



# 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

COUNTY OF SAN DIEGO,	)	Order Affirming Decision in Part,
CALIFORNIA; VIEJAS BAND OF	)	Vacating Decision in Remaining Part,
KUMEYAAY INDIANS; and STATE OF	)	and Remanding
CALIFORNIA,	)	
Appellants,	)	
	)	Docket Nos. IBIA 15-035
v.	)	15-041
	)	15-045
PACIFIC REGIONAL DIRECTOR,	)	
BUREAU OF INDIAN AFFAIRS,	)	
Appellee.	)	May 24, 2016

These appeals to the Board of Indian Appeals (Board) are from an October 16, 2014, decision (Decision) of the Pacific Regional Director (Regional Director), Bureau of Indian Affairs (BIA), to accept in trust, for the Ewiiapaayp Band of Kumeyaay Indians (Ewiiapaayp or Band),<sup>1</sup> 18.95 acres of land, referred to as the Salerno parcel, located in San Diego County, California. Appellants contend that the Regional Director lacks legal authority to accept the Salerno parcel in trust for Ewiiapaayp, and that, even assuming she has such authority, her decision is flawed as an exercise of discretion on various grounds and she failed to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*

We reject Appellants' arguments that the Regional Director lacks authority to accept the Salerno parcel in trust for Ewiiapaayp, but we agree that the Regional Director did not adequately address a disconnect in the record between Ewiiapaayp's justification for the fee-to-trust acquisition and the Band's stated intended use (or nonuse) of the parcel and purposes of the acquisition. Nor is it apparent that the Regional Director considered all of Appellants' comments on the proposed trust acquisition. We also agree with Appellants that the Band's assurance that it has no "immediate" change-of-use plans was not a proper basis for BIA to apply a categorical exclusion under NEPA from further environmental review.

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<sup>1</sup> Ewiiapaayp (pronounced WEE-ya-pye) is also known as the "Cuyapaipe Band of Mission Indians" or the "Cuyapaipe Community of Diegueño Mission Indians of the Cuyapaipe Reservation, California."

## Background

The Salerno parcel consists of approximately 18.95 acres, located on Alpine Boulevard in Alpine, California, an unincorporated area of San Diego County.<sup>2</sup> Ewiiapaayp owns the parcel in fee, and in 2001 submitted an application to BIA for the land to be accepted in trust. *See* Resolution No. 01-23, Aug. 8, 2001 (Administrative Record (AR) 9); Ewiiapaayp Application for Conveyance of Fee Land to Trust Status and Reservation Proclamation, Sept. 13, 2001 (Application) (AR 9).

According to Ewiiapaayp's application, the parcel is located approximately 40 miles west of the Band's reservation,<sup>3</sup> and approximately 1.3 or 1.5 miles from other land held in trust by BIA for the Band in Alpine, California. Application at 1, 6. The Band refers to its executive order reservation as "Big Ewiiapaayp," to distinguish it from the Alpine trust lands, which the Band refers to as "Little Ewiiapaayp" (to the consternation of Appellant Viejas Band of Kumeyaay Indians (Viejas)). Ewiiapaayp Answer Brief (Br.), May 18, 2015, at 3. Little Ewiiapaayp, also referred to as the "SIHC site," consists of two parcels totaling approximately 10 acres, which are subject to a long-term lease from Ewiiapaayp to the Southern Indian Health Council, Inc. (SIHC), for a health clinic. *See id.* at 2-3; *see also Ewiiapaayp Band v. Acting Pacific Regional Director*, 56 IBIA 163 (2013). Ewiiapaayp's tribal headquarters are located on a portion of the SIHC site, but SIHC contends that Ewiiapaayp's occupation is unauthorized and violates SIHC's right of possession and use. Application at 1; Letter from SIHC to Ewiiapaayp, Apr. 26, 2013 (AR 116).

The Band explained that the "overall purpose of this application is to provide increased *long-term socio-economic security* for the Band through land acquisition to benefit the Band's efforts of enhancing self-determination." Application at 2 (emphasis added). Explaining the need for the fee-to-trust acquisition, the Band stated that its existing 10 acres of Alpine trust lands had "proven to be inadequate for the Band's future goals and objectives," noting that the property was leased to SIHC. According to the Band, Big Ewiiapaayp "has no reasonable possibility of economic development" because of its geographic remoteness and lack of adequate access and utilities, with little of the property suitable for housing or economic development. *Id.* at 3. Thus, the Band continued, it had

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<sup>2</sup> The parcel is identified as San Diego Assessor's Parcel No. 404-090-07-00, and the legal description of the property is included in the Regional Director's decision.

<sup>3</sup> The Band's reservation was created by executive order in 1891, and subsequently expanded by statute. According to the Application, the reservation was approximately 4,102 acres. According to Viejas, it was expanded by 1,360 acres granted under the California Indian Lands Transfer Act. Letter from TeSam to Superintendent, Apr. 8, 2002, at 2 (AR 36).

determined that in order to meet the needs of the Band, it is necessary to acquire land in trust in an easily accessible location central to the membership.<sup>4</sup> In the future, the Band *may require the availability of land for use as tribal headquarters, open space preservation, housing, utility storage, or other yet undetermined tribal needs.*

*This places the Band in a dire need for tribal trust land.* Acquisition of the land will assist the Band's efforts to preserve existence of the Band and protect natural and cultural resources.

*Id.* at 3 (emphases added).

The Salerno parcel consists of vacant, unimproved land. *Id.* at 5. In describing the intended use of the property, Ewiiapaayp stated that it had "no development, physical alter[ation] or change of land use planned . . . after acquisition." *Id.*; *see also id.* ("no change in use"), *id.* at 8 ("no planned change in use"), *id.* at 9 (same).

The application noted that under BIA's NEPA regulations, land conveyances may be categorically excluded from further environmental review by BIA where no change in land use is planned. *Id.* at 5. In a section of the application addressing "mitigation of potential impacts," the Band repeated that it "has no planned change in use," and thus "there will not be any significant impacts arising from the acquisition of the land in trust." *Id.* at 9. The Band added, however, that it "will attempt to mitigate any significant potential impacts arising from this project." *Id.*

In February 2002, BIA issued notice of the Band's application and solicited comments. Notice of (Non-Gaming) Land Acquisition Application, Feb. 14, 2002 (2002 Notice) (AR 21). The notice incorporated statements from the Band's application to describe the goal of the acquisition ("to provide increased long-term socio-economic security for the Band"), the current status of the property (vacant and unimproved), and the intended use ("no change of use planned after acquisition of title 'in trust']"). 2002 Notice at 2 (unnumbered).

In response to comments from the State of California (State), the Band again stated that it "does not have any plans to physically alter the land or physically use the property." Letter from Band to BIA Southern California Agency Superintendent (Superintendent), Mar. 25, 2002, at 1 (AR 35). As explained by the Band:

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<sup>4</sup> The Band apparently has seven members. It is unclear from the record where the members live.

The acquisition of a sufficient land base to carry out [the Federal policy to promote tribal self-determination] is reason in and of itself [for BIA] to accept the land in trust. Likewise, Indian tribes such as the Ewiiapaayp Band are sometimes without financial resources to develop definitive plans for physical use of land that is the subject of a fee to trust application. Finally, the Tribe is actively exploring the possibility of “using” the land to preserve open space or possibly for restoration of endangered critical habitat, if necessary. The “use” of the property as open space will facilitate the Tribe’s self-determination as such a “use” may allow the Tribe to finance or otherwise conduct economic development activities on other lands – to the benefit of the Tribe. Furthermore, the “use” of the property as open space is consistent with the property’s current status – open space. Therefore, there is no change of use and none planned.

*Id.* at 2 (unnumbered). In a subsequent letter to the Regional Director, the Band wrote:

The Tribe has no planned change in use for the property. The proposed use . . . will be for economic development purposes, i.e., it will be used as mitigation of potential environmental impacts, including use as open space by the Tribe or as mitigation for other projects in San Diego County. The Tribe envisions the Salerno parcel being used to promote the preservation of endangered species’ critical habitat, management of native flora, and, potentially, recovery of habitat, if possible.

Letter from Band to Regional Director, May 5, 2003 (AR 61).

Before the Band applied to have the Salerno parcel accepted in trust, it had also applied to have another parcel, the “Walker parcel,” accepted in trust. *See County of San Diego, California v. Pacific Regional Director*, 58 IBIA 11, 15 (2013). At the time, the proposed trust acquisition of the Walker parcel was part of an overarching plan by the Band to relocate SIHC’s facilities to the Walker parcel and build a casino on the SIHC parcel. *Id.* All of the Band’s Alpine parcels—fee and trust—are in relative close proximity to one another, with the Walker and Salerno parcels separated from the SIHC site and other parcels by several roads, including an interstate highway. *See* AR 58.

Viejas objected to the Walker fee-to-trust application, and for a while the two tribes explored a cooperative approach that would permit Ewiiapaayp to conduct gaming (on

Viejas trust lands), but those efforts were ultimately unsuccessful.<sup>5</sup> *County of San Diego*, 58 IBIA at 17. In 2010, over Ewiiapaayp's unsuccessful objections, SIHC exercised its option to renew its lease for an additional 25 years. *See Ewiiapaayp*, 56 IBIA 163.

In the meantime, the application for the Salerno parcel apparently was dormant, and in 2012, BIA re-issued notice of the Band's application. *See* Notice of (Non-Gaming) Land Acquisition Application, Nov. 8, 2012 (AR 76); *see also* Letter from Band to BIA, Dec. 8, 2011 (AR 75) (requesting action on Salerno application). The notice stated that the Salerno property "continues to be undeveloped," and that the Band "has no change in land use planned for the parcel after the acquisition." *Id.* at 2.

Appellants again objected to the Band's application. Viejas characterized the Salerno proposal as reactivating the Band's earlier "elaborate scheme," in 2001, to develop a casino on the Alpine trust lands. *See* Comments of Viejas Band, Jan. 9, 2013, at 1 (AR 95). Viejas accused the Band of "again" trying to avoid disclosing its development plans. *Id.* at 2. According to Viejas, the various fee-to-trust applications identified by the Band, including the Walker and Salerno proposals, were "obviously" connected, interrelated actions, with the ultimate objective of using the SIHC parcel for gaming by opening a new health clinic on the Walker parcel. *Id.* at 2; *Id.*, Exhibit 2 at 66-68 (Viejas brief in Walker parcel appeal). Viejas contended that once the Salerno site was accepted in trust, the Band would use it for gaming-related and gaming support commercial purposes. *Id.* at 4. Viejas argued that BIA should suspend its review of the Salerno application until the Band "confirms whether" the request was intended as "part of the same off-reservation gaming scheme initiated in 2001." *Id.* at 14. Even if not intended for gaming-related purposes, Viejas contended that the Band must clarify and explain its economic development plans. *Id.*

The State and the County of San Diego (County) also filed objections to the re-issued notice of the Band's Salerno application.

Ewiiapaayp responded to the various objections. Responding to the State, which had described the Salerno parcel as 40 miles west of the Band's reservation (i.e., Big Ewiiapaayp) and 1.5 miles from the SIHC trust parcels, the Band argued that the State "errs" in its description. The Salerno parcel was, according to the Band, 19 miles, and 0.23 miles, respectively, from those existing trust lands. Ewiiapaayp Responses to Comments, July 8, 2013, at 1-2 (AR 106). Regarding its "need for sufficient land for beneficial use," Ewiiapaayp asserted that the remoteness and other characteristics of Big Ewiiapaayp "severely reduce[d]" the area within Big Ewiiapaayp "available for housing and

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<sup>5</sup> Viejas also objected to the Salerno parcel fee-to-trust proposal.

administration,” and thus contained “insufficient land to provide adequate housing” for the Band’s citizens. *Id.* at 2-3.

The Band vehemently disputed Viejas’s assertion that the Salerno application was or had ever been related to the Band’s “former tribal gaming project.” *Id.* at 12. Arguing that Viejas was mistaken in suggesting that there was only one reason—gaming—for the trust acquisition request, the Band asserted that Viejas failed to acknowledge “the insufficiency of [Big Ewiiapaayp] for tribal housing, government operations or economic development.” *Id.* at 12. Ewiiapaayp reiterated that Big Ewiiapaayp “holds insufficient land to provide adequate housing for its tribal citizens.” *Id.* In response to Viejas’s claim that the Salerno parcel would be used for gaming-related purposes, the Band stated that Viejas “offers no facts to support their speculation.” *Id.* at 18. Ewiiapaayp also asserted that although its tribal headquarters presently were located on the SIHC parcel, SIHC disputed the Band’s right to be there, and while the Band disagreed, it might have no option but to relocate its headquarters to Big Ewiiapaayp, despite its lack of infrastructure, “if removed from [the SIHC parcel] and no other trust land is available.” *Id.* at 13.

In her decision to approve taking the Salerno parcel in trust for Ewiiapaayp, the Regional Director initially identified the authority for the acquisition as the Indian Land Consolidation Act, 25 U.S.C. § 2202, which incorporates trust acquisition authority in 25 U.S.C. § 465, but she later simply identified her action as being taken in accordance with § 465. *See* Notice of Decision, Oct. 16, 2014 (Decision), at 2, 33 (AR 135). The Regional Director described Ewiiapaayp’s application, and provided an extensive description of comments received in opposition, and Ewiiapaayp’s responses to those comments. *See* Decision at 2-27.

The Regional Director then addressed the regulatory factors in 25 C.F.R. Part 151 (Land Acquisitions) that BIA must consider in deciding whether to accept land in trust for a tribe. With respect to the Band’s need for additional land, *see* 25 C.F.R. § 151.10(b), the Regional Director found that Big Ewiiapaayp was “unsuitable for residential or commercial development.” Decision at 28. The Regional Director noted the Band’s contention that the SIHC site was being used for a health center and had “proven to be inadequate for the Band’s future goals and objectives.” *Id.* Repeating the Band’s response to comments, the Regional Director stated that while the Band disagreed with SIHC about the Band’s right to occupy a portion of the SIHC site, the Band “may have no option but to relocate its tribal office to Big Ewiiapaayp . . . if removed from [the SIHC parcel] *and no other trust land is available.*” *Id.* at 29 (emphasis added). The Regional Director accepted the Band’s assertion that “[t]his places the Band in dire need for tribal trust land,” and that in order to meet the Band’s needs, it was “necessary to acquire land in trust in an easily accessible location central to the membership.” *Id.* In considering the Tribe’s need for the land, the Regional Director found that the parcel “will provide the [Band] with sufficient

space to pursue its long-term goals to be used as tribal headquarters, open space preservation, housing, utility storage or yet undetermined tribal need.” *Id.*

Addressing the purpose for which the land will be used, *see* 25 C.F.R. § 151.10(c), the Regional Director noted that the Salerno property is currently vacant, and that the Band “does not have any immediate development, physical alteration or land use changes planned for the parcel after acquisition.” Decision at 29. The Regional Director accepted the Band’s assertion that the primary goal for the acquisition was “to provide long-term socio-economic security for the Band through land consolidation, thus, enhancing the Band’s self-determination.” *Id.* Addressing several other regulatory factors, *see* 25 C.F.R. § 151.10(f) (jurisdictional and land use issues), and (g) (BIA’s ability to discharge its trust responsibility), the Regional Director repeated that the property is undeveloped and that Ewiiapaayp has “no planned change in use.” Decision at 30; *see id.* at 31. The Regional Director accepted the Band’s statement that there will not be any significant impacts arising from the acquisition, while stating, as had the Band, that Ewiiapaayp would “attempt to mitigate any significant potential impacts arising from this project.” *Id.* at 30. The Regional Director found “no basis in [Viejas’s] speculation” that the Salerno proposal was part of a plan by Ewiiapaayp to operate a casino on its Alpine trust lands, and rejected Viejas’s argument that the proposal was related to, and must be considered with, the Band’s other trust acquisition proposals, for purposes of BIA’s compliance with NEPA. *Id.* at 31.

Because the Salerno parcel is not contiguous to land currently held in trust for the Band, the acquisition would constitute an “off-reservation acquisition” under BIA’s regulations, thus triggering a requirement for additional considerations affected by the distance of the parcel from the Band’s reservation. *See id.* at 32; 25 C.F.R. § 151.11. The Regional Director noted that the Band’s original application had stated that the Salerno parcel was approximately 40 miles west of the main Ewiiapaayp reservation, and 1.5 miles from the Band’s Alpine trust lands, but that the Band subsequently contended that the County and Viejas were in “error” in using those same figures, and that the “actual” distances are 19 miles and 0.23 miles, respectively. The Regional Director stated that she had “reviewed the concerns” voiced by Appellants and “made the determination that acquisition of the Salerno parcel is justified and supported [by] federal law.” Decision at 32. The Regional Director added that her decision is “based on the fact that the [Band] already owns a fee interest in the land and the land is necessary to facilitate tribal self-determination.” *Id.* at 33. The Regional Director found that the Salerno site “will not be used for business purposes,” and therefore the regulations did not require the Band to submit a business plan. *Id.* The Decision has no additional discussion of the criteria applicable to off-reservation acquisitions.

On appeal from the Regional Director's decision, Appellants filed opening briefs, Ewiiapaapp filed an answer brief, and Appellants filed reply briefs. The Regional Director did not file a brief.

### Standard of Review

A decision whether to take land into trust is discretionary; the Board does not substitute its judgment for BIA's in decisions based upon an exercise of discretion. *City of Lincoln City, Oregon v. Portland Area Director*, 33 IBIA 102, 104 (1999). 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. *Crow Leaseholders Ass'n v. Rocky Mountain Regional Director*, 52 IBIA 156, 158 (2010). An appellant bears the burden of demonstrating that a regional director did not properly exercise her discretion. *City of Lincoln City*, 33 IBIA at 104.

### Discussion

Appellants challenge the Regional Director's decision as unlawful, requiring outright reversal, and as arbitrary and capricious, requiring that we at least vacate the decision and remand for further consideration. We reject Appellants' arguments that the trust acquisition is unauthorized, but we agree that the Decision fails as an exercise of discretion. We thus vacate and remand for further proceedings. We address each argument in turn.

#### I. Regional Director's Authority to Acquire the Salerno Parcel in Trust

Viejas argues that the Regional Director does not have authority to acquire the Salerno parcel in trust for the Band under the Indian Land Consolidation Act, 25 U.S.C. § 2202—the authority initially cited by the Regional Director in her decision. *See* Decision at 2. In her conclusion, however, the Regional Director cites only 25 U.S.C. § 465 as the source of authority for the acquisition, *see* Decision at 33, and Viejas does not contend that § 465 does not independently provide authority for the trust acquisition. Therefore, we do not consider this argument further.

The State contends that the Regional Director failed to respond to its comments that acquisition of the Salerno parcel is inconsistent with the purposes of § 465, because the land was not lost through the allotment process and is not, according to the State, necessary for



the political or economic development of the Band.<sup>6</sup> State Opening Br. at 2. We find no support for the State's argument that the Secretary may only reacquire in trust land that was lost through the allotment process. But we agree that the Regional Director failed to address this comment by the State, and to the extent it raises an issue that is relevant to BIA's exercise of discretion—the Band's need for the land—we agree that it was error for the Regional Director not to respond to the State's contention that the acquisition is not justified under § 465.

## II. Regional Director's Consideration of Regulatory Factors for Trust Acquisitions

### A. Inconsistent Analysis of BIA Regarding Need and Purpose

BIA's trust acquisition regulations require BIA, in evaluating whether to accept land in trust for a tribe, to consider the need of the tribe for additional land and the purposes for which the land will be used. 25 C.F.R. § 151.10(b)&(c). Appellants contend that the Regional Director's factual findings, analysis, and conclusions are internally contradictory, inconsistent, and incoherent. County Opening Br., Feb. 26, 2015, at 1; Viejas Opening Br., Feb. 27, 2015, at 7, 14. Appellants also argue that the Regional Director's decision does not demonstrate that she considered their comments, either ignoring them or in some cases simply repeating the Band's responses. *See, e.g.*, Viejas Opening Br. at 17-18 (arguing that the Regional Director failed to address its request for consultation and comments regarding the Endangered Species Act and National Historic Preservation Act).

We agree. The Regional Director found that the Band had demonstrated a need for the Salerno parcel based on the unsuitability of Big Ewiiapaayp for housing or commercial development, and the unavailability of the SIHC parcel for use by the Band. In particular, the Regional Director found that the prospect that the Band might be forced to relocate its tribal headquarters from the SIHC parcel placed the Band in "dire need for tribal trust land." Decision at 29. The Regional Director found that the Band needed the Salerno parcel to provide it with "sufficient space to pursue its long-term goals to be used as tribal headquarters, open space preservation, housing, utility storage or yet undetermined tribal need." *Id.*

On appeal, Ewiiapaayp confirms its position that Big Ewiiapaayp is unsuitable for administrative purposes. That position would seem to reinforce the Band's need for the Salerno parcel for a tribal headquarters, if the Band is evicted from the SIHC parcel, and "if

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<sup>6</sup> The State contends that the Band has seven members and receives \$1.1 million per year from the Revenue Sharing Trust Fund, and that Big Ewiiapaayp has the economic potential for wind energy development. State Opening Br., Feb. 12, 2015, at 8-9.

no other trust land is available.” *See* Decision at 29. But the Band also denies that any such implication should attach to the quoted language. Ewiiapaayp Answer Br. at 13. Ewiiapaayp also argues that the Regional Director “reasonably determined” that the Band needed the Salerno parcel to facilitate tribal self-determination, “economic development, or Indian housing.” Ewiiapaayp Answer Br. at 6, 10. And Ewiiapaayp contends that it is well-documented that the unsuitability of Big Ewiiapaayp demonstrates the Band’s need for additional land “for beneficial use.” *Id.* at 13.

Yet the Band also reiterates its announced intent not to change the use of the vacant, undeveloped Salerno parcel. The Regional Director appears to have uncritically accepted all of the Band’s representations, without attempting to reconcile the disjunct between the Band’s potentially dire need for land for a tribal headquarters, and a need for suitable additional land for housing and commercial development—needs that Big Ewiiapaayp and the SIHC parcel could not satisfy—and the stated intent not to develop the property. And by accepting the Band’s representation that it has no “immediate” plans to develop or otherwise alter the currently vacant Salerno parcel, as grounds to categorically exclude the acquisition from further NEPA review, it does not appear that the Regional Director considered whether potential uses of the property identified by the Band were reasonably foreseeable. In response to comments, Ewiiapaayp emphasized use of the Salerno parcel as open space, but the Regional Director did not address how such use related to the stated inadequacy of Big Ewiiapaayp as a justification for the acquisition. The Band contends that Big Ewiiapaayp consists largely of open space, useful for little else.

In addition, although the Regional Director, in the analysis portion of her decision, notes some of the comments received from Appellants, she appears to simply repeat the Band’s responses to those comments, e.g., without explaining her reasons for accepting those responses as convincing, if that is what she intended. In the face of numerous objections from Appellants, including objections alleging inconsistencies between the Band’s stated needs and the stated purposes for the acquisition, it was incumbent upon the Regional Director to respond in some meaningful way and to explain her reasoning in deciding to accept the parcel in trust, particularly for an off-reservation acquisition. *See* 25 C.F.R. § 151.11 (Secretary shall give greater scrutiny to the tribe’s justification of anticipated benefits, and greater weight to concerns raised by state and local governments having regulatory jurisdiction over the land to be acquired).

As we have previously stated, the Board “must be able to discern from the Regional Director’s decision, or at least from the record, that due consideration was given” to timely comments by interested parties. *Village of Hobart, Wisconsin v. Acting Midwest Regional Director*, 57 IBIA 4, 12-13 (2013). It is not sufficient for the Regional Director to merely describe in the decision comments received in opposition. She must actually address the

comments, so that the Board may determine whether and how BIA responded in explaining the exercise of its discretion. *See County of San Diego*, 58 IBIA at 30.

B. Reliance on New Information Regarding the Band's Aboriginal and Ancestral Territory

The State argues that the Regional Director erred in relying on evidence, submitted by the Band to support a conclusion that the Salerno parcel is within the “aboriginal and ancestral territory” of the Band, without affording the State an opportunity to comment on that evidence. State Opening Br. at 2, 5-8. On a related note, Viejas argues that the Regional Director failed to adequately address its comments that acquisition of the Salerno parcel would negatively impact Viejas’s “territorial jurisdiction within its aboriginal territory.” Viejas Opening Br. at 18. The Regional Director responded to that comment by stating that the Band had provided documents to corroborate that the parcel “is indeed within the aboriginal and ancestral territory” of the Band. Decision at 30. The documents apparently relied on constitute the evidence to which the State and Viejas contend they were entitled to respond.

In response to Appellants’ arguments, Ewiiapaayp contends that the information was provided to BIA only in rebuttal to misinterpretations by Viejas and the State about historic clan territory. Because Part 151 does not include a requirement regarding aboriginal, traditional, or historical territories of tribes, Ewiiapaayp argues that its rebuttal comments on that topic were unrelated to BIA’s decision to accept the Salerno parcel in trust. Ewiiapaayp Answer Br. at 4.

We agree with Ewiiapaayp that BIA’s trust acquisition regulations do not require BIA to consider the aboriginal and ancestral territory of a tribe when taking land into trust, nor does § 465 limit BIA’s authority in that respect. But in response to an allegation by Viejas that the trust acquisition would “impact” its territorial jurisdiction, the Regional Director responded by citing evidence submitted by Ewiiapaayp, seemingly giving at least some weight and consideration to that evidence—and the issue itself. To the extent she found a determination of the historic territory of Ewiiapaayp meaningful in making her discretionary decision, she was not free to simply accept, without explanation, the “rebuttal” evidence offered by Ewiiapaayp. The State argues on appeal that Ewiiapaayp’s evidence itself contradicts Ewiiapaayp’s own claim. And whether or not she was required to allow the State and Viejas to respond to Ewiiapaayp’s evidence, her failure to do so in this case means that the various allegations regarding the evidence, and its significance—or lack thereof—are matters that are not within the Board’s purview to resolve. Thus, we remand this issue for further consideration.

## C. Off-Reservation Acquisition Factors

### I. Meaning of “Reservation” in 25 C.F.R. Part 151

The Salerno parcel is located outside of and noncontiguous to Ewiiapaayp’s reservation, and therefore additional regulatory factors apply to the Salerno proposal as an “off-reservation acquisition.” *See* 25 C.F.R. § 151.11. One such factor requires that “as the distance between the tribe’s reservation and the land to be acquired increases, [BIA] shall give greater scrutiny to the tribe’s justification of anticipated benefits from the acquisition.” *Id.* § 151.11(b). Similarly, for off-reservation acquisitions, BIA is required to give “greater weight to the concerns raised” by state and local governments having regulatory jurisdiction over the land to be acquired. *Id.* In addressing the applicability of the off-reservation factors, and measuring the distance of the Salerno parcel from the Band’s reservation, the Regional Director concluded that both Big Ewiiapaayp and Little Ewiiapaayp (the SIHC parcel) qualify as the Band’s “Indian reservation,” as that term is defined by the trust acquisition regulations. *See* Decision at 32.

As relevant here, the regulations provide that “[u]nless another definition is required by the act of Congress authorizing a particular trust acquisition, *Indian reservation* means 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). In *County of San Diego*, we held that the SIHC parcel, which is held in trust for Ewiiapaayp, qualifies as a “reservation” for the purpose of 25 C.F.R. Part 151. 58 IBIA at 29. That holding followed our prior decision in *Aitkin County, Minnesota v. Acting Midwest Regional Director*, 47 IBIA 99 (2008), and we rejected the appellants’ arguments in *County of San Diego* that *Aitkin* was wrongly decided. 58 IBIA at 29.

In the present appeal, the County and State take another run at convincing us that we erred in *Aitkin County*. According to the State, the Secretary lacks authority, through regulation or otherwise, to “designate” lands in California as a “reservation,” except by specific statutory authority, and for the SIHC site, Congress has not granted the Secretary such authority outside 25 U.S.C. § 467. State Opening Br. at 4-5. Section 467 authorizes the Secretary to proclaim lands acquired under the Indian Reorganization Act as “new Indian reservations.” Because the SIHC parcel has not been proclaimed a new Indian reservation pursuant to § 467, the County and State argue that it cannot be treated as a “reservation” under BIA’s trust acquisition regulations, and the distance of the Salerno parcel from the Band’s “reservation” may be determined only in relation to Big Ewiiapaayp.

We remain unpersuaded that the SIHC parcel does not qualify as an “Indian reservation,” within the specific meaning given that term for the purpose—and only for the

purpose—of applying Part 151. As we explained in *County of San Diego*, the Secretary's authority in § 465 is not constrained by § 467, and thus the regulations implementing § 465 need not limit the definition of "reservation," for purposes of BIA's trust acquisition policies, to lands formally proclaimed under § 467 to be new "Indian reservations." 58 IBIA at 29.

Section 465 authorizes the Secretary to acquire lands in trust "within *or without* existing reservations" (emphasis added), and places no additional requirements on acquisitions of lands "without existing reservations." As such, the Secretary's authority to accept land in trust pursuant to § 465 is not limited, under that section, by the location of the lands to be acquired in relation to a tribe's existing reservation. It follows that BIA was free to promulgate a definition for the term "Indian reservation" to suit the policies and purposes of the trust acquisition regulations, which do not purport to define the term for purposes of implementing § 467. Contrary to the State's argument, this does not mean that the SIHC parcel has been improperly "designated" as a reservation in conflict with § 467.<sup>7</sup> And contrary to the County's argument, the regulatory definition does not have the effect of construing § 467 as "mere surplusage," County Opening Br. at 12, because Part 151 does not purport to construe § 467.<sup>8</sup>

## 2. Distance from the Salerno Parcel to the Band's Reservation

The County argues that the Band supplied inconsistent information regarding the location of the Salerno parcel in relation to its existing reservation and trust parcels, and that the Regional Director failed to make a specific determination regarding the location of the parcel relative to those lands. The County contends that it is uncertain whether the Regional Director considered the distances to be 40 miles or 19 miles (from Big

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<sup>7</sup> According to the State, the Secretary's offense is in using the term "Indian reservation" in the trust acquisition regulations, thus purportedly "designating" lands in California as "reservation" lands without doing so pursuant to the statutory authority found in § 467. Thus, if Part 151 were revised to use a different word, all would be well.

The State also argues that the SIHC parcel is devoted to the "exclusive use" of SIHC, not Ewiiapaayp, by virtue of SIHC's lease, and thus cannot be formally proclaimed a new Indian reservation under § 467, *see* State Opening Br. at 2; 25 U.S.C. § 467. Whether or not the Secretary would be authorized to proclaim the SIHC parcel as a new reservation pursuant to § 467 is not an issue in this appeal; the Regional Director did not purport to do so.

<sup>8</sup> Of course, to the extent that Appellants challenge the validity of the regulations, rather than our interpretation of the regulations, we lack jurisdiction to consider their challenge. *See Northern Natural Gas v. Minneapolis Area Director*, 15 IBIA 124, 126 & n.3 (1987).

Ewiiapaayp), and 1.5 miles or 0.23 miles (from Little Ewiiapaayp), in applying the off-reservation acquisition factors.

Ewiiapaayp answers that the Regional Director did not err in stating the distance between the Salerno parcel and Big Ewiiapaayp in 2001 as 40 miles, and as 19 miles in 2012 and 2014, asserting that the greater distance is based on road mileage, while the shorter distance is “point-to-point miles between the closest boundaries.” Ewiiapaayp Answer Br. at 12. Ewiiapaayp contends that the shorter distance is the “more accurate measurement.”<sup>9</sup> *Id.*

The problem, however, is that whether or not the differing metrics can be explained by Ewiiapaayp on appeal,<sup>10</sup> it remains unclear from the Decision how the Regional Director actually considered the distance—or distances. And the fact that Ewiiapaayp, in the proceedings below, argued that the State had “erred” by using Ewiiapaayp’s own figures, adds to the confusion, because we cannot determine whether the Regional Director understood all of the figures to be correct in their own way (contrary to Ewiiapaayp’s own assertions at the time), and if so, what consideration was given to the distances in applying § 151.11.

In *County of San Diego*, we directed the Regional Director to consider the off-reservation criteria in light of distances between the Walker parcel and the SIHC parcel *and* between the Walker parcel and Big Ewiiapaayp, or if she chose to take a different approach, to explain the rationale. 58 IBIA at 29 n.24. Similarly, we conclude here that the Regional Director should make her findings of the distances clear and explicit (and support them in the record), explain why she concludes it is appropriate to use one metric or the other (or both), and analyze the distances between the Salerno parcel and the SIHC parcel and between the Salerno parcel and Big Ewiiapaayp, or explain the rationale for choosing a different approach.

### 3. Requirement for a Business Plan When Land Is Acquired for Business Purposes

For proposed off-reservation acquisitions, when the land is being acquired for business purposes, the regulations require the tribe to provide “a plan which specifies the anticipated economic benefits associated with the proposed use.” 25 C.F.R. § 151.11(c).

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<sup>9</sup> Ewiiapaayp argues that 19 miles is the more accurate figure, but does not articulate why it believes that 19 miles is the more *meaningful* figure, for purposes of applying § 151.11.

<sup>10</sup> The County (and State) contend that there is no actual evidence in the record to support Ewiiapaayp’s 19-mile figure.

The plan is relevant to the requirement in § 151.11(b) that for off-reservation acquisitions, BIA “shall give greater scrutiny to the tribe’s justification of anticipated benefits from the acquisition.” In the present case, the Regional Director concluded that no business plan was required because the Salerno parcel will not be used for business purposes. Decision at 33.

Viejas argues that the Regional Director erred because where, as here, a finding of a need for additional land is based on a tribe’s need for land suitable for economic development, then a business purpose is “foreseeable” and the tribe must submit a business plan under § 151.11(c).

We conclude that this issue is not ripe for our review because the record is too uncertain whether and how the Band intends to use the parcel.

#### D. Erroneous Application of NEPA Categorical Exclusion

Viejas contends that it was impermissible for BIA to apply a categorical exclusion to the acquisition, thereby excusing it from further review under NEPA, based on Ewiiapaayp’s representation that there will be “no change in use.” According to Viejas, that representation is inconsistent with the Band’s alleged need for the land for housing and utility storage, and a “dire need” for land for its tribal headquarters.<sup>11</sup> Viejas argues that the standard under NEPA is whether a use is “reasonably foreseeable,” not—as suggested by the Regional Director—whether an “immediate” change in land use is planned. Viejas contends that the Band’s identified need for the Salerno parcel for use as tribal headquarters, housing, and utility storage, and the Regional Director’s justification of the acquisition as related to those uses, establish those uses as “reasonably foreseeable” for purposes of NEPA compliance, thus requiring an Environmental Assessment or Environmental Impact Statement. Viejas also argues that these uses would affect designated critical habitat of the Arroyo Toad, under the Endangered Species Act (ESA), which also would preclude the application of a categorical exclusion. Even a proposed use for open space preservation

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<sup>11</sup> The State does not contest the Band’s representation that it has no immediate plans to use the property, characterizing the description of possible future uses as “nothing more than speculation.” State Opening Br. at 9 n.1. For the State, however, the absence of any planned change of use argues against the acquisition because, according to the State, it undermines the Band’s need for the land. Considering the alleged inconsistencies in the record between the need for the property and the planned use, we leave it to the Regional Director on remand to seek clarification from the Band and, as appropriate, permit additional responses.

does not, according to Viejas, permit a categorical exclusion if it would require ground disturbance and active management.

Viejas next argues that the Regional Director improperly segmented the Salerno proposal from the Band's other proposals, including the Walker parcel fee-to-trust request and an earlier request concerning lands referred to as the "Willows Road" parcels, and its requests to have lands formally declared "reservation" lands under § 467. NEPA prevents an agency from "dividing a project into multiple actions, each of which individually has an insignificant environmental impact, but which collectively have a substantial impact." Viejas Opening Br. at 24 (quoting *Native Ecosystems Council v. Dornbeck*, 304 F.3d 886, 894 (9th Cir. 2002)). According to Viejas, the Band's various proposals, including the Salerno parcel acquisition, will have "cumulatively significant impacts." *Id.* at 26.

We agree that the Regional Director erred in summarily concluding that a categorical exclusion applies because the Band has no "immediate" change-of-use plans. The definition of "effects" under NEPA is not limited to "immediate" effects. *See* 40 C.F.R. § 1508.8. Thus, we vacate this portion of the Decision. But because we are remanding for further proceedings for the Regional Director to address what appear to be inconsistencies in the record between the Band's need for the Salerno parcel, and the proposed use(s), we conclude that the NEPA issue is not otherwise ripe for our review. On remand the Regional Director shall, after clarifying the purpose(s) and use(s) of the Salerno parcel, and if she again decides to accept the parcel in trust, address the NEPA arguments raised by Viejas, in evaluating whether or what effects are caused by the Federal action of taking the land in trust. *See id.*

#### E. Additional Arguments

Viejas also argues that the Regional Director failed to comply with the ESA and failed to consult with Viejas. Because the proposed use(s) of the property require further clarification, and because the resolution of these issues may depend on those further proceedings, we also conclude that these are not ripe for Board review. They shall, however, be addressed by the Regional Director on remand, to the extent relevant and appropriate to the further proceedings.

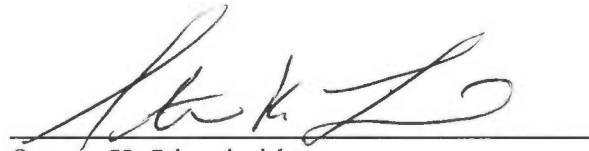
#### Conclusion

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board affirms the Regional Director's



October 16, 2014, decision in part, vacates it in part, and remands for further proceedings consistent with this decision.

I concur:



Steven K. Linscheid  
Chief Administrative Judge



Thomas A. Blaser  
Administrative Judge

**County of San Diego, California; Viejas  
Band of Kumeyaay Indians; and State of  
California v. Pacific Regional Director, BIA  
Docket Nos. IBIA 15-035, 15-041, and  
15-045**

**Order Affirming Decision in Part, Vacating  
Decision in Remaining Part, and Remanding  
Issued May 24, 2016**

**63 IBIA 75**

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