit's decision, the Regional Director concluded that the Village and the Nation, if they cannot reach an agreement, may need to implement separate stormwater management programs. *Id.* at 11-12.[14]

The Village also objected to these trust acquisitions on the grounds that they could cause "jurisdictional confusion" and thus impair emergency services. *Id.* at 12. The Regional Director suggested that the best solution to resolve such jurisdictional conflicts "is the development of cooperative service agreements with other government bodies in the area," and noted that a prior service agreement between the Village and the Nation expired in November 2007. *Id.*

D. 25 C.F.R. § 151.10(h) – Compliance with Environmental Requirements

With respect to the Village's environmental concerns, the Regional Director began by acknowledging that all trust acquisitions must comply with applicable environmental laws, including the National Historic Preservation Act (NHPA), the Endangered Species Act (ESA), and the National Environmental Policy Act (NEPA), as well as various binding agency guidance documents (including 516 Department Manual (DM) 6 (NEPA Revised Implementing Procedures) and 602 DM 2 (Land Acquisitions: Hazardous Substances Determinations)). Remand Decision at 13-15. The Regional Director then explained that BIA had concluded in 2015 that nothing further was required to comply with the NHPA, because these trust acquisitions do not have the potential to affect historic properties, or the ESA, because the Nation did not propose any change in land use and thus the agency had determined that these acquisitions would have "no effect" on threatened and endangered species.[15] *Id.*

Next, the Regional Director addressed the Village's contention that the trust acquisitions did not comply with NEPA. The Regional Director explained that, because no change in land use was anticipated for these parcels, BIA had determined that the acquisitions would "not have a significant effect on the quality of the human environment (individual or cumulatively)" and that it was appropriate to rely on a categorical exclusion (CE) for these properties. *Id.* at 14. And because the trust acquisitions fell within this

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[14] The Seventh Circuit found that Congress had authorized the Environmental Protection Agency (EPA) to delegate the authority to issue stormwater permits to the states, but that Wisconsin disclaimed the authority to regulate stormwater runoff on Indian lands when it applied for such permitting authority. Remand Decision at 11; *Oneida Tribe of Indians*, 732 F.3d at 840.

[15] The FWS concurred with BIA's "no effect" determination on March 14, 2016. Remand Decision at 13.

categorical exclusion, BIA was not required to prepare either an environmental assessment (EA) or an environmental impact statement (EIS). *Id.* The Regional Director acknowledged the Village's argument that the categorical exclusion could not be applied to this trust acquisition and that an EIS should have been prepared instead, but she ultimately disagreed, finding that "all applications for the Hobart properties contemplate maintaining the current land use," and that a categorical exclusion was therefore appropriate. *Id.*at 14-15. The Regional Director concluded that BIA had complied with NEPA. *See id.* at 14.

The Regional Director then summarized the Village's four arguments that BIA failed to comply with 602 DM 2. *Id.* at 15. First, the Village objected that BIA did not consult with the Village or interview local government officials when preparing its environmental site assessments. *Id.* Second, the Village argued that the environmental site assessments were deficient because they identified nearby environmental concerns, but did not complete further (Phase II) assessments. *Id.* Third, the Village contended that the environmental site assessments were the product of institutional bias. *See id.* And fourth, the Village argued that BIA failed to comply with the requirements mandated by Environmental Compliance Memorandum No. ECM 10-2.[16] *See id.*

In response, the Regional Director explained that the purpose of 602 DM 2 is to:

> prescribe[] Departmental policy, responsibilities, and functions regarding required determinations of the risk of exposing the Department to liability for hazardous substances or other environmental cleanup costs and damages associated with the acquisition of any real property by the Department for the United States.

Id. To that end, Phase I environmental site assessments were used to "ascertain the nature and extent of any potential liability resulting from hazardous substances or other

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[16] Pre-Acquisition Environmental Assessment Guidance for Federal Land Transactions, Environmental Compliance Memorandum No. ECM 10-2 (ECM 10-2), U.S. Department of the Interior, Office of the Secretary (June 16, 2010), available at ecm-10-2-pre-acquisition-ea-guidance-for-federal-land_0.pdf (doi.gov) (last accessed Sept. 20, 2023). ECM 10-2 provides an overview of the steps taken by the Federal government when acquiring an interest in real property "to assist the bureaus and agencies in identifying environmental conditions associated with real property, and to enable them to secure, to the extent possible, the protections of the liability defenses set forth in [the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)] and [the Oil Pollution Act (OPA)]." *See id.* (cover memorandum from Director, Office of Environmental Policy and Compliance to Heads of Bureaus and Offices).

environmental problems associated with the subject property." *Id.* The Regional Director acknowledged that Phase I environmental site assessments must comply with "current ASTM standards"[17] for consultation with local officials, identification of "recognized environmental conditions," and performance by "Environmental Professionals." *See id.* (citing ASTM E1527-13).[18]

The Regional Director, however, concluded that the Phase I environmental site assessments for the Hobart Parcels satisfied those requirements. *Id.* at 17. The Regional Director explained that interviews were conducted with the Nation's environmental and land department staff, which, "[i]n combination with extensive site visits, . . . serve[d] to meet the requirements of ASTM E1527." *Id.* at 16. And despite the conditions noted by the Village, the Regional Director concluded that "evidence was not found on the Hobart properties that justified the issuance of notice of a recognized environmental condition as defined by the applicable ASTM standard." *Id.* In addition, the Regional Director disagreed with the Village's characterization of ECM 10-2 as mandatory, finding that "602 DM 2.6(a) allows bureaus to establish their own pre-acquisition environmental site assessment procedures." *Id.* at 17. The Regional Director thus found "the Village's concerns to be without merit." *Id.*

IV. Appeal of the Remand Decision to the Board

Having completed her reconsideration of the Village's comments on remand, the Regional Director issued her Remand Decision on January 19, 2017. The Remand Decision included notice of BIA's intent to accept the Hobart Parcels into trust on behalf of the Nation. *Id.* at 25. On February 22, 2017, the Village appealed the Remand Decision to the Board. The Village filed an opening brief, the Regional Director and the Nation filed answer briefs, and the Village replied.

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[17] ASTM standards are voluntary consensus technical standards for materials, products, systems, and services. *See* ASTM International, Wikipedia.org, https://en.wikipedia.org/wiki/ASTM_International (last visited September 8, 2023).

[18] ASTM E1527-13, Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process, ASTM International, West Conshohocken, PA, 2013, available at: https://www.astm.org/e1527-21.html (last accessed September 8, 2023).

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. *Hobart I*, 57 IBIA at 12. Instead, the Board reviews these 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. *Id.* An appellant bears the burden of proving that BIA did not properly exercise its discretion. *Id.*

"[P]roof that the Regional Director considered the factors set forth in 25 C.F.R. § 151.10 must appear in the record, but there is no requirement that BIA reach a particular conclusion with respect to each factor." *Shawano County, Wisconsin v. Acting Midwest Regional Director*, 53 IBIA 62, 68-69 (2011). An appellant cannot carry its burden of proof simply by disagreeing with BIA's decision. *Id.* at 69; *Hobart I*, 57 IBIA at 13. Moreover, the factors set out in Part 151 need not be weighed or balanced in any particular way or exhaustively analyzed. *State of Kansas v. Acting Eastern Oklahoma Regional Director*, 62 IBIA 225, 233 (2016) (quoting *State of South Dakota v. Acting Great Plains Regional Director*, 49 IBIA 84, 98 (2009)). The Board must be able to discern from the record and the Regional Director's decision, however, that due consideration was given to timely submitted comments by interested parties. *Hobart I*, 57 IBIA at 13.

In contrast to the Board's limited review of BIA's 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.

Discussion

In *Hobart I*, the Board affirmed the Regional Director's consideration of four of the criteria set out in 25 C.F.R. § 151.10: the agency's statutory authority (§ 151.10(a)), the Nation's need and purpose for the lands (§ 151.10(b) and (c)), and the additional duties that taking this land into trust might impose on BIA (§ 151.10(g)). 57 IBIA at 16-31. The Board vacated and remanded the original notices of decision in remaining part, however, so that the Regional Director could reconsider the remaining criteria, as well as the Village's claims of bias and violations of environmental laws. *Id.* at 31. The Regional Director completed that remand on January 19, 2017. Remand Decision at 25 (AR Vol. 1, Tab 5).

The Village now appeals that Remand Decision to the Board, making three main arguments. First, it argues that it was denied due process because BIA and the Regional

Director were biased against it. Second, it challenges the Regional Director's reconsideration of the remaining criteria set out in § 151.10—tax losses (§ 151.10(e)), jurisdictional problems and land use conflicts (§ 151.10(f)), and environmental compliance (§ 151.10(h))—and argues that the Regional Director failed to comply with various environmental laws. Third, it argues that the process that the Regional Director used to reach this Remand Decision was defective.

For the reasons explained below, we reject the Village's arguments and affirm the Regional Director's Remand Decision.

I. Bias and Due Process

The Village argues that the Regional Director's decision to approve these trust acquisitions was tainted by bias and violated the requirements of due process. Opening Br. at 4-30; Reply Brief, Dec. 14, 2017, at 2-13. That bias, the Village claims, grew out of the Midwest MOU, a "consortium" agreement which allowed participating tribes (including the Nation) to consent to the reprogramming of Federal funds so that additional BIA employees could be hired to process fee-to-trust applications faster. *See* Midwest MOU FY 2008–FY 2010 (Opening Br., Exhibit (Ex.) 3 at 17-27).[19] The Village contends that BIA was pressured into approving these trust acquisitions so that it could keep this additional funding, and that, as a result, the Midwest MOU (1) fostered institutional bias at BIA, (2) encouraged impermissible ex parte communications between the Nation and BIA staff, and (3) created an unlawful conflict of interest that forced BIA staff to choose between keeping their jobs and evaluating these applications fairly. *See* Opening Br. at 4-30. The Village demands that the Remand Decision "be vacated and remanded for consideration by an independent, neutral decision-maker." *Id.* at 5.

We address each of the Village's allegations in turn below, after discussing the general principles of due process. We conclude that the Village has not shown that the Regional Director's approval of these trust acquisitions was biased or that the Village was denied due process. We find no evidence of improper institutional bias or impermissible ex parte

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[19] The Midwest MOU that was in effect at the time that the original NODs were issued was the FY 2008–FY 2010 MOU. Remand Decision at 20. Throughout this order, when the Board refers to the Midwest MOU, we mean the FY 2008–FY 2010 MOU. Midwest MOU FY 2008–FY 2010 (AR Vol. 21, Tab 196, VOH 7125-31). The terms of the Midwest MOU in effect when the Remand Decision was issued (that is, the Midwest MOU FY 2014–FY 2017) do not differ materially, and the Board would reach the same conclusions regarding the Village's claims of bias and violations of due process if that MOU were applicable. *See* Midwest MOU FY 2014–FY 2017 (Opening Br., Ex. 3 at 2-9).

communications. Most importantly, even assuming that the BIA employees hired under the Midwest MOU faced a conflict of interest, due process was not violated here because those employees were not the decisionmakers. Instead, these trust acquisitions were approved by the Regional Director, who is an independent, neutral decisionmaker whose employment is not funded by the Midwest MOU.

A. General Principles of Due Process

The Due Process Clause of the Fifth Amendment states that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. This does not mean that a full courtroom trial must precede every deprivation of property; what constitutes "due process" is not "fixed," but is "flexible" and varies based on the "time, place and circumstances." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (holding that due process did not require an evidentiary hearing before the termination of disability benefits); *see also Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 320 (1985) (noting that "the processes required by the [Due Process] Clause . . . vary depending upon the importance attached to the interest and the particular circumstances under which the deprivation may occur"). But while the exact requirements vary, a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). That requirement applies both to the courts and also to "administrative agencies which adjudicate." *Withrow v. Larkin*, 421 U.S. 35, 46 (1975).

A party must do more than merely allege bias to show that it has been denied a "fair tribunal" and due process. Adjudicators enjoy a "presumption of honesty and integrity," and overcoming that presumption requires an appellant to carry a "difficult burden of persuasion." *Id.* at 47; *see also, e.g., South Dakota v. United States DOI*, 787 F. Supp. 2d 981, 1000 (D.S.D. 2011); *South Dakota v. United States DOI*, 401 F. Supp. 2d 1000, 1011 (D.S.D. 2005). As such, the Board has repeatedly confirmed that an appellant must make a "substantial showing of bias" to disqualify a hearing officer in an administrative proceeding. *See, e.g., Starkey v. Pacific Regional Director*, 63 IBIA 254, 270-71 (2016). The courts have also identified narrow situations where a "substantial showing of bias" is not required because "[e]xperience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable." *Withrow*, 421 U.S. at 47. Chief among these is where "the adjudicator has a pecuniary interest in the outcome" of the case.[20] *Id.*

[20] The other such situation identified by the Supreme Court is not relevant here. *Withrow*, 421 U.S. at 47.

Thus, to succeed on its claims here, the Village must either make a substantial showing of bias or it must establish that the BIA decisionmaker had a "pecuniary interest in the outcome" of these applications. The Village argues that it need only show a "probability of unfairness" or that the adjudicator might face "a possible temptation," Opening Br. at 5, but we reject that argument. It is true that the Supreme Court has stated that "[e]very procedure which would offer a possible temptation to the average man as a judge . . . denies . . . due process of law." *Tumey v. Ohio*, 273 U.S. 510, 532 (1927). But the "procedure" at issue in that case was that the judge only got paid for his work if he convicted the defendants; as a result, he had an impermissible "pecuniary interest in the outcome" of the trial. *Id.* at 531-32, 535. No court has ever held that every judge and agency adjudicator that faces "possible temptation" must be disqualified. *See also, e.g., Fero v. Kerby*, 39 F.3d 1462, 1478 (10th Cir. 1994) (agreeing that claimant must show either "actual bias" or "that circumstances were such that an appearance of bias created a conclusive presumption of actual bias").

We also note that the Due Process Clause, as interpreted and applied by the courts, establishes the Constitutional minimum for fairness and impartiality in adjudications.[21] Less fundamental matters of bias, such as "kinship" and "personal bias," do not violate due process but may be restricted as a matter of "legislative discretion." *Tumey*, 273 U.S. at 523. Thus, Congress and Federal agencies may impose higher standards on agency adjudications through statutes and regulations (respectively). The Administrative Procedure Act (APA), for example, requires trial-type, adversarial hearings for "formal adjudications." 5 U.S.C. §§ 554, 556-57. The Regional Director's resolution of these fee-to-trust applications, however, was not a "formal adjudication" because it was not required by law to be conducted "on the record"; instead, it falls into the APA's broad, catch-all category of "informal adjudications." *See, generally,* Cong. Rsch. Serv., R46930, Informal Administrative Adjudication: An Overview (2021), at 24-28 (describing informal adjudications and their requirements). The APA imposes only minimal requirements on informal adjudications like the resolution of these trust applications: such adjudications are subject to judicial review, 5 U.S.C. §§ 701-06, and certain other modest limits that are not relevant here, *see, e.g., id.* § 555(e) (requiring the agency to provide notice and reasons for denial of requests in an informal adjudication). *See also Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 655 (1990).

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[21] The Due Process Clause only applies to those adjudications that deprive a person of life, liberty, or property. For the sake of this analysis, we assume (without deciding) that the potential reduction of the Village's future taxes by these trust acquisitions constitutes a deprivation of property.

Finally, the Village bears the burden of proof in this case. *See, e.g., Roberts County, South Dakota v. Acting Great Plains Regional Director*, 51 IBIA 35, 46 (2009); *Heirs and Successors in Interest to Mose Daniels v. Eastern Oklahoma Regional Director*, 55 IBIA 139, 145 n. 7 (2012). "[U]nsubstantiated claims of bias generally are not enough to overcome the presumption of impartiality in an administrative decision-maker." *Cty. of Charles Mix v. United States DOI*, 799 F. Supp. 2d 1027, 1044 (D.S.D. 2011). Nor can the Village reverse the burden of proof by arguing that the Regional Director has not proven an absence of bias. *See, e.g.,* Opening Br. at 23 ("[T]here is no evidence in the record that the RD independently reviewed the decisions drafted by the Division."). To prevail on its claims, the Village must show that it was denied due process and that "something more than harmless error resulted." *Cty. of Charles Mix*, 799 F. Supp. 2d at 1043.

B. Specific Claims of Bias

1. Prejudgment/Structural Bias

First, the Village argues that the Regional Director prejudged these issues because she was "going to accept these parcels into trust no matter what." Opening Br. at 13. A party is denied due process when an adjudicator has "prejudged" the party's case against them before the case is even heard. *See United States v. Morgan*, 313 U.S. 409, 421 (1941). The Village claims that the Midwest MOU created a "structural bias" that fostered prejudgment here. *See* Opening Br. at 29-30.

We reject the claim that the Midwest MOU created an unlawful "structural bias." Congress has authorized BIA to take land into trust for Indians, and it has directed BIA to advance the causes of Indian self-determination and self-government. *See, e.g.,* 25 U.S.C. § 5108 (formerly 25 U.S.C. § 465). Both the Board and the Courts have consistently rejected the argument that BIA's pursuit of those goals makes the agency "structurally biased" and disqualifies it from deciding fee-to-trust applications. *Starkey*, 63 IBIA at 270; *Thurston County, Nebraska v. Great Plains Regional Director*, 56 IBIA 296, 304 (2013); *Roberts County*, 51 IBIA at 48; *see also South Dakota*, 401 F. Supp. 2d at 1011 ("Following Congress's statutory policies does not establish structural bias warranting reversal of the Director's decision."). BIA may adjudicate trust applications without bias—and without any denial of due process—even though it has "an underlying philosophy" and "strong views" on these issues, so long as it has not prejudged the law and facts of a specific application. *See Morgan*, 313 U.S. at 421.

The Village recognizes that its argument has been rejected before, but it argues that this case is different because it is alleging that the Midwest MOU, not just BIA's general policies, creates structural bias here. *See* Opening Br. at 29. But the Village fails to show that the Midwest MOU is creating structural bias. As the Village notes, the Midwest MOU

states that "[t]he need for increased land base is imperative to the Tribes of Minnesota, Wisconsin, Michigan, and Iowa." Midwest MOU at 1. That, however, is simply a restatement of the policies that Congress has already set for BIA and, consistent with our previous decisions, does not evidence a structural bias that would disqualify BIA from deciding these trust applications. The Midwest MOU also states that the purpose of the agreement is "facilitating the expeditious processing of fee-to-trust applications." *Id.* But BIA's commitment to processing applications faster is not evidence that it has prejudged those applications; it could still deny the applications, consistent with the Midwest MOU. (We address the Village's claims that the Midwest MOU's funding mechanisms create bias and a conflict of interest in Section I.B.3 below.)

The Village has also failed to identify any evidence that the Regional Director prejudged these specific applications. The standard for proving such prejudgment is "high." *Stand Up for Cal.! v. United States DOI*, 204 F. Supp. 3d 212, 303 (D.D.C. 2016). The courts have not found it "except in cases where an agency has *committed* itself . . . to an outcome" ("for example, by contract"). *Id.* (emphasis in original); *see also, e.g., FTC v. Cement Inst.*, 333 U.S. 683, 701 (1948) (holding that plaintiff must demonstrate that the mind of the decisionmaker was "irrevocably closed" to prove denial of due process). In *Rio Arriba, New Mexico, Board of County Commissioners v. Acting Southwest Regional Director*, the Board found the "taint" of prejudgment where a Regional Director had commented in the press on the specific trust acquisition challenged by the appellant. 38 IBIA 18, 28-29 (2002) (holding that it was "inappropriate for a BIA deciding official to make public comments of this nature on a matter that is pending before him").

But here, unlike *Rio Arriba*, the Village has not pointed to any statements or actions by the Regional Director (or anyone else at BIA) that would cause the Board to question the impartiality of the Remand Decision. Nothing in the Midwest MOU shows any prejudgment about the Hobart Parcels. The Village argues that "[t]he fact that the [Regional Director's] Decision was written by [] Division employees . . . evidences prejudgment," Opening Br. at 23, but even if Division employees helped to prepare a draft of the Remand Decision for the Regional Director's use, we do not see how that shows prejudgment, as long as the Regional Director completed her own independent review and reached her own decision (and we conclude below in Section I.B.3 that she did).

Similarly, the Village cites e-mails showing that the Regional Director and Division employees made the completion of this remand a priority, *id.* at 18-19, but prioritizing a decision is not the same as prejudging the result of that decision. The Village argues that the fact that the Regional Director "has not denied one application from the Tribe related to land in the Village" since 2008 shows prejudgment. *Id.* at 17. The record, however, suggests that the Regional Director has not denied any applications because the tribes withdraw applications that are not likely to be approved, rather than risking denial. *See* IG

Report at 10 (explaining that the Regional Director had never denied a trust application because "if an application has a problematic issue, it would be dealt with prior to the application reaching the adjudication stage; if an application has an issue that cannot be overcome, the tribe simply withdraws the application since they know it will not be adjudicated favorably."). Moreover, the mere fact the Remand Decision is adverse to the Village—even on all of the issues raised—is not evidence of bias as long it is supported by the law and the facts. *See Crenshaw v. Hodgson*, 24 Fed. Appx. 619, 621 (7th Cir. 2001). The Village was required to substantiate its claim that the Regional Director impermissibly prejudged these issues—it is not enough to rely on "assumptions and speculation"—and it has failed to do so. *See Roberts County*, 51 IBIA at 50.

2. Ex Parte Communications

Second, the Village claims that it was denied due process because the Regional Director and other BIA employees (especially Division employees) engaged in impermissible ex parte communications with the Nation about these trust applications. *See, e.g.,* Opening Br. at 23 ("BIA and Division employees communicate directly with the Oneida in a joint effort to get the parcels accepted into trust."). The Village argues that "Division employees who communicate with the participating tribes [] on a regular basis . . . should not be the same employees responsible for drafting the decision 'issued' by the [Regional Director]." Reply Br. at 10 n.48. These "ex parte communications," the Village contends, "create[] an unacceptable level of bias." Opening Br. at 10-11, 20-22.

The Village, however, fails to identify any provision of any statute or regulation that prohibits ex parte communications between BIA and the applicant when reviewing a trust acquisition application. If this were a formal adjudication under the APA, then the Regional Director (as adjudicator) would be barred from engaging in off-the-record communications on the merits of the proceeding with interested parties. *See* 5 U.S.C. §§ 551(14) (definition of "ex parte communication"), 557(d)(1) (prohibiting ex parte communications in formal adjudications); *see also* 5 U.S.C. § 554(d)(1) (prohibiting ALJs from "consult[ing] a person or party on a fact in issue"). But this is not a formal adjudication or any other kind of adversarial, trial-type proceeding where ex parte communications are necessarily improper. Instead, it is an informal adjudication, and the APA's restrictions on ex parte communications do not apply.

Moreover, BIA's regulations explicitly require the agency to communicate with the tribal applicant (as well as state and local governments) to evaluate these applications. 25 C.F.R. § 151.10; *see also id.* § 151.12 (permitting BIA to "request any additional information . . . deemed necessary to reach a decision"). The Village was not deprived of due process here simply because the Nation was allowed to participate in this process with BIA.

And even if the law were on the Village's side, the Village would still have had to show, not only that the Regional Director engaged in impermissible ex parte communications, but also that those communications resulted in actual bias. *See, e.g., Menard v. FAA*, 548 F.3d 353, 360-61 (5th Cir. 2008) (rejecting claim that FAA orders were subverted by ex parte communications where plaintiffs had "not put forth a scintilla of evidence showing that bias or improper communications clouded the [agency's] judgment"). Many of the communications that the Village cites between BIA and the Nation were merely inquiries about the status of the applications. *See, e.g.*, Opening Br. at 20 (claiming that "the Oneida and BIA Division employees regularly communicate with one another regarding the status of fee-to-trust applications and the Division's accomplishments"); *id.* at 21-22 (stating that, "just days before the [Regional Director's] Decision was released, the Oneida representative inquired whether the notice of decisions for the Hobart properties had been signed and issued"). Such inquiries would not be impermissible even under the APA's stricter standards for formal adjudication. *See* 5 U.S.C. § 551(14) (excluding "requests for status reports" from the definition of "ex parte communication"); *id.* § 557(d)(1) (only prohibiting ex parte communications "relevant to the merits of the proceeding"). And while the Village cites other meetings and communications that might have been barred if this were a formal adjudication, nothing the Village cites shows that the Regional Director's interactions with the Nation improperly influenced her decision. *See Roberts County*, 51 IBIA at 49 (finding that an allegation of bias against a superintendent based on the superintendent's status as a tribal member and former tribal official was insufficient absent evidence that the superintendent's former service improperly influenced his decision). Speculation about the Regional Director's motives in approving these applications is not sufficient to meet the Village's burden of proof. *See Roberts County*, 51 IBIA at 49 n.8 ("Instead of evidence, the State simply speculates about the Superintendent's motives for approving the acquisitions."); *cf. Elec. Power Supply Ass'n v. Fed. Energy Regulatory Comm'n*, 391 F.3d 1255, 1259 (D.C. Cir. 2004) (holding that the key to determining if an ex parte communication is prohibited is "whether there is a possibility that the communication could affect the agency's decision in a contested on-the-record proceeding"). As such, we reject the Village's claim that it was denied due process because BIA engaged in impermissible ex parte communications with the Nation.

3. Conflict of Interest

Third, the Village argues that it was denied due process because the Midwest MOU created an impermissible conflict of interest. The Village alleges that, because the tribes participating in the Midwest MOU (including the Nation) were "paying the salaries of these Division employees," Opening Br. at 8, those BIA employees had to "do everything in [their] power to guarantee the land will be accepted into trust, or lose [their] job[s]," *id.* at

14; *see also* Reply Br. at 6 (arguing that the "preeminent problem" is that "the consortium tribes pay 100% of the salaries of the BIA employees who process these applications, and the employees will lose their jobs if they do not accept the parcels into trust"). The Village also contends that the Midwest MOU gave participating tribes significant power over personnel matters within the Division (including power over hiring and performance awards). *See* Opening Br. at 8-9. Due process, the Village contends, demands that this Remand Decision be vacated and remanded "to be decided by independent BIA employees whose jobs are not in jeopardy if they deny a fee-to-trust application." *Id.* at 8.

As discussed above in Section I.A, a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. at 136. A party is denied due process where an adjudicator has "a direct, personal, substantial, [and] pecuniary interest in reaching a conclusion against [that party] in [its] case." *Tumey*, 273 U.S. at 523 (holding that due process was violated where judges were only paid for convicting defendants); *see also Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 872 (2009) (holding that due process was violated when elected judge heard a case against a corporation who had given him "campaign contributions in an extraordinary amount"). Unlike the Village's other allegations of bias, it need not show actual bias to prove a violation of due process under such circumstances, but only that the adjudicator had a pecuniary interest substantial enough that "the risk of unfairness is intolerably high." *Withrow*, 421 U.S. at 58. The Village bears the burden of proving facts that establish that the adjudicator here held such a disqualifying interest.

The Midwest MOU appears to have given Division employees some interest in having these trust applications resolved, although it is not clear whether the degree and nature of that interest would disqualify them from deciding the applications. On the one hand, Division employees did not have the kind of direct pecuniary interest in the resolution of these applications that the courts have found disqualifying: unlike the judge in *Tumey*, for example, they were not paid for each trust acquisition that was approved. *Tumey*, 273 U.S. at 531; *cf. Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (holding that administrative judges on licensing board had impermissible conflict of interest because they would inherit business if they suspended licenses of their competitors).

On the other hand, describing this funding mechanism as "reprogramming," Remand Decision at 22, does not change the fact that Division employees would likely lose their jobs if the tribes stop participating in the Midwest MOU (although apparently some might keep jobs at BIA at the expense of lower grade employees). *See* IG Report at 7, 11; Midwest MOU at 1 (stating that Division employees are hired "[t]hrough funds provided by participating tribes to supplement BIA staff"). The IG Report shows that Division employees under the former Pacific MOU worried that they would lose their jobs if tribes

stopped participating, IG Report at 9, and there is no reason to believe that Division employees hired under the Midwest MOU did not share those concerns.[22]

The Regional Director argues that there was no conflict of interest because the Midwest MOU was revised in light of the IG Report and "corrective actions" were taken. Remand Decision at 23-24. It does appear that the Midwest MOU was revised to limit the participating tribes' ability to "influence the selection, performance awards, and duties and responsibilities of the federal consortium staff," which the Inspector General found to be significant in creating a conflict of interest. *See* IG Report at 1. Notably, the Midwest MOU provided that "Federal employee's personnel rights are governed by Title 5 of the [United States Code]" and that "[s]tatutory rights and obligations will not be superseded by this Agreement." Midwest MOU at 3. In contrast to the former Pacific MOU, it also limited the role of the tribes in the hiring of Division staff. *Id.* ("It is agreed that the process for selecting staff for filling of the Division positions will follow federal personnel rules and regulations. The position descriptions, interviewing of prospective candidates, will be made by the MWRO. MWRO shall inform Advisory Council of selection criteria and the selected employees."). But none of these revisions changed the fact that the tribes control the purse strings from which the consortium staffs' salaries are dependent.

In any event, we need not decide whether the Midwest MOU disqualified Division employees from deciding these trust applications because Division employees did *not* decide these trust applications; the decisions were made by the Regional Director. While the Midwest MOU tasked Division employees with the preparation of draft "notices of determination" for the Regional Director's use, Midwest MOU at 5, those employees reported to the Regional Director's office, *id.*, and the Regional Director "alone . . . [made] all final decisions with respect to applications submitted pursuant to the Midwest MOU,"

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[22] Both the Village and BIA make loose claims about the Inspector General's report and the conclusions that it reached. In fact, the only conclusions reached in the IG Report were that the former Pacific MOU created "a patent perception of a conflict of interest," which the Inspector General's investigation found "to be, in fact, real" due to the participating tribes' ability to "influence the selection, performance awards, and duties and responsibilities of the federal consortium staff—coupled with the fact that the tribes control the purse strings from which the consortium staffs' salaries are dependent." IG Report at 1. The IG Report reaches no other conclusions. It does purport to summarize the conclusions set out in a "legal opinion rendered by the Office of the Solicitor" on the "legality of consortiums." IG Report at 1, 11-12. Because the Board does not have a copy of that legal opinion and cannot assess its reasoning, and because we review these legal issues *de novo*, we do not rely on the IG Report's characterization of the opinion of the Office of the Solicitor to decide this case and draw no inferences from the Inspector General's summary of it.

Remand Decision at 21; *see also id.* at 23 ("The Deputy Regional Director-Trust Services, a BIA employee outside the Division, reviews all application recommendations by Division staff before forwarding them to the decision maker for final determination. Final determinations are then made by the Regional Director."). The Regional Director has full authority to review decisions of her subordinates *de novo* and was not bound by the recommendations of Division employees. *Thurston County*, 56 IBIA at 304; *State of South Dakota*, 49 IBIA at 102. The Regional Director is not an employee of the Division, and her position was not funded by the Midwest MOU. She would not lose her job even if all tribes stopped participating in the Midwest MOU. As such, she was not subject to the conflict of interest that allegedly disqualified Division employees from adjudicating these applications.

Thus, even if Division employees had a conflict of interest here, the Regional Director's independent review cured that conflict of interest.[23] *Roberts County,* 51 IBIA at 49 ("Even if the State had shown possible bias on the part of the Superintendent, the State has provided no basis for us to conclude that the Regional Director's independent review of the applications did not cure any such bias."). The Village asks that these applications "be decided by independent BIA employees whose jobs are not in jeopardy if they deny a fee-to-trust application," Opening Br. at 8, but that has already happened here: the Regional Director is an "independent BIA employee," her job is "not in jeopardy if [she] den[ies] a fee-to-trust application," and she was the decisionmaker.

The Village goes on to argue that the Regional Director "merely rubber stamp[ed]" decisions already made by Division employees and never conducted her own independent review. *Id.* at 23. But the Village cites no evidence to support those allegations. Instead, the Village tries to reverse the burden of proof by arguing that "there is no evidence in the record that the [Regional Director] independently reviewed the decisions drafted by the

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[23] Similarly, under the National Environmental Protection Act (NEPA), a contractor may prepare an environmental impact statement (EIS) for a project and, even if that contractor has a conflict of interest, the conflict does not invalidate the EIS unless it is proven that the agency—as the ultimate decisionmaker—failed to engage in adequate independent oversight. *See, e.g., Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. Zinke*, 889 F.3d 584, 607-08 (9th Cir. 2018) (holding that contractor's conflict of interest did not invalidate EIS where plaintiffs had "not presented any evidence that the BIA failed to engage in adequate independent oversight over the preparation of either the DEIS or the FEIS"); *Ass'ns Working for Aurora's Residential Env't v. Colo. DOT*, 153 F.3d 1122, 1128-29 (10th Cir. 1998) (holding that, to the extent contractor had conflict of interest, it was cured by agency oversight). It should be noted that NEPA's restrictions on conflicts of interest are imposed by regulation and are not grounded in the Due Process Clause.

Division." *Id.* That is not sufficient because the Village bears the burden of proof here and was required to show that the Regional Director failed to conduct an independent review, a showing it has not made. *See Roberts County*, 51 IBIA at 50 (holding that appellant bore the burden of proving that Regional Director did not "independently and thoroughly evaluate the applications"); *Walch Logging Co. v. Assistant Portland Area Director (Economic Development)*, 11 IBIA 85, 112 (1983) (holding that "[a] legal presumption of regularity supports the official acts of public officers acting in their official capacities").

The record, moreover, does show that the Regional Director undertook her own independent review of these trust applications, the Village's comments, and the related notices of decision.[24] The comprehensiveness of the Regional Director's decision also belies the Village's claim that she undertook no independent review. *See Roberts County*, 51 IBIA at 50; *see also South Dakota*, 401 F. Supp. 2d at 1012 (holding that Regional Director's responses to objections raised by local governments was "substantial evidence that the Director conducted the proceedings in a fair, unbiased manner"). For all these reasons, we conclude that the Village was not denied due process here, even if the Midwest MOU created a conflict of interest for Division employees, because the Regional Director's independent review cured any such conflict.

C. Completion of Remand

In *Hobart I*, the Board directed the Regional Director to "address the Village's allegations of bias as well as the outcome of the IG investigation and its relevance, if any, to the Village's allegations." 57 IBIA at 16. The Regional Director did that, Remand

[24] BIA certified that the administrative record—including the Village's comments—reflects all the documents utilized by the Regional Director in rendering the Remand Decision. *See* Memo from Regional Director to Board, June 2, 2017. Unsurprisingly, many of the documents related to the Regional Director's review of the draft notices of decision have been withheld as privileged (either under the deliberative process privilege or attorney-client privilege). The Board has not reviewed the contents of those withheld documents. Nonetheless, the descriptions of the documents set out in the privilege log (which was produced on all parties, including the Village) show that the Regional Director (and other non-consortium BIA and Solicitor's Office staff) reviewed the draft notices of decision. *See, e.g.,* AR Priv. Vol. 1, Tabs 4- 8, 12 (showing review of draft NODs by Field Solicitor's Office); AR Priv. Vol. 2, Tabs 14-15, 23 (same); AR Priv. Vol. 3, Tab 34 (showing review by BIA's Director of the draft notices of decision); *see also* Memorandum from Acting Regional Director Tammie Poitra to Field Solicitor, Twin Cities Field Office (Dec. 9, 2013) (AR Vol. 12, Tab 140) (asking Field Solicitor's Office for independent review of Village's bias claims).

Decision at 17-25, concluding that the IG Report "has no bearing on the Village's current bias claim" because it "found no instances of actual bias" and "centered on the terms of the Pacific MOU then in use, not the Midwest MOU," and because "the MOUs in effect at the time . . . have both long since expired and been replaced by restructured MOUs," *id.* at 20.

The Village disagrees with the Regional Director's conclusions. As discussed above, we have reviewed the Village's claims of bias and denial of due process *de novo* and reject those claims. The Village also argues, however, that the Regional Director failed to complete the remand ordered by the Board in *Hobart I* because she failed to grapple with the IG Report's findings. *See, e.g.,* Opening Br. at 16. This is simply untrue: the Regional Director discussed the IG Report and the Village's claims of bias at length in the Remand Decision. *See* Remand Decision at 17-25. And even if it were of "less than ideal clarity," her discussion is more than sufficient that, together with the record, her "path may reasonably be discerned" and her completion of the remand affirmed. *See, e.g., Wolf Point Community Organization v. Acting Rocky Mountain Regional Director*, 40 IBIA 131, 134 (2004) (noting that the Board will affirm a decision, even if it does not explain itself, if "the administrative record and the decision, read together, . . . show how BIA reached its conclusion"); *see also Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974) (holding that the courts will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned"). Nothing in our remand order in *Hobart I* required the Regional Director to analyze the IG Report more exhaustively, especially where she concluded that it was not relevant to her decision.

The Village also contends that the Regional Director failed to complete the remand because she reviewed only "a redacted, incomplete version of the report that did not contain any of the 19 attachments upon which the report was based."[25] Opening Br. at 12. Many of the redactions in the IG Report appear to be names (which were presumably redacted to protect the privacy of the interviewed employees). The Village has not explained why that information (or any other redacted information) would have made any difference to the Regional Director's analysis. Moreover, our order required the Regional Director to review "the outcome of the IG investigation," not the documents on which it was based. The Village has not shown that the Regional Director abused her discretion by relying on the redacted version of the IG Report or that such reliance was contrary to the Board's instructions on remand.

[25] The Regional Director explains that BIA did not obtain an unredacted copy of the IG Report because its disclosure "could only be made with the express written consent of the [Inspector General]." Remand Decision at 19 n.98.

D. Legality of the Midwest MOU

Finally, the Village argues that the Midwest MOU was "illegal" because it is inconsistent with the terms of both the Indian Self-Determination and Education Assistance Act (ISDEAA), 25 U.S.C. § 5301 *et seq.*, and the Tribal Self-Governance Act (TSGA), 25 U.S.C. § 5361 *et seq.* Opening Br. at 24-25; *see also* Reply Br. at 12-13. We reject this claim for two reasons.

First, the Village has not shown that it has standing to bring this claim. Even if the Village were correct, and the reprogramming of funds authorized by the Midwest MOU was unlawful, it has not explained how its legally protected interests were harmed by that reprogramming. As discussed above, we have already concluded that the Midwest MOU did not violate the Village's right to due process. And even if BIA had been deprived of the funding provided by the consortium agreement, it still had funding to complete its review of these trust acquisitions eventually.

Importantly, the Village has not only failed to show that it has Article III standing to bring such a claim, but it has also failed to show that its interests fall within the zone of interests protected by these statutes. *See Preservation of Los Olivos (POLO) v. Pacific Regional Director*, 58 IBIA 278, 297-98 (2014). The purpose of these Acts is to support and assist Indian tribes in "the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities." 25 U.S.C. § 5302(b). Nothing in the Acts suggests that Congress meant to allow parties like the Village to bring suit to enforce the terms of these statutes simply because their economic interests might be indirectly affected by a project funded under the Acts. Nor is this a case where the Village's economic interests are "closely enough and often enough entwined with" decisions made under these Acts that parties like the Village have become "reasonable" and "predictable" challengers to such decisions. *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 224, 227 (2012). The Village simply has not shown that it is the proper party to challenge the legality of the Midwest MOU or BIA's reprogramming of funds under that consortium agreement. For these reasons, we conclude that the Village does not have standing to bring these claims.[26]

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[26] Similarly, the Village argues at length that the Midwest MOU violated the "annual funding agreements between the Oneida and the United States." Opening Br. at 26-28. The Village does not explain how it has standing to bring such a claim, and we conclude that it does not for the same reasons discussed in this section: because it cannot sue to vindicate the terms of an agreement to which it is not a party and which at most indirectly affects its interests.

Second, even if the Village had standing to bring these claims, we would still deny them because the Village has not shown that the Midwest MOU was unlawful. The Midwest MOU cites several provisions of law as "[l]egal authority." Midwest MOU at 1 (citing 25 U.S.C. § 123c, *id.* § 458cc(b)(3) (now codified at *id.* § 5363(b)(3)), and *id.* § 450j (now codified at *id.* § 5324)). Together, these provisions authorize the tribes to use tribal funds for many purposes (including the broad category of "expenditures for the benefit of Indians and Indian tribes," 25 U.S.C. § 123c), allow the tribes to enter into a range of "self-determination agreements," and permit the tribes to "redesign" "programs, services, functions, and activities . . . and reallocate funds for such program, services, functions, and activities," 25 U.S.C. § 5363(b)(3).

Given these provisions, it is not obvious why the Midwest MOU would be unlawful, and the Village has not presented any argument that persuades us that it was. It is certainly not sufficient, in light of these broad statutory authorizations, for the Village to argue that the Midwest MOU was unlawful simply because the Acts do not "expressly authorize the funding of a Division created for expediting fee-to-trust applications." Opening Br. at 24-25. The conclusions that the Village cites from the Solicitor's Office opinion on the Pacific MOU are also not sufficient—not only because we have those conclusions second-hand and stripped of their reasoning, as quoted in the IG Report—but also because the Solicitor's Office apparently concluded that these consortium MOUs were lawful. *See* IG Report at 11-12 (stating that the Solicitor's Office "determined that they 'do not believe that the consortiums violate the government-wide ethics rules or appropriations laws'" and that "the SOL opinion did not determine that the consortiums were 'directly inconsistent with [ISDEAA]'").

The single statutory argument that the Village makes also fails to carry its burden here. The Village claims that the Midwest MOU violated 25 U.S.C. § 5363(b)(2) because the "reprogramming of federal TPA funds for the purpose of processing fee-to-trust applications on behalf of certain tribes creates precisely the preference forbidden" by that provision of the statute. Opening Br. at 25. Section 5363(b)(2), however, merely states that "nothing *in this subsection* may be construed to provide any tribe with a preference with respect to the opportunity of the *tribe to administer* programs, services, functions, and activities" (emphases added). But Division employees are Federal employees compensated with reprogrammed funds, not tribal employees. And even assuming that the Midwest MOU created such a "preference" for the participating tribes (i.e., to expedite BIA's processing of their applications), this provision does not "forbid" such preferences; it merely states that Section 5363(b) does not itself create any preference. Thus, even if the Village had standing to bring these claims, we would still deny them because none of the Village's arguments show that the Midwest MOU was unlawful.

II. Section 151.10 Criteria and Compliance with Environmental Laws

The Board remanded these notices of decision for further consideration of three criteria set out in § 151.10: impact on tax rolls (§ 151.10(e)), jurisdictional problems and land use conflicts (§ 151.10(f)), and compliance with environmental laws (§ 151.10(h)). *See Hobart I*, 57 IBIA at 29-31. The Village now appeals the resulting remand decision, arguing that the Regional Director abused her discretion by failing to "properly consider" these criteria and asks the Board to vacate and remand the matter "to a neutral and independent decision-maker." *See* Reply Br. at 1. The Village also argues that the Regional Director violated various environmental laws, regulations, and agency guidance documents. Opening Br. at 43-56; Reply Br. at 23-28.

We disagree. The record and the Remand Decision show that the Regional Director considered the Village's comments on remand, and the Village's continued objections to the Remand Decision are not supported by the facts or the law. The Village's disagreement with the Regional Director's analysis of these acquisition criteria is not enough to show that the Regional Director erred here. Nor has the Village shown that the Regional Director violated any environmental laws.

A. Overview of § 151.10 Criteria

Through Section 5 of the Indian Reorganization Act (IRA), Congress conferred broad authority on the Secretary of the Interior to take land into trust for Indians. *See South Dakota v. United States DOI*, 423 F.3d 790, 797 (8th Cir. 2005). The only limitations that Congress imposed on that authority are that the land must be acquired for Indians, it must be acquired using authorized funds, and the acquisition must serve the goals identified in the Act's legislative history. *See id.*

That authority, here delegated to the Regional Director, is further constrained by the regulations adopted by the Department set out at 25 C.F.R. Part 151. For trust acquisitions that are "within or contiguous to an Indian reservation" and that are not mandatory, like the trust acquisitions at issue here, those regulations require the Regional Director to "consider" eight listed criteria before taking the land into trust. 25 C.F.R. § 151.10. The Regional Director need only "consider" these factors, however: there is "no requirement that [she] reach a particular conclusion with respect to each factor." *Roberts*, 51 IBIA at 46. "Nor must the factors be weighed or balanced in a particular way or exhaustively analyzed." *Id.* at 46.

Notably, nothing in the Act or these regulations prohibits the Regional Director from taking land into trust whatever her conclusions about these criteria. She is not required to "resolve" any "problems or issues" that the trust acquisition might create. *Id.* at

52. These criteria were introduced only "to insure that conflicting interests are *evaluated* before land is acquired in trust status." 45 Fed. Reg. 62035 (Sept. 18, 1980) (emphasis added). Thus, the Regional Director may take land into trust even if she concludes, for example, that doing so will create "jurisdictional problems," "potential conflicts of land use," or have a significant impact on the tax rolls of the State or its political subdivisions. *See* 25 C.F.R. § 151.10(e), (f).

To succeed on its claims here, the Village must show that the Regional Director erred, either by failing to consider one of the listed criteria or by reaching conclusions regarding those criteria that were "arbitrary and capricious" or otherwise unsupported by the administrative record. "Simple disagreement" with the Regional Director's conclusions cannot carry the Village's burden of proof. *Roberts*, 51 IBIA at 46.

B. § 151.10(e) – Impact on the Tax Rolls

On appeal, the Village raises three main objections to the Remand Decision's analysis of the impact of these trust acquisitions on the Village's tax rolls. First, the Village argues that the Remand Decision fails to address the cumulative impact of all of the Nation's pending applications for trust acquisitions. Second, the Village claims that the Remand Decision's tax calculations for fiscal year 2015 are wrong. Third, the Village argues that the Remand Decision fails to respond to the Village's comments. The Board is not persuaded by the Village's arguments.

1. Cumulative Tax Impacts

The Village argues that the Regional Director erred by failing to consider the cumulative tax impacts of all of the Nation's pending applications for trust acquisitions together. *See* Opening Br. at 30-31; Reply Br. at 18. The Village argues that this case is "exactly the type of situation" where cumulative tax impacts must be considered because the Nation's "stated goal" is "placing 100% of [the Village of] Hobart in trust." Opening Br. at 31; Reply Br. at 18 (citing *Roberts County*, 51 IBIA at 51 n.13). Because the Nation allegedly has pending applications to place over 100 parcels of land within the Village in trust, the Village contends that the Regional Director's decision not to analyze cumulative tax impacts here is "nonsensical." Opening Br. at 31.

As the Village notes, the Board has noted that BIA may be required to consider "the collective tax impact of simultaneous trust acquisitions—e.g., numerous simultaneous acquisitions which, collectively, would have a significant tax impact"—in "an appropriate case." *Roberts County,* 51 IBIA at 51-52 n.13. The Board, however, has drawn a distinction between the cumulative impacts of trust applications that are being decided simultaneously and the impacts of other applications that are merely pending before BIA (and that may or

may not ultimately be approved). *See Thurston County*, 56 IBIA at 312 n.20. We have rejected the argument that BIA must consider the cumulative effects of all pending trust applications. *Id.* ("[W]e reject the County's argument that the Regional Director must consider the cumulative impact of all fee-to-trust applications *pending* before BIA. These applications will be considered in due course by BIA and, if appropriate, BIA may then consider any cumulative impact based on, e.g., the tax loss from all applications decided simultaneously or previously in the same tax year.").

Requiring the Regional Director to determine the potential cumulative tax impacts of applications that have not been decided would result in a decision based not on the record, but on speculation about potential future effects that might never come to pass. The Board has repeatedly held that BIA is not required to consider speculation about potential future losses of revenue under this criteria.[27] *Shawano County*, 53 IBIA at 80 (BIA is only required to "consider the present impact on the tax rolls of a proposed trust acquisition"); *see also City of Eagle Butte, South Dakota v. Acting Great Plains Regional Director*, 49 IBIA 75, 82 (2009) ("The Regional Director . . . has no obligation to consider [the appellant's] speculation about what might happen in the future"). Contrary to the Village's claim that this "future tax loss is not speculative, but rather a real threat against the Village's survival as a community," Opening Br. at 35, such a cumulative analysis would require the Regional Director to speculate about each pending application and whether it will ultimately be approved or denied. Nothing in the regulations or our precedent requires that. For all these reasons, we conclude that the Regional Director was not required to consider the potential cumulative impacts of other pending (but not simultaneous) trust applications on the Village's tax rolls.[28]

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[27] The Regional Director also concluded that the Village's comments on the Wisconsin tax levy limit and its allegations concerning the Nation's efforts to "thwart" the Village's economic development plans were speculative, unsupported, and need not be considered. *See* Remand Decision at 8-9. The Village appears to have abandoned the latter argument on appeal. *See* Opening Br. at 30-35. With respect to the tax levy, the Village has not met its burden to show that the Regional Director erred in exercising her discretion, i.e., it has not shown that the concern is more than speculative.

[28] The Regional Director did consider the collective impact of the acquisition of the Hobart Parcels on the Village's tax rolls, as required by *Roberts County*, because her decisions to acquire those parcels were made simultaneously.

2. Tax Calculations

Next, the Village argues that the Remand Decision "erroneously calculates the tax loss for the Village for the year 2015." *Id.* at 31. According to the Village, the 2015 tax bills show that the Village was due $4,090.40 in taxes on the Hobart Parcels, but the Remand Decision undervalued those taxes by $92.50 (a difference of about 2%).[29] *Id.* at 31-32. Similarly, the Village argues that the Regional Director miscalculated the 2015 school district taxes, explaining that the Village collected $8,483.20 in taxes from the Hobart Parcels on behalf of the Pulaski Community School District and the West De Pere School District, which the Remand Decision incorrectly undervalued by $188.70 (again, a difference of about 2%). *Id.* at 32. The Regional Director does not dispute these errors, but contends they were harmless transcription errors and that her analysis of the tax losses would not have changed if "the proper figures [been] transcribed." Answer Br. at 24-25.

The Board concludes that these errors are harmless. The errors are small, and the Village does not argue that the Regional Director would have reached a different conclusion if not for the errors, does not allege that it was harmed by the errors, and does not allege that it was precluded from presenting colorable arguments by the errors. *See South Dakota*, 787 F. Supp. 2d at 997 (an error is more than harmless if it "precludes an interested party from presenting certain colorable arguments to the ultimate decision maker"). Most importantly, the record supports the Regional Director's explanation that these were merely transcription errors, *see* Taxes/Zoning Spreadsheet (AR Vol. 1, Tab 6) (showing improper transcriptions in work product), and that the accurate tax information is in the record and was before the Regional Director when she issued the Remand Decision, *see* 2015 Tax Bills (AR Vol. 2, Tab 22); Town, Village, and City Taxes 2015 (AR Vol. 1, Tab 7).

3. Failure to Address the Village's Comments

The Regional Director must give due consideration to all timely comments submitted by interested parties, but she need not "resolve" all objections raised in such comments to the commenter's satisfaction. *Mille Lacs County, Minnesota v. Acting Midwest Regional Director*, 62 IBIA 130, 137 (2016); *Desert Water Agency v. Acting Pacific Regional Director*, 59 IBIA 119, 127-28 (2014); *State of New York v. Acting Eastern Regional Director*, 58 IBIA 323, 329 (2014); *Jefferson County, Oregon, Board of Commissioners v. Northwest Regional Director*, 47 IBIA 187, 199-200 (2008). Here, the Village argues that the Regional Director failed to address the Village's comments on the impacts of these tax

[29] Specifically, the Remand Decision cites the taxes due on the DeRuyter property as $162.10, but the 2015 tax bills show that $254.60 was due, a discrepancy of $92.50. *Compare* Remand Decision at 6 *with* 2015 Tax Bills (AR Vol. 2, Tab 22).

losses. In particular, the Village contends that the Regional Director did not "directly" address the Village's duty to provide public services to these parcels with reduced funding and made "no meaningful analysis" of the Village's continuing obligation to provide fire protection services. Opening Br. at 33-34. The Village claims that the Regional Director dismissed its comments about road maintenance and repair without any "real review" and failed to provide evidence to support her conclusion that the Indian Reservation Road Inventory Program (IRR) would offset the Village's financial burden. *See id.* at 34. And the Village asserts that the Remand Decision "fails to recognize" that the loss of tax revenue to the school district will increase the financial burden on Village residents as student enrollment increases.[30] *See id.* at 35. But while the Village continues to disagree with the Regional Director's conclusions, it is clear from both the Remand Decision and the record that the Regional Director gave due consideration to the Village's comments.

a) Public Services

The Village argues that the Regional Director did "not directly address the Village's concerns related to the Village's obligation to continue to provide services with reduced funding." *Id.* at 33. But the Remand Decision does acknowledge the Village's comment that "it provides numerous services to those residing within the area to be acquired . . . which, if the land is taken into trust, it would have to perform with reduced funding." Remand Decision at 4. The Regional Director also recognized the absence of a service agreement between the Nation and the Village and reviewed the services provided by the Nation that may offset some of the Village's responsibilities. *See* Remand Decision at 7. Nothing in the principles of administrative law or Part 151 required the Regional Director to solve this potential problem or prohibited her from taking this land into trust even though doing so may impose some burdens on the Village. She was required to consider

[30] The Village also argues that the Regional Director abused her discretion by failing to address a statement in the original NODs that the benefits of the acquisition to the Nation outweigh the impacts on the Village. *See* Opening Br. at 33; Reply Br. at 19; *Hobart I*, 57 IBIA at 29 (finding that the Regional Director failed to provide any substance or context to the conclusory statement that she believed the impact of taking the parcels into trust would be outweighed by the economic or social benefits to be gained from the acquisition). The Regional Director was not required to explain or support this line of reasoning on remand because it does not appear in the Remand Decision and thus makes up no part of the basis for her decision here. The Regional Director was not required to address this issue by our remand order. *Hobart I*, 57 IBIA at 29-30 (noting that the Regional Director did not "discuss why she believed the impact on the Village . . . would be outweighed," but remanding because the Regional Director did not identify or discuss any of the Village's concerns regarding tax loss).

these issues and the Village's comments, and she did so. The Village's dissatisfaction with the result does not show that she violated the law or abused her discretion.

b) Fire Protection Services

The Regional Director also acknowledged the Village's comment that it was unlikely to enter into an agreement on fire protection services with the Nation in the near future, *see id.* at 7 & n.43, and thus "there is a possibility that emergency services provided by the Village, including fire protection, could go uncompensated," *id.* at 8. As the Regional Director noted, that is also true of other tax-exempt properties within the Village, such as churches and schools. *Id.* The Village continues to object, but, again, the Regional Director was only required to consider this potential problem, not fix it. The Village has not shown that she failed to consider it.

The Village also argues that the Regional Director was required to ask the Village for "specific information regarding the cost of fire protection" and failed to do so. Opening Br. at 34; *see also* Remand Decision at 8. But the Regional Director solicited additional comments from the Village, and the Village chose to rely largely on its previous comments and its briefs submitted to the Board in *Hobart I*. *See, e.g.*, Response to Supp. NOA (AR Vol. 13, Tab 142 at VOH04202). If the Village wanted the Regional Director to consider "specific information regarding the cost of fire protection," it should have submitted it then.[31] *See Thurston County*, 56 IBIA at 68 ("[I]t is arguably incumbent on the [appellant], which was informed of the remand by the Regional Director . . . to advise the Superintendent of any updated information it wished to submit.").

c) Road Maintenance

The Village argues that the Regional Director "dismissed, without any real review," its comments regarding its obligation to continue to provide road maintenance and repair services with reduced funding. Opening Br. at 34. But the Regional Director acknowledged those comments and found that the three roads identified by the Village "do not directly service any of the proposed acquisitions currently under consideration, but are only located near the Boyea property." Remand Decision at 8. Nonetheless, the Regional Director concluded that Federal funding through the Indian Reservation Road Inventory Program (IRR) (a Federal program that, among other things, funds the maintenance of public roads that provide access to Indian reservations and trust land) was available for

[31] We also note that the Village has not identified what information regarding the cost of fire protection services it would have presented if it had been given another opportunity to comment.

other nearby roadways and would "partially offset[] the Village's financial burden for road maintenance." *Id.*

The Village argues that the Regional Director failed to "provide . . . evidence to support [her] conclusion regarding BIA funding for maintenance of roads." Opening Br. at 34; Reply Br. at 14. But it is the Village's burden to show that the Regional Director failed to consider its comments or abused her discretion on appeal. The record shows that the Regional Director considered the estimated cost of road work and maintenance in the area and reviewed the directory of roads eligible for Federal funding near the Hobart Parcels. *See* Road Work Estimates (AR Vol. 5, Tab 49); Indian Reservation Road (IRR) Summary (AR Vol. 5, Tab 51). The Regional Director acknowledged the Village's concerns and considered whether other sources of funding might offset some of its road maintenance costs. That was enough to satisfy her duty to give due consideration to the Village's comments, *see Hobart I*, 57 IBIA at 13, and the Village's disagreement with her decision does not show that she erred.

d) Impact on School Funding

The Regional Director acknowledged the Village's comment that the "loss of tax revenue [for schools] will not be reflected in additional federal grants," but concluded that the Village had failed to explain how the loss of revenue for the school district would affect the Village. Remand Decision at 7. On appeal, the Village argues that the Regional Director failed to recognize that this loss of revenue could lead the schools to ask for more funding from the Village, possibly leading to "increased tax burdens" on Village residents. Opening Br. at 35. The Regional Director, however, was not required to infer or speculate about an indirect harm that the Village itself did not explicitly identify in its own comments. The Village cannot show that the Regional Director erred simply because she did not address potential harms that the Village itself did not raise in its own comments.

4. Conclusion

The Regional Director considered the impacts of these trust acquisitions on the Village's tax rolls and gave due consideration to the comments submitted by the Village. The Village disagrees with her conclusions, but has not shown that she failed to consider the Village's comments or otherwise erred.

C. § 151.10(f) – Jurisdictional Problems and Conflicts of Land Use

The Village alleges that the Regional Director failed to consider its comments on jurisdictional problems and potential conflicts of land use (the criterion set out in § 151.10(f)) "in any meaningful manner (apart from contradictory, conclusory

statements)." Opening Br. at 36. Specifically, the Village argues that these trust acquisitions will (1) impair its stormwater management programs, (2) create a "checkboard pattern of zoning" that will lead to conflicts of land use, and (3) cause jurisdictional conflicts over the provision of emergency services. *See* Opening Br. at 35-43; Reply Br. at 20-22. The Village argues that the Regional Director failed to consider these issues, and that, even if she did, "it is not enough for [her] to simply acknowledge a jurisdictional problem"; rather, she must "respond to that concern, explain why it was not warranted, or otherwise address it." Opening Br. at 36 (citing *Jefferson County*, 47 IBIA at 200).

As discussed above in Section II.A, § 151.10 only requires the Regional Director to consider potential jurisdictional problems and conflicts of land use that may arise from these trust acquisitions. She is not required to resolve or prevent those problems, nor is she required to weigh those problems against the potential benefits of the trust acquisition to the tribe. *See State of New York*, 58 IBIA at 346; *Roberts County*, 51 IBIA at 52. The law does not prohibit her from taking this land into trust even if doing so would cause all of the problems identified by the Village.

We conclude that the Regional Director's consideration of the Village's comments regarding jurisdictional problems and potential conflicts of land use was consistent with her obligations under § 151.10(f), and the Village has not shown that she erred.

1. Stormwater Management

The Village argues that the Regional Director "noted the stormwater management issue in her [Remand] Decision," but "failed to recognize" that "the current state of affairs between the Village and the Oneida" will worsen jurisdictional problems related to stormwater management if the Hobart Parcels are taken into trust. Opening Br. at 37. In *Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, the Seventh Circuit Court of Appeals found that the Village could no longer impose stormwater management fees on the Nation's trust lands. 732 F.3d 837, 842 (7th Cir. 2013). The Village argues that the trust acquisitions at issue here will "hamper" its efforts to "improve stormwater runoff" because (1) they will contribute to a "checkerboard pattern" of jurisdiction alternating between the Village and the Nation, (2) stormwater does not recognize these jurisdictional boundaries (i.e., it "does not flow in a checkerboard pattern"), and (3) the Village can no longer impose its stormwater management program on the Nation after the Seventh Circuit's decision. Opening Br. at 38-39. The Village argues that the Regional Director ignored this "real jurisdictional conflict." *Id.* at 38.

But the Regional Director did not ignore this issue. To the contrary, she summarized the Village's comments and objections as well as the Seventh Circuit's decision and its effects. Remand Decision at 11-12. She never denied that these issues may

complicate the Village's efforts to manage stormwater. She simply concluded that the "jurisdictional problem" has been resolved because jurisdiction is now clear: as a result of the Seventh Circuit's decision and the State of Wisconsin's disclaimer of authority to regulate stormwater on Indian lands, the Village and the Nation must "implement separate stormwater management programs" (although presumably they could reach an agreement to work together on this issue). *Id.* at 12. The Regional Director considered the Village's comments, and the fact that she characterized the issue differently than the Village does not show that she erred. And, again, she was only required to consider this problem, not solve it.

2. Zoning and Land Use Conflicts

The Village also argues that the Regional Director "completely ignore[d]" the Village's concerns about the "checkerboard pattern of zoning and land use" that could result from the acquisition of the Hobart Parcels. Opening Br. at 39. According to the Village, the Regional Director "fail[ed] to provide any meaningful analysis" of conflicts in zoning and relied on "unsubstantiated" and "erroneous" conclusions regarding the consistency of the Nation's and the Village's intended uses for these parcels. *See id.*

The Regional Director did not "completely ignore" the Village's comments. She compared and contrasted the Village's and the Nation's zoning and proposed uses for these properties. She found that only three parcels had inconsistent zoning and concluded that there was "a low risk for conflicting land use" for two of those three parcels. Remand Decision at 9. She found that the remaining parcel—the Gerbers parcel—did have "a potential for land use conflict," but that conflict was not "unique" and the Village itself had "created the same situation unilaterally by placing agricultural and industrial zoning districts immediately adjacent to one another." *Id.* at 9-10. The Village objects that the Regional Director failed to consider that taking the Gerbers parcel into trust would create "different zoning designations *within* a single zone," Opening Br. at 40 (emphasis in original), but, in fact, she explicitly noted that the Gerbers parcel is located "*within* and adjacent to land zoned by the Village for a commercial industrial park." Remand Decision at 9 (emphasis added).

Again, as discussed in Section II.A, the law only requires the Regional Director to consider these jurisdictional problems and potential conflicts of land use; it does not require her to resolve them, and it does not bar her from taking land into trust even if doing so would create such problems or conflicts. *See Roberts County*, 51 IBIA at 52. She was not required to "reconcile the different zoning designations," as the Village suggests. Opening Br. at 40. The Regional Director plainly considered these issues, and the Village has not shown that her conclusions were "arbitrary and capricious" or unsupported by the record. Finally, to the extent that the Village argues that the Regional Director failed to follow the

Board's "order[] . . . to provide more detail" in her consideration of § 151.10(f), *see* Opening Br. at 41, we note that the Board did not decide that the Notices of Decision failed to address this criteria, *see Hobart I*, 57 IBIA at 30, but were remanded instead because they failed to address the stormwater management issues and so that the Regional Director could "address [the zoning issues] in more detail to make clear they have been considered," *id.* The Regional Director's analysis in the Remand Decision complies with that order.

3. Emergency Services

The Village argues that the Regional Director failed to "properly consider" that these trust acquisitions will harm its ability to provide emergency services because they will contribute to the "checkerboard pattern" of alternating jurisdiction which complicates, for example, police responses. *See* Opening Br. at 41-43; Reply Br. at 21-22. Again, though, the Regional Director explicitly acknowledged these issues and responded to the Village's comments. Remand Decision at 12. She concluded that a cooperative services agreement is "the most feasible solution." *Id.* And while the Village contends that no such agreement is "anticipated," due to its ongoing conflict with the Nation, the Regional Director also recognized that conflict and acknowledged that the "inability of the Village and Nation to execute an intergovernmental service agreement contributes to the jurisdictional conflict that the Village complains of." *Id.*

Again, this is all that was required. The Regional Director heard the Village's comments and considered these potential jurisdictional problems. She was not required to resolve them and was not required to balance the factors in any particular way. She was not prohibited from taking this land into trust even if it may affect the Village's ability to provide emergency services. The Village has not shown that the Regional Director erred.

D. Compliance with Environmental Laws and § 151.10(h)

The Village claims that the Regional Director ignored its environmental concerns and relied on "inconsistent and outdated environmental information." Opening Br. at 47. As a consequence, the Village argues that the Regional Director (1) failed to complete the remand ordered by the Board; (2) violated various environmental laws, regulations, and binding agency guidance documents (including NEPA, the NHPA, and the ESA); and (3) did not properly consider the potential environmental effects of this trust acquisition, as the Village alleges is required by § 151.10(h). We conclude that, even assuming that the Village has standing to bring these claims, it has not shown that the Regional Director failed to complete the Board's remand, violated any environmental laws, or erred in her consideration of the criterion set out in § 151.10(h).

1. Remand on Environmental Issues

First, the Village again claims that the Regional Director failed to complete the remand ordered in *Hobart I*, here because it alleges that the Remand Decision does not address "any of the environmental concerns the Village raised in its prior . . . briefs." *See* Opening Br. at 47-48. In fact, the Remand Decision addresses the Village's environmental concerns at length. *See* Remand Decision at 12-17. What the Village seems to be arguing is that the Regional Director failed to complete the remand because she treated many of these environmental issues generally and did not address each one specifically. For example, the Village argues that the presence of a "major pipe line and three sets of high voltage power lines located near the Lahay property as well as one underground storage tank upslope of the Lahay property" triggered the need for a more detailed environmental site assessment. Opening Br. at 48. The Regional Director provided a general response to the Village's argument that more detailed site assessments were needed, but did not specifically address the pipeline or power lines or many of the other specific environmental conditions identified by the Village. *See, e.g.,* Remand Decision at 15 (summarizing the Village's concern as: "[t]he Phase I ESA's were deficient . . . because they identified environmental concerns nearby (e.g., an underground storage tank 0.2 miles from the Lahay property), yet no Phase II studies were completed").

The Regional Director argues that she did complete the remand because, "instead of addressing and refuting each particularized claim, [she] addressed the issue at [the] heart of each claim." Answer Br. at 48. We agree. Nothing in our remand order or the principles of administrative law required the Regional Director to discuss each of these alleged environmental issues separately or prohibited her from considering them collectively where appropriate. It is clear from the Remand Decision that the Regional Director did consider these issues. *See* Remand Decision at 12-17; *see State of South Dakota v. Acting Great Plains Regional Director*, 63 IBIA 179, 180 (2016) ("BIA's consideration of comments and objections, individually or collectively, must be demonstrated in the decision or the record."). The Village's briefs from its last appeal are also in the record and thus were part of the basis for the Regional Director's Remand Decision. *See, e.g.,* VOH Opening Br. (Lahay) (AR Vol. 15, Tab 162); VOH Opening Br. (Buck, Catlin, Calaway, DeRuyter) (AR Vols. 16-17, Tab 168). The Village has not shown that the Regional Director failed to complete this remand simply because she did not specifically and explicitly address, for example, "three sets of high voltage power lines located near the Lahay property." *See* Opening Br. at 48.

2. Environmental Laws, Regulations, and Guidance

a) NEPA

Second, the Village argues that the Regional Director violated NEPA. Opening Br. at 50-54; Reply Br. at 24-26. BIA must comply with NEPA before approving a trust acquisition. NEPA does not prohibit an agency from taking any action, even if it will harm the environment, but it does require the agency to be fully apprised of the likely environmental impacts of its action. *See, generally*, *Voices for Rural Living v. Acting Pacific Regional Director*, 49 IBIA 222, 239 (2009). To ensure that, NEPA requires all Federal agencies to prepare a detailed "environmental impact statement" (EIS) if they are considering taking an action that may "significantly affect[] the quality of the human environment." 42 U.S.C. § 4332(C). Where an agency concludes that its action will not "significantly affect the quality of the human environment," however, it is not required to prepare an EIS and may comply with NEPA by preparing a less-comprehensive "environmental assessment" (EA) and reaching a "finding of no significant impact" (FONSI). 40 C.F.R. §§ 1501.5, 1501.6. Alternatively, NEPA also allows agencies to "categorically exclude" whole classes of actions from further NEPA review where they do not "individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1501.4; *id.* § 1508.4.

Here, the Regional Director applied a "categorical exclusion" to these trust acquisitions because she concluded that they would not result in any significant change in land use (and thus she completed her NEPA review without preparing an EA or EIS). Remand Decision at 14. The Village argues that these trust acquisitions were not eligible for a categorical exclusion because they will, in fact, cause changes in land use. *See* Opening Br. at 51. The Village also argues that BIA failed to comply with Departmental guidance because it did not consult with local officials on those effects. *See id.* at 54-55.

(1) Standing

As a threshold matter, the Village has not shown that it has standing to challenge the Regional Director's NEPA compliance. An appellant must demonstrate that it has standing to have a right to appeal to the Board. *See* 25 C.F.R. § 2.2 (2022) (definitions of "Appellant" and "Interested party");[32] 43 C.F.R. § 4.331 (Who may appeal); *County of Santa Barbara, California v. Pacific Regional Director*, 65 IBIA 204, 211 (2018). An

[32] The Board's regulations incorporate by reference the definitions in 25 C.F.R. § 2.2 (2022). *See* 43 C.F.R. § 4.330(a). The 25 C.F.R. Part 2 regulations were amended effective September 8, 2023. 88 Fed. Reg. 53774.

appellant must demonstrate standing for each of its claims. 65 IBIA at 211; *Thompson v. Great Plains Regional Director*, 58 IBIA 240, 241 (2014); *County of Sauk, Wisconsin v. Midwest Regional Director*, 45 IBIA 201, 218 (2007), *aff'd sub nom. Sauk County v. U.S. Dep't of the Interior*, No. 07-543, 2008 U.S. Dist. LEXIS 42552 (W.D. Wis. May 29, 2008). To evaluate standing, the Board applies the elements of constitutional standing articulated by the Federal courts. *Santa Barbara*, 65 IBIA at 211 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). The elements of constitutional standing require an appellant to demonstrate that: (1) it has suffered an actual or imminent, concrete and particularized injury to or invasion of a legally protected interest; (2) the injury is causally connected with or fairly traceable to the challenged action; and (3) the injury will likely be redressed by a favorable decision. *See Lujan*, 504 U.S. at 560-61; *POLO*, 58 IBIA at 296-97. These standards may be relaxed when an appellant asserts a "procedural" injury, such as a claim that an agency has failed to comply with the procedures required by NEPA. *Arizona State Land Department v. Western Regional Director*, 43 IBIA 158, 169 n.14 (2006) (emphasis omitted) (quoting *Lujan*, 504 U.S. at 573 n.7).

In addition to the constitutional elements of standing, the Board also applies the principle of "prudential standing": An appellant must show that "the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute . . . in question." *Ass'n. of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970); *see POLO*, 58 IBIA at 297-98; *County of Sauk*, 45 IBIA at 219. The zone of interests test is "not meant to be especially demanding." *Clarke v. Sec. Indus. Ass'n.*, 479 U.S. 388, 399 (1987).

Here, while standing may be somewhat relaxed for procedural claims brought under NEPA, the Village was still required to show that these trust acquisitions had some potential to harm its environmental interests. The Village's economic interests do not give it standing to bring a NEPA claim because they do not fall within the "zone of interests" that NEPA is meant to protect. *See Ass'n. of Data Processing Serv. Orgs., Inc.*, 397 U.S. at 153; *see also Voices for Rural Living*, 49 IBIA at 237. The Village's recitation of a list of alleged environmental hazards on these parcels (e.g., "used tires, waste piles, machinery and used drums on the Calaway property," Opening Br. at 51) does not demonstrate standing because, again, the Village has not alleged that these hazards will harm its environmental interests. Moreover, it is not enough for the Village to show that environmental hazards may exist on these parcels; to demonstrate standing, it had to show that BIA's acquisition of these lands in trust would somehow cause those hazards to harm the Village's environmental interests. The Village's briefs and notice of appeal contain only vague allegations of environmental harm. *See, e.g.,* Notice of Appeal at 4 ("The placement of such a substantial amount of land into trust will have serious detrimental, social, economic and environmental [e]ffects on the local community"). In any event, even assuming that the

Village has standing to bring these NEPA claims, we conclude for the reasons discussed below that it has not shown that the Regional Director violated NEPA.

(2) Categorical Exclusion

Where there is a "category of actions" that "do not individually or cumulatively have a significant effect on the human environment," a Federal agency may adopt a "categorical exclusion" that excludes such actions from further NEPA review (and thus no EA or EIS need be prepared). 40 C.F.R. § 1508.4. BIA has adopted a categorical exclusion for "[a]pprovals or grants of conveyances and other transfers of interests in land where no change in land use is planned." 516 DM 10.5(I). The Board has consistently affirmed the application of this categorical exclusion to trust acquisitions where there is no anticipated change in land use. *See, e.g.*, *Benewah County, Idaho v. Northwest Regional Director*, 55 IBIA 281, 297-98 (2012); *Thurston County*, 56 IBIA at 297; *State of New York*, 58 IBIA at 349-350. BIA applied that categorical exclusion here to exclude these trust acquisitions from further NEPA review (and did not prepare an EA or EIS). Remand Decision at 14.

The Village makes two arguments challenging this use of the categorical exclusion. First, it argues that the exclusion cannot be applied here because the use of these lands will change once they are taken into trust. Opening Br. at 51. But as evidence of those alleged changes, the Village cites only certain slight differences in zoning. *Id.* (referring back to *id.* at 39-41). A change in zoning does not necessarily mean that there will be a change in land use, and, in fact, the Nation "has not proposed a change in use for any of the subject properties." Remand Decision at 10. It is certainly possible that some uses will change after the trust acquisition, but the Regional Director was not required to speculate about possible future land uses.[33] *See City of Yreka, California v. Pacific Regional Director*, 51 IBIA 287, 297 (2010), *aff'd, City of Yreka v. Salazar*, No. 10-1734, 2011 WL 2433660 (E.D. Cal. June 14, 2011). By its own terms, this categorical exclusion may be applied as long as no change in land use is "planned," and no change is planned here.

Second, the Village argues that "extraordinary circumstances" prevented the use of this categorical exclusion. *See* Reply Br. at 25. NEPA's regulations require categorical exclusions to include a "safety valve" that compels further environmental review of an

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[33] In addition, the Village's argument may be barred by the law of the case because, in *Hobart I*, the Board affirmed the Regional Director's consideration of the "purposes for which the land will be used" (25 C.F.R. § 151.10(c)), in part, on the grounds that the Nation's "intended uses and purposes for [these] lands . . . will remain unchanged." 57 IBIA at 27; *see Estate of Richard Lucero*, 1 IBIA 46, 54 (1970) (discussing the "law of the case" rule).

action, even if it would normally be excluded, if that action may have a significant environmental effect due to "extraordinary circumstances." 43 C.F.R. §§ 46.205(c), 46.215 (listing criteria for such extraordinary circumstances); *see also* Council on Environmental Quality, Final Guidance for Federal Departments and Agencies on Establishing, Applying, and Revising Categorical Exclusions Under the National Environmental Policy Act, 75 Fed. Reg. 75628, 75629-30 (Dec. 6, 2010). The Village, however, fails to make a case that any such extraordinary circumstances existed here. Instead, it lists the extraordinary circumstances set out in NEPA's regulations and argues that they "may exist." Reply Br. at 25. Arguing that "extraordinary circumstances" "may" exist is not enough to carry the Village's burden of proof, and it cannot reverse that burden of proof by demanding that the Regional Director prove that extraordinary circumstances do not exist. *See id.* To prevail on these claims, the Village had to show that the Regional Director erred by applying this categorical exclusion, and it has failed to make that showing.

b) NHPA and ESA Compliance

The Village also argues that the Regional Director used outdated information to comply with the National Historic Preservation Act (NHPA) and that there is nothing in the record or the Remand Decision to show what the Regional Director considered in making the determination that no further compliance with the NHPA was necessary. Opening Br. at 49-50. The Village has not demonstrated that it has standing to bring these NHPA claims. It does not allege any injury to its own legally protected interests from these alleged violations of the NHPA. It has not even argued that the Regional Director's determination was in error or that these trust acquisitions would have a detrimental effect on any historic property. *See id.*; Reply Br. at 23-25. As such, we deny these claims for lack of standing. And even if we considered these claims, we would still deny them because the Village has failed to show that the Regional Director violated the NHPA.

Similarly, the Village argues that the Regional Director violated the Endangered Species Act (ESA) because she relied on "outdated determinations" and failed "to provide any analysis of the threatened species" that the FWS identified as living within the boundaries of the reservation. *See* Opening Br. at 50. The Village also objects that BIA did not follow up with the FWS after 12 months (as that agency recommended) to determine if the information remained current. *Id.* But again, the Village has not explained how these alleged violations of the ESA have injured its own legally protected interests. Moreover, BIA determined that these trust acquisitions would have "no effect" on ESA-listed species, and the FWS concurred in that determination. Letter from Fasbender, Field Supervisor, USFWS to Flowers, Oneida Nation (Mar. 14, 2016) (AR Vol. 6, Tab 54) (stating that "the Service would concur that these transactions are appropriate to document as a 'no effect'"). The Village does not argue that these trust acquisitions will affect listed species or that BIA's "no effect" determination or the FWS's concurrence were in error. As such, we hold that

the Village lacks standing to bring an ESA claim against BIA and that, even if it did, it has failed to prove any violation of the ESA or that the Regional Director erred in her analysis.

c) 602 DM 2 – Hazardous Substance Determination

The Village also argues that the environmental site assessments that BIA prepared for these parcels failed to comply with the requirements set out in binding agency guidance in the Departmental Manual (at 602 DM 2) and in an Environmental Compliance Memorandum (ECM) (ECM 10-2). Opening Br. at 46-47, 52-54; Reply Br. at 25-28. Specifically, the Village claims that these assessments are defective because they did not recommend further environmental review, BIA failed to interview local government officials when preparing them, and they were allegedly not updated after the Board remanded the Regional Director's original decision. Opening Br. at 46-47, 52-54; Reply Br. at 25-28.

Again, the Village has not demonstrated standing to bring these claims. The purpose of the cited provisions of the Departmental Manual and the Environmental Compliance Memorandum is to protect the Department—not the Village—from environmental liability. *See* 602 DM 2.1 (stating that its purpose is to "prescribe[] Departmental policy, responsibilities, and requirements regarding determinations of the potential to expose the Department . . . to liabilities and costs of remediation related to the release or threatened release of hazardous substances"); ECM 10-2 at 1 (stating that its purpose is to "minimize environmental liability by not acquiring contaminated real property"). In this appeal, the Village must defend its own interests, not the Department's. *See, e.g., Cheyenne River Sioux Tribe v. Acting Great Plains Regional Director*, 41 IBIA 308, 311 (2005) (a party must assert its own rights and interests, and cannot rest its claim of relief upon the rights or interests of others). As discussed above in Section II.D.2(a)(1), the Village has not clearly alleged that these trust acquisitions will harm its environmental interests, much less that its environmental interests will somehow be harmed by the agency's alleged failure to properly complete these site assessments. Thus, the Village has failed to show that it has standing to bring these claims.

And even if the Village had standing, we would still deny these claims. For example, the Village argues that BIA must prepare a more comprehensive (Phase II) environmental site assessment for the Gerbers property because the original assessment identified "unknown containers on the property" and "there is still no evidence . . . that those containers have been removed or what hazards may be present." Opening Br. at 52. BIA, however, considered this issue and concluded that these containers—and the other environmental issues identified by the Village—posed minimal environmental concerns. Phase I ESA (Boyea), Apr. 27, 2016 (AR Vol. 5, Tab 36 at VOH 1388). The Village's argument—that this land cannot be taken into trust as long as there is any unresolved

environmental concern, even if it has been reviewed and found to be insignificant—finds no support in the law, and we reject it.

d) Consultation Under 516 DM 1.6

Next, the Village argues that the Regional Director erred because she "did not consult or coordinate with the Village on any environmental-related concerns," which the Village claims was required by two provisions set out in the Department of the Interior's Departmental Manual. Opening Br. at 54-55 (citing 516 DM 1.6(A)(1) & (C)(1)). Those provisions require certain Departmental officials to "consult, coordinate, and cooperate" with State, local, and tribal governments on the potential environmental effects of the Department's "plans and programs," as well as on the plans and programs of State, local, and tribal governments. 516 DM 1.6(A)(1) & (C)(1).

These provisions do not apply here. They only require consultation when the Department is "planning or implementing Departmental plans and programs" (or when State, local, or tribal governments are planning or implementing their own plans and programs), and the Regional Director's approval of these trust acquisitions is not a "plan or program." *See* 516 D.M. 1.6(A)("Departmental Plans and Programs"), (C) ("Plans and Programs of Other Agencies and Organizations").

Even if they did apply, the Village has not shown that the Regional Director violated these requirements because she did attempt to consult with the Village: the supplemental notices of application, mailed to the Village on August 6, 2013, expressly asked the Village to "articulate its specific environmental concerns for BIA's consideration." Supplemental NOA at 2. In response, the Village chose to stand "by its previously submitted comments, objections, and briefing on these issues." Response to Supp. NOA at 3. It cannot now be heard to complain that BIA refused to consult with it.

3. § 151.10(h) – Environmental Compliance

Next, the Village argues that § 151.10(h) required BIA to consider the potential environmental effects of this trust acquisition and that the Regional Director failed to do so. Opening Br. at 47-49; Reply Br. at 24. Section 151.10(h) requires the Regional Director to consider "[t]he extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, [NEPA] Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations." 25 C.F.R. § 151.10(h). The Village claims that the Regional Director violated this requirement because "she failed to properly consider environmental concerns" and "relied upon inconsistent and outdated environmental information." Reply Br. at 23; Opening Br.

at 47-49. The Village lists nine environmental concerns that the Regional Director allegedly ignored. *See* Opening Br. at 48.

As discussed above, we have already reviewed the merits of the Village's environmental claims and concluded that it has not shown that the Regional Director violated 516 DM 6, appendix 4 or 602 DM 2 (or any environmental laws or that she failed to complete the remand ordered by the Board). The Village does not allege, much less prove, that the Regional Director failed to consider the criterion actually set out in § 151.10(h); namely, the extent to which the Nation provided the information needed to comply with the provisions of 516 DM 6, appendix 4, and 602 DM 2. As such, we reject the Village's claims that the Regional Director did not properly consider the factor in § 151.10(h).

III. Procedure on Remand

Third and finally, the Village argues that the process that the Regional Director used to reach this Remand Decision was defective. The Village contends that, because the Board vacated the original NODs in part, the Nation was required to start the whole process over again by submitting new applications for these trust acquisitions. Opening Br. at 56; Reply Br. at 28. But nothing in the Board's decision in *Hobart I* required the Nation or BIA to start over; to the contrary, the Board affirmed the original NODs in part and only remanded certain issues to the Regional Director. Requiring the Nation to submit new applications now would circumvent the Board's decision. Moreover, the Village points to no authority, and we have found none, that supports its argument: the Board has never required BIA to start the trust acquisition process over, with a new application, simply because some aspects of a decision were remanded. Nor is it "contrary to due process to allow judges and administrators who have had their initial decisions reversed on appeal to confront and decide the same questions a second time around"; rather, it is fundamental to our legal system. *Withrow*, 421 U.S. at 56-57.

The Village also argues that the Regional Director should have solicited updated comments from it throughout the remand proceedings and cites *Okanogan County, Washington v. Acting Portland Area Director*, 30 IBIA 42 (1996), for the proposition that the Board has "vacated decisions for the BIA's failure to solicit or request additional information after a significant passage of time." Reply Br. at 28. But *Okanogan County* is inapposite here because the Regional Director did ask the Village to supplement and update its comments. *See* Supplemental NOAs (AR Vols. 7 & 8, Tabs 81-88). In response, the Village submitted standardized comments for each property that focused on summarizing the issues remanded by the Board and stated that "the Village stands by its previously submitted comments, objections, and briefing on these issues." *See* Response to Supp. NOA at 2-3. Because the Village chose not to submit whatever updated information it now

believes was relevant, it cannot complain that the Regional Director did not solicit its comments.

We conclude that the Village has not shown that the Regional Director made any procedural errors that would require vacatur of the Remand Decision.[34]

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 decision of January 19, 2017.

I concur:

JAMES MAYSONETT

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Date: 2023.09.21 13:32:03 -04'00'

James A. Maysonett
Administrative Judge

Thomas A. Blaser
Chief Administrative Judge

[34] The Village attempts to incorporate all of its previous arguments by reference to "preserv[e] [those] arguments for further appeal." *See* Opening Br. at 57. This is not sufficient; on appeal, an appellant must show error in the decision being appealed and making that showing requires more than a cursory incorporation by reference. *See Crest-Dehesa-Granite Hills-Harbison Canyon Subregional Planning Group v. Acting Pacific Regional Director*, 61 IBIA 208, 217 (2015). We reject these arguments and any other remaining arguments made by the Village that we have not already explicitly addressed above.

Village of Hobart, Wisconsin v.
Acting Midwest Regional Director,
Bureau of Indian Affairs
Docket No. IBIA 17-054
Order Affirming Decision
Issued September 21, 2023
69 IBIA 84

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