**Assistant Secretary – Indian Affairs**
**U.S. Department of the Interior**

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| **CAPAY VALLEY COALITION,** | ) |
| **APPELLANT,** | ) |
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| **v.** | ) |
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| **PACIFIC REGIONAL DIRECTOR,** | ) |
| **BUREAU OF INDIAN AFFAIRS,** | ) |
| **APPELLEE.** | ) |
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Decision

The Capay Valley Coalition, a non-profit organization (CVC or Appellant), appealed to the Interior Board of Indian Appeals (Board) from an April 28, 2014 decision (Decision) of the Pacific Regional Director (Regional Director), Bureau of Indian Affairs (BIA), to take approximately 853 acres of land located within an unincorporated area of Yolo County, California, into trust for the Yocha Dehe Wintun Nation (Nation) pursuant to Section 5 of the Indian Reorganization Act of 1934 (IRA).[1] Pursuant to 25 C.F.R. § 2.20 and my November 12, 2013 memorandum entitled, "Assumption of Jurisdiction over certain appeals of fee-to-trust decisions to the Interior Board of Indian Appeals pursuant to 25 C.F.R. § 2.4(c)", I assumed jurisdiction over the appeal.

On appeal, Appellant argues that the Regional Director failed to adequately consider the Tribe's need for the land and potential jurisdictional and land use conflicts arising from the proposed trust acquisition, as required by 25 C.F.R. § 151.10. Appellant also argues that the BIA failed to comply with the National Environmental Policy Act (NEPA).[2] Finally, Appellant argues that that there is insufficient support in the record for the Decision, thus rendering it arbitrary and capricious.

I conclude that the Regional Director gave sufficient consideration to the regulatory criteria contained in 25 CFR 151.10, and the Decision was reasonable and supported by the record. The BIA also conducted the appropriate level of review under NEPA. Therefore, I affirm the Regional Director's Decision.

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[1] 25 U.S.C. § 465. The legal description of the property, which I refer to as the "parcels" or collectively "Property," is set forth the Regional Director's Decision, Realty Administrative Record (RAR) Tab 47, and was attached to the Appellant's May 28, 2014, Notice of Appeal as Exhibit A.

[2] 42 U.S.C. § 4321 et seq.

## Statutory and Regulatory Background

Congress enacted the IRA in 1934 to encourage tribes "to revitalize their self-government," to take control of their "business and economic affairs," and to assure a solid territorial base by "put[ting] a halt to the loss of tribal lands through allotment."[3] The IRA "establish[ed] machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically."[4] Section 5 of the IRA authorizes the Secretary of the Interior (Secretary), in her discretion, to acquire land in trust for Indian tribes and individual Indians.[5] The authority to acquire lands in trust for Indian tribes is an important tool for the United States to effectuate its longstanding policy of fostering tribal self-determination. The Department of the Interior (Department) has used this tool to help restore tribal homelands and has encouraged Regional Directors to take land into trust for tribes, when appropriate.

While the Department is in favor of land into trust for tribes in general, we take a very deliberative approach to each specific application and must follow certain rules that the Department has imposed on itself. The fee-to-trust regulations at 25 C.F.R. Part 151 establish procedures and substantive criteria to govern the Secretary's discretionary authority to acquire land in trust.

When evaluating tribal requests to acquire land located within or contiguous to an "Indian reservation," as defined in § 151.2(f), the BIA must consider the following regulatory criteria:

> (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
> (b) The need of the . . . tribe for additional land;
> (c) The purposes for which the land will be used;
> (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
> (f) Jurisdictional problems and potential conflicts of land use which may arise;
> (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 [Departmental Manual] 6, appendix 4, [NEPA] Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.[6]

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[3] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973).
[4] *Morton v. Mancari*, 417 U.S. 535, 542 (1974).
[5] 25 U.S.C. § 465; COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 15.07[1][a], at 1030 (Nell Jessup Newton ed., 2012)
[6] 25 C.F.R. § 151.10(a)-(c) and (e)-(h). Criterion § 151.10(d) is applicable only to acquisitions for individual Indians.

In addition to the applicable on-reservation Part 151 regulations, the BIA must also comply with NEPA, by conducting either a categorical exclusion determination (CE); an environmental assessment (EA) and a finding of no significant impact (FONSI); or an environmental impact statement (EIS), as applicable to the proposed action.[7]

## Factual and Procedural Background

The Nation purchased the subject parcels between 2003 and 2009 (hereinafter, collectively referred to as "Property").[8] The Property is contiguous to the northern, western and southern boundaries of the Nation's Rancheria and in the unincorporated area of Yolo County, California.[9]

The Property is surrounded by undeveloped open space and agricultural lands.[10] Cache Creek runs along a portion of the eastern boundary of the Property, and State Route 16 traverses the Property in the north/south direction.[11] Tribal member housing, as well as the Tribe's community center and recreation area are located adjacent to the Property on lands held in trust for the Nation.[12]

Currently, the property contains five (5) single family homes owned by the Nation.[13] All are unoccupied except for the residence on APN 160-030-016, which was restored by the Nation and currently houses the Nation's Cultural Department.[14] Nearly all of the Property is currently in agricultural production.[15]

On June 20, 2011, the Nation submitted its application to the BIA to place the Property into trust.[16] The Nation's application stated that it contemplates development on portions of six (6) parcels and continued current agricultural use on the remaining portions of those parcels as well as the other nine (9) parcels that make up the Property.[17] The Nation's proposed development includes 25 residential housing units for Tribal members, a new Tribal school, cultural and educational facilities, and a wastewater treatment system.[18]

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[7] *See* 40 C.F.R. § 1501.4.
[8] Nation's Fee-to-Trust Application, June 20, 2011, RAR Tab 1.
[9] *Id.* at 12; Notice of Application (NOA), July 29, 2013, RAR Tab 31 at 2.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*
[16] NOA, RAR Tab 1.
[17] *Id.*
[18] *Id.*

An EA documenting and analyzing the potential impacts of the Nation's proposed project and alternatives was completed in May 2011.[19] The BIA circulated the EA to the public[20] for comment on June 15, 2011, with the comment period ending on July 14, 2011.[21] On July 22, 2011, the Governor of California requested that the comment period be extended through August 26, 2011.[22] On August 2, 2011, the BIA granted the Governor's office the requested extension.[23] The BIA received nine letters in response to the EA, one of which was from CVC dated August 22, 2011, after the public comment period had closed.[24] CVC's letter claimed that a full EIS was necessary because of the scope and size of the parcel, its location, and the implications of trust status of the proposed project.[25]

Based on an analysis contained in the Final EA dated October 2012,[26] public comments received on the EA, the response to those comments, and the mitigation imposed, the Regional Director concluded that an EIS was not required. Therefore, it issued a FONSI on October 25, 2012.[27] In response to CVC's claim that an EIS was necessary, the Regional Director wrote that "[t]he acreage may be relevant to context or intensity" of a proposed project because it assists in determining a proposed project's potential environmental impacts but the size or acreage of a proposed acquisition alone does not dictate the need for an EIS.[28] Additionally, the Regional Director found the EA addressed all planned, proposed, and reasonably foreseeable development.[29]

Following receipt of a complete application from the Nation, the BIA issued a notice to the State and local governments on July 29, 2013, inviting comments on the proposed acquisition and specifically requesting information regarding potential impacts on property taxes, special assessments, governmental services, and whether the intended use is consistent with current zoning.[30] The County of Yolo requested and was granted an extension to submit comments.[31] The BIA extended the comment period to October 2, 2013.[32]

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[19] Nation's Environmental Assessment, May 2011, Environmental Administrative Record (EAR) Tab 3.
[20] Twenty-one (21) digital copies of the EA were delivered to the State Clearinghouse on June 15, 2011. For a list of agencies marked for distribution, see Environmental Assessment Distribution List, July 12, 2011, EAR Tab 8. Hard copies of the Notice of Availability were delivered to the Woodland Public Library, the Esparto Public Library, and Yolo County. *Id.*
[21] *See* FONSI, Oct. 25, 2012, EAR Tab 35 at 3.
[22] *See* Governor of California's Request for Extension, July 22, 2011, EAR Tab 19 at 3.
[23] *See* Bureau of Indian Affairs Letter Granting Extension Request, Aug. 2, 2011, EAR Tab 21.
[24] *See* FONSI, EAR Tab 35 at 3-5; *see* List of EA Comment Letters, Nov. 16, 2011, EAR Tab 26 at 2.
[25] *See* CVC's Comment Letter on EA, Aug. 22, 2011, EAR Tab 23 at 2.
[26] Final EA, Oct. 1, 2012, EAR Tab 31.
[27] FONSI, EAR Tab 35.
[28] *Id.* at 101.
[29] *Id.*
[30] *See* NOA RAR Tab 31.
[31] County of Yolo's Request for Extension of Comment Period, Aug. 13, 2013, RAR Tab 34.
[32] *See* County of Yolo Comment Letter, Sept. 24, 2013, RAR Tab 38 at 5.

The County of Yolo submitted comments opposing the acquisition for acreage in excess of the amount needed for the proposed development (i.e., the agricultural use land), while supporting the trust application for 100 acres upon which proposed development would be sited.[33] CVC also responded to the request for information (after the comment period closed) opposing the acquisition under 25 C.F.R. § 151.10(b), claiming the Nation does not need the Property in trust.[34] CVC's comments also adopted and incorporated by reference the comments of Yolo County.[35]

The Regional Director provided a copy of all comments, including those from the County of Yolo and CVC, to the Nation. The Nation was given an opportunity to respond to those comments pursuant to 25 C.F.R. § 151.10.[36] The Nation submitted a response to all received comments to the BIA on December 13, 2013.[37] The Regional Director issued the Decision that gave rise to Appellant's appeal on April 28, 2014.[38]

The Decision found, *inter alia*, each of the on-reservation criteria in § 151.10(a)-(c) and (e)-(h) favor trust acquisition of the parcel in this case and the preparation of an Environmental Impact Statement (EIS) was not required for the proposed acquisition.[39]

On appeal, CVC moved the Board to vacate the Decision and remand the matter for consideration of additional information and a "reasonable determination based upon the record".[40] I exercised my authority under 25 C.F.R. § 2.20(c) and 43 C.F.R. § 4.332(b) to assume jurisdiction over this appeal. The Board transferred this appeal to me on June 19, 2014. The CVC subsequently filed an opening brief, the Nation filed a brief in response, and CVC filed a reply brief. After carefully considering those briefs, and for the reasons explained below, I now affirm the Regional Director's decision to acquire the parcel in trust.[41]

## Discussion

### I. Standard of Review

The Board's standard of review in trust acquisition cases is well established and I adopt the Board's standard for this process. As the Assistant Secretary, I have issued several decisions

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[33] *See id.*
[34] *See* CVC's Comment Letter, Nov. 27, 2013, RAR Tab 41.
[35] *Id.*
[36] Section 151.10 states in relevant part that "a copy of the [state and local government] comments will be provided to the applicant, who will be given a reasonable time in which to reply and/or request that the Secretary issue a decision."
[37] Nation's Response to Comments, Dec. 13, 2013, RAR Tab 44.
[38] Decision, RAR Tab 47.
[39] *Id.*
[40] Appellant's Opening Brief at 1.
[41] I note that the administrative record contains documents designated by the BIA as privileged. I have not reviewed or considered privileged documents in making this decision.

to acquire land in trust for tribes, but here, as a reviewing official, having assumed jurisdiction of an appeal from the Board, I have determined that is prudent to apply the Board's standards. Therefore, I will not substitute my judgment for that of the BIA's in reviewing fee-to-trust decisions.[42] Instead, I will review fee-to-trust decisions over which I have assumed jurisdiction to determine whether the BIA gave proper consideration to all legal prerequisites to exercise the BIA's discretionary authority to take land into trust.[43] An appellant bears the burden of proving that the BIA did not properly exercise its discretion.[44] Simple disagreement with or bare assertions concerning the BIA's decisions are insufficient to carry this burden of proof.[45]

The BIA's land acquisition policy permits land to be acquired in trust for individual Indians or a tribe pursuant to an act of Congress in conjunction with approval by the Secretary.[46] Section 151.3(a) outlines three circumstances in which tribes may acquire trust land: "(1) [w]hen the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto; or within a tribal consolidation area; or (2) [w]hen the tribe already owns an interest in the land; or (3) [w]hen the Secretary determined that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing."[47] These are longstanding regulations, having been in place in their correct form for approximately 20 years. The land acquisition policy in § 151.3(a)(1)-(3) is disjunctive.[48] In other words, any of these circumstances is an adequate predicate for the acquisition in trust.

When evaluating tribal applications for trust acquisitions the record must show that the Regional Director considered the criteria set forth in 25 C.F.R § 151.10, but "there is no requirement that the BIA reach a particular conclusion with respect to each factor."[49] The factors need not be "weighed or balanced in any particular way or exhaustively analyzed."[50] However, it must be discernable from the Regional Director's decision, or at least from the record, that due consideration was given to timely submitted comments by interested parties.[51]

In contrast to the Board's, and hence my, limited review of the BIA discretionary decisions, the Board has full authority to review any legal issues raised in a trust acquisition

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[42] *Shawano County, Wisconsin v. Acting Midwest Regional Director*, 53 IBIA 62, 68 (2011); *Arizona State Land Department v. Western Regional Director,* 43 IBIA 158, 159-60 (2006).
[43] *Shawano County*, 53 IBIA at 68.
[44] *Id.* at 69; *Arizona State Land Department*, 43 IBIA at 160; *State of South Dakota v. Acting Great Plains Regional Director*, 39 IBIA 283, 291 (2004), *aff'd sub nom. South Dakota v. U.S. Dep't of the Interior*, 401 F. Supp. 2d 1000 (D.S.D. 2005), *aff'd*, 487 F.3d 548 (8th Cir. 2007).
[45] *Shawano County*, 53 IBIA at 69; *Arizona State Land Department*, 43 IBIA at 160.
[46] *See* 25 C.F.R. § 151.3(a).
[47] 25 C.F.R. § 151.3(a)(1)-(3).
[48] *State of New York; Franklin County, New York; and Town of Fort Covington, New York v. Acting Eastern Regional Director, Bureau of Indian Affairs*, 58 IBIA 323, 336 n18 (2014).
[49] *Shawano County*, 53 IBIA at 68-69; *Arizona State Land Department*, 43 IBIA at 160.
[50] *Shawano County*, 53 IBIA at 69; *see County of Sauk, Wisconsin v. Midwest Regional Director*, 45 IBIA 201, 206-07 (2007), *aff'd sub nom. Sauk County v. U.S. Dep't of the Interior*, No. 07-543, 2008 WL 2225680 (W.D. Wis. May 29, 2008).
[51] *Village of Hobart, Wisconsin v. Midwest Regional Director,* 57 IBIA 4, 13 (2013).

case, except those challenging the constitutionality of laws or regulations, which the Board lacks authority to adjudicate.[52] An appellant, however, bears the burden of proving that the BIA's decision was in error or not supported by substantial evidence.[53]

The scope of the Board's review, which I adopt, ordinarily is "limited to those issues that were before the . . . BIA official on review."[54] Thus, the Board ordinarily will decline to consider for the first time on appeal matters that were not, but could have been, raised to the Regional Director.[55] I shall follow suit.

## II. Review of the Regional Director's Analysis under 25 C.F.R. § 151.10

Decisions concerning whether to take land into trust are discretionary. Appellants bear the burden of proving that the BIA did not properly exercise its discretion.[56] I conclude that Appellant has failed to meet its burden of showing that the Regional Director failed to properly exercise her discretion, that she committed error, or that the Decision lacks substantial evidence. I therefore affirm the Decision.

### A. Nation's Need for Additional Land

#### 1. 25 C.F.R. § 151.3(a)

Appellant asserts that the Nation must establish a specific need for the amount of land sought to be transferred from fee to trust, citing 25 C.F.R. § 151.10(a)(3). Under 25 C.F.R. § 151.3(a)(3), "Land acquisition policy," land may be acquired for a tribe in trust status "[w]hen the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development or Indian housing." According to Appellant, the word "necessary" requires the Nation to justify its need for trust acquisition of each acre in the application. Appellant misunderstands the regulation.

Appellant conflates the language of section 151.3(a)(3) with a different provision of the regulations, section 151.10(b) ("[t]he need of the . . . tribe for additional land"). Neither requires the specific acre-by-acre justification proposed by Appellant; nor do they allow an Applicant to substitute its judgment for that of the Nation or the BIA. Section 151.3(a) is satisfied when one of three conditions are met: "(1) [w]hen the property is located within the exterior boundaries of the tribe's reservation or adjacent thereto, or within a tribal consolidation area; or (2) [w]hen the tribe already owns an interest in the land; or (3) [w]hen the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development,

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[52] *Shawano County*, 53 IBIA at 69.
[53] *Arizona State Land Department*, 43 IBIA at 160; *Cass County, Minnesota v. Midwest Regional Director*, 42 IBIA 243, 247 (2006).
[54] 43 C.F.R. § 4.318.
[55] *See id.*; *Thurston County, Nebraska v. Acting Great Plains Regional Director*, 56 IBIA 62, 66, 71, 73 (2012); *State of Kansas v. Acting Southern Plains Regional Director*, 53 IBIA 32, 36 (2011).
[56] *See, e.g.*, *Shawano County*, 53 IBIA at 69.

or Indian housing." Appellant does not dispute that "[t]he [P]roperty [owned by the Nation] is contiguous to the northern, western and southern boundaries of the Nation."[57] Tribal trust land containing tribal member housing, and the Nation's community center and recreation area are adjacent to the Property.[58] Since the Property is (1) adjacent to the Nation's existing trust land, and (2) owned by the Nation, either of these bases alone is adequate. It is immaterial whether the proposed acquisition is "necessary" to facilitate tribal self-determination or economic development under § 151.3(a)(3).[59] The requirements for § 151.3(a) have unquestionably been met by virtue of the location of the Nation's property and the Nation's interest in the Property.

Regardless, the Regional Director also found that the land was needed to protect the environment, preserve the Nation's lands, and to facilitate tribal self-determination.[60] Additionally, as the development of the Property includes tribal housing,[61] and Appellant does not refute this fact, the Regional Director reasonably concluded that a portion of the Property will be utilized for tribal housing. This adequately supports the trust acquisition under 25 C.F.R. § 151.3(a)(3).

### 2. 25 C.F.R. § 151.10(b)

Appellant also challenges the Regional Director's consideration of the criterion in § 151.10(b) ("[t]he need of the . . . tribe for additional land").[62] Appellant claims that the Regional Director failed to properly assess the Nation's need to have the 853 acres of land taken into trust and whether the Nation could achieve its objectives with fee land or just a portion of the land outlined in the application placed into trust.[63] Appellant also argues that the Nation "does not need the trust land for economic stability as the Tribe has a wealthy operation on" other "trust land in the Capay Valley".[64]

Interior's fee-to-trust regulations require consideration of the "need of . . . the tribe for additional land."[65] Courts interpreting this provision have uniformly rejected the need for some kind of particularized, acre by acre justification for the trust acquisition. "It was sufficient for the Department's [Interior's] analysis [of § 151.10(b)] to express the Tribe's needs and conclude generally that IRA purposes were served."[66] Interior is only required to address the Nation's need for land. It is not required to justify why the land should be held in trust, as

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[57] Decision, RAR Tab 47 at 7.
[58] *Id.* at 8.
[59] *See State of New York; Franklin County, New York; and Town of Fort Covington, New York v. Acting Eastern Regional Director, Bureau of Indian Affairs*, 58 IBIA at 340.
[60] Decision, RAR Tab 47 at 18-19.
[61] Nation's Application, RAR Tab 1 at 15-17.
[62] *See* Appellant's Notice of Appeal at 2-3.
[63] *See id.*
[64] *Id.*
[65] 25 C.F.R. § 151.10(b).
[66] *South Dakota v. U.S. Dep't of Interior*, 423 F.3d 790, 801 (8th Cir. 2005).

opposed to fee status.[67] However, the Board has consistently recognized that section 151.10(b), allows, but does not require, the BIA to consider a tribe's need for land in trust.[68]

Under prior precedent, the "BIA has broad leeway in its interpretation or construction of tribal 'need' for the land," and "flexibility in evaluating 'need' is an inevitable and necessary aspect of BIA's discretion."[69] Additionally, as Appellant recognizes, the Board has held that a tribe need not be landless or suffering financial difficulties to need additional land.[70]

In the present case, the Regional Director determined that the Nation needs additional trust lands "to protect the environment and preserve the Nation and its lands."[71] The Regional Director also found that the Nation needed land in trust specifically to: (1) restore the Nation's ancestral land base, (2) be able to exercise its sovereign jurisdiction over the land at its fullest extent, and (3) provide land for expansion and growth of the Nation.[72] The Regional Director's findings are sufficient to show that she considered the Nation's need for additional land under § 151.10(b), which is all that she was required to do.[73] The Regional Director did not, nor did she need to, assess whether the Nation could achieve the same objectives on fee land or on a portion of the 853 acres in the trust application, or conclude that the trust acquisition was obviated by the Nation's purported healthy financial status. Although Appellant argues that, in its view, a much smaller acquisition would have been sufficient, it is not for local governments or citizens' groups to define the Nation's need, or lack thereof, for the Parcel.[74]

Appellant would also have the Nation justify acre-by-acre the need for the acquisition, arguing that since a majority of the Property is in an agricultural preservation area and will remain agricultural nature, the Nation must not need the agricultural land to be held in trust status. Appellant also claims the Nation does not need land held in trust for agricultural use since the County's laws currently protect the agricultural nature of the land. The Board has rejected such an inflexible standard whereby a tribe must justify and have a plan in place for

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[67] *Id.* (stating that it "would be an unreasonable interpretation of 25 C.F.R. § 151.10(b) to require the Secretary to detail specifically why trust status is more beneficial than fee status in a particular circumstance").
[68] *See Pres. of Los Olivos and Pres. of Santa Ynez v. Pacific Reg'l Dir., BIA*, 58 IBIA 278, 313-314 (2014).
[69] *County of Sauk*, 45 IBIA 201, 209.
[70] *See County of Mille Lacs v. Midwest Regional Director*, 37 IBIA 169, 171-72 (2002); *State of Kansas v. Acting Southern Plains Regional Director*, 36 IBIA 152, 155 (2001); *Avoyelles Parish, Louisiana, Police Jury v. Eastern Area Director*, 34 IBIA 149, 153 (1999); *City of Oneida v. Salazar*, 2009 U.S. Dist. LEXIS 85960, *10-13 (N.D.N.Y Sept. 21, 2009)("There is nothing, in fact, limiting the reach of the IRA or Section 465 to landless Indians or Indians whose economic life needs rehabilitation."); *Mich. Gaming Opposition*, 525 F.3d 23, 32 (D.C. Cir. 2008) (acknowledging that the IRA was meant, in part, to redress the failures of prior federal Indian policies and the consequent loss of tribal land but recognizing that the IRA and Section 465 were intended to do more than return tribes to the status quo and instead promote self-determination, economic development and self-governance); *Tacoma v. Andrus*, 457 F.Supp. 342, 345 (D.D.C. 1978) ("[T]he words of [Section 465] nowhere limit its application to landless, destitute, or incompetent Indians.").
[71] Decision, RAR Tab 47 at 18-19.
[72] *See id.*
[73] *See Shawano County*, 53 IBIA at 68-69.
[74] *See Pres. of Los Olivos*, 58 IBIA at 314.

each acre that it seeks to put into trust: "The Tribe is not required to show that trust status for the land is required for the Tribe to achieve its stated needs, much less justify, acre-by-acre, the need for trust status. There simply is no requirement in the IRA or in the regulations that requires the Tribe to make this showing or for BIA to opine on it."[75] As demonstrated above and reflected in the purpose of the IRA, need simply is not ascertained by an assessment of how much land is needed for proposed development. The Nation may acquire land in trust to expand its land base without being required to develop the land.

Appellants also discount the Federal Government's policy of fostering tribal self-determination in arguing that the Nation's agricultural lands are already protected by the County's laws. While the County may currently provide protection for the agricultural lands, the Nation cannot fully exercise tribal governance over the agricultural land unless and until it is in trust for the Nation.

Appellant also argues that the Regional Director failed to consider the existing acreage of land held for the Nation and recently abandoned development plans for existing trust land when considering the fee-to-trust application for the Property. However, the Decision did reference the Nation's existing trust acreage and found that existing acreage to be insufficient to meet the Nation's needs.[76] The Decision explained, for example, that "[t]here is inadequate space within the boundaries of the Nation to accommodate the rising housing needs of its growing population."[77] Appellant has also failed to point to any evidence in the record demonstrating that the Nation has any development and agricultural preservation plans other than those outlined in the Nation's Application,[78] Resolution,[79] and discussed in the Regional Director's Decision.[80] In deciding whether to acquire land in trust, a regional director "has no obligation to consider [an appellant's] speculation about what might happen in the future."[81] Therefore, the Regional Director was not required to speculate about the Nation's future plans.

In sum, the Regional Director reasonably concluded that the Nation had demonstrated its need for the land, fulfilling her obligations under section 151.10(b).

### B. Jurisdictional Impacts – § 151.10(f)

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[75] *Shawano County*, 53 IBIA at 78 (rejecting the argument that a tribe might actually "require" only 100 out of 400 acres proposed for such general purposes as housing, forestry, parks and recreation, and governmental facilities).
[76] *See* Decision, RAR Tab 47 at 18.
[77] *Id.*
[78] Nation's Application, RAR Tab 1 at 15-17.
[79] *Id.* at 36-37.
[80] Decision, RAR Tab 47 at 19-20. Appellant cites a letter opposing the trust acquisition from private citizen, Lisa Leonard, Aug. 4, 2011, RAR Tab 4, and a comment letter from the County of Yolo, RAR Tab 38 at 3, 6-7, to reference abandoned casino and resort expansion plans and past casino developments to bolster an argument that the Regional Director failed to consider casino and resort development in evaluating the Nation's Application. Appellant admits that the letter from Lisa Leonard is the "only place in the administrative record [providing] any detailed information about any tribal casino and resort expansion. Appellant's Opening Brief at 12.
[81] *City of Eagle Butte, South Dakota v. Acting Great Plains Regional Director*, 49 IBIA 75, 82 (2009).

Appellant argues that the trust acquisition creates a high probability of creating significant land use conflicts within the Capay Valley, a predominantly agricultural area. Appellant also argues that the Regional Director ignored the County of Yolo's public interest concerns to limit or restrict intense commercial development in the agricultural valley and whether such intense commercial development would cause significant land use conflicts.[82] As a threshold matter, it is questionable as to whether Appellant has standing to raise the County of Yolo's jurisdictional arguments in the County's stead. However, even assuming CVC has standing to make such a claim, the Regional Director's Decision has already adequately addressed the County of Yolo's jurisdiction concerns.

"The BIA fulfills its obligation under § 151.10(f) as long as it "undertake[s] an evaluation of potential problems."[83] Appellant's mere speculation that the land might, at some point in the future, be used for gaming does not require the BIA to consider gaming as a possible use of the property in deciding whether to accept the property into trust.[84] Any intention to conduct gaming would confront additional regulatory hurdles in Federal Regulations.

While Appellant disagrees with the Regional Director's consideration of various jurisdictional concerns, mere disagreement with a decision is not sufficient to demonstrate the Regional Director abused her discretion.[85] In fact, the Regional Director extensively considered jurisdictional problems and potential conflicts of land use which may arise,[86] finding no significant jurisdictional conflicts resulting from the trust acquisition. The County's jurisdictional concerns were related to speculative commercial development.[87] Nothing in the record supports Appellant's theories about proposed future uses and jurisdictional conflicts related to those uses. Instead, the Regional Director reasonably gleaned from the record that over more than 88 percent of the subject Property will remain in agricultural production, in congruence with Yolo County's General Plan.[88] Moreover, Yolo County did not object to the proposed development for housing and tribal facilities.[89]

In her Decision, the Regional Director considered and analyzed jurisdictional impacts (i.e., the civil/regulatory and criminal/prohibitory jurisdictions of the State, County and Nation) of placing the Property into trust.[90] Additionally, the Regional Director noted that the proposed

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[82] *See* Appellant's Opening Brief at 8-11.
[83] *South Dakota v. United States DOI*, 775 F. Supp. 2d 1129, 1143-1144 (D.S.D. 2011)(citing *South Dakota v. United States DOI*, 314 F. Supp. 2d 935, 945 (D.S.D. 2004)(quoting *City of Lincoln City v. United States DOI*, 229 F. Supp. 2d 1109, 1124 (D. Or. 2001))).
[84] *See Town of Charlestown, Rhode Island v. Eastern Area Director*, 35 IBIA 93, 103 (2000); *Lake Montezuma Property Owners Ass'n v. Phoenix Area Director*, 34 IBIA 235, 238 (2000); *Town of Ignacio, Colorado v. Albuquerque Area Director*, 34 IBIA 37, 41 (1999); *City of Lincoln City v. United States DOI*, 229 F. Supp. 2d 1109, 1124 (D. Or. 2001); *City of Yreka v. Salazar*, 2011 U.S. Dist. LEXIS 62818, *28 (E.D. Cal. June 13, 2011).
[85] *Shawano County*, 53 IBIA at 69; *Arizona State Land Department*, 43 IBIA at 160.
[86] *See* Decision, RAR Tab 47 at 21-22.
[87] *See* County of Yolo Comment Letter, RAR Tab 38.
[88] *See* Nation's Application, RAR Tab 1 at 16.
[89] *See* County of Yolo Comment Letter, RAR Tab 38.
[90] Decision, RAR Tab 47 at 21.

project on the Property is aligned with "permitted and conditionally permitted uses identified in Yolo County's Agricultural Reserve zoning."[91] Appellant has not identified any evidence that the Regional Director failed to consider. Therefore, Appellant has not met its burden on appeal.

Finally, Appellant takes issue with the fact that the Regional Director included language from the Nation's Application in her Decision. The regulations require that the Regional Director consider the factors under 25 C.F.R. § 151.10. The record must show that the Regional Director considered the criteria set forth in 25 C.F.R § 151.10, but "there is no requirement that BIA reach a particular conclusion with respect to each factor."[92] The factors need not be "weighed or balanced in any particular way or exhaustively analyzed."[93] Consideration of the criteria under section 151.10 does not foreclose the Regional Director from using language found in a tribe's application, or any other information found in the administrative record. The record must merely demonstrate that due consideration was given to comments submitted in a timely way by interested parties.[94] I find that the record does demonstrate due consideration of the Nation's Application, timely comments by interested parties, the Nation's response, and other documents in the administrative record. Appellant's argument regarding the Regional Director's use of language from the Nation's Application fails to show a lack of due consideration of the criteria under the regulations.

## III. Compliance with NEPA

### A. Standard of Review

NEPA has twin aims. It obligates agencies to consider the significant environmental impacts of a proposed action and also ensures that the agency informs the public that it considered environmental concerns during its decisionmaking process.[95] NEPA does not mandate particular results but rather prescribes the necessary process for reviewing environmental impacts,[96] and requires that agencies take a "hard look" at environmental effects of any major Federal action.[97] Moreover, NEPA does "not require agencies to elevate environmental concerns over other appropriate considerations."[98] NEPA does not bar actions that affect the environment, even adversely. Rather, the process assures that decision-makers

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[91] *Id.*
[92] *Shawano County*, 53 IBIA at 68-69; *Arizona State Land Department*, 43 IBIA at 160.
[93] *Shawano County*, 53 IBIA at 69; *see County of Sauk, Wisconsin v. Midwest Regional Director*, 45 IBIA 201, 206-07 (2007), *aff'd sub nom. Sauk County v. U.S. Dep't of the Interior*, No. 07-543, 2008 WL 2225680 (W.D. Wis. May 29, 2008).
[94] *Village of Hobart, Wisconsin v. Midwest Regional Director,* 57 IBIA 4, 13 (2013).
[95] *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 97 (1983).
[96] *Robertson v. Methow Valley Citizens Council*, 490 US 332 (1989).
[97] *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976); *see also Hells Canyon Alliance v. U.S. Forest Serv.*, 227 F.3d 1170, 1177 (9th Cir. 2000) (NEPA "exists to ensure a process, not particular substantive results").
[98] *Baltimore Gas & Electric Co.*, 462 U.S. at 97.

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.[99]

By preparing an EA, as occurred here, the agency is able to determine whether an impact on the environment will result from one or more of the alternative courses of action and the severity of the impact.[100] If the impact will be significant, the agency must then prepare an EIS; if the agency determines that there will be no impact or that any impact will be insignificant (or can be reduced to insignificance), it may then issue a FONSI.[101] Thus, an EA serves to (1) provide evidence and analysis for determining whether to prepare an EIS or a FONSI; (2) aid an agency's decision making process when no EIS is necessary; and (3) facilitate preparation of an EIS when one is necessary.[102] Therefore, to support a FONSI and, hence, the conclusion that an EIS is not required, an EA must take a hard look at the environmental consequences of a proposed action, identify the relevant areas of environmental concern, and make a convincing case that environmental impacts from the proposed action are insignificant or can be reduced to insignificance through the imposition of mitigation measures.[103] The BIA must analyze the reasonably foreseeable environmental consequences of the proposed action and also examine reasonable alternatives to the proposed action and their environmental consequences.[104]

I reviewed the BIA's FONSI to determine whether it is supported by the record and whether it "articulate[s] a rational connection between the facts found and the choice made."[105] I will not second-guess the BIA's determination of how much discussion to include on each topic in a NEPA document, and how much data is necessary to fully address each issue.[106] As long as the EA contains "a reasonably thorough discussion of the significant aspects of the probable environmental consequences," I will uphold the BIA's decision.[107]

### B. Consideration of Reasonably Foreseeable Impacts

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[99] *Voice for Rural Living v. Acting Pacific Regional Director, Bureau of Indian Affairs*, 49 IBIA 222, 38 (2009).
[100] *See* 40 C.F.R. §§ 1508.9.
[101] *See* 40 C.F.R. §§ 1501.4, 1508.9, and 1508.13.
[102] *See id.* at § 1501.4 and 1508.9.
[103] *See Wetlands Action Network v. U.S. Army Corps of Engineers*, 222 F.3d 1105, 1114, 1121-22 (9th Cir. 2000).
[104] *Neighbors for Rational Development, Inc. v. Albuquerque Area Director*, 33 IBIA 36, 43 (1998). The "rule of reason" governs the agency's discretion in preparing environmental documents, such as an EA. *Dept. of Transportation v. Public Citizen*, 541 U.S. 752, 767 (2004) ("[I]nherent in NEPA and its implementing regulations is a 'rule of reason,' which ensures that agencies determine whether and to what extent to prepare an EIS"). The rule extends to the agency's selection of alternatives to be evaluated. *Neighbors for Rational Dev.*, 33 IBIA at 44 n.7.
[105] *Cf. Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1032 (9th Cir. 2008) (quoting *Friends of Yosemite Valley v. Norton*, 348 F.3d 789, 793 (9th Cir. 2003)); *see also Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 376 (1989) (citing *Baltimore Gas & Electric Co.*, 462 U.S. at 97-98).
[106] *Cf. Town of Winthrop v. Federal Aviation Administration*, 535 F.3d 1, 10 (1st Cir. 2008)(quoting *Sierra Club v. van Antwerp*, 526 F.3d 1353, 1361 (11th Cir. 2008)).
[107] *Neighbors for Rational Dev.*, 33 IBIA at 48.

Appellant argues that the EA and FONSI fail to acknowledge the potential for significant development and conversion of agricultural lands acquired in trust.[108] Additionally, Appellant argues that the EA dismisses cumulative impacts and growth-inducing impacts stemming from the potential significant development on the area surrounding the Property.[109] The FONSI expressly noted that the reasonably foreseeable consequence of the trust acquisition includes the "development of the site for new and expanded facilities for Tribal housing, education, cultural preservation/education. . . and related water/wastewater facilities and supporting infrastructure."[110] No further development is proposed. Appellant neither provides nor cites any evidence in support of its speculation.

It is well established that the BIA is not required to examine the environmental consequences of every conceivable development that could take place in the future on the parcels proposed for trust acquisition, much less the environmental consequences of possible future "growth" in the area surrounding the proposed trust acquisition.[111] Instead, the BIA is required to examine the environmental consequences of "reasonably foreseeable impacts" of the decision.[112] "Reasonably foreseeable future actions" include proposed actions,[113] but do not extend to actions that are dependent on contingencies, such as possible commercial development;[114] the phrase "reasonably foreseeable future actions" certainly does not mean or require the study of all possible uses of the land, including those that Appellant fears may result, but of which there is no demonstrable evidence supporting the likelihood of occurrence. Therefore, the Regional Director did not need to take potential commercial development, including a casino, into consideration.

As explained in the FONSI, the EA examined the cumulative and growth issues for the proposed project. The Regional Director was under no obligation to consider cumulative or growth issues for projects which have not been proposed. I conclude that the Regional Director did consider reasonably foreseeable impacts and was justified in issuing a FONSI upon consideration of the EA.

Appellant also claims that speculative development on the Property "could create significant impacts on water resources in the Capay Valley and reduce incidence of special status species."[115] Appellants admit that the "core threat to water resources and habitat comes not from the project as proposed but from the. . . potential for a. . . more intensive project. . ."[116] Given the consideration of the EA by the Regional Director, and the fact that the Regional Director

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[108] Appellant's Opening Brief at 13.
[109] *Id.* at 10.
[110] FONSI, EAR Tab 35 at 3.
[111] *See Neighbors for Rational Dev.*, 33 IBIA at 43.
[112] *See, e.g.*, 40 C.F.R. § 1508.25 (cumulative impact requires consideration of the impact of reasonably foreseeable future actions in addition to the proposed action and alternatives).
[113] *Northern Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 980 (9th Cir. 2006).
[114] *Gulf Restoration Network v. U.S. Dep't. of Transp.*, 452 F.3d 362, 370-71 & n.15 (5th Cir. 2006).
[115] Appellant's Opening Brief at 19.
[116] *Id.*

need consider only reasonably foreseeable future actions, I conclude that Appellant has not met its burden of showing error with respect to the assessment of the biological impact of the proposed construction.

Appellant also stated that the EA fails to indicate why or how the parcels must be placed in trust. Per regulation, an EA must include the following: (1) a brief discussion of the need for the proposal, (2) alternatives to the proposal, (3) environmental impacts of the proposed action and alternatives, and (4) a listing of the agencies and persons consulted.[117] The Regional Director did not need to consider why or how the parcel must be placed in trust in the EA or FONSI. She is using her authority under the IRA for the trust acquisition, not NEPA.

Finally, Appellant argues that the Regional Director fails to address the discrepancy between the Nation's need for 99 acres for development versus its application for 853 acres, most of which will remain agricultural in nature. The BIA has considerable latitude in selecting the alternatives to be considered in an EA. As long as the alternatives selected by the agency are reasonable in light of the goals, needs, and purposes of the project, they will be upheld.[118] There is no set number of alternatives that must be examined.[119] Appellant does not complain that the alternatives considered by the Regional Director were unreasonable, only that the Regional Director should have considered another alternative involving the intensive commercial development on the Property. Ultimately, the Nation is the owner of the proposed trust acquisition parcels and, therefore, should be able to utilize its land. Therefore, it was reasonable for the Regional Director to consider alternative uses for the proposed acquisition consistent with the Nation's stated needs and purposes for the use of the land.

## Conclusion

Pursuant to the authority delegated to me, 25 C.F.R. § 2.4(c), I affirm the Regional Director's April 28, 2014 decision to acquire approximately 853 acres in trust for the Yocha Dehe Wintun Nation.

Dated: AUG 14 2015

Kevin K. Washburn
Assistant Secretary – Indian Affairs

[117] *See* 40 C.F.R. § 1508.9(b).
[118] *Neighbors for Rational Dev.*, 33 IBIA at 44 n.7.
[119] *Id.*

**CERTIFICATE OF SERVICE**

I certify that on the 15th day of August, 2015, I delivered a true copy of the foregoing Notice of Receipt to each of the persons named below, either by depositing an appropriately-addressed copy in the United States mail, or by hand-delivery.

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