



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

Governor's Office of Planning & Research

MAY 10 2021

STATE CLEARINGHOUSE

COUNTY OF AMADOR,)	Order Vacating Decision and
CALIFORNIA,)	Remanding
Appellant,)	
)	
v.)	
)	Docket No. IBIA 17-072
ACTING PACIFIC REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	April 23, 2021

The County of Amador, California (Appellant or County) appealed to the Board of Indian Appeals (Board) from a February 22, 2017, decision (Decision) of the Acting Pacific Regional Director (Regional Director), Bureau of Indian Affairs (BIA), to accept in trust for the Buena Vista Rancheria of Me-Wuk Indians of California (Tribe) 54.90 acres of land, referred to as the "Coal Mine Road Property." The Coal Mine Road Property is located less than one mile southwest of the Tribe's reservation.

Appellant contends that the Regional Director erred by accepting the Coal Mine Road Property into trust without properly considering all the required factors governing trust acquisitions as set forth in 25 C.F.R. Part 151. Under 25 C.F.R. § 151.11, when the land to be acquired is located off-reservation, BIA must give special consideration to a tribe's justification for the acquisition and greater weight to local governments' concerns raised in opposition to the acquisition. Here, it is undisputed that the Coal Mine Road Property is noncontiguous with the Tribe's reservation, yet there is no evidence in the Decision or in the record that the Regional Director considered and weighed the § 151.11 "off-reservation" factors at all. For that reason, we must vacate the Decision and remand to the Regional Director to properly consider the off-reservation criteria.

In addition, Appellant argues, among other things, that the Regional Director did not properly consider under § 151.10(b) the Tribe's need to acquire the property in trust nor demonstrate under § 151.3(a)(3) how the acquisition would facilitate the Tribe's stated need. Appellant also contends that the Regional Director erred in his consideration of § 151.10(c), the purposes for which the land will be used, by adopting, without question, the Tribe's stated intention to continue using the property for grazing and open space purposes. Appellant raised concerns to the Regional Director that the Tribe intended to

use the Coal Mine Road Property for commercial purposes in support of the casino then planned on its existing reservation, and on appeal contends that the Regional Director failed to consider those concerns. Finally, Appellant argues that, by relying on the Tribe's assertions that there was no plan to change the current land use, the Regional Director erred in his consideration of § 151.10(h) by finding that a categorical exclusion constituted compliance with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*

During remand, in addition to addressing the § 151.11 off-reservation factors, the Regional Director must better develop the record and analysis of the trust acquisition factors set forth in 25 C.F.R. Part 151. It is not entirely clear from the record whether any of the § 151.3(a)(1)-(3) criteria have been met, and the Decision lacks its own analysis of the § 151.10(b) criterion. Nor does the Decision or the record show that the Regional Director considered the § 151.10(c) (purpose) criterion or directly responded to Appellant's comments on that issue. Given the lack of analysis of the proposed uses of the land under the purpose criterion and the interrelated nature of certain § 151.10 factors, we are unable to decide at this time whether the Decision adequately addresses NEPA compliance under § 151.10(h). Therefore, we vacate the Decision and remand the matter to the Regional Director for further consideration.

Legal Framework

Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. § 5108,¹ authorizes the Secretary of the Interior (Secretary) to acquire land in trust for Indians in her discretion. Under the 25 C.F.R. Part 151 regulations establishing the Department of the Interior's land acquisition policy, land may be acquired in trust status for a tribe:

- (1) When the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or
- (2) When the tribe already owns an interest in the land; or
- (3) When the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.

25 C.F.R. § 151.3(a)(1)-(3). The regulations define "Indian reservation" to mean "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction" *Id.* § 151.2(f).

¹ Effective September 1, 2016, the compilers of the United States Code transferred 25 U.S.C. § 465 to section 5108.

When evaluating a tribal request for BIA to accept into trust land that is “located within or contiguous to an Indian reservation,” *id.* § 151.10, BIA must consider the following “on-reservation” criteria:

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

Id. § 151.10(a)-(c) and (e)-(h).²

On the other hand, if the land proposed for trust acquisition is “located outside of and noncontiguous to the tribe’s reservation,” *id.* § 151.11, BIA must consider both the above “on-reservation” criteria, *id.* § 151.11(a), and additional requirements for so-called “off-reservation” acquisitions, *id.* § 151.11(b)-(d). *See State of New York v. Acting Eastern Regional Director*, 58 IBIA 323, 325 (2014). Specifically, BIA must consider the location of the off-reservation land to be acquired relative to state boundaries, and its distance from the boundaries of the tribe’s reservation. 25 C.F.R. § 151.11(b). As the distance between the tribe’s reservation and the land to be acquired increases, BIA must give greater scrutiny to the tribe’s justification of the anticipated benefits from the acquisition, and give greater weight to the concerns raised by state and local governments related to the acquisition’s potential impacts on regulatory jurisdiction, real property taxes, and special assessments. *See id.* § 151.11(b), (d). And, if the off-reservation land to be acquired is to be used for

² Criterion § 151.10(d) does not apply to tribal acquisitions.

business purposes, the tribe must provide a plan specifying the anticipated economic benefits associated with the proposed use. *Id.* § 151.11(c).

Factual and Procedural Background

On October 10, 2014, BIA received the Tribe's application to take the Coal Mine Road Property in trust. Tribe's Fee-to-Trust Application, undated, at 1 (Application) (Administrative Record (AR) 1); Letter from Regional Director to Tribe, Oct. 16, 2014, at 1 (unnumbered) (AR 2). According to the Application, the Tribe's "development partner," Genesee Management, Inc. (Genesee), purchased the Coal Mine Road Property "[presumably] at market rate[] and subsequently donated the property to the Tribe" in 2005. *See* Application, Exhibit (Ex.) 10, Appendix (App.) E – Client Questionnaire, Oct. 22, 2013, at 2; Vesting Deed, Jan. 7, 2005, at 1 (unnumbered) (AR 5). Genesee granted the deed to an entity named "3501 Coal Mine Road Properties, LLC." Vesting Deed at 1. The Tribe refers to 3501 Coal Mine Road Properties, LLC as its subsidiary, *see* Tribe's Response to Comments, Feb. 18, 2016 (Tribe's Responses) at 3-4 (AR 23), but the record does not contain the organizing documents that show the ownership and control of that entity.

The Coal Mine Road Property consists of two parcels, comprising approximately 54.90 acres.³ *See* Application at 1. The property is situated roughly 2,570 feet southwest of the Tribe's existing reservation. *See id.* In the Application, the Tribe represented that its existing reservation was a 67-acre tract that "includes two modular homes, a modular office, a traditional dance arbor[,] and undeveloped space, among other things."⁴ *Id.* In its

³ The Tribe and the County identify the Coal Mine Road Property as one parcel totaling approximately 55.6 acres. Application at 1; *id.*, Ex. 5 – Amador County 2013-2014 Property Tax Bill, Sept. 13, 2013. The Regional Director and the Bureau of Land Management (BLM), identify the property as two parcels totaling approximately 54.90 acres. Decision at 1-2; BLM Land Description Review, Apr. 6, 2015, (AR 7). In light of our disposition of the case, we leave it for BIA to resolve these discrepancies on remand, prior to issuing a new decision.

⁴ The Application made no mention of the Tribe's plans to construct a casino on the 67-acre reservation. The Tribe later stated that it planned to build a casino on the reservation. *See* Tribe's Response at 7. The Tribe's casino was completed and opened in April 2019. *Harrab's Northern California Hosts Soft Opening*, CasinoBeats, May 1, 2019, <https://casinobeats.com/2019/05/01/harrahs-northern-california-hosts-soft-opening> (last visited Apr. 22, 2021, and copy added to record).

responses to comments on the Application, the Tribe further described the reservation as containing land designated as “Cultural Protection Areas.” See Tribe’s Responses at 7.⁵

The Tribe describes the Coal Mine Road Property as “undeveloped grassland” except for “a single barn structure,” and describes the surrounding area as “almost entirely agricultural, with a few rural residences.”⁶ Application at 1. At the time of the Application, the Tribe was leasing the property to a third party “for grazing purposes” on a month-to-month basis, and the Tribe stated that no other uses were permitted under that lease. *Id.*, Ex. 10, App. E – Environmental Questionnaire, Oct. 22, 2013, at 5. The Tribe asserted that it “intends to continue to utilize the land as open space/grazing land” and “does not propose to change any use of the property or to introduce any ground disturbing activity as part of the fee-to-trust request.” *Id.* at 3. Based on those assertions, the Tribe maintained that no jurisdictional problems or conflicts in land use would result from the transfer to trust, 25 C.F.R. § 151.10(f), *id.* at 3-4, and that a categorical exclusion⁷ was appropriate

⁵ The Tribe initially stated that the 67-acre parcel was held *in trust* but later stated that the Application should have said that the Tribe “only has approximately 67 acres of existing reservation land.” *Id.* at 4 (emphasis added). On April 25, 2019, upon request of the Regional Director, the Board vacated and remanded an October 10, 2018, BIA decision that returned the Tribe’s application to accept the 67-acre reservation into trust as a mandatory acquisition. *Buena Vista Rancheria of Me-Wuk Indians of California v. Acting Pacific Regional Director*, 66 IBIA 214 (2019). Recently, in a separate proceeding, the United States District Court for the Northern District of California granted the Tribe’s Motion to Enforce Judgment, which required BIA to accept the 67-acre parcel into trust. *Hardwick v. United States*, No. 79-cv-01710-EMC, 2020 U.S. Dist. LEXIS 212890, at *23 (N.D. Cal. Nov. 13, 2020).

⁶ This characterization differs somewhat from the Tribe’s responses to the comments, which describe the surrounding area as “currently used for a variety of purposes, including industrial, recreational, residential[,] and commercial.” See Tribe’s Responses at 1, 7 (citing as examples a nearby air strip, multiple mineral mines, and a biomass plant).

⁷ When the Decision was issued, “categorical exclusion” (CE) was defined in Council on Environmental Quality (CEQ) regulations for implementing NEPA as a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations . . . and for which, therefore, neither an environmental assessment nor an environmental impact statement is required.

(continued...)

under NEPA, § 151.10(h), *id.* at 5. The Tribe specified that it requested the acquisition under 25 C.F.R. § 151.11 for “off-reservation” lands. *Id.* at 2.

BIA notified state and local governments of the application for trust acquisition of the Coal Mine Road Property by letter dated November 10, 2015. Notice of Application, Nov. 10, 2015 (AR 12). In response to the notice, the County provided comments in opposition to the acquisition.⁸ Letter from Amador County Board of Supervisors to Regional Director, Dec. 17, 2015 (County’s Comments) (AR 20). As relevant to this appeal, the County expressed doubt that the trust acquisition was necessary because existing County zoning provisions already protected the current use of the property as grazing land, and since the land was already owned by the Tribe, there could be no threat that the land would be used for another purpose. *Id.* at 1. The County also relayed its “pressing concerns” that the Tribe would likely develop the site with infrastructure to complement the then-planned casino on the 67-acre reservation. *Id.* at 2. According to the County, a “significant portion” of the Tribe’s 67-acre reservation was “likely unsuitable for other commercial development ancillary to a casino, such as a hotel, gas station, market[,] or other resort amenities” because of its topography and water supply challenges, and because it contains a “burial site.” *Id.* The County also raised, without any specificity, potential land use conflicts that could arise if the Tribe later altered the proposed use of the Coal Mine Road Property. *Id.* at 3.

The County further commented that use of a categorical exclusion was inappropriate so long as the Tribe could change the use of the property at any point in the future. *Id.* Thus, according to the County, BIA was obligated under NEPA to consider the environmental impacts of all the Tribe’s “potential and previously stated” uses of the land and not just the current use. *Id.* at 4. The County urged BIA to require the Tribe to prepare an Environmental Impact Statement (EIS) “evaluating the environmental and socioeconomic impacts, including but not limited to those set forth in this letter and exhibits.”⁹ *Id.* at 3. Based on those concerns, the County opposed the trust acquisition

40 C.F.R. § 1508.4; *see also* 43 C.F.R. § 46.205 (Actions categorically excluded from further NEPA review). In 2020, CEQ promulgated revised NEPA implementing regulations. 85 Fed. Reg. 43304 (July 16, 2020).

⁸ BIA also received comments from several other individuals and entities, *see* AR 15, AR 17, AR 18, and AR 19, but none of the other commenters have appealed the Decision.

⁹ Although the County references exhibits accompanying its comments, there were no attachments to the copy of the County’s letter that was in the record provided to the Board. The Board reminds the Regional Director that the administrative record is to include “all
(continued...) ”

unless the Tribe executed a deed restriction or entered into an enforceable agreement that would commit the Tribe to continuing the current use of the property, in perpetuity. *Id.* at 2.

BIA provided the Tribe a copy of the comments received from the County, and the Tribe submitted a response. *See* Letter from Regional Director to Tribe, Jan. 25, 2016 (AR 22); Tribe's Responses (AR 23). In relevant part, the Tribe asserted that it was under no legal obligation to make a commitment to maintain the current use of the property through a deed restriction or enforceable agreement as the County had urged. Tribe's Responses at 6. The Tribe reiterated that, while it did not intend to develop the land, it was not required to guarantee to preserve current uses. *Id.* at 7. With respect to the County's assertion that there was no need for the Tribe to have the land taken into trust given the Tribe's stated intention to preserve the current use, the Tribe responded that having the land in trust would promote tribal sovereignty, self-governance, and self-determination, as it would ensure that the Tribe could govern its own lands. *Id.* at 6. The Tribe also countered that it could not build its planned casino on the Coal Mine Road Property because its gaming compact with the State of California only permitted the Tribe to build the casino on its 67-acre reservation.¹⁰ *Id.* at 7. Finally, the Tribe defended the application of a CE to satisfy NEPA on the grounds that it did not intend to change the use of the property. *Id.* at 8-9.

On February 22, 2017, the Regional Director issued the Decision to have the United States accept the Coal Mine Road Property in trust. Decision at 1. The Decision opens with a description of the land that is subject to the Application, followed by a summary of the County's written comments on the trust acquisition and the Tribe's responses thereto. *Id.* at 3-9. At the onset of the analysis section, the Decision identifies both the "on-reservation" criteria, 25 C.F.R. § 151.10, and the "off-reservation" criteria, § 151.11, that the Regional Director was required to consider in rendering a decision. *Id.* at 10. Then, as relevant to this appeal, the Regional Director proceeded to discuss the Tribe's need for the acquisition (§ 151.10(b)); the purposes for which the land will be used (§ 151.10(c)); the potential for jurisdictional problems or land use conflicts (§ 151.10(f)); and the information provided regarding NEPA compliance (§ 151.10(h)).

information and documents" used by the Regional Director in rendering the decision, including "all supplemental documents which set forth claims of interested parties." 43 C.F.R. § 4.335; *Big Sandy Rancheria Band of Western Mono Indians v. Acting Pacific Regional Director*, 64 IBIA 302, 309 n.8 (2017).

¹⁰ We note that the Tribe's response did not address the County's concern that the Tribe would use the Coal Mine Road property for infrastructure "ancillary" to the casino. *See* County's Comments at 2.

Addressing the Tribe's need for additional land, § 151.10(b), the Regional Director restated verbatim a portion of the Application which asserted that the acquisition would enhance self-determination and self-governance. *Compare* Decision at 10, *with* Application at 3. Based on that assertion, the Regional Director determined that the Tribe had "established a need for additional lands to protect the environment and preserve the reservation." Decision at 10. Considering the purpose for which the land would be used, the Regional Director repeated the Tribe's statements that it planned to continue using the property for grazing purposes and that there were no plans to change that use or engage in ground-disturbing activities. *Id.* at 11. The Regional Director's consideration of jurisdictional or land use conflict issues also restated the Tribe's position that transfer of the Coal Mine Road Property into trust would be unlikely to cause any such problems because there would be no change in use of the property. *Id.* The Regional Director found that, pursuant to 18 U.S.C. § 1162 and 28 U.S.C. § 1360, the acquisition would not affect the State of California's jurisdiction to enforce laws against criminal conduct on the land. *Id.* The Regional Director also found, without further explanation, that the acquisition would not affect the County's regulatory jurisdiction because "the property is [sic] subject to tribal, not County regulatory jurisdiction and zoning regulations." *Id.* Finally, the Regional Director confirmed that neither an Environmental Assessment (EA) nor an EIS was required for the proposed acquisition and that the CE approved on January 13, 2017, was appropriate because "no immediate change in land use is planned." *Id.* at 12. After discussing the § 151.10 criteria, the Regional Director expressed the intention to accept the Coal Mine Road Property into trust. *Id.* The Decision does not address, directly or otherwise, the criteria identified under 25 C.F.R. § 151.11. *See id.* at 10-12.

The County appealed and filed an opening brief. The Regional Director did not file a brief.

Standard of Review

The Board's standard of review in trust acquisition cases is well established. Where, as here, BIA's decision whether to take land into trust is discretionary, we do not substitute our judgment for BIA's. *County of San Diego, California v. Pacific Regional Director*, 63 IBIA 75, 82 (2016). While proof that a regional director considered the factors set forth in 25 C.F.R. § 151.10 and, where relevant, § 151.11, must appear in the record, there is no requirement that BIA reach a particular conclusion with respect to each factor. *See Arizona State Land Department v. Western Regional Director*, 43 IBIA 158, 160 (2006). Nor must the factors be weighed or balanced in any particular way or exhaustively analyzed. *Aitkin County, Minnesota v. Acting Midwest Regional Director*, 47 IBIA 99, 104 (2008). However, the Board will require that BIA provide sufficient reasoning to support a discretionary decision, and the administrative record must provide evidentiary support for the decision. *Riggs v. Acting Pacific Regional Director*, 65 IBIA 192, 197 (2018). An

appellant bears the burden of demonstrating that a regional director's exercise of discretion was not proper. *Mille Lacs County, Minnesota v. Acting Midwest Regional Director*, 62 IBIA 130, 137 (2016).

Discussion

I. The § 151.11 "Off-Reservation" Criteria

Appellant alleges that the Regional Director failed to consider "each of the required elements under 25 C.F.R.[] Part 151." Opening Brief (Br.), July 31, 2017, at 6. There is no dispute that the Coal Mine Road Property is "outside of and noncontiguous to the Tribe's Reservation." Application at 2 (stating that the trust acquisition is "requested under 25 C.F.R. § 151.11"). The Regional Director even acknowledged that the § 151.11 off-reservation criteria should be considered in formulating a decision. *See* Decision at 10. When the land to be acquired is located off-reservation, as the distance between the tribe's reservation and the land to be acquired increases, BIA is to give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition and greater weight to the concerns raised by state and local governments regarding the tax impact, § 151.10(e), and potential jurisdictional problems and land use conflicts, § 151.10(f). *See* § 151.11(b), (d). Appellant contends that the Decision failed to adequately consider the "jurisdictional problems and potential conflicts of land use which may arise." Opening Br. at 5. Appellant criticizes the Decision for making the "rote assertion" that jurisdictional problems were unlikely because the Tribe plans to use the property for agricultural purposes and contends that land use problems "will absolutely arise if the Tribe uses the property for other purposes." *Id.* at 5-6.

While not required to weigh these factors exhaustively or reach a particular conclusion, it was incumbent upon the Regional Director to explain his reasoning for accepting the parcel in trust, particularly for an off-reservation acquisition. *See County of San Diego*, 63 IBIA at 84-85. It is not sufficient for the Regional Director to merely state the comments received in opposition and parrot the Tribe's responses thereto. *Id.* There is no evidence in the Decision or in the record that the Regional Director considered the distance between the Tribe's reservation boundaries and the Coal Mine Road Property or that he weighed that distance in his consideration of the County's stated concerns. Because the Decision lacks any analysis whatsoever of the off-reservation criteria in § 151.11(b), we must vacate and remand the Decision to the Regional Director.

II. The § 151.10 “On-Reservation” Criteria

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

The County argues that the Regional Director failed to adequately consider the Tribe’s need for the additional land as required under 25 C.F.R. §§ 151.10(b) and 151.11(a). Opening Br. at 4. According to the County, the Tribe has not established that it has a need for the property to be exempt from state and local regulation and taxation—which it would be were the land to be held in trust—because the Tribe’s use of the property for grazing is already consistent with applicable County zoning regulations. *Id.* In other words, the County believes that the Tribe has not demonstrated a need to have the land held *in trust*.

The Board has previously said that “BIA has broad leeway in its interpretation or construction of tribal ‘need’ for the land.” *County of Sauk, Wisconsin v. Midwest Regional Director*, 45 IBIA 201, 209 (2007). And we have consistently rejected an interpretation of § 151.10(b) that would require a tribe to demonstrate the particular need for the land to be held *in trust*. Rather, the Board has held:

[S]ubsection 151.10(b) only requires BIA to consider the applicant’s need for the additional land that is subject to the trust application. Section 151.10 as a whole permits, *but does not require*, separate consideration of an applicant’s demonstrated need to have the land held in trust as opposed to being retained in fee.

State of South Dakota v. Acting Great Plains Regional Director, 39 IBIA 283, 293-94 (2004) (emphasis added).

The Tribe’s resolution authorizing the Application states that the Tribe’s exercise of governmental authority over the land would be optimized only if the land is held in trust. Application, Ex. 4 – Tribal Resolution No. 2013-013, Nov. 22, 2013, at 1. In its response to the County’s comments, the Tribe also averred that trust status was needed to qualify for Federal grants and to promote the Tribe’s “ability to implement its own regulations and policies on Tribal lands” Tribe’s Responses at 6. Repeating the Tribe’s statements, the Regional Director determined that the acquisition would enhance self-determination and self-governance by allowing the Tribe to exercise jurisdiction and sovereign authority over its land and resources. *See* Decision at 10; Application at 3; Tribe’s Responses at 6.

The County argues that the Regional Director erred by failing to identify the evidence in the record that directly supports the Tribe's asserted need for the land. Opening Br. at 5.¹¹ While the Regional Director was not required to consider the Tribe's need for additional land "in trust," we agree that the Regional Director's analysis of this factor was insufficient, as he merely recited verbatim the Tribe's statement of need and did not manifest any of his own consideration of the factor. Relatedly, the County appears to argue that the Regional Director was required to make an affirmative determination that the proposed acquisition is necessary to facilitate tribal self-determination, economic development, or Indian housing under § 151.3(a)(3). *Id.* Even though the subsections of § 151.3(a)(1)-(3) are disjunctive, such that satisfaction of any of the criteria supports the Secretary's authority to take land into trust, *see State of New York*, 58 IBIA at 340, neither the Decision nor the record establishes that any of the disjunctive elements has been met. The Regional Director made no express findings relative to § 151.3(a)(3) (necessity) and seemingly relied solely on § 151.3(a)(2) (fee ownership) as the authority for the acquisition. *See generally* Decision at 10; Application at 2 ("The Tribe's request satisfies [§ 151.3(a)(2)] as the Coal Mine Road [Property] is currently owned in fee by the Tribe.").

However, the record is inconclusive as to whether the Tribe holds title to the property. There is no dispute that Genesee granted the deed to an entity named "3501 Coal Mine Road Properties, LLC." Vesting Deed, Jan. 7, 2005, at 1 (unnumbered) (AR 5); *see also* Title Commitment, Nov. 12, 2014, at 3 (AR 3). But, beyond the Tribe's statements in the Application and responses to comments, there is nothing in the record that substantiates the Tribe's assertions of ownership and control of 3501 Coal Mine Road Properties, LLC. *See* Tribe's Responses at 3-4; *id.* at 4 ("The [Application] . . . establishes the Tribe's ownership interest in the property through its subsidiary LLC."). On remand the Regional Director will need to revisit these issues and further develop the analysis and record as appropriate.

B. Purposes for Which the Land Will Be Used – § 151.10(c)

Appellant argues that the Regional Director failed to adequately address the County's objection that the Tribe's stated intent to continue using the Coal Mine Road Property for open space and grazing purposes is a "ruse." Opening Br. at 3. In this appeal, Appellant lists a series of alleged "facts" that it contends demonstrate the "linkage" between the Tribe's casino on the 67-acre reservation and the purported future development of the

¹¹ While Appellant presents this challenge under the Regional Director's consideration of the "purpose" factor, § 151.10(c), we also view this argument in the context of § 151.10(b).

Coal Mine Road Property for complementary commercial purposes. The alleged facts that the County presents on appeal include that: the tract of land approved for the Tribe's casino under the compact with the State of California is unsuitable for complementary development such as a parking facility, resort hotel, or gas station; the Coal Mine Road Property is less than a mile from the Tribe's 67-acre reservation and is apt for development; the Tribe acquired the Coal Mine Road Property by gift from Genesee, the Tribe's "development partner"; the signatory on the deed, Thomas C. Wilmot, Jr., is a principal in both Genesee and an affiliated entity, Wilmorite, Inc. (Wilmorite) of Rochester, NY; readily available information on Mr. Wilmot and Wilmorite reflect their involvement in the Tribe's casino and other commercial real estate development; and the consulting firm that performed the environmental analysis for the Application, Analytical Environmental Services (AES), also provided services for the Tribe's casino project. *See* Opening Br. at 1-5. Appellant declares that the Regional Director ignored these "inescapable inferences," *id.* at 3, that the Tribe would actually build ancillary infrastructure on the Coal Mine Road Property, and "instead mechanically rel[ie]d solely on the Tribe's representation[s]," *id.* at 4, that it intends to preserve the land for open space and grazing. The County posits that there is a "substantial likelihood" that the Tribe may at some point seek to develop the Coal Mine Road Property to support economic development initiatives on its reservation. *See id.* at 4.

When examining the purpose or use for any property proposed for trust acquisition, BIA must determine the current use of the property and the applicant tribe's plans for the property. *Thurston County, Nebraska v. Great Plains Regional Director*, 56 IBIA 296, 307 (2013). If BIA receives objections alleging inconsistencies regarding the stated needs and purposes for a trust acquisition, it must respond in a meaningful way, and the reasoning underlying the decision to accept the property in trust must be explained. *San Diego County*, 63 IBIA at 84. "BIA should include in its decision a discussion of the facts which are, or should be, within BIA's knowledge and which have some bearing on the present or future use of the property." *Village of Ruidoso, New Mexico v. Albuquerque Area Director*, 32 IBIA 130, 139 (1998).

In the Decision, the Regional Director states that the Coal Mine Road Property is currently "undeveloped grazing land with the exception of a single barn structure," that the Tribe "intends to continue to utilize the land as open space/grazing land," and that "[t]here is no proposed change in land use or ground disturbing activity." Decision at 11. The Regional Director's "analysis" is a near-verbatim recitation of the Tribe's application, *compare id.* at 11 *with* Application at 3, and does not acknowledge or address the allegations or purported "facts" raised in the County's written comments in opposition to the trust acquisition. While the County apparently failed to raise to the Regional Director the aforementioned "facts" and factual inferences related to Genesee, AES, Mr. Wilmot, and Wilmorite, it did state its concern that, due to the presence of a burial mound, the

proximity of the Coal Mine Road Property to the Tribe's reservation, and that "a significant portion of the 67-acre [reservation] site . . . is likely unsuitable for other commercial development ancillary to a casino," the Tribe "may end up developing the new site for these [ancillary] purposes." County's Comments at 2. In its response to the County's comments, the Tribe stated that it could not build the *casino* on the Coal Mine Road Property, but did not address the County's concern regarding ancillary commercial development. By merely repeating the Tribe's statements in the Decision, the Regional Director failed to show consideration of the issue.

"[M]ere speculation that the land might, at some point in the future, be used for gaming[-related purposes] does not require BIA to consider [that] as a possible use of the property in deciding whether to accept the property into trust." *City of Yreka, California v. Pacific Regional Director*, 51 IBIA 287, 297 (2010); *see also Lake Montezuma Property Owners Association, Inc. v. Phoenix Area Director*, 34 IBIA 235, 238 (2000). However, in this case, we think the County has raised at least a little more than "mere speculation," and the Decision or the record must demonstrate that the County's stated concerns, and the facts that were known to the Regional Director, were considered. *See San Diego County*, 63 IBIA at 84; *Village of Hobart, Wisconsin v. Acting Midwest Regional Director*, 57 IBIA 4, 12-13 (2013). The Regional Director opted to not file a response brief in this appeal, so there is nothing to help the Board understand whether and how BIA weighed any of the facts and inferences that the County alludes to regarding the proposed future use for the Coal Mine Road Property. And there is insufficient evidence for us to conclude that adequate consideration was given to the County's comments and concerns that were properly before the Regional Director when he issued the Decision. On remand, the Regional Director will have the opportunity to further develop the record regarding his consideration of this factor.

C. NEPA Compliance – § 151.10(h)

The County challenges BIA's determination that because no change in land use was planned, approval of a CE satisfied the requirements for NEPA review. Appellant contends that an EA or EIS should have been required based on the "substantial likelihood" of the Tribe using the Coal Mine Road Property for purposes other than grazing, i.e., for commercial purposes in support of the Tribe's casino operations on the nearby reservation. *See* Opening Br. at 4, 6; *see also* County's Comments at 4 ("BIA is obligated under NEPA to fully analyze the environmental impacts from the Fee-to-Trust decision and to consider all of the existing information regarding the Tribe's potential and previously stated and/or agreed upon use of the land.").

The Regional Director concluded that a CE was appropriate because "no *immediate* change in land use is planned." Decision at 12 (emphasis added) (citing as authority

516 DM 10.5(I)). However, the cited provision of the DM does not contain the word “immediate” and instead states that a categorical exclusion applies to land conveyances and other transfers “where no change in land use is planned.” 516 DM 10.5(I). And, we have previously found error where a regional director summarily concluded that a CE applied because a tribe had “no ‘immediate’ change-of-use-plans.” *San Diego County*, 63 IBIA at 90. In *San Diego County*, we noted that the definition of “effects” within the NEPA regulations at 40 C.F.R. § 1508.8 is not limited to “immediate” effects. *See id.* Because the potential effects that bear on NEPA compliance go beyond immediate effects, and because on remand the Regional Director needs to further consider the alleged facts and concerns regarding the Tribe’s proposed use of the land to be acquired, we conclude that the NEPA issue is not ripe for decision. After addressing the potential purpose(s) and use(s) of the Coal Mine Road Property, and if the Regional Director again decides to accept the parcel in trust, the Regional Director shall also address NEPA review consistent with the accurate interpretation of 516 DM 10.5(I), the relevant NEPA regulations, and the findings relative to the other 25 C.F.R. § 151.10 criteria.

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 vacates the Regional Director’s February 22, 2017, Decision, and remands for further proceedings consistent with this decision.

I concur:

**KENNETH
DALTON**

Digitally signed by
KENNETH DALTON
Date: 2021.04.23
15:41:22 -04'00'

Kenneth A. Dalton
Administrative Judge

ROBERT HALL Digitally signed by ROBERT HALL
Date: 2021.04.23 11:54:43 -04'00'

Robert E. Hall
Administrative Judge

County of Amador, California v.
Acting Pacific Regional Director,
Bureau of Indian Affairs
Docket No. IBIA 17-072
Order Vacating Decision and Remanding
Issued April 23, 2021
67 IBIA 350

James R. Parrinello, Esq.
for Appellant, County of Amador, CA
Neilsen Merksamer
2350 Kerner Boulevard, Suite 250
San Rafael, CA 94901

BY CERTIFIED MAIL

Chairperson
Buena Vista Rancheria
1418 20th Street, Suite 200
Sacramento, CA 95811

California State Clearinghouse
Office of Planning and Research
P.O. Box 3044
Sacramento, CA 95814

Joe Dhillon
Senior Advisor for Tribal Negotiations
Office of the Governor
State Capitol Building, Suite 1173
Sacramento, CA 95814

Superintendent
Central California Agency
Bureau of Indian Affairs
650 Capitol Mall, Suite 8-500
Sacramento, CA 95814-4710

Pacific Regional Director
Bureau of Indian Affairs
2800 Cottage Way
Sacramento, CA 95825

Pacific Southwest Regional Solicitor
Office of the Solicitor
U.S. Department of the Interior
2800 Cottage Way, Room E-1712
Sacramento, CA 95825

