



INTERIOR BOARD OF INDIAN APPEALS

Citizens for Safety and Environment v. Acting Northwest Regional Director,
Bureau of Indian Affairs

40 IBIA 87 (08/31/2004)

Related Board cases:

31 IBIA 183

Reconsideration denied, 31 IBIA 217

37 IBIA 282

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

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INTERIOR BOARD OF INDIAN APPEALS
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CITIZENS FOR SAFETY AND ENVIRONMENT,	:	Order Dismissing Appeal
Appellant,	:	
	:	
v.	:	Docket No. IBIA 04-30-A
	:	
ACTING NORTHWEST REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS,	:	
Appellee.	:	August 31, 2004

Citizens for Safety and Environment (CSE) appeals an October 31, 2003, decision of the Acting Northwest Regional Director, Bureau of Indian Affairs (Regional Director; BIA), to approve taking approximately 330 acres of land into trust for the Muckleshoot Indian Tribe of the Muckleshoot Reservation, Washington (Tribe). The land, referred to as the “Amphitheater (Fiori) property,” is located within the exterior boundaries of the Muckleshoot Indian Reservation, in King County, Washington. CSE contends that BIA did not adequately consider the environmental impacts associated with the intended use of the property. ^{1/} For the reasons discussed below, the Board of Indian Appeals (Board) dismisses this appeal for lack of jurisdiction.

Factual Background

In 1990, the Tribe purchased approximately 330 acres of land, which comprises eight parcels, and took title to the land in fee simple. The Tribe contemplated that an amphitheater, the White River Amphitheater (amphitheater), would be built on approximately 98 acres of the 330-acre property. On March 27, 1997, the Superintendent, Puget Sound Agency, BIA, issued an Environmental Assessment for the amphitheater, triggered at least in part, by BIA’s

^{1/} As described in the factual background, this is not the first time this dispute between CSE and BIA involving the Tribe’s amphitheater has come before the Board. See City of Auburn, Washington v. Portland Area Director, 31 IBIA 183, recon. denied, 31 IBIA 217 (1997); Citizens for Safety & Environment v. Northwest Regional Director, 37 IBIA 282 (2002).

expectation that the Tribe was about to request BIA's review and approval of a management contract between the tribal corporation and the company that would construct and manage the amphitheater. On April 1, 1997, the Superintendent issued a Finding of No Significant Impact (FONSI) for the proposed amphitheater, thereby determining that an Environmental Impact Statement (EIS) was not required.

In 1997, CSE sought Board review of a May 30, 1997, Regional Director decision dismissing as premature its appeal concerning the FONSI signed by the Superintendent. At that time, the Tribe had not yet made a request for BIA action and the FONSI was purely anticipatory. On October 9, 1997, the Board dismissed the appeal and remanded the case to BIA without prejudice to appealing any future decision involving the amphitheater project and its environmental impact. See City of Auburn, Washington v. Portland Area Director, 31 IBIA 183, 184-85, recon. denied, 31 IBIA 217 (1997). Also in 1997, five years before the trust acquisition request at issue in this appeal, the Tribe entered into a contract for the construction of the amphitheater project with Bill Graham Enterprises, and construction began in approximately June 1997.

That same year, CSE initiated a federal district court action in the Western District of Washington based on the National Environmental Policy Act, 42 U.S.C. §§ 4321-4335 (1994) (NEPA), which was captioned Citizens for Safety & Environment v. Bill Graham Enterprises, et al., No. C97-1775 C (W.D. Wash.), and set forth challenges to the amphitheater under NEPA. In addition to Bill Graham Enterprises (which constructed and operated the amphitheater), the suit named as defendants the Tribe and the Department of Interior, including various officials and offices. That federal district court action brought by CSE challenged BIA's failure to prepare an Environmental Impact Statement (EIS) for the proposed amphitheater pursuant to NEPA. As relief, CSE sought a remand to BIA for preparation of an EIS and an order enjoining BIA from issuing any permits or approvals pending completion of the EIS.

On April 17, 1998, the federal district court, granting in part CSE's motion for summary judgment, directed BIA to prepare an EIS for the amphitheater that would address the potential environmental impact on the human environment of the proposed amphitheater in compliance with NEPA. Independently, the Army Corps of Engineers (Corps) concluded, pursuant to the Clean Water Act, 33 U.S.C. §§ 1251-1387 (1994), that the Tribe required a section-404 permit for the construction of the amphitheater because of impacts on federally-protected wetlands. Id. at § 1344. This required the Corps to comply with NEPA.

In August 1999, a draft EIS was issued by BIA and the Washington State Department of Transportation (WSDOT), joined in by the Corps as a cooperating agency in the EIS-drafting process. After consultations, coordination, public comments, and a public hearing, in March 2002, BIA and WSDOT issued a Final EIS (FEIS), consisting of approximately 3,000

pages, for the amphitheater project. On May 24, 2002, by Tribal Resolution Number 02-158, the Tribe requested that the United States acquire the 330-acre tract in trust. CSE filed a second appeal to the Board. Citizens for Safety & Environment v. Northwest Regional Director, 37 IBIA 282 (2002). CSE sought Board review of the March 2002 FEIS. Since no decision had yet been made as to whether the land should be acquired in trust, the Board dismissed CSE's appeal without prejudice. Id.

After issuance of the FEIS, the Army Corps of Engineers accepted additional public comments and solicited responses from the Tribe. On September 6, 2002, the Corps granted the Tribe's section-404 permit to fill approximately one-third acre of wetlands in the process of amphitheater construction. The Corps relied on the FEIS to fulfill its own NEPA obligations.

CSE then alleged in federal district court — challenging the Corps' action — that the FEIS did not comply with the requirements mandated by the court and the requirements of NEPA because it provided “misleading,” “incomplete,” and “inaccurate” information about the amphitheater project's environmental impacts regarding traffic and other impacts. CSE alleged eight deficiencies with regard to potential traffic impacts.

On March 21, 2003, the federal district court, in the context of CSE's NEPA challenge concerning the potential traffic impacts of the Tribe's amphitheater, entered an order denying CSE's motion for partial summary judgment and granted motions for partial summary judgment separately filed by the private and federal defendants. The district court noted that “this Court may not ‘fly-speck’ a challenged EIS, holding it insufficient on the basis of inconsequential technical deficiencies.” Citizens for Safety & Environment v. Bill Graham Enterprises, et al., No. C97-1775C, slip op. at 5 (W.D. Wash. Mar. 20, 2003). After reviewing all eight deficiencies alleged by CSE, the court concluded that “BIA's FEIS satisfies the ‘rule of reason’ standard and contains a reasonably thorough discussion of the significant aspects of probable environmental consequences” of the proposed amphitheater project. Id. at 18. The court also concluded that the decision by the Corps to grant the section-404 permit in reliance on BIA's FEIS was “not unreasonable, arbitrary, capricious, or an abuse of discretion.” Id.

In June 2003, a 20,000 seat open-air amphitheater opened for business and apparently has been in business since that date, hosting concerts and community events. The amphitheater uses approximately 98 acres, or one-third, of the 330 acres for which the Tribe seeks trust status. Approximately 9 acres of the 330 acres are to be used for a tribal drug and alcohol rehabilitation center, and the remainder is to be used as fish and wildlife habitat.

In July 2003, the federal district court reviewed the remaining issues in CSE's NEPA challenge to the amphitheater project, relating to noise and air quality impacts as well as challenges relating to public interest review. Granting the joint motion for summary judgment filed by the private and federal defendants, the court concluded that the FEIS satisfied the

requisite standard of review and “contain[ed] a reasonably thorough discussion of the significant aspects of the probable environmental consequences of the proposed White River Amphitheatre.” Citizens for Safety & Environment v. Bill Graham Enterprises, et al., No. C97-1775C, slip op. at 14 (W.D. Wash., July 31, 2003). ^{2/} The court again concluded that the Corps’ decision to grant a section-404 permit in reliance on the FEIS was “not unreasonable, arbitrary, capricious, or an abuse of discretion.” Id.

The Tribe continues to own the land on which the amphitheater is located in fee simple. If the land were taken into trust by BIA, ad valorem real property taxes on the land would terminate. While the Tribe would like the 330 acres to be accepted by the United States in trust status, it insists that “[t]he Amphitheater will continue to operate whether or not title to the property upon which it is located remains held by the Tribe in fee simple status or is accepted by the United States in trust status.” (Tribe’s Mot. to Dismiss at 1-2, 4.)

Several months after the amphitheater opened for business and after the federal district court decision, the Regional Director issued his October 31, 2003, decision to take the land into trust. The Regional Director evaluated the proposed trust acquisition in accordance with Part 151 of 25 C.F.R. and determined that the trust acquisition was appropriate. As part of the decision, the Regional Director found that the amphitheater would provide employment for tribal members, generate revenues for the Tribe, enhance its economic development, and generally benefit Tribal membership. This appeal followed.

CSE filed its Notice of Appeal with the Board on December 15, 2003. On December 29, 2003, the Tribe filed a Motion to Dismiss for Lack of Standing or, in the Alternative, for Expedited Consideration and Appeal Bond. The Tribe’s motion to dismiss was based on the binding effect of the federal district court judgment and CSE’s lack of standing. The Board ordered briefing on these threshold issues and stayed submission of the administrative record on the merits of the appeal pending the Board’s determination of the threshold issues.

The Tribe argues that collateral estoppel would bar CSE from re-litigating NEPA issues concerning the amphitheater since those issues were already decided by the U.S. District Court for the Western District of Washington in favor of the government in Citizens for Safety & Environment v. Bill Graham Enterprises, et al., No. C97-1775C (W.D. Wash. 2003). The Tribe also contends that CSE lacks standing to bring this appeal because any injury claimed by CSE is neither caused by the proposed transfer of the land into trust status nor redressable by

^{2/} CSE appealed the district court’s ruling to the U.S. Court of Appeals for the Ninth Circuit, United States v. Bill Graham, Ninth Cir. No. 03-35792, where its appeal is presently pending.

BIA. ^{3/} As to the latter requirement, the Tribe reasons that even if BIA does not take the land in trust, the amphitheater will still exist, and any arguments made by CSE to the contrary necessarily amount to “slim speculation” that could not be rectified by discovery. The Tribe places heavy reliance on the Board’s decision in Evitt v. Acting Pacific Regional Director, 38 IBIA 77 (2002), for the proposition that where there is no causal connection between environmental and other alleged injuries and the trust acquisition, such injuries would not be redressed if the land were not acquired in trust. ^{4/} The Tribe also contends that CSE has neither alleged nor proven an injury in fact. ^{5/}

CSE agrees that the NEPA issues have been adjudicated in federal district court and are currently pending before the Ninth Circuit; and that these issues were raised in the appeal in order to preserve the issue for later court review. CSE argues that its Part 151 challenge remains and is distinct from its NEPA suit. With regard to its Part 151 challenge, CSE contends that it meets the “injury in fact” requirement of standing, since this requirement was not challenged by the Tribe. As to the two additional prerequisites for standing, causation and redressability, CSE contends that both prerequisites can be met since there is an unresolved question pertaining to the finances of the amphitheater, the impact that future taxes will have on its financial viability, and whether current taxes will increase because the land is no longer used as agricultural land but, instead, is used as commercial land. CSE insists that it must conduct discovery in order to make a determination as to whether the amphitheater could remain financially viable if it were required to continue to pay taxes.

^{3/} BIA joins the Tribe in its standing argument and urges dismissal of this appeal.

^{4/} In the alternative, the Tribe moved for an appeal bond to cover accruing real property taxes during the pendency of the appeal, relying upon Dawson v. Northwest Regional Director, 39 IBIA 213 (2003). Given the Board’s dismissal of this present appeal, the Tribe’s request for an appeal bond is rendered moot. The decision also makes the Tribe’s request for an expedited review moot.

^{5/} CSE filed a Motion to Strike, alleging that the Tribe raised a new issue in its reply, namely, that CSE failed to establish the first element of standing, that its members have suffered an injury in fact. CSE argues that the “new” argument should be stricken or, in the alternative, that it be allowed to file a sur-reply. The Tribe contends that it was responding to the mis-characterization that it had conceded the issue and also contends, in essence, that it is of no import since the remaining two requisite elements of standing have not been satisfied. Given that the Board has assumed in favor of CSE as to this first element of standing, CSE’s motion is rendered moot.

Only two threshold issues are presently before the Board: whether the judgment of the federal district court precludes Board review of the NEPA issues, and whether CSE has standing to challenge BIA's trust acquisition decision made pursuant to 25 C.F.R. Part 151.

Discussion

CSE's notice of appeal lists three grounds for appeal: First, CSE asserts that the Regional Director failed to consider all requisite facts under 25 C.F.R. § 151.10 in his decision to take the land in trust. As an example, CSE contends that the amphitheater's traffic impacts were grossly underestimated by BIA. Second, CSE alleges that the Regional Director's trust acquisition decision was based on an inadequate EIS pursuant to NEPA. Third, CSE posits that the Regional Director was required to prepare a supplemental EIS under NEPA prior to making the decision of whether to take the land in trust. The latter two arguments will be referred to as the NEPA arguments.

The first issue the Board will address is whether the NEPA issues are barred from further review by the Board. The Board concludes that since CSE challenged the FEIS in federal court litigation in which the Department is a defendant, and the federal district court has fully and finally ruled on that challenge, the Board is bound by that judgment, and, in any event, is not free to review the litigating position of the Department defending the adequacy of BIA's FEIS. CSE concedes that the federal district court decision is binding on the Board, and that the issues were raised here in an attempt to exhaust administrative remedies. In fact, in this appeal, CSE is raising the identical NEPA issues on which the government prevailed in federal district court. Just as it did before the federal district court, CSE here makes a demand for a supplemental Environmental Impact Statement. Therefore, the Board concludes that it is precluded from reviewing the NEPA issues presented by CSE.

We next review whether CSE has standing to challenge the Regional Director's trust acquisition decision, made pursuant to 25 C.F.R. Part 151 — separate and apart from its NEPA challenge. The Board has previously addressed the issue of standing in several cases, including Evitt v. Acting Pacific Regional Director, 38 IBIA 77 (2002). In Evitt, the Tribe challenged the standing of four individuals who sought to appeal the decision of the Acting Pacific Regional Director to take land in trust. As a prudent matter, the Board limits its jurisdiction to cases in which an appellant can show standing, even though the Board is not bound by the case or controversy restriction in Article III of the United States Constitution, applicable to federal courts. The Board has relied on the analysis provided in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), to evaluate standing. Evitt, 38 IBIA 77; Friends of East Willits Valley v. Acting Pacific Regional Director, 37 IBIA 213 (2002). In Lujan, the Supreme Court set forth three requirements to establish standing:

First, the plaintiff must have suffered an “injury in fact” — an invasion of a legally protected interest which is (a) concrete and particularized, * * * and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical,’” * * * Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be “fairly * * * trace[able] to the challenged action of the defendant, and not * * * th[e] result [of] the independent action of some third party not before the court * * * . Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”

Lujan, 504 U.S. at 560-61 (citations and footnote omitted), quoted in Evitt, 38 IBIA at 79-80.

The Supreme Court in Lujan clarified that the burden of proving these three prerequisites of standing rests with the party invoking jurisdiction. Lujan, 504 U.S. at 561. Thus, here, CSE must show that it satisfies all three elements of standing. The Board has taken into consideration CSE’s affidavit, and even considering it, concludes that CSE has not met its burden of proof. The Board similarly concludes that any discovery sought by CSE would not cure its inability to prove standing.

With regard to the first element, namely, an “injury in fact,” CSE does not name even one member whose legally-protected interest would be invaded. Such information should be within the purview of CSE to obtain without resorting to discovery. Moreover, since that element is jurisdictional, it cannot be conceded by a party, even if the Tribe originally intended to concede it in its motion to dismiss. The Board does note, however, that CSE’s amended complaint filed in federal district court, and attached to the Tribe’s motion to dismiss, does include allegations of injury in fact. Therefore, we will assume, for purposes of addressing the issue of standing in this appeal, that CSE could show injury in fact resulting from the amphitheater. Nevertheless, the jurisdictional stumbling block for CSE is that it cannot meet its burden as to the remaining two elements of standing in its challenge of the trust acquisition.

With regard to the second element of standing, CSE must show “a causal connection between the injury and the conduct complained of.” Lujan, 504 U.S. at 560-61. Thus, the issue of whether BIA acquires the land in trust must be causally connected to the injuries CSE asserts. But, in this case, the injuries asserted by CSE do not arise from the trust acquisition — specifically, the change in title from the Tribe to the United States, in trust for the Tribe. Instead, the alleged injuries necessarily arise from the use of the property as an amphitheater. And the use of the property as an amphitheater is not dependent on the land’s trust status, as might be the case if other uses (e.g., gaming) were intended following the trust acquisition. See Evitt, 38 IBIA at 80-81. The fact remains that this proposed trust acquisition of 330 acres of land encompassing the amphitheater is independent and separate from the decision of the

Tribe to use the property as an amphitheater, a use which has been already in effect for over a year, since June 2003. Therefore, the Board concludes that CSE has not shown the requisite causal connection between the injury and the conduct complained of. Although our analysis need not proceed further in order to conclude that CSE has not met its burden of proving standing, we nevertheless turn to the third and final element of standing.

With regard to the third element of standing, redressability, “it must be ‘likely,’ as opposed to merely ‘speculative,’ that the injury will be ‘redressed by a favorable decision.’” Lujan, 504 U.S. at 561. CSE has failed to demonstrate, even as an initial matter, that the Tribe would shut down the amphitheater if the land is not taken into trust. Indeed, the Tribe asserts it will continue operation regardless of BIA’s decision. While CSE may believe that real property tax liability (if the land were not taken into trust) might affect the continued financial viability of the amphitheater as a business operation, such conjecture is wholly within the realm of speculation and falls short of the injury being fairly redressable by a decision not to take the land into trust. ^{6/} The Tribe built the amphitheater in 1997, and began operating it in 2003, perhaps with the hope, but without any guarantee that BIA would acquire the property into trust. As such, it is speculative to suggest that the continued operation of the amphitheater is “dependent” on the land being taken in trust by BIA and that CSE’s alleged injuries would be redressed by a BIA decision to disapprove the Tribe’s trust application. Even if CSE’s consultant concluded that, in his opinion, the amphitheater is not an economically viable enterprise on the land, the Tribe is clearly not bound by that opinion and is free to continue the operation of the amphitheater. For example, if the financial situation of the amphitheater warrants, the Tribe could subsidize amphitheater operations from other sources of revenue and could make other business decisions for the future financial viability of the amphitheater. Such decisions regarding the operation of the amphitheater are for the Tribe — not BIA — to make, and are not controlled by the status of the land title as “fee” or “trust.” See Evitt 38 IBIA at 83, (Appellants failed to show that decision not to take property into trust could redress the alleged injuries); compare TOMAC v. Norton, 193 F. Supp. 2d 182 (D.D.C. 2002), cited in Evitt, 38 IBIA at 80-81 (redressability was satisfied when decision not to take land in trust would prevent the tribe’s intended use).

The Board cannot grant the relief requested by CSE for an additional reason. CSE requested that the Board vacate the Regional Director's decision and remand it to require BIA to consider “additional information.” But the only additional information identified by CSE is the same type of information considered in the environmental impact assessment, such as the impact of traffic. This is a thinly-veiled attempt to take a second bite of the NEPA apple and to

^{6/} Even the language in CSE’s brief is speculative in nature: “a new [tax] assessment [is] likely in the future;” “taxes could increase significantly;” “the Tribe **may intend** to continue to operate the facility * * * but perhaps it could not successfully do so * * * .” (CSE’s Resp. to Tribe’s Mot. to Dismiss at 6 (emphasis added)).

have the Board consider the NEPA issues under the guise of reviewing BIA's application of 25 C.F.R. Part 151, by reviewing the same substantive issues ruled on by the federal district court in favor of the Department of the Interior. In fact, the federal district court specifically addressed the adequacy of BIA's FEIS with respect to potential traffic, noise, and other environmental impacts. ^{7/} Apart from raising the same substantive arguments that were raised in its NEPA challenge, CSE does not provide any separate grounds to challenge BIA's application of 25 C.F.R. § 151.10, even if we had found that CSE does have standing, which it does not. Accordingly, the Board grants the Tribe's Motion to Dismiss, based on the federal court's judgment in CSE's NEPA litigation and its lack of standing.

Conclusion

The Board concludes that the federal district court judgment limits this appeal solely to BIA's approval of the Tribe's trust acquisition application pursuant to 25 C.F.R. Part 151, and only with respect to any challenge that is not inextricably intertwined with the NEPA issues. As to the trust acquisition decision, the Board concludes that CSE has failed to meet its burden to demonstrate that it has standing to challenge the Regional Director's October 31, 2003, decision to acquire the 330 acres of land in trust. Even if CSE had standing, the substance of its challenge is merely a replication of its NEPA challenge in the federal district court, whose judgment is binding on the Board.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, this appeal is dismissed in its entirety on the threshold jurisdictional grounds that the Board is precluded from revisiting the NEPA issues which have already been adjudicated and that CSE lacks standing.

//original signed
Colette J. Winston
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge

^{7/} The federal district court also considered CSE's "public interest" challenge, which considered the same types of issues which BIA considered under 25 C.F.R. Part 151.