



INTERIOR BOARD OF INDIAN APPEALS

State of Utah v. Acting Phoenix Area Director, Bureau of Indian Affairs

32 IBIA 169 (04/24/1998)

Judicial review of this case:

Summary judgment granted for United States on issue of participation in lease approval proceedings under 25 U.S.C. § 415(a), *Utah v. United States Department of the Interior*, Consolidated Case No. 2:98 CV 380 K (D. Utah Apr. 9, 1999)



United States Department of the Interior

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

STATE OF UTAH

v.

ACTING PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 98-16-A

Decided April 24, 1998

Appeal from the denial of a request to intervene in a lease approval proceeding under 25 U.S.C. § 415 (1994).

Dismissed.

1. Administrative Procedure: Standing--Indians: Leases and Permits: Generally--Intervention

A stranger to a lease of trust or restricted Indian lands is not within the zone of interests sought to be protected by 25 U.S.C. § 415 (1994), and therefore has no right to intervene in, or appeal from, a Bureau of Indian Affairs proceeding under that section.

APPEARANCES: Philip C. Pugsley, Esq., Salt Lake City, Utah, for Appellant State of Utah; Rose Vallie, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Salt Lake City, Utah, for the Phoenix Area Director; Danny Quintana, Esq., Salt Lake City, Utah, for the Skull Valley Band of Goshute Indians; Margaret A. Swimmer, Esq., and Joseph D. Fincher, Esq., Tulsa, Oklahoma, and Joseph R. Membrino, Esq., Washington, D.C., for Private Fuel Storage L.L.C.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

The State of Utah (State) seeks review of a September 18, 1997, decision of the Acting Phoenix Area Director, Bureau of Indian Affairs (Area Director; BIA), dismissing as premature the State's appeal from a July 11, 1997, decision of the Superintendent, Uintah and Ouray Agency, BIA (Superintendent). The Superintendent concluded that the State lacked standing to intervene in the BIA proceeding which resulted in the conditional approval of a lease between the Skull Valley Band of Goshute Indians (Tribe) and Private Fuel Storage L.L.C. (PFS). ^{1/} For the reasons discussed below, the Board of Indian Appeals (Board) dismisses this appeal for lack of standing.

^{1/} In its Notice of Appeal, the State acknowledged that the lease had been conditionally approved. For the first time in its Reply Brief, the State suggested that the lease was approved without conditions. Interestingly,

The Tribe and PFS negotiated a lease of a portion of the Tribe's reservation to PFS for the construction and operation of a spent nuclear fuel storage facility. Because the land which is the subject of the lease is held in trust for the Tribe by the United States, the lease is subject to approval by BIA under 25 U.S.C. § 415. The State asserted both before BIA and in this appeal that it has a right to intervene in the lease approval process.

Upon receipt of this appeal, the Board required the State to show the basis on which it alleged it had standing. The State filed a response which the Board concluded was sufficient to prevent summary dismissal. The Board gave interested parties an opportunity to respond to the State's filing. Briefs opposing the State's position were filed by the Tribe, PFS, and the Area Director. Without leave being previously granted for any further briefs, the State filed a Reply Brief. ^{2/} The Tribe and PFS moved to strike the State's Reply Brief and, in the alternative, responded to that brief. The State has requested an opportunity to respond to the filings by the Tribe and PFS.

The Board agrees with the Tribe and PFS that the State presented arguments in its Reply Brief that went beyond anything presented in its initial response to the Order to Show Cause. It therefore finds the motion to strike well taken. However, under the circumstances here, in which the Tribe and PFS alternatively responded to the State's Reply Brief, the Board believes that the better course of action is to accept and consider

fn. 1 (continued)

the document upon which the State relies for this suggestion in its Reply Brief was also attached to, and mentioned in, its Notice of Appeal.

The Tribe, PFS, and BIA state that approval of the lease was conditioned on the successful completion of review under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370d (1994), and the issuance of a license by the Nuclear Regulatory Commission (NRC) after the completion of the NRC review process. See, e.g., Area Director's Jan. 7, 1998, Brief at 2 and 4 ("The BIA's decision to approve the lease will not be final until the [Environmental Impact Statement required under NEPA] is complete, any necessary mitigation measures are implemented, and the NRC issues a license to PFS"), and PFS' Jan. 9, 1998, Brief at 19 (the Tribe adopted PFS' brief). Section 4(A) of the lease provides that, if the lease is approved prior to completion of the NEPA and NRC review processes, approval is conditioned on the successful completion of those reviews. The Board concludes that approval of the lease is conditioned on the successful completion of the NEPA and NRC review proceedings and the issuance of a license by the NRC.

All further citations to the United States Code are to the 1994 edition.

^{2/} All briefing in this matter has been in response to the Board's Order to Show Cause, rather than under 43 C.F.R. § 4.311.

both the State's Reply Brief and the responses filed by the Tribe and PFS. In this way, the State, PFS, and the Tribe have each had an opportunity to file one additional brief. The motions filed by the Tribe and PFS to strike the State's Reply Brief are denied, as is the State's motion to file another brief. The Board concludes that this matter is ripe for a decision as to whether or not the State has shown it has a right to intervene in the lease approval proceeding and/or to bring this appeal.

The State bases its claim that it has a right to intervene in the lease approval proceeding primarily on 25 U.S.C. § 415. Section 415(a) authorizes the leasing of tribally or individually owned land for, inter alia, business purposes. In arguing that it has a right to intervene, the State relies upon the last sentence in section 415(a), which was added in 1970:

Prior to approval of any lease or extension of an existing lease pursuant to this section, the Secretary of the Interior shall first satisfy himself that adequate consideration has been given to the relationship between the use of the leased lands and the use of neighboring lands; the height, quality, and safety of any structures or other facilities to be constructed on such lands; the availability of police and fire protection and other services; the availability of judicial forums for criminal and civil causes arising on the leased lands; and the effect on the environment of the uses to which the leased lands will be subject.

In support of its argument, the State quotes one sentence from the legislative history of the 1970 amendment: "While it is not the intention of the committee to unduly burden development plans for Indian lands, the committee and the Department of the Interior have an obligation to protect the public interest and safety." S. Rep. No. 832, 91st Cong., 2nd Sess., reprinted in 1970 U.S.C.C.A.N. 3243, 3245. ^{3/} The State argues that the amendment and its legislative history make it clear that Congress intended "to broaden the review [of leases of trust lands] from the limited, historic consideration of what will be in the narrow, parochial interest of the tribe to include important public considerations, including the effect of the proposed use of the property on the environment." Response to Order to Show Cause at 4-5.

^{3/} The Report continues:

"The purpose of the committee amendment is to require that the Secretary of the Interior satisfy himself that adequate consideration has been given to the provision of fire and police protection and enforcement of appropriate land use regulations, pollution control and health and safety standards. Access to the courts is also an important consideration for the occupants of the leased lands and cannot be excusably denied in this country."

Id.

In further support of this argument, the State cites Davis v. Morton, 469 F.2d 593 (10th Cir. 1972). It argues that the court held in Davis that the purpose of the quoted language in section 415 "was to reaffirm 'congressional intent that environmental considerations are to play a factor in any [BIA] decisions.'" Id. at 5. The State further asserts that the Davis court held that the language in section 415 was not inconsistent with the mandates of NEPA.

In Davis, the court held that NEPA applied to BIA decisions concerning the leasing of lands held in trust or restricted status. It noted that 25 U.S.C. § 415 had been amended shortly after the lease at issue in Davis was approved, and considered the meaning of the amendment in relation to NEPA. The court stated:

The lower court felt NEPA did not apply to Indian lands or otherwise the amendment to 25 U.S.C. § 415 would not have addressed the problem of environmental concerns. We do not draw that conclusion. NEPA is a very broad statute covering both substantive and procedural problems relating to the environment. The amendment to 25 U.S.C. § 415 deals primarily with the addition of Indian tribes to the group [of other tribes which previously had] long-term [i.e., 99-year] lease authority. Only briefly is the environmental problem discussed. The amendment only requires the Secretary to satisfy himself on the environmental issue; nowhere are any specific procedural guidelines set out as in NEPA. In [Calvert Cliffs' Coordinating Comm. v. United States Atomic Energy Commission, 449 F.2d 1109 (D.C. Cir. 1971),] a similar problem arose. The court correctly determined that unless the obligations of another statute are clearly mutually exclusive with the mandates of NEPA, the specific requirements of NEPA will remain in force. The reasoning is applicable in the instant case. The general statement in § 415 in no way implies leases on Indian lands were not covered by NEPA. The amendment merely reaffirms congressional intent that environmental considerations are to play a factor in any [BIA] decisions.

469 F.2d at 598.

The Tribe and PFS argue that section 415 does not grant a right to intervene to a person who is not a party to the lease, and note that they found no decision allowing a state to appeal the approval of a tribal lease entered into under section 415. They cite Webster v. United States, 823 F. Supp. 1544 (D. Mont. 1992), aff'd, 22 F.3d 221 (9th Cir. 1994), in support of their contention that, even after the 1970 amendment, the approval of a lease of trust or restricted land under section 415 remained discretionary, and that BIA was still obligated to make such decisions in the best interest of the trust landowner.

In Webster, the court was concerned with the approval of a lease of trust land in the context of Federal liability under the Federal Tort

Claims Act, 28 U.S.C. §§ 2671-2680. It considered whether 25 U.S.C. § 415 and implementing regulations in 25 C.F.R. Part 162 constituted limitations on the Secretary's discretion to approve a lease of trust land. As relevant to this appeal, the court held:

[T]he BIA has the discretion to approve or not approve leases submitted by the tribe or tribal entities. Without question it is a matter of judgment for the Secretary to decide whether such approval should be granted based on the information he has before him. However, there are provisions in [section 415] which require that certain steps be taken by the Secretary before any decision can be made. * * *

* * * [N]either the statute nor any applicable regulations purport to define what constitutes "satisfaction" or "adequate consideration." * * * Consequently, the court finds that the statute allows wide judgment on the part of the Secretary to determine when he is satisfied, what constitutes "adequate consideration" and who will be responsible for giving "adequate consideration."

Plaintiff also focuses on the word "shall" as an indication of a mandatory directive. However, this language places an obligation upon the Secretary to do nothing more than subjectively "satisfy himself" that someone has given adequate consideration to the [enumerated factors]. * * *

* * * * *

[Section 415] speaks only to the Secretary satisfying himself concerning the [enumerated factors]. Even if the statute had particularly stated that he must satisfy himself concerning [the enumerated factors], the statute does not give any guidance whatsoever as to what the Secretary should do in this regard. It does not require an expert's analysis, it does not require inspections, it does not require the gathering of any data. * * * Therefore, the statute does not mandate clear duties upon the Secretary but allows him broad discretion in "satisfying himself" that "adequate consideration" has been given to [the enumerated factors].

823 F. Supp. at 1549-50.

[1] Section 415 was passed for the benefit and protection of Indians with respect to leases of their trust or restricted lands. Although the 1970 amendment to section 415 specifies certain factors which the Secretary must consider prior to approving or disapproving a lease, it does not restrict the Secretary's discretion once the Secretary has satisfied

himself that the enumerated factors have been adequately considered. ^{4/} In the absence of compelling evidence to the contrary in the amendment or its legislative history, the Board declines to hold that the amendment alters the historic intent of 25 U.S.C. § 415, renders that section a "mini-NEPA," or grants a right to intervene in lease approval proceedings to persons who are strangers to the lease. The Board holds that the State, as a stranger to this lease between a sovereign Indian nation and a private party, is not within the zone of interests sought to be protected by section 415, and therefore does not have a right to intervene in, or appeal from, a BIA proceeding under that section. See Warth v. Seldin, 422 U.S. 490, 500 (1975) ("Essentially, the standing question * * * is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief"). Cf. cases construing 25 U.S.C. § 81, e.g., Enterprise Management Consultants, Inc. v. United States, 685 F. Supp. 221 (W.D. Okla. 1988), aff'd, 883 F.2d 890 (10th Cir. 1989) (The district court held: "[T]he purpose of [25 U.S.C. § 81] is to protect the interests of Indians. This is old law." 685 F. Supp. at 222); Kombol v. Acting Assistant Portland Area Director (Economic Development), 19 IBIA 123, 130 (1990).

The State also claims a right to intervene under three sections of the Administrative Procedure Act (APA). It first cites 5 U.S.C. § 554(c). Section 554 is entitled "Adjudications," and provides in pertinent part:

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing. * * *

* * * * *

(c) The agency shall give all interested parties opportunity for--

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

A lease approval proceeding under 25 U.S.C. § 415 is not an "adjudication" within the meaning of 5 U.S.C. § 554 because such a proceeding is not "required by statute to be determined on the record after opportunity

^{4/} In this case, the fact that BIA conditioned lease approval on successful completion of the NEPA and NRC review proceedings evidences BIA's conclusion that the environmental impacts of this proposal will be adequately considered through those proceedings.

for an agency hearing." Therefore, 5 U.S.C. § 554 does not apply to a BIA lease approval proceeding under 25 U.S.C. § 415.

The State next cites the third sentence of 5 U.S.C. § 555(b). Section 555 is entitled "Ancillary matters." Subsection (b) provides:

A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding. [Emphasis added to material relied on by the State.]

The State's argument appears to be based on its belief that because it is "interested" in how the Tribe uses its lands, it is an "interested party" or "interested person" in any proceeding addressing any aspect of that issue. (See, e.g., Notice of Appeal at 3-4: "The potential consequences of an accident involving the transportation, handling or storage of the nuclear fuel rods are so horrendous that the State should be given an unqualified right to participate in all proceedings involving the proposal"). The State cites American Trucking Associations, Inc. v. United States, 627 F.2d 1313, 1320 (D.C. Cir. 1980), and Moffat Tunnel League v. United States, 289 U.S. 113 (1933), for the proposition that the sufficiency of a party's "interest" must be determined with reference to the particular context in which the party seeks to assert its position.

In American Trucking, the court considered regulations promulgated by the Interstate Commerce Commission governing intervention in its proceedings. The court stated that there was not a "ready and convenient definition in the case law" of the term "interested." 627 F.2d at 1319. It then cited Alleghany Corp. v. Breswick & Co., 353 U.S. 151 (1957), in which the Supreme Court stated:

The reference in [the Interstate Commerce Act] to "interested parties," like the reference * * * to "party in interest," must be interpreted in accordance with the rules relevant to standing to become parties in proceedings under the Interstate Commerce Act. A hearing under that Act is not like a

legislative hearing and "interest" is not equivalent to "concern." It may not always be easy to apply in particular cases the usual formulation of the general principle governing such standing--e.g., "the complaint must show that plaintiff has, or represents others having, a legal right or interest that will be injuriously affected by the order." Moffat Tunnel League 289 U.S. 113, 119. In each case, the sufficiency of the "interest" in these situations must be determined with reference to the particular context in which the party seeks to assert its position.

353 U.S. at 173.

In determining whether the State has a right to intervene here, the Board has examined the particular context in which the State seeks to assert its position. The State seeks to assert its position with respect to environmental and safety concerns about a proposed use of tribal land in the context of a BIA lease approval proceeding under 25 U.S.C. § 415. The Board has determined that, in that context, the State does not have a right to intervene because it is a stranger to the lease and is not within the zone of interests sought to be protected by section 415. This holding does not preclude the State from asserting its position with respect to environmental and safety concerns in a proper context, *i.e.*, the NEPA and NRC review proceedings.

The Board concludes that 5 U.S.C. § 555(b) does not grant the State a right to intervene in a BIA lease approval proceeding under 25 U.S.C. § 415.

In regard to the third APA provision which it cites, 5 U.S.C. § 702, the State references other court decisions for the general proposition that "[i]n considering issues involving intervention and standing to participate in administrative proceedings, courts have regularly looked to decisions dealing with who has standing to appeal administrative decisions to the courts and held that parties who would have standing to challenge agency action in court should be permitted to intervene in the administrative proceedings." Response to Order to Show Cause at 10. It contends that it has standing under section 702 to challenge the BIA lease approval in Federal court.

Section 702 provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

In the context of this decision, the Board holds that the State has not shown that it has suffered a "legal wrong" because of, or that it is "adversely affected" by, BIA's approval of a lease of tribal land under 25 U.S.C. § 415. Therefore, the State has also not shown that 5 U.S.C. § 702 grants it a right to intervene in a BIA lease approval proceeding under 25 U.S.C. § 415.

The Board therefore concludes that no provision of the APA which the State has cited grants it a right to intervene in a BIA lease approval proceeding under 25 U.S.C. § 415.

The State also contends that it is entitled to intervene in the BIA lease approval proceeding because it is not clear that it will be permitted to participate in the NRC review proceeding and because PFS "has asked that the State be precluded from raising issues related to the trust responsibility of the Secretary of the Interior in approving the lease." Notice of Appeal at 2.

In fact, the filing on which the State bases these assertions states in pertinent part:

PFS does not object to the State of Utah's standing in this proceeding. * * *

The State presents a statement of aspects on which it wishes to intervene pursuant to 10 C.F.R. § 2.714(a)(2). * * * Some of the aspects raised by the State appear to be beyond the scope of this proceeding (e.g., the Secretary of the Interior has not satisfied his trust responsibility to American Indians * * *) and others appear to challenge NRC regulations (e.g., NRC lacks authority to issue a license of an away-from-reactor ISFSI * * *). PFS will address these matters if and when contentions are filed by the State. [Emphasis added in first paragraph.]

PFS' Answer to Request for Hearing and Petition to Intervene of the State of Utah in In the Matter of Private Fuel Storage L.L.C., Docket No. 72-22, ASLBP No. 97-732-02-ISFSI, before the NRC, at 1.

This Board lacks authority to determine the manner in which an NRC proceeding is conducted or the issues that may be raised in such a proceeding. However, the possibility that the State may not be able to raise every issue it wants to raise in the NRC proceeding does not grant it a right to intervene in a BIA proceeding in which it otherwise does not have such a right. 5/

The Board concludes that the State has failed to show that it has a right to intervene in, or appeal from, a BIA lease approval proceeding under 25 U.S.C. § 415.

5/ According to a news report, the NRC granted the State's petition to intervene in the NRC proceedings on Apr. 22, 1998. See John Heilprin, Nuclear Panel Gives State Place at Talks, Salt Lake Tribune, Utah Online, Apr. 23, 1998.

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 from the Acting Phoenix Area Director's September 18, 1997, decision is dismissed for lack of standing. 6/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

5/ Other arguments raised but not specifically addressed were considered but found to be without merit or unresponsive to the limited questions raised in this appeal.