United States Department of the Interior

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COUNTY OF SAN DIEGO, CALIFORNIA and VIEJAS BAND OF KUMEYAAY INDIANS, Appellants,	)	Order Vacating Decision and Remanding
v.	)	Docket Nos. IBIA 11-136 11-137
PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	September 6, 2013

The County of San Diego, California (County) and the Viejas Band of Kumeyaay Indians (Viejas) (collectively, Appellants) seek review by the Board of Indian Appeals (Board) of a May 31, 2011, decision (Decision) by the Pacific Regional Director, Bureau of Indian Affairs (BIA). The Regional Director's decision is to approve acquisition by the United States in trust of approximately 16.69 acres, known as the Walker Parcel,[1] for the Ewiiaapaayp Band of Kumeyaay Indians (Ewiiaapaayp)[2] as an on-reservation acquisition pursuant to 25 C.F.R. § 151.10. We vacate the Decision and remand the matter to the Regional Director for her to give further consideration to whether the Walker Parcel is contiguous to the Ewiiaapaayp reservation, and therefore properly considered under the criteria for on-reservation acquisitions. During remand, BIA must also supplement its 2001 Environmental Assessment (EA) of the proposed action to more fully consider Ewiiaapaayp's 2008 amended land-into-trust application, in which Ewiiaapaayp proposed to establish a second healthcare clinic and daycare center instead of relocating an existing healthcare clinic and daycare center to the Walker Parcel as was originally proposed.

We reject Ewiiaapaayp's threshold argument that the County lacks standing to appeal the Decision. Because the County persuades us to vacate the Decision and remand

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[1] A legal description of the Walker Parcel is contained in the Decision at 1-2. *See also* Grant Deed (Administrative Record (AR) Tab 1, Ex. 1); Title Commitment at 5 (AR Tab 3).

[2] Ewiiaapaayp is also known as the "Cuyapaipe Band of Mission Indians" or the "Cuyapaipe Community of Diegueño Mission Indians of the Cuyapaipe Reservation, California."

the matter, and because Viejas presents similar challenges to the Decision, we need not decide whether Viejas also has established standing to appeal.

We conclude that the Regional Director did not properly determine whether the Walker Parcel is located contiguous to the Ewiiaapaayp reservation and thus whether the acquisition should be evaluated under the standard applicable to on-reservation acquisitions. The Regional Director did not explain the rationale for her apparent determination that the lands are contiguous notwithstanding their separation by three roads and she does not appear to have fully considered the record on this issue. Nor does it appear that the record itself is complete, and therefore we vacate the Decision and remand the matter so that the record on this issue may be more fully developed and considered. However, we reject Appellants' contention that Ewiiaapaayp's existing trust lands are not part of its "reservation" for purposes of applying the land-into-trust regulations and considering whether the Walker Parcel is located contiguous to the Ewiiaapaayp reservation.

Turning to the EA, we are persuaded that the 2001 EA must be supplemented to consider the potential cumulative environmental impacts of simultaneously operating both the existing and the new proposed healthcare clinics and daycare centers. But we disagree with Appellants that the Regional Director should consider the proposed acquisition of the Walker Parcel in connection with a possible future casino on other land. On the record before the Board, the establishment of a casino is speculative and unconnected to the proposed action concerning the Walker Parcel for purposes of the EA.

Therefore, we vacate the Decision and remand the matter to the Regional Director for further consideration.

Statutory and Regulatory Background

Section 5 of the Indian Reorganization Act (IRA), 25 U.S.C. § 465, authorizes the Secretary of the Interior (Secretary) to acquire land in trust for Indians in her discretion. Under the regulations establishing BIA's land acquisition policy, land may be acquired in trust for a tribe if (1) the land is located within or "adjacent" to the exterior boundaries of the tribe's reservation; (2) the tribe already owns an interest in the land; or (3) the Secretary determines that the acquisition is necessary to facilitate tribal self-determination, economic development, or Indian housing. 25 C.F.R. § 151.3(a)(1)-(3). The term "adjacent" is undefined in Part 151.

When evaluating tribal requests to acquire land located within or "contiguous" to an "Indian reservation," i.e., an on-reservation acquisition, BIA must consider the following regulatory criteria in § 151.10(a)-(c) and (e)-(h):[3]

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

The term "contiguous" is also undefined in Part 151. "Indian reservation" means, *inter alia*, "that area of land over which the tribe is recognized as having governmental jurisdiction," unless another definition is required by a Federal statute "authorizing a particular trust acquisition." *Id.* § 151.2(f) (definition of Indian reservation).

Where the land is located outside of and "noncontiguous" to the tribe's reservation, BIA must consider the criteria applicable to an on-reservation acquisition as well as other requirements. *Id.* § 151.11(a)-(d). For example, if the land is being acquired for business purposes, the tribe must provide a plan that specifies the anticipated economic benefits associated with the proposed use. *Id.* § 151.11(c). In addition, as the distance between the tribe's reservation and the land to be acquired increases, BIA must give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition and must give greater

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

weight to concerns raised by state and local governments concerning the acquisition's potential impacts on regulatory jurisdiction, real property taxes, and special assessments. *See id.* § 151.11(b), (d).

Regardless of the location of the land to be acquired relative to the tribe's reservation, BIA must comply with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, including the completion of a categorical exclusion determination; an environmental assessment (EA) and finding of no significant impact (FONSI); or an environmental impact statement (EIS), as applicable to the proposed action. *See* 40 C.F.R. § 1501.4.

Factual and Procedural Background

Ewiiaapaayp has approximately five members. Comprehensive Economic Development Strategy (CEDS) at 12 (AR Tab 20). Its largest land base is a reservation containing approximately 5460 acres, situated in the Laguna Mountains in San Diego County, approximately 47 miles east of the City of San Diego and about 12 miles north of Interstate 8 (I-8). Decision at 9.[4] Access is difficult and both Ewiiaapaayp and BIA characterize the land as largely unsuitable for commercial development. *Id.*; CEDS at 2; Tribal Transportation Needs Assessment at 3-1 (AR Tab 18).

Approximately 40 miles to the west, in the unincorporated community of Alpine within San Diego County, Ewiiaapaayp has two neighboring trust parcels, comprising 8.6 and 1.42 acres, which BIA placed into trust in 1986 and 1997, respectively. Decision at 2, 9. The 1.42-acre parcel is used for the Ewiiaapaayp Tribal Office. *Id.* at 9. The 8.6-acre parcel is leased, for $1 per year, to the Southern Indian Health Council (SIHC), a nonprofit tribal healthcare organization that provides services to tribal members of a consortium of seven tribes (including Ewiiaapaayp and Viejas) as well as to non-Indians in the community. *Id.* We refer to the 8.6-acre parcel as the SIHC Parcel. For reasons we discuss *infra*, we refer to the combined 10.02 acres held in trust as the Alpine trust lands.

The parcel that is the subject of this appeal—the 16.69-acre Walker Parcel—is owned by Ewiiaapaayp in fee. *Id.* at 3. It is situated approximately two miles from the Viejas Casino, which is located on the Viejas Reservation on the north side of I-8. Viejas Notice of Appeal (NOA) at 2. In her Decision, the Regional Director described the Walker Parcel's location as "directly south of" and "adjacent to" Ewiiaapaayp's Alpine trust lands.

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[4] This reservation was established by Executive Order (Dec. 29, 1891) pursuant to the Mission Indian Relief Act of January 12, 1891, 26 Stat. 712, and was enlarged by the California Indian Land Transfer Act, Pub. L. No. 106-568, 114 Stat. 2921, 2922 (2000).

Decision at 2-3. She did not mention that three roads separate the Walker Parcel from the Alpine trust lands: Willows Road (a County road on the southern border of the Alpine trust lands), Alpine Boulevard (a County road on the northern border of the Walker parcel), and I-8 (situated in-between Willows Road and Alpine Boulevard).[5]

Ewiiaapaayp first applied in 2001 to convey the Walker Parcel and easement into trust for the purpose of constructing and relocating SIHC to a new healthcare clinic and daycare center on the Walker Parcel. Application, Mar. 21, 2001, at 1 (AR Tab 1). The existing healthcare clinic and daycare center on the SIHC Parcel consist of several buildings and modular units. Environmental Assessment (EA), November 2001, at 1-5 (AR Tab 58). Ewiiaapaayp's overarching plan was to build a casino on the SIHC Parcel;[6] construct a larger, consolidated healthcare clinic and daycare center elsewhere on the SIHC Parcel for SIHC to operate temporarily; and ultimately—if the Walker Parcel were accepted into trust—construct and relocate SIHC to another new healthcare clinic and daycare center on the Walker Parcel. *See id.* at 1-5 to 1-6; Ewiiaapaayp Answer Brief (Answer Br.) at 4. The plan did not involve the simultaneous operation of healthcare clinics and daycare centers on both the SIHC and Walker Parcels. *See* EA at 1-5 (the healthcare clinic and daycare center on the SIHC Parcel would be converted to administrative space). Nor did Ewiiaapaayp contextualize the Walker Parcel trust acquisition as an economic development project: It was proposed to meet a need for health services among the members of the tribal consortium. *See id.*; Application at 4.

Consistent with that plan, in Ewiiaapaayp's original March 2001 application, it proposed to construct a 23,700 square foot healthcare clinic and a 2700 square foot daycare center on the Walker Parcel for operation by SIHC under a new business lease. *See* Application at 1; Tribal Resolution No. 01-05, Mar. 15, 2001, at 1 (AR Tab 2); EA at 2-4. In November 2001, a final EA[7] was completed for the trust acquisition of the Walker Parcel

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[5] The Decision also includes trust acquisition of a 60-foot-wide road and utility easement extending from the eastern border of the Walker Parcel, across 1.15 acres of private property, to Alpine Boulevard. *See* Decision at 2; Grant of Easement (AR Tab 1, Ex. 2).

[6] Relevant to its potential use for gaming, the SIHC Parcel was acquired in trust prior to the effective date of the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701 *et seq.*

[7] BIA transmitted a draft EA to Appellants for comment in August 2001. Letter from BIA to County, Aug. 22, 2001 (AR Tab 51); Letter from BIA to Viejas, Aug. 22, 2001 (AR Tab 51). The County and Viejas submitted comments on it. Letter from County to BIA, Sept. 20, 2001 (AR Tab 47); Letter from Viejas to BIA, Sept. 21, 2001 (AR Tab 48). The Regional Director provided written responses to the County's and Viejas's comments along

(continued...)

and for construction of a healthcare clinic and daycare center on that parcel. The EA represented that the proposed trust acquisition was not an integral part of the casino project and that if the Walker Parcel were not accepted into trust then SIHC would remain in the consolidated healthcare clinic and daycare center on the SIHC Parcel. EA at 1-6. The EA stated that a separate EA would be prepared for the actions planned for the SIHC Parcel, including demolition of the existing facilities, construction of the consolidated healthcare clinic and daycare center, and construction of the casino. *Id.*

According to the Walker Parcel EA analysis of impacts anticipated to result from the proposed healthcare clinic and daycare center, although the construction phase could result in significant impacts that would require mitigation, the operation phase would not result in significant new impacts because SIHC would be relocating to the Walker Parcel. The EA stated, for example, that "[s]ince the proposed action will not change the size of the Clinic, nor its capacity for serving clients, the volume of traffic in the region should not change from current levels." *Id.* at 4-4. Based on the EA, the Regional Director[8] signed a FONSI determination on November 7, 2001. *See* FONSI (AR Tab 4).[9]

With respect to SIHC's existing lease and the proposal to relocate the healthcare clinic and daycare center to the Walker Parcel, Ewiiaapaayp and SIHC made some progress in reaching an agreement, but the efforts ultimately were unsuccessful. *See* Answer Br. at 4; Letter from Ewiiaapaayp to BIA, Aug. 4, 2009 (AR Tab 107). In 2010, SIHC exercised its option to renew its lease for a second 25-year term[10] and, in light of SIHC's refusal to relocate, Ewiiaapaayp now "has no proposal to move the SIHC health clinic to the Walker parcel." Answer Br. at 4.

(...continued)
with copies of the final EA and FONSI. Letter from BIA to County, Nov. 23, 2001 (AR Tab 65); Letter from BIA to Viejas, Nov. 23, 2001 (AR Tab 65).

[8] Determinations were made regarding the proposed acquisition over time by different persons having the delegated authority of the Regional Director. We will refer to each of them as the Regional Director.

[9] Appellants appealed the FONSI and the Board dismissed the appeals without prejudice to Appellants' right to re-file an appeal after BIA's final decision on the land-into-trust application. *Viejas Band of Mission Indians v. Pacific Regional Director*, 38 IBIA 73, 74 (2002).

[10] BIA concluded that it was not required to review, for purposes of approval or disapproval, SIHC's decision to exercise its renewal option. We affirmed BIA's decision in *Ewiiaapaayp Band of Kumeyaay Indians v. Acting Pacific Regional Director*, 56 IBIA 163, 172 (2013).

The Regional Director approved the acquisition on June 27, 2002, however, on July 22, 2002, the Assistant Secretary – Indian Affairs (Assistant Secretary) withdrew the Regional Director's decision in order to conduct his own review. Letter from Assistant Secretary to Ewiiaapaayp, July 22, 2002 (AR Tab 6). In 2004, Ewiiaapaayp requested a delay of the final decision while it pursued a joint venture with Viejas whereby each Tribe would operate a casino on the Viejas Reservation. Letter from Ewiiaapaayp to Assistant Secretary, May 1, 2008, at 1 (AR Tab 7); Answer Br. at 5. The joint venture was not established, and on May 1, 2008, Ewiiaapaayp requested reactivation of its application. AR Tab 7. When Ewiiaapaayp requested reactivation, it amended the application by extending tenant eligibility to any qualified health service and daycare provider, including but not limited to SIHC, that would serve the general public. Tribal Resolution No. 08-09, May 9, 2008 (AR Tab 8); Answer Br. at 6. Thus, it now proposes to use the Walker Parcel for "non-gaming economic development." Answer Br. at 5.

The Assistant Secretary directed the Regional Director to reactivate the application and to "update the prior environmental work as necessary." Letter from Assistant Secretary to Regional Director, May 16, 2008 (AR Tab 9). At BIA's request, the environmental contractor who prepared the original EA, Analytical Environmental Services (AES), reviewed the suitability of the November 7, 2001, FONSI in light of the amended application and current environmental conditions. AES concluded that "[t]he Tribe's intention to pursue other medical service provider tenants for the Walker Parcel would not result in any effect to the EA analysis, since [the] environmental impacts would not change in either their nature or magnitude." AES Review Report, July 9, 2008, at 4 (AR Tab 11, Attach.).[11] AES noted that SIHC would continue to operate the existing clinic north of I-8. *Id.* But it did not discuss the potential environmental impacts of operating two sets of healthcare clinics and daycare facilities at the same time north and south of I-8.

On August 9, 2010, the Regional Director recommended approval of the acquisition to the Assistant Secretary. Memorandum from Regional Director to Assistant Secretary, Aug. 9, 2010, at 14 (unnumbered) (AR Tab 29). The Assistant Secretary returned the application to the Regional Director for a decision. *See* Letter from Assistant Secretary to Ewiiaapaayp, Apr. 7, 2011 (AR Tab 31). The Regional Director's May 31, 2011, Decision followed.

[11] The Decision incorrectly identifies the date of the report as July 9, 2009. *See* Decision at 13.

I. Comments on the Application by the County and Viejas

BIA "reissu[ed]" notice of the fee-to-trust application on October 20, 2008, to the state, local governments, and several Indian tribes. Notice, Oct. 20, 2008, at 1 & Ex. A (AR Tab 13). The notice invited comments on the proposed acquisition and specifically requested information regarding impacts on property taxes, special assessments, government services, and whether the intended use is consistent with current zoning. *Id.* at 1.

The County submitted timely comments opposing the amended application. The County commented, *inter alia*, that "[t]he current trust application should be clarified to state if the proposed healthcare facility [for the Walker Parcel] would replace the existing SIHC [clinic]."[12] Letter from County Land Use and Environment Group to BIA, Nov. 24, 2008, at 2 (AR Tab 14, Ex. D). Regarding zoning, the County commented that the Walker Parcel is zoned as Limited Agriculture, that the proposed healthcare clinic is classified as a commercial use and is not consistent with current zoning, and that the proposed daycare center is a civic use and is only allowable with a Major Use Permit. *Id.* at 2-3. Moreover, the County noted that the Alpine Community Plan of the San Diego County General Plan discourages spot commercial zoning unless a need is demonstrated, and it contended that "the environmental documentation should demonstrate and justify the need for the healthcare facility." *Id.* The County also listed a number of other environmental and land use concerns, including generation of traffic and noise. *See id.* at 4. Finally, the County asserted that Ewiiaapaayp "has applied for an Off-Reservation Trust Acquisition." *Id.*[13]

Viejas also submitted timely comments on the amended application, objecting to it on several of the grounds asserted by the County and other grounds. In support of the comment that the off-reservation standard should be applied, Viejas asserted that the Walker Parcel is not "contiguous" to the Alpine trust lands because they are separated by roads with differing ownership, and that the Alpine trust lands are not a "reservation." Viejas Comments, Dec. 15, 2008, at 14 (AR Tab 14, Ex. G). Viejas also noted that the

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[12] The Vice Chairwoman of the County Board of Supervisors separately commented to "oppose Ewiiaapaayp's continued attempts to acquire additional lands in trust to construct a new casino on land which is currently occupied by [SIHC]." Letter from Dianne Jacob to BIA, Nov. 21, 2008 (AR Tab 14, Ex. C).

[13] The County provided information regarding annual loss of tax revenue ($7624.58) but it did not object to the acquisition on that basis. Letter from County Assessor to BIA, Oct. 30, 2008 (AR Tab 14, Ex. A, Attach.).

Walker Parcel cannot be accessed directly from the Alpine trust lands and instead "access can be obtained only by driving 1.3 miles over Alpine Road and Interstate 8." *Id.*

Viejas additionally commented on the sufficiency of BIA's environmental review, asserting that the EA is out of date and improperly segmented the environmental analysis of the amended application and other actions that Ewiiaapaayp wishes to undertake, including gaming on the SIHC Parcel and pending land-into-trust and reservation proclamation requests for other parcels in Alpine.[14] *Id.* at 23-33. After the deadline for comments on the amended application, Viejas submitted "supplemental" comments reiterating its prior concerns and alleging additional errors by BIA. Viejas Supplemental Comments, Jan. 22, 2009 (AR Tab 14, Ex. H).

II. Ewiiaapaayp's Response to Comments and Viejas's Rebuttal

By letter dated April 21, 2009, Ewiiaapaayp responded to Appellants' comments. Letter from Ewiiaapaayp to BIA, Apr. 21, 2009 (AR Tab 15). In support of Ewiiaapaayp's position that its application is for an on-reservation acquisition, it re-submitted a 2002 "Contiguous Property Determination" prepared by its counsel. Letter from Dorsey & Whitney LLP to BIA, June 13, 2002 (AR Tab 15, Attach.).[15] And as to the adequacy of BIA's environmental review, Ewiiaapaayp stated that "[t]he proposed project has not changed from that described in the 2001 [EA] in any way that would result in new or increased environmental impacts." AR Tab 15 at 2; *see id.* at 16. Ewiiaapaayp further responded, *inter alia*, that the Department should not speculate about possible future gaming on the SIHC Parcel as a basis for requiring additional environmental review concerning the amended application. *See id.* at 19.

In July 2009, Viejas submitted what it referred to as "supplemental and new information relevant to . . . NEPA compliance and trust land acquisition criteria . . . for the Walker Parcel." Letter from Viejas to BIA, July 15, 2009, at 1 (AR Tab 104). Ewiiaapaayp responded to those comments in a letter to BIA. Letter from Ewiiaapaayp to BIA, Aug. 4, 2009 (AR Tab 106).

Finally, Viejas submitted "rebuttal" comments opposing the acquisition. Letter from Viejas to BIA, Dec. 17, 2009 (AR Tab 23); Viejas Rebuttal Comments, Nov. 23, 2009 (AR Tab 23). Viejas included two new technical reports that it commissioned in

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[14] The pending land-into-trust applications identified by Viejas involve parcels known as the Salerno Parcel (18.95 acres) and the Willows Road Parcels (totaling 10.45 acres). AR Tab 14, Ex. G at 28.

[15] The copy of the letter that is contained in the record does not include its enclosures.

support of its contentions that the Walker Parcel should be considered under the off-reservation standard and that a second clinic is not justified and is merely a ruse for achieving Ewiiaapaayp's actual goal of gaming on the SIHC Parcel.

Relevant to the contiguity issue, the first report was prepared by Wunderlin Engineering, Inc., and is entitled "Report of Present and Historic Boundaries of Assessor's Parcel No. 404-061-01 [SIHC Parcel] and Assessor's Parcel No. 404-080-26 [Walker Parcel], Alpine, CA, July 14, 2009" (Wunderlin Report) (AR Tab 23, Attach. 3).[16] The Wunderlin Report advises that it "should not be considered a complete investigation, but a report of findings to date," that "[d]ifferent public agencies (BIA, [Bureau of Land Management], County of San Diego, and State of California) may have varying definitions of 'contiguous parcels,'" and that "[t]his report does not discuss the specifics of these definitions, but rather reviews the physical characteristics of the parcels in relationship to each other and public rights-of-way." Wunderlin Report at 1 (unnumbered). It concludes that the Walker Parcel is not contiguous to the Alpine trust lands for two reasons: "First, there is a long standing history of the properties being separated by multiple rights-of-way. Second, the properties were historically not adjacent to each other. Lands owned by other private parties separated the two underlying properties." *Id.* at 2 (unnumbered).

III. Regional Director's Decision

On May 31, 2011, the Regional Director issued the Decision from which Appellants appeal. The Regional Director first concluded that the acquisition satisfies BIA's land acquisition policy, 25 C.F.R. § 151.3(a)(1)-(3), for multiple reasons: The Walker Parcel is "adjacent to existing trust lands," Ewiiaapaayp owns the land in fee, and "rental for [the] health facility could generate income." Decision at 3.

She then summarized the comments received on the amended application and Ewiiaapaayp's responses to those comments.[17] *Id.* at 3-8. It is unclear whether the Regional Director intended to express her opinion on the comments or on Ewiiaapaayp's responses thereto, or if she intended only to summarize the opposing viewpoints. Her written analysis of the on-reservation criteria in § 151.10, which we describe below, does not—except as we indicate—refer to the County's or Viejas's comments, or to Ewiiaapaayp's responses thereto.

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[16] The copy of the Wunderlin Report that is contained in the record does not include all of its attachments.

[17] The Regional Director did not mention Viejas's December 17, 2009, rebuttal comments or either of the technical reports attached to those comments.

As to § 151.10(a) (statutory authority), the Regional Director cited § 465. Decision at 3, 14. Concerning § 151.10(b)—tribe's need for additional land—she stated:

> The proposed and current use of th[e SIHC Parcel] was/is the development/construction of a permanent and adequate health center to meet current and unmet needs for health care services for the Indians within southern San Diego County. . . . According to the Band's application [for the Walker Parcel], "present trust land in Alpine, California, has proven to be inadequate for the *SIHC's future goals and objectives*. . . ." The *SIHC's long-term goals* include construction and operation of a permanent health facility, retirement center, and museum/cultural center. The proposed approximately 16.69-acre parcel will provide the *Tribe* with sufficient space to pursue *its long-term goals to be used for a healthcare facility*. Thus, the proposed clinic could still be leased wholly or in part to [SIHC]; however the Tribe could lease it to other similar health service providers as well.

Id. at 9-10 (emphases added). The Regional Director did not mention Tribal economic development.

Under § 151.10(c) (purpose for which the land will be used), the Regional Director stated that Ewiiaapaayp amended its application to extend tenant eligibility for the proposed clinic to any healthcare entity. *Id.* at 10. She concluded, under § 151.10(e), that the projected loss of tax revenue—$8051.94 based on the 2009-2010 tax roll—was "relatively insignificant" and would not "cause a major impact on the County's financial situation." *Id.*

With respect to § 151.10(f) (jurisdictional problems and potential conflicts of land use), the Regional Director found that, since tribal jurisdiction in California is subject to Public Law No. 83-280, there would be no change in criminal jurisdiction on the Walker Parcel. *Id.* Attempting to summarize the County's comments regarding zoning conflicts, she stated as follows:

> According to the County, the proposed land is designated as A-70 (Limited Agriculture Use Regulations). The Walker property is subject to the Forest Conservation Initiative . . . whereby the County of San Diego imposed limitation on growth in certain areas of the county. The purpose of this designation is to provide lands for limited residential, civic and agricultural use. Therefore, it appears that a medical clinic may require a "Major Use Permit" if a medical clinic were to be constructed on fee property subject to the County zoning requirements.

Id. at 10-11. The Regional Director then concluded: "However, if the property is accepted into trust, compliance with local zoning ordinances would not be applicable." *Id.* at 11.

As for BIA's capacity to assume additional trust responsibilities, the Regional Director determined under § 151.10(g) that "[a]ny additional responsibilities resulting from this transaction," including additional workload attributable to lease to an outside entity, "will be minimal." *Id.* at 12. Finally, concerning § 151.10(h) (contaminant survey and documentation for NEPA compliance), the Regional Director determined that no hazardous substances were present on the land to be acquired. *Id.*

In addressing NEPA compliance, the Regional Director noted that the November 2001 EA reflected consideration of comments received during a previous public review and comment period, and that a FONSI was issued based on that EA. *Id.* The Regional Director stated that most of the comments pertained to "the [previously proposed SIHC] lease termination and the subsequent construction of a casino," but that those issues were not included in the EA and are not a part of the Decision. *Id.* at 12-13. Based on AES's review of the EA in July 2008, she concluded that no further NEPA review was needed.[18] *Id.* at 13. She also determined that compliance with Section 106 of the National Historic Preservation Act had been documented with a letter from the State Historic Preservation Officer, and that compliance with Section 7 of the Endangered Species Act was completed with receipt of a Biological Opinion from FWS dated April 10, 2002, regarding the effect of the proposed action on the arroyo toad and its designated critical habitat. *Id.*

This appeal followed. The County and Viejas each submitted opening and reply briefs, and Ewiiaapaayp filed an answer brief. The Regional Director did not participate in the briefing. Viejas also submitted requests to supplement the administrative record.[19] The Board need not decide whether the documents that Viejas submitted are or should be part of the administrative record. The Regional Director may consider the documents during remand to the extent she finds them relevant.

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[18] The Regional Director did not mention Viejas's July 15, 2009, comments regarding NEPA compliance or Ewiiaapaayp's August 4, 2009, responses to those comments.

[19] Viejas Motion to Supplement the Record, Nov. 4, 2011 (enclosing documents labeled "supplemental administrative record" (SAR) 109-208); Viejas Motion to Supplement the Record, Jan. 18, 2013 (enclosing SAR 209-215).

Discussion

I. Standard of Review

In *Village of Hobart, Wisconsin v. Acting Midwest Regional Director*, 57 IBIA 4, 12-13 (2013), we set forth our well-established standard of review in trust acquisition cases:

> Decisions of BIA officials on requests to take land into trust are discretionary, and the Board does not substitute its judgment for BIA's in discretionary decisions. Instead, the Board reviews discretionary decisions to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of that discretion, including any limitations on its discretion that may be established in regulations. An appellant bears the burden of proving that BIA did not properly exercise its discretion. Proof 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. Simple disagreement with or bare disagreements concerning BIA's decisions are insufficient to carry this burden of proof. The factors need not be weighed or balanced in any particular way or exhaustively analyzed. We must be able to discern from the Regional Director's decision, or at least from the record, that due consideration was given to timely submitted comments by interested parties.
>
> In contrast to the Board's limited review of BIA discretionary decisions, the Board has full authority to review any legal issues raised in a trust acquisition case, except those challenging the constitutionality of laws or regulations, which the Board lacks authority to adjudicate.
>
> The scope of the Board's review ordinarily is "limited to those issues that were before the . . . BIA official on review." 43 C.F.R. § 4.318. Thus, the Board ordinarily will decline to consider for the first time on appeal matters that could have been but were not first raised before the Regional Director.

(Citations and internal quotations omitted.)

II. Appellants' Standing

Ewiiaapaayp argues that Appellants were required but failed to establish standing to appeal in their opening briefs, were thus precluded from addressing standing in their reply briefs, and in any event lack standing to challenge the Decision. Answer Br. at 9, 12 n.5.

We disagree that an appellant may not demonstrate standing when the issue is first raised in an answer brief. While it is true that the ultimate burden to demonstrate standing lies with an appellant, the Board has not rigidly imposed a requirement that every appellant affirmatively plead and demonstrate standing in its NOA or opening brief, under threat of waiver.

Ewiiaapaayp argues that neither the County nor Viejas has demonstrated any adverse effect—injury in fact—to a legally protected interest that would result from the Decision to accept the Walker parcel in trust for the Tribe. Ewiiaapaayp asserts that the County's standing depends on whether it alleges that the Regional Director failed to consider the tax and jurisdictional factors in §§ 151.10 and 151.11. *Id.* at 9. Ewiiaapaayp does not separately address the County's standing to raise its NEPA claim, but appears to contend that the County's standing to raise NEPA is dependent upon its standing under §§ 151.10 and 151.11. *See id.* at 12-13.

We have no difficulty concluding that the County has standing to bring this appeal to challenge the Decision under the fee-to-trust acquisition criteria, 25 C.F.R. §§ 151.10 and 151.11, and under NEPA. *See Arizona State Land Dept. v. Western Regional Director*, 43 IBIA 158, 172 (2006). The conveyance of title to the Walker Parcel to the United States in trust for Ewiiaapaayp would remove the property from the County's tax rolls and from the County's regulatory jurisdiction, both of which would adversely affect what have been characterized as governmental "proprietary interests." *Id.*; *see City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197-1201 (9th Cir. 2004). The injury is traceable to the Decision, and would be redressed by a favorable decision. Regardless of whether the County specifically challenges the Decision on the basis of tax and/or jurisdictional impacts, or more generally alleges that the Regional Director improperly considered the § 151.10 and, as applicable, § 151.11 criteria, the County has standing to challenge the Decision under those regulations. And to the extent Ewiiaapaayp contends that the County's land use or environmental interests are not arguably within the zone of interests protected by both the trust acquisition statute, 25 U.S.C. § 465 (and the implementing regulations, §§ 151.10 and 151.11), and NEPA, we disagree. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. ___, ___, 132 S. Ct. 2199, 2210-12 (2012) (the economic, environmental, and aesthetic interests of a neighbor to the use of trust land arguably fall within § 465's scope); *County of Sauk, Wisconsin v. Midwest Regional Director*, 45 IBIA 201, 218 (2007) ("[t]he purpose of NEPA is to address the *environmental* impact of proposed Federal action").

Ewiiaapaayp misconstrues the Board's decision in *County of Sauk* by conflating issues within the County's claim—i.e., whether the County is alleging adverse tax and/or jurisdictional impacts—with the claim itself. As we explained in *County of Sauk*, a trust acquisition decision involves the exercise of discretion that considers, collectively, all of the

applicable factors in §§ 151.10 and 151.11. 45 IBIA at 208. With respect to Part 151, the "claim," for purposes of determining a state or local government's standing, is that BIA failed to properly consider the legal prerequisites of a trust acquisition decision, i.e., § 151.10 and, as applicable, § 151.11. The County undoubtedly makes that claim here, and in any event the County's allegations that BIA should have applied the off-reservation standard—and consequently did not give the County's jurisdictional and land use concerns adequate weight—fall within the scope of § 151.10(f).

Whether Viejas has demonstrated that it has standing to challenge the acquisition either pursuant to § 465 (and §§ 151.10 and 151.11, as applicable), or NEPA is another question, and one that we do not decide. Whatever "propriety interests" Viejas may have, *see City of Sausalito*, 386 F.3d at 1197-1201, Viejas's standing arguments are (1) that taking the Walker Parcel in trust will result in a casino on the SIHC Parcel, thus creating economic competition that will adversely affect Viejas, and (2) the Walker Parcel acquisition will injure Viejas by increasing traffic, undermining Viejas's sovereignty, adversely affecting Viejas's tribal culture, and jeopardizing Viejas's members' access to health care. Viejas Reply Br. at 36-37. The speculative chain of causation between taking the Walker Parcel into trust and the establishment of a casino on another trust parcel is too attenuated, in our view, to demonstrate injury in fact, causation, and redressability. But ultimately, because we conclude that the County has standing, and because we decide this appeal based on arguments raised by the County, we need not decide whether any of Viejas's standing arguments is sufficient to demonstrate its own standing to bring this appeal.

III. Review of the Regional Director's Analysis under Part 151

Appellants challenge the Decision on the grounds that the Regional Director did not apply the correct regulatory criteria, did not apply the criteria properly, and did not adequately address their comments on the application or explain the rationale for her Decision. We vacate the Decision and remand the matter for the Regional Director to more fully consider whether the on-reservation standard should be applied. During remand, if the Regional Director decides to approve the acquisition, she should also more fully respond to Appellants' comments in opposition to the proposed acquisition and articulate the rationale for her decision.

A. Whether the Application is for an On-Reservation Acquisition

Appellants contend that the Regional Director erred by not applying the off-reservation criteria in § 151.11. They argue that the Walker Parcel is not "contiguous" to a reservation because the Walker Parcel and the Alpine trust lands are separated by three roads—two of which are owned by the County and the third owned by the State of California—and that the Walker Parcel and the Alpine trust lands have never shared a

common boundary. *See* County Opening Br. at 5-6; County Reply Br. at 11-12; Viejas Opening Br. at 51-52; Viejas Reply Br. at 9-10. They also argue that the Alpine trust lands are not an "Indian reservation." *See* County Opening Br. at 3-4; County Reply Br. at 8-10; Viejas Opening Br. at 45-49; Viejas Reply Br. at 11-16. We vacate and remand the Regional Director's Decision for failure to adequately consider the contiguity issue but we reject Appellants' contention that the Alpine trust lands are not "reservation" lands within the meaning given that term in 25 C.F.R. Part 151 and we disagree that the IRA does not permit BIA to have adopted the definition of "reservation" that it did for purposes of implementing BIA's fee-to-trust acquisition policy.

The Regional Director first describes the Walker Parcel as "directly south" of the Alpine trust lands. Decision at 2. This does not establish the distance of the Walker Parcel to those lands. She next describes the Walker Parcel as "adjacent" to Ewiiaapaayp's existing trust lands within the meaning of § 151.3(a)(1).[20] *Id.* at 3. The Board has held that the term adjacent "is a term of flexible meaning" and a conclusion that land is adjacent to a reservation must be supported in the record with "an exact statement of the lot's location, vis-à-vis the reservation boundary, or a discussion of reasons for the . . . conclusion." *Maahs v. Acting Portland Area Director*, 22 IBIA 294, 296 (1992) (footnote omitted) (vacating a BIA decision which concluded without explanation that the land was not adjacent to the tribe's reservation). While the record could support the Regional Director's determination that the Walker Parcel is "adjacent" to the Alpine trust lands, it would not necessarily follow that her apparent determination that the parcels are also contiguous is supported in the record. Adjacent lands "may be, but need not be, 'contiguous.'" *Jefferson County, Oregon, Board of Commissioners v. Northwest Regional Director*, 47 IBIA 187, 206 (2008) (citing *Maahs*, 22 IBIA at 296). The Board has held that, to be contiguous under § 151.10, "at a minimum, the lands must touch." *Jefferson County*, 47 IBIA at 206; *see id.* at 205 ("lands which are 'contiguous' for purposes of 25 C.F.R. § 151.10 are lands that adjoin or abut").

The Board has been asked once before, in *County of Sauk*, to decide whether separation by a road renders otherwise contiguous parcels noncontiguous. In that case the county raised the issue for the first time on appeal and the Board determined that it need not address the issue. 45 IBIA at 208 n.11. But the Board nonetheless stated that "[t]he fact that a highway easement separates the actual land surfaces of the two parcels does not render them any less contiguous for purposes of section 151.10." *Id.* at 213. Subsequently,

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[20] Because Ewiiaapaayp owns the Walker Parcel in fee, the acquisition would satisfy BIA's land acquisition policy under § 151.3(a)(2) regardless of whether the parcel is adjacent to Ewiiaapaayp's Reservation. The acquisition must satisfy § 151.3(a)(1), (2), "or" (3). 25 C.F.R. § 151.3(a).

in *Jefferson County*, the Board suggested that a relevant consideration may be "the ownership of the road's surface or subsurface by easement, fee, lease, or grant." 47 IBIA at 204.[21]

Although unmentioned in her Decision, in 2002 the Regional Director requested a "contiguous or adjacent land determination" from the Acting Regional Solicitor. In the request, the Regional Director asserted that notwithstanding their separation by roads the Walker Parcel "should still be considered contiguous or adjacent to the [Ewiiaapaayp] Reservation." Request for Contiguous or Adjacent Land Determination, June 17, 2002, at 1 (AR Tab 5). Her rationale is unclear. She noted that while "25 CFR Part 151[] . . . does not include a definition of 'adjacent[,]' Section 66424 of the California Subdivision Map Act states: 'Property shall be considered as contiguous units, even if it is separated by roads, streets, utility easement or railroad rights-of-way.'" *Id.* She also referred to maps and a "Letter from Dorsey and Whitney," and described them as "evidencing that the subject parcel is contiguous or adjacent to existing [Ewiiaapaayp] trust land." *Id.* at 1-2. The Acting Regional Solicitor replied that the "Walker Parcel[] would qualify within the meaning of 'contiguous or adjacent to the existing reservation' as stated in 25 CFR Part 151." Memorandum from Acting Regional Solicitor to Regional Director, June 20, 2002 (AR Tab 5). The Acting Regional Solicitor referred to the definitions of "adjacent" and "contiguous" in *Black's Law Dictionary*, the definition of "contiguous" in a treatise on California real estate law, and Section 66424 of the California Subdivision Map Act. *See id.* He also stated that, "[i]n the documentation provided by both you and the Tribe, but for the intervention of Interstate 8 and the supporting service roads that parallel the Interstate, the [Walker Parcel] would be touching the existing reservation." *Id.*

Following the Regional Director's 2011 Decision, it remains unclear what evidence and arguments she found persuasive in her apparent determination that the Walker Parcel is contiguous to the Alpine trust lands. Even had the Regional Director cited the Acting Regional Solicitor's determination in her Decision, we would find that reliance to be insufficient. First, contrary to what Ewiiaapaayp argues on appeal, *see* Answer Br. at 23-24, the meaning of "contiguous" in § 151.10 does not depend on the law of the state in which the land to be acquired is located. We find not the slightest hint in the regulations of any intention to make state law applicable, nor do we understand BIA's and its counsel's references to the California Subdivision Map Act to imply so much. It is a question of Federal law. Second, contrary to what is stated in the Acting Regional Solicitor's

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[21] The Board also noted that the First Circuit Court of Appeals affirmed, without analysis, BIA's treatment of parcels as contiguous where they were separated by a town road. *Jefferson County*, 47 IBIA at 204 (citing *Carcieri v. Kempthorne*, 497 F.3d 15, 45, n.21 (1st Cir. 2007), *rev'd on other grounds*, *Carcieri v. Salazar*, 555 U.S. 379 (2009)).

determination, the phrase "contiguous or adjacent to the existing reservation" is nowhere found in Part 151. As we explained above, the two terms appear in different provisions of the regulations and we have never held that they are synonymous, nor is it apparent that they are. Only the word "contiguous" is relevant to the on- versus off-reservation distinction. Finally, as discussed *infra*, it does not appear that a sufficient record on the contiguity issue was developed and considered when the Regional Director issued her Decision.

Thus, the Board is not persuaded that the Regional Director adequately considered whether the Walker Parcel is contiguous to the Alpine trust lands. Although we may review and decide this issue *de novo* as a matter of law, we do not do so at this time. While the record contains evidence and legal opinions by the parties in support of their respective positions as to whether the lands ever were and are now contiguous, it appears that the record on this issue is still incomplete and should be further developed during remand. The Acting Regional Solicitor's 2002 determination, which was presumably relied upon by the Regional Director, predates the 2009 Wunderlin Report submitted by Viejas. It also predates BIA's handbook entitled "Acquisition of Title to Land Held in Fee or Restricted Status," May 20, 2008, attached to the Wunderlin Report. AR Tab 23, Ex. B, Attach. 11. The handbook defines "contiguous parcels" as "[t]wo parcels of land having a common boundary notwithstanding the existence of non-navigable waters or a public road or right-of-way, including parcels that touch at a point. Also referred to as 'adjacent parcels.'"[22] *Id.* at 4. Moreover, the copy of the Wunderlin Report and the copy of Ewiiaapaayp's "Contiguous Property Determination" that are contained in the record do not appear to be complete copies. *See supra* notes 15 & 16. Therefore, we vacate the Decision and remand the matter to the Regional Director for further consideration of whether the Walker Parcel is contiguous to the Alpine trust lands.[23]

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[22] Except for the reference to "adjacent parcels," the handbook definition is identical to the definition of "contiguous" in 25 C.F.R. § 292.2, published in the *Federal Register* on the same day. 73 Fed. Reg. 29354, 29376 (May 20, 2008); *see also* Fee-to-Trust Handbook Version II, July 13, 2011, at 3 (updated handbook retains its definition of "contiguous parcels") (http://www.bia.gov/cs/groups/xraca/documents/text/idc-002543.pdf) (copy added to appeal record). The handbook cannot, of course, carry any legal force or effect against a party in the absence of notice-and-comment rulemaking.

[23] In addition, although the Board has held that the meaning of "contiguous" is not dependent on direct transportation access between two tracts, we have also stated that "[c]onsideration of such factors as the distance by road between the Reservation and the property [to be acquired in trust] is properly undertaken under 25 C.F.R. § 151.10(f) where raised by a commenter." *Jefferson County*, 47 IBIA at 208. As Viejas raised this issue

(continued...)

However, we reject Appellants' arguments that Ewiiaapaayp's existing trust lands in Alpine are not "reservation" lands for the purpose of 25 C.F.R. Part 151. "Indian reservation" is defined to include "that area of land over which the tribe is recognized by the United States as having governmental jurisdiction." 25 C.F.R. § 151.2(f). The Alpine trust lands were acquired by the United States in trust for Ewiiaapaayp. *See, e.g.*, Viejas Comments at 5-6 (contending that BIA placed the SIHC Parcel in trust in Ewiiaapaayp's name despite objections that the land should be placed in trust in the names of all seven consortium tribes). We have held that a tribe is presumed to have jurisdiction over its trust properties. *Aitkin County, Minnesota v. Acting Midwest Regional Director*, 47 IBIA 99, 104-07 (2008). Although the SIHC Parcel was leased by Ewiiaapaayp to SIHC to benefit the members of the consortium tribes, Ewiiaapaayp is the sole lessor. Appellants have not rebutted the presumption by demonstrating that any tribe other than Ewiiaapaayp has governmental jurisdiction over the Alpine trust lands. Nor do we find fault, as Viejas suggests, in the fact that the Regional Director did not make an express finding in her Decision that the trust parcels in Alpine constitute a "reservation." In accordance with our holding in *Aitkin County*—which Appellants have not persuaded us was decided incorrectly—Ewiiaapaayp's existing trust lands in Alpine are a "reservation" for the purpose of 25 C.F.R. Part 151 even though they have not been proclaimed a formal reservation under 25 U.S.C. § 467. The Secretary's authority in § 465 to take land into trust is not constrained by § 467, and thus BIA's regulations implementing § 465 need not be constrained by a distinction between a formally proclaimed reservation and other lands held in trust for a tribe. The Regional Director is not required to cite the Board's precedent and it was sufficient that she described the Alpine lands as "existing trust lands." Decision at 3; *see id.* at 2. Moreover, the record shows that the Regional Director did expressly conclude that "the Secretary has recognized [Ewiiaapaayp] as having governmental jurisdiction over" the Alpine trust lands. Request for Contiguous or Adjacent Land Determination at 1.[24]

(...continued)
in its comments, *see supra* at 19, and it was not addressed in the Decision, the Regional Director should consider it on remand.

[24] We do not decide whether Ewiiaapaayp's larger reservation and the Alpine trust lands constitute one or two Indian reservations for the purpose of 25 C.F.R. Part 151. *See, e.g.*, County Opening Br. at 7 (contending that BIA must consider the 40-mile distance of the Walker Parcel from the larger reservation). But based on the facts of this particular case, if the Regional Director determines that the Walker Parcel is noncontiguous to the Alpine trust lands, then she should expressly consider criterion § 151.11(b) in light of the distances of the Walker Parcel to the Alpine trust lands *and* to the larger Ewiiaapaayp reservation. Alternatively, she may take a different approach and explain the rationale for it.

B. Whether the Regional Director Properly Considered Ewiiaapaayp's Need, Purpose, and Potential Jurisdictional Problems and Conflicts of Land Use—§ 151.10(b), (c), and (f)

Appellants contend that the Decision does not adequately consider one or more of the § 151.10 criteria, including § 151.10(b) (need), § 151.10(c) (purpose), and § 151.10(f) (jurisdiction and land use conflicts). Appellants also contend that the Regional Director failed to adequately respond to their comments on the proposed acquisition and explain the rationale for her Decision. Because we vacate the Decision and remand for further consideration as to whether the acquisition should be considered under the off-reservation standard, it would be premature for the Board to decide whether the Decision adequately addresses each of the criteria in § 151.10 and Appellants' comments.

But if the Regional Director again determines to approve the acquisition, she should address Appellants' comments in greater to detail to establish that they have been considered. *See Village of Hobart*, 57 IBIA at 30 (instructing the regional director to address land use and zoning conflicts under § 151.10(f) in more detail where the original decision summarily concluded that no new jurisdictional problems with the village were likely to result). In that respect, we disagree with Ewiiaapaayp's contention in this appeal that BIA's consideration of the factors in §§ 151.10 and 151.11 does not require BIA to actually address comments from interested parties concerning those factors. *See* Answer Br. at 36. The factors are not considered in a vacuum, and the only way for the Board to determine whether BIA considered the factors in the context of an actual decision is to review whether and how BIA responded to comments in explaining the exercise of its discretion.

IV. NEPA

Appellants allege that the EA is deficient, and thus the FONSI is invalid, for several reasons. First, Appellants argue that BIA improperly segmented, in an effort to avoid the mandate of NEPA, its environmental analysis of the new clinic and daycare center from other pending or potential requests by Ewiiaapaayp for Federal action, including gaming on the SIHC Parcel, acquisitions of other lands in Alpine in trust, and formal reservation proclamations for existing and proposed trust lands in Alpine. Next, Appellants contend that, even if the proposed clinic and daycare center may be considered independent of those other actions, the EA failed to adequately analyze its environmental consequences. Finally, Appellants contend that the EA is out of date and must be updated to reflect changed environmental circumstances: They contend that the EA fails to consider the cumulative

impacts[25] of simultaneously operating healthcare clinics and daycare facilities on both the SIHC and Walker Parcels pursuant to Ewiiaapaayp's amended application, and fails to consider the cumulative impacts of other development in the area that occurred subsequent to the EA's issuance.[26]

"NEPA does not bar actions which affect the environment, even adversely. Rather, the process assures that decision-makers are fully apprised of the likely effects of alternative courses of action so that the selection of a particular course represents a fully informed decision." *Voices for Rural Living v. Acting Pacific Regional Director*, 49 IBIA 222, 239 (2009). Where a proposal to acquire land in trust involves a change in land use, as is being proposed here, the agency may prepare an EA to determine whether a significant impact on the environment would result from implementing one or more of the alternative courses of action. If the agency concludes that there would not be a significant impact, or the impact can be reduced to insignificance through measures to mitigate adverse effects, then the agency may issue a FONSI. We review a regional director's FONSI to determine "whether it is supported by the record and whether it articulates a rational connection between the facts found and the choice made." *Id.* at 240 (citations and internal quotation omitted).

We reject Appellants' contention that the FONSI is defective because the EA did not analyze the environmental consequences of a gaming establishment on the SIHC Parcel. That project is speculative and not "connected"[27] to Ewiiaapaayp's amended application. However, we conclude that the EA must be supplemented to consider the potential

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[25] "Cumulative impact" is defined as

> the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7.

[26] Additionally, Appellants argue that the Decision fails to consider new information regarding the critical habitat of the arroyo toad, a species currently listed as endangered under the Endangered Species Act (ESA), 16 U.S.C. § 1531 *et seq.*; 59 Fed. Reg. 64589 (Dec. 16, 1994) (listing).

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

cumulative effects of simultaneously operating healthcare clinics and daycare facilities on both the SIHC Parcel and Walker Parcel.[28]

A. Whether the EA is Improperly Segmented

Although it might be the case that when the EA was issued in 2001 it should have considered the casino project based on the relationship of that project to the proposed use of the Walker Parcel at that time—an issue that we do not decide—the Regional Director acted reasonably by not considering the casino project in an EA supporting Ewiiaapaayp's *amended* application. In addition to being speculative, *see supra* at 25, the casino project is not a "connected action" with respect to the Walker Parcel acquisition and the proposed healthcare clinic and daycare center. *See* 40 C.F.R. § 1508.25(a)(1). Ewiiaapaayp asserts, and Appellants have not shown otherwise, that the Walker Parcel acquisition and associated clinic and daycare center can and would be undertaken regardless of whether Ewiiaapaayp is eventually able to establish a casino on other land. Appellants have not met their burden to demonstrate that it was unreasonable for the Regional Director, with respect to her consideration of the amended application, to omit the casino project on the theoretical possibility that it might be undertaken on other land in Alpine in the future. *See Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.20 (1976) (NEPA "does not require an agency to consider the possible environmental impacts of less imminent actions"); *see also, e.g., City of Eagle Butte, South Dakota v. Acting Great Plains Regional Director*, 49 IBIA 75, 82 (2009) (in deciding whether to acquire land in trust, "[t]he Regional Director . . . has no obligation to consider [appellant's] speculation about what might happen in the future").

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[28] We also reject Appellants' contention that BIA is required to reinitiate consultation with FWS regarding the proposed action's potential impacts on the arroyo toad. FWS originally designated the critical habit of the arroyo toad in 2001. 66 Fed. Reg. 9414 (Feb. 7, 2001). At that time, the Walker Parcel was located within critical habit unit 18, Sweetwater River Basin, San Diego County, and FWS issued a Biological Opinion concerning the proposed action that was premised on that fact. *See id.* at 9424-25; Biological Opinion, Apr. 10, 2002, at 4 (AR Tab 91). Due to litigation, FWS' critical habitat designation was vacated, and FWS subsequently re-designated the critical habitat, 76 Fed. Reg. 7246 (Feb. 9, 2011), which again included the Walker Parcel. The re-designation of the critical habitat in 2011, which designation again included the Walker Parcel, and removed 152 acres of tribal lands and 6 acres of private lands from critical habitat unit 18, *see id.* at 7258, 7266-67, 7274-75, does not require BIA to reinitiate consultation. It was not a designation of any new critical habitat in the affected critical habitat unit or in the action area considered in the Biological Opinion. *See* Biological Opinion at 6 (defining the action area to include natural habitat adjacent to the Walker Parcel one mile upstream and one mile downstream of the proposed activities).

B. Whether the EA Adequately Examined the Impacts of the Healthcare Clinic and Daycare Center as Originally Proposed

Appellants contend that the EA failed to adequately analyze the environmental consequences of the proposed clinic and daycare center. The County specifically argues that the final EA did not include a noise study and that the traffic impact analysis did not include the daycare center. *See* County Opening Br. at 11. Both Appellants also generally assert, without explanation or substantiation, that the EA failed to adequately consider the direct and indirect impacts of the proposed action on, *inter alia*, biological and wetland resources, surface water quality, groundwater supply, and air quality. *See id.*; Viejas Opening Br. at 65.[29] If we were solely considering the original proposal to relocate the SIHC facilities to the Walker Parcel, we might not find fault with BIA's environmental review. For example, BIA replied to the County's comments, stating that noise "is largely influenced by traffic on Interstate 8," that the noise generated by a replacement SIHC clinic and daycare center would be "largely" equivalent to the existing and "generally limited to daylight hours," and therefore there was not a need for further study. Letter from BIA to County, Nov. 23, 2001, at 1 (unnumbered) (AR Tab 65). With respect to traffic, BIA replied that although the EA did not include the number of trips generated by the daycare center, it had determined the incremental increase and that increase would not result in significant adverse impacts. *Id.* at 2 (unnumbered); *see* Memorandum from John Boarman, P.E. to BIA, Nov. 19, 2001, at 2 (unnumbered) (AR Tab 60). For the reasons discussed below, however, we conclude that the EA must be supplemented.

C. Whether the EA and FONSI are Defective Due to Changed Circumstances

An agency is not required to supplement a completed NEPA review unless the agency "makes substantial changes in the proposed action that are relevant to environmental concerns" or "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(i)-(ii).[30] In 2008, considering the age of the EA at that time, BIA did request its contractor, AES, "to independently review whether there has been a change in

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[29] Viejas appears to make this argument for the first time on appeal, citing comments previously submitted by the County and by a neighboring landowner. *See* Viejas Opening Br. at 65. But for the County making the same argument, we would reject it as untimely. *See* 43 C.F.R. § 4.318.

[30] Although § 1502.9(c)(1)(i)-(ii) speaks directly to supplementing an EIS, "BIA also supplements EAs as appropriate" using the same factors. *See* Indian Affairs NEPA Guidebook, 59 IAM 3-H, August 2012, at 15 (http://www.bia.gov/cs/groups/xraca/documents/text/idc009157.pdf) (copy added to appeal record).

the acquisition purpose or whether there are any changes in circumstances." BIA Memorandum, July 22, 2008 (AR Tab 11). AES noted that Ewiiaapaayp had amended its application so that it could lease the Walker Parcel facilities to service providers other than SIHC and that the existing SIHC facilities would continue to be used by SIHC. *See* AES Review Report at 3-4 (AR Tab 11, Attach.). However, there is no indication that AES considered the cumulative environmental impacts of concurrently operating facilities on both the SIHC Parcel and the Walker Parcel. Appellants are correct that this omission reveals a flaw in the FONSI, because the EA on which the FONSI is based presumes that the environmental effects of operating a healthcare clinic and daycare center on the SIHC Parcel would merely relocate across the roads to the Walker Parcel without any change in their magnitude. *See, e.g.*, EA at 4-4 ("Since the proposed action will not change the size of the Clinic, nor its capacity for serving clients, the volume of traffic in the region should not change from current levels, but the pattern of traffic use of roadways is expected to change."). Because the cumulative impacts of operating dual clinics and daycare centers apparently were never considered, we conclude that the FONSI is not supported by the record.

Moreover, although AES stated that "[e]nvironmental conditions *of the Walker Parcel* have not significantly changed," AES Review Report at 4 (emphasis added), there is no indication that AES considered whether any additional past, present, or reasonably foreseeable future development activities in the area should be included in the cumulative impacts analysis. Appellants contend, for example, that a 47,000 square foot grocery store and a Sheriff's substation were opened in Alpine, and that BIA should have considered the cumulative traffic impacts of those developments. *See* County Opening Br. at 12; Viejas Opening Br. at 64. Apparently, both the grocery store and substation opened sometime between the issuance of the 2001 EA and AES's 2008 review of the EA. The grocery store was not included in the original EA's "near term cumulative analysis due to its speculative nature at the time the traffic study was conducted in March 2001." AR Tab 60 at 2 (unnumbered). On the other hand, the cumulative impacts analysis did assume build out of the Alpine community using transportation modeling data. *See id.* Without our deciding whether the grocery store and substation are material to the analysis of the proposed action, during remand BIA should consider those past actions and other actions that may have occurred in the area to the extent the past action(s) has present effects and the information is useful for BIA's analysis of the effects of the proposed action. BIA should also consider during remand whether there any other present or reasonably foreseeable future actions in the area that should be included in its cumulative impacts analysis for the proposed action. *See* 40 C.F.R. § 1508.7.[31]

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[31] We have considered the remainder of Appellants' arguments and we reject them.

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 May 31, 2011, Decision and remands the matter for further consideration.

I concur:

Thomas A. Blaser
Administrative Judge

Steven K. Linscheid
Chief Administrative Judge

County of San Diego California and Viejas Band of Kumeyaay Indians v. Pacific Regional Director, Bureau of Indian Affairs
Docket Nos. IBIA 11-136 & 11-137
Order Vacating Decision and Remanding
Issued September 6, 2013
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