



INTERIOR BOARD OF INDIAN APPEALS

Delbert Brown v. Navajo Regional Director, Bureau of Indian Affairs

41 IBIA 314 (10/26/2005)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

DELBERT BROWN,
Appellant,

v.

NAVAJO REGIONAL DIRECTOR,
BUREAU OF INDIAN AFFAIRS,
Appellee.

: Order Dismissing Appeal
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: Docket No. IBIA 03-128-A
:
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: October 26, 2005

Delbert Brown (Appellant) appealed from a June 27, 2003 decision of the Navajo Regional Director, Bureau of Indian Affairs (Regional Director; BIA), which rejected Appellant's claim that BIA discriminated against him in allegedly denying him a billboard permit for New Mexico Indian Allotment No. 1473 (Allotment 1473). Allotment 1473 is located at the NE1/4 of Sec. 18, T. 16 N., R. 18 W., McKinley County, New Mexico. For the reasons discussed below, the Board dismisses the appeal for lack of jurisdiction.

Background

This appeal concerns a revocable use permit (RUP) for a billboard referred to as the "Gallup Indian Plaza" or "Gallup Indian Plaza Chevron" billboard (Indian Plaza billboard), located on Allotment 1473. At all times pertinent to this appeal, the Indian landowners of Allotment 1473 have been Faye Peterson, Jennie Peterson, Jimmy Peterson, Sr. (the Petersons), and the undetermined heirs of the Estate of Marita Tsinnijinnie.

On April 4, 2000, Appellant entered into an agreement with the then-owner of the billboard, Mohammad Aysheh, to have ownership of the Indian Plaza billboard and permit rights transferred from Aysheh to Appellant. The agreement is addressed to "Sally Begay," an apparent reference to Lucille Begay, a BIA Realty Specialist in the Navajo Regional Office. The Petersons signed the agreement indicating their approval of the transfer. The agreement makes no reference to the undetermined heirs of the Estate of Marita Tsinnijinnie, nor does the agreement contain a signature line for BIA approval. Appellant contends that he presented

a request for the Indian Plaza billboard permit to Begay in March 2000, but there is no evidence in the record whether or when the April 4, 2000 agreement may have been presented to Begay. A copy was provided to the Board as an exhibit to Appellant's notice of appeal, but it is not included in BIA's administrative record.

In a related agreement, Appellant apparently agreed to pay Aysheh \$1,000 for the billboard, and tendered a check for that amount dated April 17, 2000. That agreement provided that the check could not be cashed "until all legal documents have been signed and approved by the land users, NAVAJO TRIBE and BIA." Appellant's Motion to Supplement Record, Ex. B.

Appellant never received a permit for the Indian Plaza billboard. According to Appellant, in March or April of 2003, Perry Null of Perry Null Trading Post obtained the landowners' consent for a permit for the Indian Plaza billboard, which BIA approved. When Appellant learned of Null's permit, he and his wife went to Begay's office in Gallup, New Mexico, to complain. Begay's notes state that Appellant and his wife complained that BIA had "[given] away the [Indian Plaza] billboard without consulting with them," and that Aysheh "gave him the billboard." April 9, 2003 Begay Client Contact Notes. Appellant returned to the BIA office the next day to meet with Begay's supervisor, Jane Farris. Appellant complained to Farris that Begay had refused to give him the Indian Plaza permit.

On April 13, 2003, Appellant wrote a letter to the Regional Director, titled "Billboard Discrimination on Allotment 1473." He alleged that Begay had discriminated against him by preventing him from obtaining a permit for the Indian Plaza billboard. He asserted that he had been attempting to obtain a permit for this particular billboard since March of 2000, and that Begay had consistently told him that the billboard was "in litigation" and that she would inform him if the status changed. Appellant asserted that Begay had rejected his "signed consent by the owner of Gallup Indian Plaza, land allottee(s) and [himself]" for the billboard. Appellant argued that he was Navajo and that "the Navajo preference law should be applied when comparing land user consent for the Gallup Indian Plaza sign along with the precedent consent between permit seekers." Appellant also contended that Begay had "prohibited any permits that [he] might try to seek in the future," although his letter did not specify when or how she had done so. ^{1/} Appellant alleged that Begay had adopted this "freeze" on permits in

^{1/} Appellant had a separate permit, RUP-EN-02-99, for two single-face outdoor advertising billboards on Allotment 1473. The term was from March 1998 to March 2003. When that RUP expired, BIA notified Appellant and started the paperwork for renewing the RUP and, apparently at Appellant's request, adding a third billboard to the RUP — but not the Indian Plaza billboard. An unsigned, undated RUP for three billboards is included in BIA's administrative record. Although it is unclear whether Appellant ever presented a signed copy to BIA for approval, the record indicates that on April 28, 2003, Appellant made a payment to BIA in the amount of \$1,800 for the three billboards, and one week later Appellant paid an

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retaliation for Appellant complaining about Begay to Farris. Appellant asserted that he had never defaulted on any rental obligations and was in good standing with all landowners.

In response, after summarizing the BIA's trust responsibility to allotment owners, the Regional Director concluded:

[A]ll actions taken by our Realty staff are consistent with federal regulations pertaining to leasing and permitting; and any and all actions taken were made solely to protect and preserve the properties of the landowners of Allotment 1473. We have considered your allegations that you were discriminated against by this office, however, our review of this matter supports the actions taken by the Realty Office were consistent with the federal regulations pertaining to leasing and permitting.

June 27, 2003 Decision.

Appellant appealed to the Board, alleging that "the actions of the Realty Office were discriminatory and violated appellant's due process and equal protection rights." Appellant's notice of appeal contended that "[t]he landowners had previously consented to the transfer of [the Indian Plaza] billboard and permit rights" and attached a copy of the April 4, 2000 agreement between him and Aysheh, approved by the Petersons. Appellant requested that the Board reverse the Regional Director's decision and grant him the billboard permit for Allotment 1473. Appellant did not file a separate opening brief, but filed a Notice of Partial Abandonment of Appeal and Motion to Supplement Record, dated October 21, 2003, which attached several additional documents for the Board's consideration. 2/

1/(...continued)

additional amount of \$162.99, which was apparently the balance still due.

In a letter to the Board dated November 17, 2003, the Petersons assert that they signed the permit, but that Appellant never presented it to BIA to be processed and approved. The Petersons' letter also states that they are "unanimous" in their "decision * * * to withdraw [their] authorization for the permit renewal."

2/ The portion of the appeal abandoned by Appellant pertained to Allotment No. 1479, another allotment for which Appellant apparently held an RUP at one time for several billboards.

Although documents not considered by BIA are not part of BIA's administrative record, the Board has allowed parties to supplement the record on appeal as long as opposing parties have an opportunity to respond. See California v. Acting Pacific Regional Director, 40 IBIA 70, 71 n.3 (2004). By order dated November 21, 2003, the Board allowed other parties in this

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The Regional Director did not file an answer brief. The Petersons filed a letter dated November 17, 2003, stating that they have “[chosen] not to allow [Appellant] to use our land anymore.”

Discussion

Appellant’s arguments on appeal, which by and large simply incorporate by reference his April 13, 2003 letter to the Regional Director, are general in nature and fail to allege with any specificity the grounds on which Appellant contends the Regional Director erred. We need not address the merits of Appellant’s arguments, however, because we conclude that Appellant lacked standing to bring this appeal, and even if he had standing when the appeal was filed, it has become moot.

Although the Board, as an executive branch forum, is not bound by the case or controversy requirement of Article III of the U.S. Constitution, as a matter of prudence, the Board generally limits its jurisdiction to cases in which the appellant can show standing and where claims have not become moot. See Cheyenne River Sioux Tribe v. Acting Great Plains Regional Director, 41 IBIA 308, 310 (2005), and cases cited therein.

In Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992), the Supreme Court held that, to satisfy Article III’s standing requirements, a person must show (1) he has suffered an “injury in fact,” that is, an invasion of a legally protected interest which is concrete and particularized, as well as actual or imminent; (2) the injury is fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. See Cheyenne River Sioux Tribe, 41 IBIA at 310.

Appellant has not shown that he has any legally protected interest in obtaining an RUP for the Indian Plaza billboard. With limited exceptions not relevant here, the authority to negotiate and grant leases for use of individual Indian trust lands lies with the owners, subject to approval by BIA. See, e.g., 25 C.F.R. §§ 162.3, 162.6 (2000); 25 C.F.R. §§ 162.602, 162.605 (2003). ^{3/} The regulations do not require Indian landowners to grant permits, nor do the regulations give BIA the authority to force landowners to do so. In addition, even if Indian landowners initially agree to grant a revocable permit to a particular individual, they remain

^{2/}(...continued)

case to respond to the additional documents submitted by Appellant, and therefore the Board has considered them as part of the appeal record.

^{3/} These provisions specifically refer to “leases,” but the regulations define the term “lease” to include permits, unless otherwise provided. See 25 C.F.R. § 162.101 (2003).

free to change their minds prior to approval of the permit, and even after approval — subject to any constraints in the permit itself. Both Permit RUP-EN-09-99 and the draft RUP for Appellant to have three billboards on Allotment No. 1473 expressly provided that they could be terminated at any time by either party, subject only to a 60-day notice requirement. 4/

In addition, when Appellant brought this appeal in August 2003, his alleged injury — failure to obtain an RUP for the Indian Plaza billboard — was no longer even arguably traceable to BIA’s allegedly wrongful action. In March 2003, the Petersons decided to grant a permit for the Indian Plaza billboard to Null Rental Agency. Whatever previous approval the Petersons may have given for Appellant to transfer the billboard and permit from Aysheh was necessarily superseded and withdrawn when they agreed instead to grant a permit for the billboard to Null Rental Agency. At that time, BIA no longer had authority to “approve” the previous agreement to grant an RUP to Appellant, and Appellant’s dispute was with the landowners, not the BIA.

For the same reasons, the Board cannot order BIA to approve an RUP to which the landowners no longer consent. As such, Appellant’s alleged injury would not be redressed by a decision vacating or reversing the Regional Director’s decision, because the Board cannot grant the relief he requests — a permit for the Indian Plaza billboard.

Because Appellant has no protectable interest in obtaining an RUP for the Indian Plaza billboard, because his alleged injury is not traceable to BIA’s action, and because the alleged injury cannot be redressed by a favorable decision by the Board, Appellant lacks standing to bring this appeal.

Even assuming there is any question whether Appellant had standing when this appeal was brought, the appeal became moot when the Petersons wrote to the Board in November 2003 that they have decided not to allow Appellant to use their land anymore. See Cheyenne River Sioux Tribe, 41 IBIA at 312 (“the requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).”) (citations omitted). Mootness may occur when nothing turns on the outcome of an appeal. Id. (citing Pueblo of Tesuque v. Acting Southwest Regional Director, 40 IBIA 273, 274 (2005)).

4/ At most, during the time period when the landowners apparently had agreed to allow Appellant to obtain the RUP for the Indian Plaza billboard, 25 C.F.R. § 2.8 provided Appellant with a right to demand timely action by BIA whether to approve or disapprove transfer of the RUP. Section 2.8 provides procedures for prompting action by a BIA official who has not responded to a request for action or decision. There is no evidence in the record that Appellant ever sought to exercise his rights under section 2.8.

Nothing turns on the outcome of this appeal for the same reason that the redressability element of standing is not satisfied: Even if the Board were to find that the Regional Director wrongfully withheld approval of Appellant's April 4, 2000 agreement, the Board now lacks the authority to grant the requested relief for the additional reason that during the course of this appeal the Petersons have reiterated their refusal to agree to a permit with Appellant.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board dismisses this appeal for lack of standing and, in the alternative, as moot.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Katherine J. Barton
Acting Administrative Judge