ASSISTANT SECRETARY – INDIAN AFFAIRS
U.S. DEPARTMENT OF THE INTERIOR

STATE OF SOUTH DAKOTA	)	
	)	
APPELLANT,	)	
	)	
v.	)	
	)	Pe'Sla Property
GREAT PLAINS REGIONAL DIRECTOR,	)	(2,022.66 Acres)
BUREAU OF INDIAN AFFAIRS,	)	
	)	
APPELLEE.	)	
	)	
	)	

Of Decision

The State of South Dakota (State) appealed to the Interior Board of Indian Appeals (Board) from a March 10, 2016 decision (Decision) of the Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA) to place approximately 2,022.66 acres of land known as the Pe'Sla Property (Pe'Sla, Property) in trust for the benefit of four Tribes (Tribes).[1] Pursuant to 25 C.F.R. § 2.20 and the Assistant Secretary – Indian Affairs memorandum of November 12, 2013, 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)," this Office assumed jurisdiction over the appeal.

I note at the outset that the State is the only appellant. Pennington County (County), which typically opposes placing land into trust, recognized the cultural and religious significance of Pe'Sla to the Tribes and chose to not oppose this application. The County explained that "the land known as Pe'Sla is a different situation [from other applications that it has opposed] and the land is considered sacred by the Tribes."[2] The State does not challenge the religious and cultural significance of Pe'Sla.

Rather, the State makes several challenges to the statutory authority of the Regional Director to restore Pe'Sla by accepting the land in trust. First, the State argues that Section 5 of the Indian Reorganization Act (IRA)[3] only authorizes the Department of the Interior (Department) to accept property in trust for an individual tribe. Second, the State, citing *Carcieri v. Salazar*,[4] argues that

[1] Specifically, the Property trust comprises an undivided 51.2 percent interest for the Rosebud Sioux Tribe, an undivided 29.9 percent interest for the Shakopee Mdewakanton Sioux Community, an undivided 12 percent interest for the Standing Rock Sioux Tribe, and an undivided 6.9 percent interest for the Crow Creek Sioux Tribe (collectively Tribes).
[2] *See* letter from Lyndell Petersen, Chairman, Pennington County Board of Commissioners to Danelle J. Daugherty, Regional Director, BIA (Aug. 18, 2015)(AR Tab 38 at 776).
[3] Section 5 of the IRA was formerly codified at 25 U.S.C. § 465. The compilers of the United States Code have recently transferred it to 25 U.S.C. § 5108.
[4] 555 U.S. 379 (2009).

the Department cannot place the Property into trust because the Shakopee Mdewakanton Sioux Community (Shakopee) was not under Federal jurisdiction in 1934. Third, the State argues that the Department cannot accept this land in trust because to do so would constitute an unauthorized creation of a new federally recognized Indian tribe. The State also argues that the Regional Director does not have the authority to accept land into trust because Shakopee is located outside of the geographical jurisdiction of the Regional Director. Finally, the State argues that the criteria included at 25 C.F.R. §§ 151.10 and 151.11 do not weigh in favor of placing the Property in trust. I note that many of the State's objections to restoring Pe'Sla are objections already litigated and denied by either the Board or the Federal courts.

For the reasons below, I affirm the Regional Director's Decision to accept Pe'Sla in trust. The Regional Director properly determined that he had the statutory authority to accept Pe'Sla in trust pursuant to the IRA. Next, Department policies clearly provide the Regional Director with authority to accept Pe'Sla in trust due to its location within the BIA Great Plains Region. Finally, I reject the State's argument that the Regional Director did not properly consider the relevant criteria included at 25 C.F.R. §§ 151.10 and 151.11.

I. 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."[5] The IRA "establish[ed] machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically."[6] 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.[7] 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 has used this tool to help restore tribal homelands and has encouraged Regional Directors to accept land in trust for tribes, when appropriate.

When the Department receives an application for an off-reservation acquisition, such as the Property that is the subject of this appeal, it must consider the criteria included at 25 C.F.R. § 151.11. The relevant criteria found in § 151.11 are:

> (a) The criteria listed in § 151.10 (a) through (c) and (e) through (h);
> (b) The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation, shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition. The Secretary shall give greater weight to the concerns raised pursuant to paragraph (d) of this section.

[5] *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973).
[6] *Morton v. Mancari*, 417 U.S. 535, 542 (1974).
[7] *See* 25 U.S.C. § 5108; Felix Cohen, Cohen's Handbook of Federal Indian Law § 15.07 (Nell Jessup Newton, et al. eds., 2012).

(d) Contact with state and local governments pursuant to § 151.10 (e) and (f) shall be completed as follows: Upon receipt of a tribe's written request to have lands taken in trust, the Secretary shall notify the state and local governments having regulatory jurisdiction over the land to be acquired. The notice shall inform the state and local government that each will be given 30 days in which to provide written comment as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.[8]

The relevant criteria in § 151.10 required to be considered per § 151.11(a) are:

(a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
(b) The need of the individual Indian or the tribe for additional land;
(c) The purposes for which the land will be used;
(d) 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;
(e) Jurisdictional problems and potential conflicts of land use which may arise;
(f) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status; and
(g) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act[9] Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.[10]

In addition to the applicable Part 151 regulations, BIA must also comply with the National Environmental Policy Act by conducting either a categorical exclusion determination; an environmental assessment and a finding of no significant impact; or an environmental impact statement, as applicable to the proposed action.[11]

II. Factual and Procedural Background

On November 12, 2014, the Rosebud Sioux Tribe (Rosebud), Shakopee, the Standing Rock Sioux Tribe (Standing Rock), and the Crow Creek Sioux Tribe (Crow Creek) submitted a fee to trust application for land known as Pe'Sla. The Property is located in the Black Hills of South

[8] 25 C.F.R §151.11. For applications for business purposes, the regulations also require the applicant tribe to "provide a plan which specifies the anticipated economic benefits associated with the proposed use." 25 C.F.R §151.11(c). Because Pe'Sla is being acquired for cultural, religious, and tribal purposes, this requirement does not apply.
[9] *See generally* National Environmental Policy Act, 42 U.S.C. § 4332.
[10] 25 C.F.R. § 151.10(a)-(c) and (e)-(h). (Section 151.10(d) is applicable only to acquisitions for individual Indians.)
[11] *See generally* 40 C.F.R. § 1501.4.

Dakota. Although the land is located outside of the boundaries of the Tribes' current reservations, it is located within the historical territory of the Great Sioux Nation.[12]

The Tribes explain that Pe'Sla is "innately tied" to their creation and existence.[13] Their application explains that Pe'Sla is one of their "most precious sacred sites . . . in the heart of everything that is, in the middle of the place where [they] originate from, and is central" to their existence.[14] A study of the Property directed by Rosebud and performed by a group of Lakota, Dakota, and Nakota has identified 484 traditional cultural properties, 5 historic sites, 3 archeological sites, and 4 disturbed cultural sites within Pe'Sla.[15]

On February 26, 2015, the Great Plains Regional Office (Regional Office) issued a Notice of Application (NOA) and invited comments from all interested parties, including the State and County.[16] The initial deadline for comments, 30 days after issuance of the notice, was extended several times at the request of the State and County.[17]

On August 18, 2015, the County submitted its official comments on the Tribes' application.[18] The County stated that it appreciated the "cooperative efforts put forth by the representatives of the Tribes in working with the County to address [its] concerns."[19] Further, the County noted that its past practice was to not support "any type of land being taken off of the tax rolls," but noted that it realized "the land known as Pe'Sla is a different situation and the land is considered sacred by the Tribes."[20] In a reversal of standard policy, the Pennington County Commissioners stated that they were not opposed to the Tribes' trust application.[21]

On September 22, 2015, approximately six months after the original deadline for comments, the State submitted its comments in opposition to the Tribes' application.[22] The State did not challenge the significance of Pe'Sla to the Tribes. Rather, it chose to oppose the acquisition of Pe'Sla on several grounds including: 1) asserting that the Regional Director did not have the authority to acquire Pe'Sla on behalf of the Tribes; 2) the Tribes did not state a need for the land; 3) jurisdictional concerns; 4) BIA's ability to discharge additional duties resulting from

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[12] *See* Reg'l Dir.'s Notice of Decision (Mar. 10, 2016)(AR Tab 4 at 41); Tribes' Fee-to-Trust Application (Nov. 12, 2014)(AR Tab 80 at 1467).
[13] Tribes' Fee-to-Trust Application (Nov. 12, 2014)(AR Tab 80 at 1470).
[14] *Id.* at 1471.
[15] *Id.* at 1472.
[16] Notice of Application (Feb. 26, 2015)(AR Tab 72).
[17] The State and County both received the NOA on March 2, 2015, making the initial deadline for comments March 31, 2015. *See id.* at 1354. Both the State and County made multiple requests for extensions to submit their comments. *See* AR Tabs 63, 61, 58, 54, and 41. Ultimately, the County's final deadline to submit comments was September 4, 2015. *See* AR Tab 47. The County submitted its comments on August 18, 2015. *See* AR Tab 38. The State's final comment extension expired on September 21, 2015. S*ee* AR Tab 37. We note that the State's comments were submitted late, on September 22, 2015, s*ee* AR Tab 27, and though the Regional Director was not obligated to consider them, he did, and so do we.
[18] *See* letter from Lyndell Petersen, Chairman, Pennington Cnty. Bd. of Comm'rs to Danelle J. Daugherty, Regional Director, BIA (Aug. 18, 2015)(AR Tab 38).
[19] *Id.* at 776.
[20] *Id.*
[21] *Id.*
[22] *See* letter from Matt Naasz, Assistant Attorney General, Office of Attorney General, State of South Dakota to Regional Director, Great Plains Regional Office (Sept. 22, 2015)(AR Tab 27).

acquiring Pe'Sla in trust; and 5) concerns regarding the distance of Pe'Sla from the Tribes' existing reservations.[23]

The Regional Director provided a copy of all comments to the Tribes. The Tribes were given an opportunity to respond to those comments pursuant to 25 C.F.R. § 151.10.[24] The Tribes submitted a response to the State's comments to the Regional Office on September 25, 2015.[25] The Regional Director issued the Decision that gave rise to State's appeal on March 10, 2016.[26]

On April 1, 2016, the State gave its Notice of Appeal of the Regional Director's Decision to acquire Pe'Sla in trust.[27] On April 6, 2016, 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 April 11, 2016. The State subsequently filed an opening brief. The Tribes and Regional Director filed separate briefs in response, and the State filed a reply brief. After carefully considering those briefs and the administrative record, and for the reasons explained below, I now affirm the Regional Director's Decision to acquire the Property in trust.

III. Standard of Review

The Board's standard of review in trust acquisition cases is well established, and I have adopted the Board's standard for this process.[28] As a reviewing official, having assumed jurisdiction of an appeal from the Board, I have determined that it is prudent to apply the Board's standards. Therefore, I will not substitute my judgment for that of the Regional Director's in reviewing fee to trust decisions.[29] Instead, I will review fee to trust decisions over which I have assumed jurisdiction to determine whether the Regional Director gave proper consideration to all legal prerequisites to exercise the Secretary's discretionary authority to place land into trust.[30] An appellant bears the burden of proving that the Regional Director did not properly exercise his discretion.[31] Simple disagreement with or bare assertions concerning the Regional Director's decisions are insufficient to carry this burden of proof.[32]

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[23] *Id*. at 635-643.
[24] 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 replay and/or request that the Secretary issue a decision."
[25] *See* letter from Kurt V. BlueDog, General Counsel, Shakopee Mdewakanton Sioux Community to Timothy L. Lapointe, Regional Director, BIA (Sept. 25, 2015)(AR Tab 24).
[26] *See* Reg'l Dir.'s Notice of Decision (Mar. 10, 2016)(AR Tab 4).
[27] *See* Notice of Appeal (Apr. 1, 2015)(AR Tab 2).
[28] *See Capay Valley Coal. v. Pac. Reg'l Dir., BIA*, Decision of the Assistant-Secretary Indian Affairs, U.S. Department of the Interior at 5 (August 14, 2015), *see also Shawano Cnty. Wis. v. Midwest Reg'l Dir., BIA*, Decision of the Assistant-Secretary Indian Affairs, U.S. Department of the Interior at 7 (Sept. 22, 2016).
[29] *See Shawano Cnty., Wis. v. Acting Midwest Reg'l Dir.*, 53 IBIA 62, 68 (2011); *see also Arizona State Land Dep't v. Western Reg'l Dir.*, 43 IBIA 158, 159-60 (2006).
[30] *See Shawano Cnty.*, 53 IBIA at 68.
[31] *See id*. at 69; *see also Arizona State Land Dep't*, 43 IBIA at 160; *see also State of South Dakota v. Acting Great Plains Reg'l Dir.*, 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*, 486 F.3d 548 (8th Cir. 2007).
[32] *See Shawano Cnty.*, 53 IBIA at 69; *Arizona State Land Dep't*, 43 IBIA at 160.

The Department's land acquisition regulations permit land to be acquired in trust for tribes pursuant to an act of Congress.[33] When evaluating tribal applications for trust acquisitions the record must show the Regional Director considered the criteria set forth in 25 C.F.R §§ 151.10 and 151.11, but "there is no requirement that BIA reach a particular conclusion with respect to each factor."[34] The factors need not be "weighed or balanced in any particular way or exhaustively analyzed."[35] 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.[36]

In contrast to the limited review of BIA discretionary decisions as explained above, similar to the Board, I review any legal issues raised in a trust acquisition case, except those challenging the constitutionality of laws or regulations.[37] An appellant bears the burden of proving that the BIA's decision was in error or not supported by substantial evidence.[38]

IV. Review of the Regional Director's Analysis under 25 C.F.R. 151.10

I conclude that the State has not met its burden of showing that the Regional Director failed to properly exercise his discretion, that he committed error, or that the Decision is not supported by substantial evidence. I therefore affirm the Decision.

A. Analysis of the Statutory Authority for the Acquisition

Section 151.10(a) requires BIA to consider the "existence of statutory authority for the acquisition and any limitations contained in such authority."[39] Here, the Regional Director cited the IRA as the authority for the trust acquisition of the Property.[40]

The State makes several arguments challenging the Regional Director's statutory authority to acquire Pe'Sla in trust. First, the State argues that the IRA only authorizes the Department to place property into trust for the benefit of a singular tribe.[41] Second, the State argues that the Department is not authorized to place property into trust for Shakopee because it was not under Federal jurisdiction in 1934.[42] Third, the State argues that, if Pe'Sla is acquired in trust, the Department would be recognizing the intertribal entity created to manage Pe'Sla as a new tribe contrary to law.[43] I will address each argument in turn.

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[33] *See* 25 C.F.R. § 151.3(a).
[34] *Shawano Cnty.*, 53 IBIA at 68-69; *Arizona State Land Dep't*, 43 IBIA at 160.
[35] *Shawano Cnty.*, 53 IBIA at 69; *see Cnty. of Sauk, Wis. v. Midwest Reg'l Dir., BIA*, 45 IBIA 201, 206-07 (2007), *aff'd sub nom. Sauk Cnty. v. U.S. Dep't of the Interior*, No. 07-543, 2008 WL 2225680 (W.D. Wis. May 29, 2008).
[36] *See Vill. of Hobart, Wis. v. Midwest Reg'l Dir.*, 57 IBIA 4, 13 (2013).
[37] *See Shawano Cnty.*, 53 IBIA at 69.
[38] *See Arizona State Land Dep't*, 43 IBIA at 160; *Cass Cnty., Minn. v. Midwest Reg'l Dir.*, 42 IBIA 243, 247 (2006).
[39] 25 C.F.R. § 151.10(a).
[40] *See* Reg'l Dir.'s Notice of Decision (Mar. 10, 2016) (AR Tab 4 at 41-43).
[41] *See* Appellant's Opening Brief at 3, *State of S.D. v. Great Plains Reg'l Dir. BIA* (2016).
[42] *See id.*
[43] *See id* at 7-11.

(1) The IRA Authorizes the Department to Accept Pe'Sla in Trust

The State contends that Section 5 of the IRA only authorizes the Department to acquire land in trust on behalf of a single tribe, which precludes the Regional Director from acquiring Pe'Sla for the Tribes.[44] The State cites to language in Section 5 providing that "title to any lands or rights acquired pursuant to this Act … shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired."[45]

The State's cramped reading ignores other language in Section 5, which authorizes the Secretary "[t]o acquire . . . *any interest* in lands . . . within or without existing reservations . . . for the purpose of providing land for *Indians*."[46] The IRA's reference to "any interest" encompasses partial interests. The reference to "Indians" is not limited to one tribe or one individual Indian. Indeed, the Department accepts and holds land into trust for multiple tribes and its decisions to do so have not been disturbed by the courts.[47] The purpose of the sentence from Section 5 quoted by Applicant is to clarify that the land will be acquired in trust; the IRA also makes clear that the Department may hold land in trust for multiple tribes. Here, the Department will hold the individual interests held by the four Tribes in trust for each Tribe.[48]

Even assuming the reference to the Secretary's authority to acquire "any interest" for "Indians" in Section 5 is ambiguous, which it is not, under the Indian canon of construction, ambiguous statutory provisions are to be interpreted to the benefit of Indians, [49] and support the Decision here. In addition, the State's position ignores the fact that these lands were reserved in the Treaty of Fort Laramie as the permanent home for the Great Sioux Nation, and the lands are sacred to the Tribes. Accepting land in trust for the Tribes falls squarely within the IRA's plain language and statutory intent.[52] Indeed, it would be nonsensical to apply the IRA, an act designed to remedy repudiated policies aimed at destroying tribal governments, in a manner that frustrated the very purpose of restoring tribal homelands to the tribes that survived those repudiated policies. Further, the Department routinely holds land, or interests in land, in trust for multiple tribes.[53] Thus, the State's proposed reading of Section 5 is contrary to the plain language of the IRA and its purpose of ameliorating the loss of tribal lands.

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[44] *See id* at 5.
[45] Appellant's Opening Brief at 6, *State of S.D. v. Great Plains Reg'l Dir. BIA* (2016).
[46] 25 U.S.C. § 5108 (emphasis added). The IRA defines "Indian" as "all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood." 25 U.S.C. § 5129.
[47] *Cf. Neighbors for Rational Dev. v. Norton*, 379 F.3d 956 (10th Cir. 2004) (dismissing challenge to land placed into trust for nineteen Pueblos in New Mexico).
[48] The State's reliance on the definition of "tribe" in the Section 19 of the IRA and BIA's land into trust regulations likewise misses the mark. Those definitions only go to whether an entity qualifies as a "tribe" under the IRA or the regulations; they do not limit the Secretary's authority to acquire multiple interests for multiple tribes.
[49] *See County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 269 (1992).
[52] *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973).
[53] The Department accepts land on the Wind River Reservation in trust jointly for the Eastern Shoshone and Northern Arapaho Tribes. *See* the Act of July 27, 1939, 53 Stat. 1128. The Omnibus Indian Advancement Act, Pub.

Citing the IRA and the Department's land-into-trust and acknowledgment regulations, the State also argues that the Department lacks authority to acquire land in trust for "an entity formed by the four tribes that own Pe'Sla."[54] The State's argument is not supported by the facts in the record and the Decision. The Regional Director is not acquiring land in trust for such an entity, but rather is acquiring distinct interests for the separate tribes. The fact that the tribes may create an entity in the future to jointly *manage* and *protect* the property does not affect the analysis or the Department's authority.[55]

In its opening brief, the State acknowledges that the IRA may allow for the trust acquisition of partial interests in land, but cautions against it, arguing that the Federal Government would hold Pe'Sla in a "bare trust."[56] The "bare trust" cases the State cites are off the mark. Each of those cases involve scenarios in which tribal governments sued the United States for financial damages related to mismanagement of natural resources. They do not limit or affect Department's authority to acquire land in trust under the IRA. The plain language of Section 5 and broad remedial purposes of the IRA support the Decision here.

The State also cites to language in BIA's Fee-to-Trust Handbook[57] referring to an applicant as an "individual or tribe" to support its argument that the acquisitions here were improper.[58] However, the Fee-to-Trust Handbook is procedural guidance; it does not limit BIA's statutory and regulatory authority. Here, the Tribes applied to have their separate interests acquired in trust through submitting separate resolutions, as provided for in the Fee-to-Trust Handbook.[59]

(2) The Tribes Were Clearly Under Federal Jurisdiction in 1934

Next, the State alleges that the Regional Director is not authorized to acquire Pe'Sla in trust on the basis that Shakopee was not under Federal jurisdiction in 1934.[60] The State's argument arises from the Supreme Court's decision in *Carcieri v. Salazar*.[61] The Court held that the IRA limits the Department's authority under the first definition of "Indian" to acquire land into trust for "those tribes that were under the federal jurisdiction of the United States when the IRA was enacted in 1934."[62]

L. No. 106-568, § 411(b), 114 Stat. 2868, 2904 (2000), mandates the acquisition of land on behalf of several Sioux tribes. Tribes in Oklahoma also share trust land.

[54] *See* Appellant's Opening Brief at 6, *State of S.D. v. Great Plains Reg'l Dir. BIA* (2016).

[55] *See* Tribes' Fee-to-Trust Application (Nov. 12, 2014)(AR Tab 80 at 1467 and 1495).

[56] *See* Appellant's Opening Brief at 8-9, *State of S.D. v. Great Plains Reg'l Dir. BIA* (2016).

[57] Department of the Interior, Bureau of Indian Affairs, Office of Trust Services, Division of Real Estate Services, Acquisition of Title to Land Held in Fee or Restricted Fee Status Handbook, Release # 16-47, Version IV (rev. 1), 31-38 (6/28/16) available at http://bia.gov/WhatWeDo/Knowledge/Directives/Handbooks/index.htm.

[58] *See* Appellant's Opening Brief at 6-7, State of S.D. v. Great Plains Reg'l Dir. BIA (2016).

[59] As explained by the Regional Director, the applicant Tribes each submitted separate resolutions for separate interests, *see* Reg'l Dir.'s Notice of Decision (Mar. 10, 2016) (AR Tab 4 at 40), as required by the Fee-to-Trust Handbook. *See* Fee-to- Trust Handbook, Release # 16-47, Version IV (rev. 1), 31-38 (6/28/16) at 17, available at http://bia.gov/WhatWeDo/Knowledge/Directives/Handbooks/index.htm. But, given the joint ownership structure, and the history of these lands, it made sense and conserved resources for the Tribes to submit one joint application with the same supporting materials. Nothing in the Fee-to-Trust Handbook forecloses a joint application.

[60] *See* Appellant's Opening Brief at 3-4, *State of S.D. v. Great Plains Reg'l Dir. BIA* (2016).

[61] 555 U.S. 379 (2009).

[62] *Id*. at 395.

The State raises its argument that the Shakopee were not under Federal jurisdiction in 1934 for the first time on appeal. The Board normally does not consider arguments or evidence made for the first time on appeal.[63] I adopt the Board's approach. However, even if I were required to consider it, I find that the State's argument lacks merit.

The Regional Director correctly concluded that all four Tribes were under Federal jurisdiction when the IRA was enacted in 1934.[64] In 2014, the Department's Solicitor issued M-Opinion 37029, "[t]he Meaning of 'Under Federal Jurisdiction' for Purposes of the Indian Reorganization Act" (M-Opinion).[65] The M-Opinion sets forth a two part inquiry to determine whether a tribe was under Federal jurisdiction in 1934.[66] The first part of the inquiry requires an examination of "whether there is a sufficient showing in the tribe's history, at or before 1934, that it was under federal jurisdiction . . ." The second part of the inquiry requires a determination as to "whether the tribe's jurisdictional status remained intact in 1934."[67] The M-Opinion also concludes that some evidence or actions are dispositive of whether a tribe was under Federal jurisdiction in 1934, such as a vote shortly following the IRA's enactment whether to accept the IRA.[68]

After the M-Opinion was released, the Board subsequently determined that the M-Opinion is consistent with its prior analysis of whether a tribe was under Federal jurisdiction in 1934.[69] Further, the Board has stated that consideration of historical evidence is "necessary and appropriate" when the Department is making a determination as to whether a tribe was under Federal jurisdiction in 1934.[70]

As explained in the Regional Director's Notice of Decision, the Rosebud, the Standing Rock, and the Crow Creek voted on whether to accept or reject the IRA shortly after its enactment and were therefore under Federal jurisdiction in 1934.[71] The Shakopee did not vote on whether to accept or reject the IRA. However, the record demonstrates that they were under Federal jurisdiction prior to 1934 and that their jurisdictional status remained intact in 1934. The Shakopee are a successor in interest to the Mdewakanton and Wahpekute Dakota bands that signed treaties with the United States between 1805 and 1858.[72] In 1863, following the conflict

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[63] *See Vill. of Hobart, Wis. v. Midwest Reg'l Dir., BIA*, 57 IBIA 4, 13 (2013) ("The scope of the Board's review ordinarily is 'limited to those issues that were before the . . . BIA official on review.' 43 C.F.R. § 4.318. Thus, the Board ordinarily will decline to consider for the first time on appeal matters that could have been but were not first raised before the Regional Director. *See Kansas v. Acting Southern Plains Reg'l Dir.*, 53 IBIA 32, 36 (2011)").
[64] *See* Reg'l Dir.'s Notice of Decision (Mar. 10, 2016) (AR Tab 4 at 41-42).
[65] Solicitor's Opinion M-37029 Memorandum from the Office of the Solicitor, U.S. Dep't of the Interior to the Secretary of the Interior, The Meaning of "Under Federal Jurisdiction" for Purposes of the Indian Reorganization Act, (Mar. 12, 2014).
[66] *See id* at 19-20.
[67] *Id.* at 19.
[68] *See id.* at 20-21.
[69] *See State of New York; Franklin County, New York; and Town of Fort Covington, New York v. Acting Eastern Reg'l Dir., BIA*, 58 IBIA 323, 334-335 n. 17 (2014).
[70] *Grand Traverse Cnty. Bd. of Comm'rs v. Acting Midwest Reg'l Dir., BIA*, 61 IBIA 273, 281 (2015).
[71] *See* Reg'l Dir.'s Notice of Decision (Mar. 10, 2016) (AR Tab 4 at 41); *see* Theodore Haas, Ten Years of Tribal Government Under IRA, 18-19 (1947).
[72] *See* Reg'l Dir.'s Notice of Decision (Mar. 10, 2016) (AR Tab 4 at 42); s*ee e.g.*, Treaty of July 15, 1830, 7 Stat. 328; Treaty of September 29, 1837, 7 Stat. 538; Treaty with the Sioux—Mdewakanton and Wahpakoota Bands,

with certain Dakota, Congress terminated payment to the Dakota Bands under the treaties[73] and sought to remove the Dakota Bands from Minnesota.[74] Some remained in Minnesota, and others later returned to Minnesota.

From 1886 to 1890, Congress, through a series of acts, appropriated funds for and purchased land to be held by the United States for the benefit and use of the Mdewakanton.[75] These appropriations were used to purchase lands for the Mdewakanton in Prior Lake, Prairie Island, and at the Lower Sioux Agency.[76] In 1905, the Department began administering a land assignment system for the Dakota at Prior Lake.[77] The Regional Director concluded that the treaties, congressional acts providing for the purchase of land and appropriations, as well as other acts of Federal supervision established that the Shakopee was under Federal jurisdiction in 1934.

In addition, Departmental communication immediately following passage of the IRA also demonstrates that the Shakopee's jurisdictional status remained intact in 1934. In 1935, Commissioner of Indian Affairs John Collier wrote:

> In view, however, of the fact that there are restricted lands upon which these Indians are now living, it would appear possible to recognize the Mdewakanton Sioux either as one group with jurisdiction over all of the five or six localities or as five or six groups each with jurisdiction over the land . . . There appears to be a legal basis for either form of organization.[78]

The Indians living on the Prior Lake Reservation eventually organized under the IRA in 1969 as the Shakopee Mdewakanton Sioux Community.[79]

In 1980, Congress enacted Public Law 96-557, which provides:

> That all right, title, and interest of the United States in those lands (including any structures or other improvements of the United States on such lands) which were acquired and are now held by the United States for the use or benefit of Certain Mdewakanton Sioux Indians under the Act of June 29, 1888 (25 Stat. 217); the Act of March 2, 1889 (25 Stat. 980); and the Act of August 19, 1890 (26 Stat. 336), are hereby declared to hereafter be held by the United States—(1) with respect to the some 258.25 acres of such lands located within Scott County,

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Aug. 5, 1851, 10 Stats., 954, Proclaimed Feb. 24, 1853; and Treaty with the Sioux, June 19, 1858, 12 Stats., 1031, Ratified Mar. 9, 1859, Proclaimed Mar. 31, 1859.

[73] *See* Act of Feb. 16, 1863, ch. 37, 12 Stat. 652.

[74] *See* Act of Mar. 3, 1863, ch. 119, 12 Stat. 819.

[75] *See* 24 Stat. 29, 25 Stat. 217, 25 Stat. 980, and 26 Stat. 336. The State argues, for the first time in its reply brief, that these land acquisitions were for individual Mdewakanton that "have severed their tribal relations," and thus demonstrate that Shakopee was not under Federal jurisdiction in 1934. Appellant's Reply Brief at 7, *State of S.D. v. Great Plains Reg'l Dir. BIA* (2016). The Board normally does not consider arguments made for the first time in a reply brief, and I adopt this approach. However, M-37029 recognizes that actions demonstrating Federal obligations to both tribes and members are sufficient to demonstrate Federal jurisdiction. *See* M-37029 at 19.

[76] *See* Reg'l Dir.'s Notice of Decision (Mar. 10, 2016) (AR Tab 4 at 43).

[77] *See id.*

[78] Correspondence from John Collier to Joe Jennings, Pine Ridge Agency, p. 2 (Nov 27, 1935).

[79] *See* Reg'l Dir.'s Notice of Decision (Mar. 10, 2016) (AR Tab 4 at 43).

> Minnesota, in trust for the Shakopee Mdewakanton Sioux Community of Minnesota . . .[80]

The State does not dispute any of this history, nor could it. Rather, the State argues that the Shakopee were not under Federal jurisdiction in 1934 because they were not recognized until 1969. The State improperly conflates two distinct concepts and ignores both the text of the IRA and the Supreme Court's decision in *Carcieri*. As explained by the Solicitor in M-Opinion 37029, the IRA only requires that a tribe be under Federal jurisdiction in 1934 and "recognized" at the time the statute is applied.[81] "As Justice Breyer explained in his concurrence [in *Carcieri*], the word 'now' modifies 'under federal jurisdiction,' but does not modify 'recognized.' As such, he aptly concluded that the IRA 'imposes no time limit on recognition.'"[82] The Solicitor's interpretation of the first definition of "Indian," including her conclusion that a tribe need not be "recognized" in 1934 has been upheld by the courts, most recently by the Court of Appeals for the D.C. Circuit in *Confederated Tribes of the Grande Ronde Cmty. of Or. v. Jewell*.[83]

The State's argument that Shakopee's organization in 1969 means that they were not under Federal jurisdiction in 1934 is therefore without merit. The Regional Director, consistent with Board precedent and M-Opinion 37029, properly concluded that the Shakopee Mdewakanton Sioux Community was under Federal jurisdiction in 1934 and eligible to have land accepted in trust on their behalf.

(3) The State's Remaining Statutory Authority Arguments Are Without Merit

The State argues that the Department is accepting land in trust on behalf of an intertribal body organized to manage Pe'Sla, which would result in the recognition of an illegally recognized tribal government.[84] This argument is also without merit. The Tribes submitted a joint application to have their interests of land taken into trust, and the Regional Director's Decision was to acquire the land in trust on behalf of the tribes, not the intertribal management entity.[85] The State did not proffer a cognizable claim, and thus did not meet its burden.

Additionally, the State argues that the Regional Director's decision is flawed because the Tribes requested the Regional Director to issue a reservation proclamation for the land subject to their trust application. According to the State, the Tribes must have meant for the reservation to be proclaimed for the intertribal management body.[86] The State does not cite to anything in the record to support this assertion. In any event, this argument is not ripe as the Regional Director has not issued a reservation proclamation for Pe'Sla pursuant to Section 7 of the IRA.[87] The

[80] 94 Stat. 3262.
[81] M-Opinion 37029 at 23.
[82] *Id*. at 24.
[83] *See* 830 F.3d 552 (D.C. Cir. 2016).
[84] *See* Appellant's Opening Brief at 5-8, *State of S.D. v. Great Plains Reg'l Dir. BIA* (2016).
[85] *See* Reg'l Dir.'s Notice of Decision (Mar. 10, 2016)(AR Tab 4 at 57-58).
[86] *See* Appellant's Opening Brief at 10, *State of S.D. v. Great Plains Reg'l Dir. BIA* (2016).
[87] *See* Appellant's Reply Brief at 20, *State of S.D. v. Great Plains Reg'l Dir. BIA* (2016).

Regional Director's decision is limited to review of the Tribe's application submitted pursuant to Section 5 of the IRA.

Finally, the State asserts that the Regional Director did not have authority to acquire the land in trust for the Tribes because Shakopee is located outside of the geographical boundaries of the BIA Great Plains Region.[88] While the Shakopee are located in the BIA Midwest Region, the authority to acquire Pe'Sla in trust is well within the authority of the Great Plains Regional Director. The Department of the Interior Departmental Manual reads, "[e]ach Regional Director is responsible for all Bureau activities, within a defined geographical area, except education and law enforcement."[89] In other words, unless otherwise circumscribed, the Regional Director's authority is determined by his or her geographical area and not the location of the particular tribe. The BIA activity of acquiring and managing trust land within the boundaries of the BIA Great Plains Region clearly falls within the jurisdiction of the Great Plains Regional Director.

The Regional Director properly exercised his authority to acquire Pe'Sla in trust for the Tribes.

B. 25 C.F.R § 151.10(b)

The Department's fee to trust regulations require consideration of "the need of . . . the tribe for additional land."[90] The State argues that "[t]he Tribe failed to assert a need" for Pe'Sla to be held in trust.[91] The State acknowledges that "[t]he Tribes have indicated that they wish to preserve Pe Sla as a sacred site for themselves and their ancestors."[92] However, the State argues the Tribes have not suggested "how holding the property in fee simple prohibits any such use of this property."[93]

The State correctly states that "an applicant to take property in trust need not demonstrate the need for additional property to be held in trust – just the need for additional property."[94] However, without citing any statutory language or case law, the State argues that the "applying Tribes should articulate their need to have the property placed in trust" due to the distance between Pe'Sla and the nearest reservation of the applicant Tribes.[95] No such interpretation is required by the plain reading of §151.10(b) nor prior decisions of the Board or any Federal court.

Courts have regularly held that the Department is only required to address a tribe's need for land. Indeed, the Eighth Circuit rejected this very argument by the State more than a decade ago.[96] Accordingly, I do the same. The Tribes are not required to justify why the land should be held in trust, as opposed to fee status.[97] Even if they were required to do so, the Regional

[88] *See* Appellant's Opening Brief at 2-3, *State of S.D. v. Great Plains Reg'l Dir. BIA* (2016).
[89] 130 DM 6.3(A).
[90] 25 C.F.R. § 151.10(b).
[91] *See* Appellant's Opening Brief at 12, *State of S.D. v. Great Plains Reg'l Dir. BIA* (2016).
[92] *Id.*
[93] *Id.*
[94] *Id.* at 12-13.
[95] *Id.* at 13.
[96] *See South Dakota v. U.S. Dep't of the Interior*, 423 F.3d 790, 801 (8th Cir. 2005) (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.").
[97] *See Pres. of Los Olivos and Pres. of Santa Ynez v. Pacific Reg'l Dir., BIA*, 58 IBIA 278, 314 (2014).

Director explained that the Tribes' primary need for Pe'Sla in trust status is to "advance Tribal self-determination with cultural and religious preservation."[98] Further, the Regional Director stated that the Tribes' "acquired this land in hopes to protect the property and the religious rights of their Tribal members from the encroachment of foreign jurisdictions."[99] As explained by the Regional Director, the Tribes' desire to protect property considered sacred, as acknowledged by the County, by placing it in trust with the Department clearly satisfies 151.10(b) even under the State's reading of this criteria.

The "BIA has broad leeway in its interpretation or construction of tribal 'need' for [] land," and "flexibility in evaluating 'need' is an inevitable and necessary aspect of BIA's discretion."[100] State or local governments do not define the Tribe's need, or lack therefore, for land.[101]

The Regional Director's conclusions regarding the Tribes' need are supported by the Tribes' application, in which they noted that "Pe Sla is one of our most precious sacred sites . . . and is central to our existence."[102] For that reason, the Tribes' application stated they needed the land to ensure that Pe'Sla "is never alienated or...disturbed in a way that would jeopardize" the Tribes' culture and traditions.[103] Placing the land in trust protects this land for future generations as only Congress can remove land validly accepted into trust. Further, the Tribes stated that Pe'Sla "was going to be developed" unless they purchased and protected the land.[104] The Tribes also noted that Pe'Sla is home to hundreds of culturally significant sites.[105]

The Decision demonstrates that the Regional Director considered the Tribe's need for the Property. The Regional Director's findings, supported by the Administrative Record, are sufficient to show that he considered the Tribes' need for additional land under Section 151.10(b).[106] Accordingly, the Regional Director fulfilled his obligations under § 151.10(b), and I affirm his conclusions.

C. 25 C.F.R. § 151.10(f)

Under 25 C.F.R. § 151.10(f), BIA must consider "[j]urisdictional problems and potential conflicts of land use which may arise" from the acquisition of the Property in trust. While these problems and potential conflicts need to be considered, BIA is not required to resolve

[98] Reg'l Dir.'s Notice of Decision (Mar. 10, 2016)(AR Tab 4 at 43).
[99] *Id.*
[100] *County. of Sauk*, 45 IBIA at 209.
[101] *See id.*
[102] Tribes' Fee-to-Trust Application (Nov. 12, 2014)(AR Tab 80 at 1471).
[103] *Id*.
[104] *Id*.
[105] *Id.* at 1472.
[106] *Shawano County, Wisconsin v. Acting Midwest Reg'l Director*, 53 IBIA 62, 68-69 (2011) ("Proof that the Regional Director considered the factors set forth in 25 C.F.R. § 151.10 must appear in the record, but there is no requirement that BIA reach a particular conclusion with respect to each factor. *See* [*Arizona State Land Dep't*, 43 IBIA at 160]; *Eades v. Muskogee Area Director*, 17 IBIA 198, 202 (1989). Nor must the factors be weighed or balanced in a particular way or exhaustively analyzed. *Jackson County v. Southern Plains Regional Director*, 47 IBIA 222, 231 (2008); *Aitkin County v. Acting Midwest Regional Director*, 47 IBIA 99, 104 (2008); *County of Sauk v. Midwest Regional Director*, 45 IBIA 201, 206-07 (2007), *aff'd sub nom. Sauk County v. U.S. Department of the Interior*, No. 07 C 0543 S (W.D. Wis. May 29, 2008)").

these problems or conflicts.[107] The BIA fulfills its obligations under § 151.10(f) as long as it "undertake[s] an evaluation of potential problems."[108] An appellant's mere disagreement with a decision is not sufficient to demonstrate that the Regional Director abused his discretion.[109]

The State argues that it opposes the trust acquisition of Pe'Sla due to its various concerns regarding criminal and civil jurisdiction once the land is placed in trust.[110] The State also asserts that "[t]he Regional Director should have required the Tribes to rectify all concerns surrounding criminal and civil jurisdiction prior to accepting this property into trust."[111] However, at no point does the State argue that the Regional Director failed to fulfill his duty to *consider* potential jurisdictional issues as is required by Section 151.10(f). The State merely disagrees with the Regional Director's conclusions, and seeks to impose additional requirements not contained in the IRA or the regulations.

The Regional Director acknowledged that there may be jurisdictional issues after trust acquisition, just as there are between cities and counties, but that the Property would be treated the same as other trust land. He noted that jurisdiction will be transferred to BIA and tribal law enforcement. He also summarized the Tribes' extensive efforts to address the potential for jurisdictional conflicts with local governments, recognizing the Tribes' "firm commitment to work through any jurisdictional issues with the County, State, and Federal governments, [and] have entered into service agreements for the protection of . . . members and the public in general..."[112] Importantly, the Tribes have negotiated cooperative agreements with the County to address law enforcement, fire protection, emergency services, right-of-way, and invasive species issues.[113] These agreements are intended to ensure law enforcement, aid services, and other services are provided at Pe'Sla. In addition, the record reflects that the Black Hills Forest

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[107] *New York*, 58 IBIA at 346 (*citing Roberts Cnty., S.D.; State of S.D. and Sisseton Sch. Dist. No. 54-2; City of Sisseton, S.D.; and Wilmot Sch. Dist. No. 54-7 v. Acting Great Plains Reg'l Dir., Bureau of Indian Affairs*, 51 IBIA 35, 52 (2009)).

[108] *South Dakota v. U.S. Dep't of the Interior*, 775 F. Supp. 2d 1129, 1143-1144 (D.S.D. 2011) (citing *South Dakota v. U.S. Dep't of the Interior*, 314 F. Supp. 2d 935, 945 (D.S.D. 2004) (citing *Lincoln City v. U.S. Dep't of the Interior*, 229 F. Supp. 2d 1109, 1124 (D. Or. 2001))).

[109] *See Shawano County*, 53 IBIA at 69; *see also Arizona State Land Dep't*, 43 IBIA at 160.

[110] *See* Appellant's Opening Brief at 13-15, *State of S.D. v. Great Plains Reg'l Dir. BIA* (2016).

[111] *See* Appellant's Reply Brief at 9, *State of S.D. v. Great Plains Reg'l Dir. BIA* (2016).

[112] Reg'l Dir.'s Notice of Decision (Mar. 10, 2016)(AR Tab 4 at 58).

[113] *See id*. at 55; *see also* Agreement for Construction and Maintenance of County Right-of-Way Roads Within the Area Known as Pe Sla and for Pest Control, Including Bark Beetles, and Control of Invasive Species (July 28, 2015)(AR Tab 43 at 903-06); *see also* Agreement for Cooperative Law Enforcement and Cross Deputization for the Area Known as Pe Sla (Aug. 3, 2015)(AR Tab 43 at 907-12); *see also* letter from Lyndell Petersen, Chairman, Pennington Cnty. Bd. of Comm'rs to Tim LaPointe, Reg'l Dir., BIA (July 21, 2015)(AR Tab 44 at 914-15); and *see also* letter from Craig Bobzien, Forest Supervisor to Timothy L. LaPointe, Regional Director, BIA (June 29, 2015)(AR Tab 46 at 928). The State questions the validity of the cooperative law enforcement agreement between the Tribes, BIA, and the County because it did not include the signature of the County Sheriff. *See* Appellant's Opening Brief at 14, *State of S.D. v. Great Plains Reg'l Dir. BIA* (2016). As noted in the Decision, the Sheriff was involved in discussions about the agreement, but any dispute regarding the appropriate signatures on the agreement is not for BIA to resolve. *See* Reg'l Dir.'s Notice of Decision (Mar. 10, 2016)(AR Tab 4 at 55). In any event, the Decision's discussion of the jurisdictional status of the Property following trust acquisition, the Tribe's commitment to work through any jurisdictional issues, and discussion of comments from the State and County, met the Regional Director's burden to consider jurisdictional issues.

Supervisor stated that the U.S. Forest Service will cooperate in fire management activities on Pe'Sla.[114]

The State again asserts that Pe'Sla will be held in a "bare trust," which it alleges would create a vacuum of criminal jurisdiction in which the Tribes would be solely responsible for law enforcement on the property.[115] To support this assertion, the State again erroneously relies on a series of cases in which tribal governments sought financial damages for alleged Federal mismanagement of tribal natural and economic resources.[116] These cases are irrelevant to the question of criminal jurisdiction on Indian country, which is governed by a patchwork of Federal, state, and tribal law.[117] In other words, trust acquisition here will not create a jurisdictional vacuum, but, as noted by the Regional Director, the Property will be governed by the same laws that govern other trust land. Acknowledging that the Property is located outside of the boundaries of the Tribes' Reservations, the Regional Director also found that BIA and the Tribes are equipped to provide law enforcement services.

The State also raises concerns regarding civil jurisdiction once Pe'Sla is acquired in trust, asking about a legal remedy for the victims of torts that may occur on the property.[118] But no Federal law or regulation requires tribes to waive sovereign immunity or carry insurance on property in order for it to be acquired in trust, and we decline to impose such a requirement here. Rather, it was sufficient for the Regional Director to conclude that Pe'Sla would be treated as other trust land, and will be subject to tribal jurisdiction. The Regional Director also met his burden in considering potential conflicts of land use, noting that the use of the property will not change once in trust status, and is being overseen by the Tribe in collaboration with the Indian Land Tenure Foundation.[119]

In the Decision, the Regional Director states that the trust acquisition "will not have a negative effect on the jurisdictional problems that may already exist," and may actually improve care of the property because Pe'Sla "will be subject to tribal jurisdiction and care."[120] As previously stated, the Regional Director extensively and appropriately considered jurisdictional and land use issues at Pe'Sla. The State has therefore not met its burden on appeal with regard to Section 151.10(f).

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[114] *See* letter from Craig Bobzien, Forest Supervisor to Timothy L. LaPointe, Regional Director, BIA (June 29, 2015)(AR Tab 46 at 928).
[115] *See* Appellant's Opening Brief at 13, *State of S.D. v. Great Plains Reg'l Dir. BIA* (2016).
[116] *See id*. at 8-9 **(**citing *United States v. Mitchell*, 463 U.S. 206 (1983); *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003); *Hydaburg Co-op. Ass'n v. United States*, 667 F.2d 64 (Ct. Cl. 1981)).
[117] *See United States v. Bryant*, 136 S.Ct. 1954, 1959-60 (2016); s*ee generally* Felix Cohen, Cohen's Handbook of Federal Indian Law Ch. 9 (Nell Jessup Newton, et al. eds., 2012).
[118] *See* Appellant's Opening Brief at 14, *State of S.D. v. Great Plains Reg'l Dir. BIA* (2016).
[119] Reg'l Dir.'s Notice of Decision (Mar. 10, 2016)(AR Tab 4 at 46).
[120] *Id*. at 45.

(D) 25 C.F.R. § 151.10(g)

The 25 C.F.R. § 151.10(g) requires BIA to consider whether it is "equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status." The State claims that it believes BIA is unable to handle any additional responsibilities that will occur as a result of acquiring Pe'Sla in trust, in part due to the distance between the Property and the nearest reservation. The State further argues that "[n]either the Tribes' application nor the Regional Director's decision letter indicates how [the trust] acquisition [of Pe'Sla] will trigger any additional Bureau resources."[121]

As previously stated by the Board, "the determination of whether BIA can handle the additional duties is 'a managerial judgment that falls within BIA's administrative purview [and] we do not construe § 151.10(g) to necessarily require BIA' to include evidence of such ability in the record."[122]

In his decision, the Regional Director considers additional BIA duties relating to law enforcement at Pe'Sla. The Decision concludes that the "Tribes, BIA, and the County have addressed any additional duties related to criminal jurisdiction through the cooperative law enforcement agreement."[123] The Regional Director also concludes that Federal and tribal law enforcement officers would be able to fully discharge any additional law enforcement duties at Pe'Sla without assistance of the county.[124]

Beyond criminal jurisdiction, the Regional Director concluded that "additional duties placed upon the BIA will be minimal."[125] The Tribes' application states that they will use Pe'Sla "solely for cultural and spiritual purposes" and that "no difference in the land's use will occur" once the property is taken into trust.[126] The Regional Director also noted that there will be no permanent residents on Pe'Sla beyond a few caretakers.[127] The administrative record supports the Regional Director's conclusion that the acquisition of Pe'Sla will not require significant additional duties be undertaken by BIA.

The State's bare assertions regarding BIA's inability to discharge responsibilities related to the Property, contradicted by the Record and the Decision, are insufficient to meet its burden on appeal with regard to § 151.10(g).

[121] Appellant's Opening Brief at 16, *State of S.D. v. Great Plains Reg'l Dir. BIA* (2016).
[122] *State of Kansas and Jackson County, Kansas v. Acting Southern Plains Reg'l Dir., BIA*, 56 IBIA 220, 228 (2013) (citing *State of Kansas v. Acting Southern Plains Reg'l Dir., BIA*, 53 IBIA 32, 39 (2011)).
[123] Reg'l Dir.'s Notice of Decision (Mar. 10, 2016)(AR Tab 4 at 54-55).
[124] *See id*. at 55.
[125] *Id*.
[126] Tribes' Fee-to-Trust Application (Nov. 12, 2014)(AR Tab 80 at 1473).
[127] *See* Reg'l Dir.'s Notice of Decision (Mar. 10, 2016)(AR Tab 4 at 55).

(E) 25 C.F.R. § 151.11(b)

The 25 C.F.R. 151.11(b) provides, in relevant part, "The location of the land relative to state boundaries, and its distance from the boundaries of the tribe's reservation shall be considered as follows: as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition." The State does not dispute that BIA carefully examined the distance of the Property from the Tribes' Reservations and state boundaries. The State argues that, because the Property is 170 miles away from the closest Reservation, BIA was required to give "great scrutiny to the justification for taking this property into trust."[128] The State argues that neither the Tribes nor the Regional Director considered the anticipated benefits of acquiring Pe'Sla in trust as required by section 151.11(b).[129]

"[B]are assertions, standing alone, are not sufficient to meet [the] burden of showing that the Regional Director's decision is unreasonable."[130] The State's assertions are belied by the Decision and the Tribes' applications, both of which demonstrate several benefits of accepting the property in trust. After explaining that "Pe Sla is innately tied to [the Tribes'] creation and existence," the Tribes' application states that "[t]rust status will ensure that [the Tribes] have perpetual access to Pe Sla" and that "the land is never alienated or otherwise disturbed in a way that would jeopardize the cultural traditions" of the Tribes.[131]

In his decision, the Regional Director extensively considered the anticipated benefits of the acquisition. The Decision noted that the acquisition will support the Tribes' goals of protecting the Property from encroachment from foreign jurisdictions and commercial development, and protecting the religious and spiritual beliefs of Tribal members.[132]

The States argument that the Regional Director did not consider the benefits of acquiring Pe'Sla is not consistent with the Decision and Administrative Record. As such, the State has not met its burden on appeal with regard to § 151.11(b).

[128] Appellant's Opening Brief at 17, *State of S.D. v. Great Plains Reg'l Dir. BIA* (2016).
[129] *See id.* at 16.
[130] *Ruth Morgan Linabery v. Acting Great Plains Reg'l Dir., BIA*, 53 IBIA 42, 48 (2011)(citing *Bird v. Acting Rocky Mountain Reg'l Dir.*, 48 IBIA 94, 104 (2008)).
[131] Tribes' Fee-to-Trust Application (Nov. 12, 2014)(AR Tab 80 at 1470-71).
[132] *See* Reg'l Dir.'s Notice of Decision (Mar. 10, 2016)(AR Tab 4 at 43-44, 48).

Conclusion

Pursuant to the authority delegated to me, 25 C.F.R. § 2.4(c), I affirm the Regional Director's March 10, 2016 decision to acquire approximately 2,022.66 acres in trust for the Rosebud Sioux Tribe, the Shakopee Mdewakanton Sioux Community, the Standing Rock Sioux Tribe, and the Crow Creek Sioux Tribe. The Regional Director shall approve and record the conveyance document accepting the Property in trust for the Tribes in accordance with 25 C.F.R. Part 151.

Dated: DEC 02 2016

Lawrence S. Roberts
Principal Deputy Assistant Secretary –
Indian Affairs