



## INTERIOR BOARD OF INDIAN APPEALS

City of Auburn, Washington; Citizens for Safety & Environment;  
City of Enumclaw, Washington v. Portland Area Director, Bureau of Indian Affairs

31 IBIA 183 (10/09/1997)

Reconsideration denied:

31 IBIA 217

Related Board cases:

37 IBIA 282

40 IBIA 87

Related court case:

*Citizens for Safety & Environment v. Bill Graham Enterprises, et al.*, No. C97-1775C  
(W.D. Wash. Mar. 20, 2003), appeal filed, *United States v. Bill Graham*,  
No. 03-35792 (9th Cir.)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
4015 WILSON BOULEVARD  
ARLINGTON, VA 22203

CITY OF AUBURN, WASHINGTON, Appellant	:	Order Dismissing Appeals and Remanding Cases
	:	
CITIZENS FOR SAFETY & ENVIRONMENT, Appellant	:	
	:	
CITY OF ENUMCLAW, WASHINGTON, Appellant	:	Docket Nos. IBIA 97-144-A IBIA 97-145-A IBIA 97-148-A
	:	
v.	:	
	:	
PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	October 9, 1997

Appellants City of Auburn, Washington; Citizens for Safety & Environment; and City of Enumclaw, Washington, each sought review of a May 30, 1997, decision of the Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), dismissing as premature appeals concerning a Finding of No Significant Impact (FONSI). Opening Briefs have been filed in these appeals.

On October 6, 1997, the Board of Indian Appeals (Board) received a Request for Remand from the Area Director. The Area Director asks the Board to dismiss these appeals with prejudice, and remand the matter to him so that he can direct the Superintendent, Puget Sound Agency, BIA (Superintendent) to retract the FONSI at issue here. In support of this request, the Area Director states at pages 1-2 of his Request for Remand:

On April 1, 1997, the Superintendent \* \* \* signed a [FONSI] relating to a proposed development of an amphitheater by the Muckleshoot Indian Tribe on fee land owned by the Tribe and located within the Muckleshoot Indian Reservation. At that time the Superintendent expected to soon receive a request from the Tribe for BIA action with respect to the amphitheater. \* \* \*

In the six months since the Superintendent signed the FONSI, he has not received any request for BIA action with respect to the amphitheater. Consequently, [the Area Director] believes that it would be appropriate to retract the FONSI, and avoid administrative litigation over the ability to seek review of a potentially moot document. When, and if, federal action by BIA is required

with respect to the Tribe's amphitheater project, the Superintendent will, of course, first comply with the National Environmental Policy Act [NEPA].

By retracting the FONSI, the Superintendent would not be making any conclusions as to the adequacy of the FONSI or the Environmental Assessment associated with it. Furthermore, this request for a remand should not be interpreted by any party as a concession on legal issues or arguments raised in these appeals.

Appellants should not object to this request because after the Superintendent retracts the FONSI, they will be in the same position as they were prior to April 1, 1997, when the Superintendent signed the FONSI.

The FONSI at issue in these appeals was prepared in the expectation that the Tribe would imminently be requesting approval of an amphitheater. Although the Tribe has not submitted such a request in the time since the FONSI was prepared, the Board has no information before it concerning the Tribe's present and/or future intent in regard to that project. Thus, the underlying need for a FONSI or other NEPA determination may or may not be moot.

However, the specific issue raised here is the timing of an appeal from a FONSI. The Area Director concluded that the appeals before him were premature based on "the position of the BIA that any party that is adversely affected by a BIA [NEPA] determination will have the right to appeal that determination at such time as BIA makes a final decision relying on the NEPA determination." May 30, 1997, Decision at 1. Citing 25 C.F.R. § 2.7, the Area Director stated: "[Y]ou will be notified of any action by the Superintendent with respect to the Muckleshoot Amphitheatre that relies on the FONSI. At that time you will be informed of your appeal rights and may assert any arguments you want with respect to the FONSI or the Superintendent's compliance with NEPA." *Id.* at 2.

Whether or not BIA's position in regard to the timing of appeals from NEPA determinations is legally justified--a question that the Board explicitly declines to reach here--it appears likely that the position was taken to avoid either duplicative litigation or litigation over a NEPA determination which might never be implemented.

The Board concludes that the FONSI at issue here has been rendered moot by the passage of time without a request from the Tribe to proceed with the amphitheater. A new, or at least updated, FONSI or other NEPA determination will most likely be necessary if and when the Tribe decides to proceed with this project. Based on BIA's willingness to retract the FONSI, the Board believes that the continuation of these appeals would be a waste of the time and resources of everyone involved.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, these appeals

from the Portland Area Director's May 30, 1997, decision are dismissed, and this matter is remanded to the Area Director so that he can order the Superintendent, Puget Sound Agency, to retract the April 1, 1997, approval of the Finding of No Significant Impact as to the Muckleshoot amphitheater project. This dismissal is with prejudice as to BIA's April 1 and May 30, 1997, decisions. The dismissal does not, however, preclude any party to the present appeals from appealing any future decision made by the Superintendent and/ or Area Director in regard to the amphitheater project and its environmental impacts, and/or BIA compliance with the National Environmental Policy Act with respect to the amphitheater project. 1/

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//original signed

Kathryn A. Lynn  
Chief Administrative Judge

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//original signed

Anita Vogt  
Administrative Judge

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1/ All motions not previously addressed are hereby denied.