



INTERIOR BOARD OF INDIAN APPEALS

David Evitt, Russell Evitt, and Doris Evitt and James Edmonds  
v. Acting Pacific Regional Director, Bureau of Indian Affairs

38 IBIA 77 (08/26/2002)



# United States Department of the Interior

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

DAVID EVITT, RUSSELL EVITT, and	:	Order Dismissing Appeals
DORIS EVITT,	:	
Appellants	:	
	:	
JAMES EDMONDS,	:	
Appellant	:	
	:	Docket Nos. IBIA 02-68-A
v.	:	IBIA 02-69-A
	:	
ACTING PACIFIC REGIONAL DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	August 26, 2002

These are appeals from a January 28, 2002, decision of the Acting Pacific Regional Director, Bureau of Indian Affairs (Regional Director; BIA), to take 1000 acres in Amador County, California, into trust for the Jackson Rancheria of Me-wuk Indians of California (Tribe). Appellants are David Evitt, Russell Evitt, and Doris Evitt (Evitts) (Docket No. IBIA 02-68-A) and James Edmonds (Docket No. IBIA 02-69-A). For the reasons discussed below, the Board dismisses these appeals for lack of standing.

The Regional Director's decision was not challenged by any entity with clear standing in this matter. <sup>1/</sup> Therefore, the Board ordered briefing on the question of the standing of these individuals to challenge the Regional Director's decision before the Board. Briefs have been filed by Appellants, the Regional Director, and the Tribe. Appellants contend that they have standing. The Regional Director and the Tribe argue that Appellants do not have standing.

Appellants devote a good portion of their briefs to discussions of their objections to the Regional Director's January 28, 2002, decision and their objections to a Finding of No Significant Impact (FONSI) and Environmental Assessment concerning the proposed trust acquisition. These arguments address the adequacy of the Regional Director's decision and the documents supporting it—in other words, the merits of the trust acquisition decision.

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<sup>1/</sup> In cases where at least one appellant has clear standing, the Board has allowed appeals to proceed despite the arguable lack of standing of some appellants. See Oklahoma Petroleum Marketers Ass'n v. Acting Muskogee Area Director, 35 IBIA 285, 287 (2000).

The only issue before the Board at this point is the issue of Appellants' standing. Accordingly, Appellants' arguments on the merits will not be addressed in this decision.

Appellants also devote considerable attention to injuries they state have resulted from present activities on Jackson Rancheria lands already in trust. These alleged injuries, however, as they are already in existence, clearly cannot be said to result from the proposed trust acquisition. Therefore, Appellants' arguments concerning these injuries will not be addressed in this decision.

Appellants have formally appealed only the Regional Director's trust acquisition decision and not the related FONSI, which was signed by the Regional Director on November 9, 2001. However, the Evitts submit a December 19, 2001, letter they received from the Regional Director, which responded to their inquiry as to whether the FONSI could be appealed at that time. The Regional Director's letter stated:

[W]e are enclosing a policy memorandum of the Deputy Commissioner of Indian Affairs dated November 6, 1995. That memorandum states, in part, "Any party that is adversely affected by a BIA [National Environmental Policy Act (NEPA)] determination shall have the right to appeal that determination at such time as BIA makes a final decision relying on the NEPA determination." [2/]  
Accordingly, we believe that the most appropriate time for an appeal is following the decision as to trust acquisition.

Appellants may well have considered their appeals from the trust acquisition decision to have incorporated appeals from the FONSI. As they raise environmental issues, this appears to be the case. Given Appellants' environmental arguments, the policy expressed in the Deputy Commissioner's 1995 memorandum, and the Regional Director's December 19, 2001, letter, the Board construes the Regional Director's trust acquisition decision as having incorporated the FONSI, and thus construes these appeals as appeals from the FONSI as well as the trust acquisition decision.

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2/ The Deputy Commissioner's policy memorandum was addressed to BIA Area Directors (now called Regional Directors) and Central Office Directors. As far as the Board is aware, the policy expressed in the memorandum has not been made public in any form. While the policy is undoubtedly intended to promote efficiency in the appeal process, it conflicts with provisions of BIA's appeal regulations in 25 C.F.R. Part 2, *e.g.*, 25 C.F.R. § 2.7.

The Board has received a number of appeals from FONSI's and in some cases has stayed proceedings in those appeals pending BIA's final decisions relying on the FONSI's. Although this procedure accomplishes the result evidently envisioned in the Deputy Commissioner's policy memorandum, it would clearly be preferable for BIA to publish a regulation concerning the appeal of NEPA determinations, so that conflicts can be avoided and the public can be made aware of the procedures BIA intends to follow.

Under these circumstances, the Board finds that Appellants' standing must be analyzed both with respect to the trust acquisition decision itself and with respect to the FONSI.

In previous Board cases, appellants have been found to lack standing where they failed to show they had suffered a "legal wrong," Utah v. Acting Phoenix Area Director, 32 IBIA 169, 176 (1998), or to show that the decision on appeal adversely affected the appellants' enjoyment of a legally protected interest. Hawley Lake Homeowners' Ass'n v. Deputy Assistant Secretary--Indian Affairs (Operations), 13 IBIA 276, 284 (1985); Redfield v. Acting Deputy Assistant Secretary—Indian Affairs (Operations), 9 IBIA 174, 175 (1982). In addressing standing, the Board has been guided by the standing analysis employed in the Federal courts, even though the Board is not bound by the case-or-controversy restrictions in Article III of the United States Constitution. E.g., Utah, 32 IBIA at 173-74; Gossett v. Portland Area Director, 28 IBIA 72, 75 (1995); Kombol v. Acting Assistant Portland Area Director, 19 IBIA 123, 130 (1990); Hawley Lake Homeowners' Ass'n, 13 IBIA at 281-83.

The Board's cases have recognized that an appellant may have standing to challenge an environmental determination made by BIA even though the same appellant may lack standing to challenge a related (or even the same) BIA decision on another basis. E.g., Utah, 32 IBIA at 176; Neighbors for Rational Deveopment, Inc. v. Albuquerque Area Director, 33 IBIA 36 (1998). 3/ This distinction reflects the fact that environmental interests have long been recognized by the Federal courts as within the zone of interests protected by NEPA. E.g., United States v. SCRAP, 412 U.S. 669, 686 n.13 (1973).

Recently, the Board dismissed an appeal from a trust acquisition decision for failure to show standing. Friends of East Willits Valley v. Acting Pacific Regional Director, 37 IBIA 213 (2002). In that case, the appellant had based its claim to standing before the Board upon its right under California law to bring suit in California courts as a "private attorney general." The Board found that the appellant had not described any concrete injury that affected it in a personal and individual way. The Board therefore found that the appellant had failed to show that it satisfied the first of three elements of standing described by the Supreme Court in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

In Lujan, the Supreme Court stated:

[T]he irreducible constitutional minimum of standing contains three elements. 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

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3/ Neighbors for Rational Development was an appeal from a BIA decision approving a lease. The appellant's standing was not challenged, and thus the issue of standing was not addressed in the Board's decision. Although the appeal was ostensibly taken from the lease approval, the appellant was actually challenging the underlying EA and FONSI.

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.” [Citations and footnote omitted.]

504 U.S. at 560-61.

Here, Appellants allege that they will be personally affected by the Regional Director’s decision. Edmonds alleges that the value of his property will decrease, that a proposed access road will result in increased traffic which will affect him personally, and that a proposed water pipeline will dry up his property. Like Edmonds, the Evitts allege property devaluation, traffic, and water pipeline impacts. In addition, they allege that they will suffer visual, air quality, and noise impacts and will be required to pay higher taxes as a result of the trust acquisition. Of Appellants’ alleged injuries, all but two (property devaluation and tax increase) are environmental in nature.

It appears from the materials before the Board that all Appellants live in the vicinity of the property proposed for trust acquisition although none live directly adjacent to the property. The Board assumes for purposes of this discussion that all Appellants live close enough to be affected by activities taking place on the property. Thus, the Board also assumes for purposes of this discussion that Appellants satisfy the first element of the standing test described in Lujan.

Under the second element described in Lujan, Appellants must show “a causal connection between the injury and the conduct complained of.” Thus they must show that the trust acquisition decision, rather than the independent action of a third party not before the court (or in this case, the Board), will cause the injuries they allege.

In TOMAC v. Norton, 193 F.Supp.2d 182 (D.D.C. 2002), the United States District Court for the District of Columbia held that the plaintiff organization (Taxpayers of Michigan Against Casinos (TOMAC)) had standing in Federal court to challenge a trust acquisition for the Pokagon Band of Potawatomi Indians where the property proposed for trust acquisition was to be used for casino purposes. The district court found that the plaintiff satisfied the first element of the standing test described in Lujan because several of its members lived in the vicinity of the proposed trust acquisition and asserted injuries to their personal enjoyment of their own property and their neighborhood resulting from the casino operation. With respect to the “causation” element, the court noted that the injuries asserted by the plaintiff did not arise from the trust acquisition per se but from the Pokagon Band’s intended use of the property for casino purposes. Even so, the court found that the “causation” element was satisfied

because trust acquisition of the land was a necessary prerequisite to its use for casino purposes. The court also found that the third element, redressability, was satisfied because a decision not to take the land in trust would prevent the Pokagon Band from operating a casino on the site.

In this case, the Tribe intends to use its property for ten homes for tribal members, an RV park with a capacity for 200 vehicles, equestrian and walking trails, an archery park and shooting range, and preservation of tribal cultural sites. Appellants do not contend that any of these intended uses would be precluded if the property is not taken into trust.

The Tribe contends, and Appellants do not dispute, that the development planned by the Tribe is consistent with land use requirements established for the area by Amador County. The Tribe also contends that its plans will result in less dense development than would have taken place under a project which the County had previously approved for the property. In support of this contention, the Tribe submits the opinions of two real estate appraisers. <sup>4/</sup> Although Appellants object to the Tribe's submission of these professional opinions, they do not refute the opinions.

From the materials before the Board, it appears likely that, if the property is not taken into trust, the Tribe could proceed with its present development plans under State and County law. In any event, Appellants have failed to show that the Tribe could not do so.

The Tribe is a third party with authority to take action independent of BIA. Further, the Tribe is not before the Board within the meaning of Lujan, even though it has participated in this appeal as an interested party, because its independent actions are not subject to review by the Board. <sup>5/</sup>

Appellants have not shown that the Tribe's development plans are dependent upon trust acquisition of the property. Thus, they have failed to establish a causal connection between the

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<sup>4/</sup> One of the appraisers states that the Tribe's plan "clearly results in a significant decrease in the amount of infrastructure required for development when compared to the previously County-approved Gold Creek Project, as well as a significant decrease in land usage." June 8, 2002, Opinion Letter of Henry H. Arnold, III, at 2. The other appraiser states that the Tribe's plan results in "[l]ower traffic generating trips; [l]ower water usage; [l]ower noise impacts \* \* \*; [a]nd land impacts described as less than significant." June 12, 2002, Report of Cydney G. Bender at 2.

<sup>5/</sup> The Board is not a court of general jurisdiction and has only those authorities delegated to it by the Secretary of the Interior. It does not have authority to review actions taken by tribal officials. See, e.g., Hilliard v. Portland Area Director, 34 IBIA 272, 274 (2000); Welmas v. Sacramento Area Director, 24 IBIA 264, 268 (1993), and cases cited therein.

Regional Director's decision and the environmental injuries they allege would result from the Tribe's development of the property.

Two of Appellants' alleged environmental injuries concern a proposed access road and a proposed water pipeline.

Edmonds objects to the proposed access road which, he asserts, will result in increased traffic. However, the road cannot be constructed unless permits are granted by Caltrans, a California State agency, and Amador County, both of which are third parties and neither of which is before the Board. Further, if the permits are issued, the road can be constructed regardless of whether the property is taken into trust. <sup>6/</sup>

All Appellants object to a water pipeline which, if constructed, would cross the property proposed for trust acquisition. However, the Tribe has already granted an easement over the property to the Amador Water Agency for the purpose of constructing the pipeline. Because of a challenge to the pipeline currently pending in California State court, it is uncertain whether construction will occur. However, if the Amador Water Agency prevails in the litigation, it will have the right to construct the pipeline across the Tribe's property under the already granted easement, regardless of whether the property is taken into trust.

Appellants have not shown that construction of either the access road or the water pipeline is dependent upon trust acquisition of the property. Thus, they have failed to establish a causal connection between the Regional Director's decision and the environmental injuries they allege would result from construction of the access road and the water pipeline.

The two remaining injuries alleged by Appellants are economic rather than environmental in nature. All Appellants allege that the value of their property will decrease as a result of the development planned by the Tribe. As discussed above, Appellants have not shown that the Tribe's development plans are dependent upon trust acquisition of the property. Thus, they have failed to establish a causal connection between the Regional Director's decision and this alleged economic injury.

The Evitts also allege that they will be required to pay increased taxes because the Tribe's property will be removed from the tax rolls if it is taken into trust. However, if the Evitts' taxes are increased, the increase will be imposed through the independent action of Amador County or the State of California, both of which are third parties and neither of which is before the Board. Thus, the Evitts have failed to establish a causal connection between the Regional Director's decision and this alleged economic injury.

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<sup>6/</sup> The Tribe states that the access road was included in the plans for the development project which Amador County had previously approved.

