



## INTERIOR BOARD OF INDIAN APPEALS

Abby Bullcreek et al. v. Western Regional Director, Bureau of Indian Affairs

40 IBIA 196 (01/07/2005)

### Related Board cases:

32 IBIA 169

39 IBIA 100

40 IBIA 191

### Judicial Review:

Appeal dismissed, Bullcreek v. U.S. Department of the Interior,  
426 F. Supp. 2d 1221 (D. Utah 2006)



## 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

ABBY BULLCREEK, LISA BULLCREEK, : Order Affirming Decision  
MARGENE BULLCREEK, LENA : to Dismiss Appeal  
KNIGHT, DANIEL MOON, :  
DELFORD MOON, and OHNGO :  
GAUDADEH DAVIA AWARENESS, :  
Appellants, : Docket No. IBIA 02-8-A  
v. :  
WESTERN REGIONAL DIRECTOR, :  
BUREAU OF INDIAN AFFAIRS, :  
Appellee. : January 7, 2005

Appellants, individuals Abby Bullcreek, Lisa Bullcreek, Margene Bullcreek, Lena Knight, Daniel Moon, and Delford Moon, and an organization named Ohngo Gaudadeh Davia Awareness, appeal an August 20, 2001, decision of the Western Regional Director, Bureau of Indian Affairs (Regional Director; BIA). The Regional Director dismissed Appellants' challenges to the BIA Uintah and Ouray Agency Superintendent's conditional approval of a proposed business lease (lease) between the Skull Valley Band of Goshute Indians (Tribe) and Private Fuel Storage, L.L.C., (PFS), a consortium of utility companies, for the temporary storage of spent nuclear fuel on the Tribe's reservation in central Utah. <sup>1/</sup> Appellants' notice of appeal characterizes Appellant individuals as individual voting members of the Tribe's

---

<sup>1/</sup> On May 19, 2003, the Board of Indian Appeals (Board) referred the case of Margene Bullcreek v. Western Regional Director, IBIA 03-46-A, involving an internal dispute within the Tribe, to the Department's Office of Collaborative Action and Dispute Resolution (CADR). On June 2, 2003, the Board stayed this appeal pending the outcome of an alternative dispute resolution (ADR) assessment in the Margene Bullcreek appeal. On Aug. 19, 2003, this case was consolidated with Margene Bullcreek, since both raised issues involving the same tribal government dispute, although arising in different factual contexts. On July 20, 2004, the Board lifted the stay after it was informed by CADR that the Margene Bullcreek appeal was not amenable to resolution through ADR. The Board's decision regarding this appeal is being issued separately from the Board's decision in Margene Bullcreek, which is also being decided today. 40 IBIA 191 (2005).

governing body, the General Council, which is composed of all tribal members over the age of 18 who are qualified to vote. Appellant individuals bring this appeal as individual tribal members and as members of the General Council. Appellant organization's membership apparently includes members of the Tribe. For the reasons discussed below, the Board affirms the Regional Director's decision to dismiss Appellants' challenges on standing and ripeness grounds. Appellants lack standing to challenge BIA's conditional approval of the lease, based on allegations that the lease was not authorized by the Tribal Council or that BIA's approval breached the Secretary of the Interior's trust responsibility to the Tribe. To the extent that Appellants' environmental challenges to BIA's approval of the lease may be construed as asserting Appellants' individual interests, those challenges are not ripe for Board review.

### Background

On February 19, 1994, the Tribe's General Council authorized the Tribe's Executive Committee to enter into negotiations for the building of an interim storage facility for spent nuclear fuel on the Tribe's reservation in Tooele County, Utah. The negotiations, which began in May 1996, involved land held in trust for the Tribe by the United States.

Through actions taken in December 1996 and April 1997, the General Council authorized the Tribe to enter into the lease with PFS. On May 20, 1997, the Tribe's Chairman, Vice-Chairwoman, and Secretary, and the Chairman of PFS, signed an "Amended and Restated Business Lease Between Skull Valley Band of Goshute Indians and Private Fuel Storage, L.L.C."

The land subject to the lease includes approximately 820 acres. The lease gives PFS exclusive use and control of the property, as well as the responsibility for securing the area, and includes an exclusive easement and right-of-way. This easement covers approximately 202 acres of land out of the 820 acres. In addition, PFS is given, in the lease, an irrevocable option to obtain additional easements and rights-of-way within the reservation as necessary or appropriate for the storage facility. The initial term of the lease is 25 years, with PFS having an irrevocable option to extend the term of the lease for an additional 25 years.

The lease sets forth four conditions that must be met before construction of the storage facility may commence: (1) the Nuclear Regulatory Commission (NRC) and BIA must complete the environmental analysis required under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321-4325 (2000); (2) the lease must be modified to incorporate mitigation measures identified in the Record of Decision; (3) a NEPA Environmental Impact Statement (EIS) must be issued; and (4) the requisite license must be issued by the NRC. The Secretary must certify, within 30 days from the satisfaction of all four conditions, that the conditions have in fact been satisfied. Only then, under the terms of the lease, will the Secretary authorize PFS to take possession and commence construction of the facility.

Because the United States holds the land subject to the lease in trust for the Tribe, approval had to be sought from the Secretary of the Interior under 25 U.S.C. § 415(a). This section broadly requires approval by the Secretary of the Interior of leases of Indian trust lands. Among other things, section 415(a) provides that before approving a lease, the Secretary “shall first satisfy himself that adequate consideration has been given to the relationship between the use of leased lands \* \* \* and the effect on the environment of the uses to which the leased lands will be subject.”

The Superintendent approved the lease on May 23, 1997, on a page of the lease designated “Approval of Lease,” but issued no separate decision or analysis. On September 22, 2000, Appellants appealed the Superintendent’s approval of the lease to the Regional Director, contending that the Superintendent’s approval violated 25 U.S.C. § 415(a) and NEPA, and was also improper because the Tribal Council had not authorized the lease and because of other alleged improprieties.

On August 20, 2001, the Regional Director denied Appellants’ appeal on jurisdictional grounds, but also concluded that Appellants had failed to prove error in the Superintendent’s conditional approval of the lease. After first concluding that he would consider Appellants’ appeal, despite questions concerning its timeliness, the Regional Director addressed seven categories of issues raised in the appeal: ripeness, standing, exhaustion of tribal remedies, allegations of impropriety and bribery, authority of the Tribe’s General Council, environmental issues, and additional claims.

With regard to ripeness, the Regional Director found the appeal to be premature and not ripe since the four conditions on which the Superintendent’s approval were based might not be satisfied in the future, and construction and operation of the facility may never commence. The Regional Director reasoned that until the conditions in the lease were met, Appellants could not be adversely affected by the lease, and, therefore, the appeal was premature and not ripe for his review.

The Regional Director also concluded that Appellants lacked standing because the Superintendent’s conditional approval was not an agency action that can adversely affect Appellants. He added that, in any event, individual tribal members lack standing to bring an appeal based on a personal assessment of what is or is not in the best interests of the Tribe.

The Regional Director also found that Appellants’ tribal remedies had not been exhausted; that allegations of bribery, corruption, and impropriety were vague, general, and encompassed within a framework not redressable by BIA; that the lease had been properly authorized by the Tribe’s General Council; and that any environmental concerns were not ripe

for review since final approval of the lease was subject to environmental review. He denied all other claims raised by Appellants. 2/

## Discussion

Appellants appealed the Regional Director's August 20, 2001, decision to the Board, raising substantive challenges to BIA's approval of the lease, and contending that the Regional Director's denial of their claims on jurisdictional grounds was in error. 3/

---

2/ The controversy over this project has spawned much litigation. The State of Utah previously sought, unsuccessfully, to intervene in BIA's lease approval process. See Utah v. Acting Phoenix Area Director, 32 IBIA 169 (1998) (State does not have right to intervene in BIA's lease approval proceeding), aff'd, Utah v. U.S. Department of the Interior, 45 F. Supp. 2d 1279 (D. Utah 1999) (State lacked standing to challenge BIA's lease approval), dismissal aff'd on other grounds, 210 F.3d 1193 (10th Cir. 2000) (dismissing State's environmental challenges as not ripe for judicial review). Other litigation includes Skull Valley Band of Goshute Indians v. Nielson, 376 F.3d 1223 (10th Cir. 2004) (Utah statutes regulating the storage and transportation of spent nuclear fuel are preempted by federal law); Bullcreek v. Nuclear Regulatory Commission, 359 F.3d 536 (D.C. Cir. 2004) (Atomic Energy Act confers on the NRC the authority to license and regulate storage and disposal of spent nuclear fuel); and Blackbear v. Norton, 93 Fed. Appx. 192 (10th Cir. 2004) (action filed before the Regional Director's Aug. 20, 2001, decision dismissed for failure to exhaust administrative remedies).

3/ After receipt of the appeal, the Board ordered briefing on an additional jurisdictional issue — whether the appeal to the Board had been timely filed. In mailing their notice of appeal to the Board, Appellants had transposed the Board's street address numbers, and the notice was returned to Appellants by the U.S. Postal Service. Thereafter, Appellants re-sent their notice of appeal to the correct address, but this second mailing was untimely. Although Appellants did not respond to the timeliness issue in their brief, the Board's closer review of the record found that the appeal instructions contained in the Regional Director's decision also transposed the Board's street address numbers in the same erroneous manner. The Board has held that when an appellant has been given, and complies with, incorrect appeal instructions, and where, otherwise, that appeal would have been timely filed with the Board, such an appeal may be considered by the Board to be timely. See, e.g., Hendry County, Florida v. Eastern Regional Director, 40 IBIA 135, 136 (2004); Pretty Paint v. Rocky Mountain Regional Director, 38 IBIA 177, 178 (2002). Therefore, because Appellants sent their initial notice of appeal in a timely manner to the same incorrect address provided to them by BIA, the Board considers this appeal as having been timely filed.

Addressing the merits of BIA's approval of the lease, Appellants argue that it was improper because the lease was executed by a tribal Executive Committee with questionable authority and the lease was never reviewed by the Tribe's General Council. As a result, they argue that the lease was neither properly considered nor approved by the Tribe because a question of fact existed as to whether the approval of the General Council was required before the tribal officials could sign the lease on behalf of the Tribe. Appellants also contend that BIA should not have approved the lease before conducting an adequate environmental assessment and impact statement. They allege that 25 U.S.C. § 415 requires the consideration of environmental impacts prior to the agency's decision to approve or disapprove a lease. They also level a challenge under the NEPA. According to Appellants, BIA's approval of the lease, without first completing these environmental reviews, was premature and violates the Secretary's trust responsibility to the Tribe. In addition to articulating these two specific arguments on the merits, Appellants also seek to incorporate by reference various arguments contained in earlier pleadings filed with the Regional Director, for why the Superintendent's approval should be reversed. Although Appellants' substantive arguments raised in these other documents are often less than clear, it appears that Appellants may also be seeking to raise environmental challenges to BIA's approval of the lease, based on alleged environmental injuries or threatened injuries to them as individuals. Solely for purposes of resolving this appeal, the Board assumes that Appellants may be seeking to raise environmental challenges to BIA's action based on alleged adverse effects on their individual interests.

Turning to the jurisdictional issues, Appellants allege that their appeal is ripe because they have had to expend limited resources in opposition to the proposed facility and have thus been adversely affected. Although Appellants admit that the approval of the lease was conditional, they argue that BIA's approval "substantially moved forward the process" of building the facility. Appellants also claim they have standing to bring this appeal since they are official members of the General Council, the Tribe's governing body, which they contend must approve the lease, but has not done so. Finally, Appellants contend that since there is no legitimately established tribal court, exhaustion of tribal remedies would be futile, and it was error for the Regional Director to require them to exhaust tribal remedies.

Because two of the jurisdictional grounds relied upon by the Regional Director — standing and ripeness — are dispositive of this appeal, the Board need not address the exhaustion of tribal remedies issue, or the merits of Appellants' challenges to BIA's conditional approval of the lease.

First, the Board agrees with the Regional Director that Appellants, as individual tribal members, lack standing to challenge BIA's conditional approval of the lease, based on claims that the lease was not properly authorized by the Tribe's General Council, or that BIA's failure to first complete environmental reviews violated the Secretary's trust responsibility to the Tribe. Both of these claims seek to assert claims based on tribal interests. The Board has held that

tribal members, as individuals, lack standing to challenge the validity of a tribal action in an appeal before the Board. See, e.g., Swab v. Sacramento Area Director, 25 IBIA 205 (1994). Similarly, “[t]he Department [of the Interior] has never recognized \* \* \* any right of an individual member of a tribe to bring an action for the tribe based on a personal assessment of what is or is not in the best interests of the tribe.” Frease v. Sacramento Area Director, 17 IBIA 250, 256 (1989), quoting Redfield v. Acting Deputy Assistant Secretary - Indian Affairs (Operations), 9 IBIA 174, 177 (1982). This policy arises from the Department’s responsibility to refrain from interfering in intra-tribal disputes. Swab, 25 IBIA at 208.

Appellants contend, however, that they are more than individual tribal members, because they are members of the Tribe’s General Council, which is the governing body of the Tribe. For the reasons discussed in Margene Bullcreek, 40 IBIA 191 (2004), also decided today, the Board rejects Appellants’ argument that their “official capacity” as members of the Tribe’s General Council affords them any greater standing than their status as individual tribal members. The Tribe’s General Council consists of all tribal voters 18 years of age or older, and therefore the status of a member of the Tribe’s governing body is as a practical matter indistinguishable from his or her status as an adult member of the Tribe generally. Indeed, the same type of tribal organization existed in Frease, in which the Board held that individual tribal members lacked standing to assert what are in effect tribal interests. Therefore, any remedy Appellants may have with respect to these concerns is to be found within the tribal context.

Next, to the extent that Appellants’ environmental challenges to BIA’s conditional approval of the lease might be construed as seeking to protect their interests, as individuals, from alleged adverse health, economic, or environmental effects that would result from the proposed storage facility, the Board concludes that these claims are not ripe. <sup>4/</sup> By now it is well-established that BIA’s approval of the lease was conditional, did not constitute final approval of the proposed storage facility, and did not authorize PFS to take possession or commence construction of the facility. See Utah, 210 F.3d at 1195 (Superintendent conditionally approved the lease); Utah, 32 IBIA at 170 n.1 (BIA’s decision to approve the lease was conditional, and not final). It is entirely conceivable that no action at all may be taken in the future to store spent nuclear fuel on the Tribe’s reservation, because no construction or operation of the facility can commence without further BIA evaluation to ensure that the conditions set forth in the lease have been met. If one or more of the requisite conditions are not met, the Secretary will not issue the necessary certification which, in effect, gives final

---

<sup>4/</sup> In Evitt v. Acting Pacific Regional Director, 38 IBIA 77 (2002), the Board 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 the same BIA action on another basis. For purposes of this appeal, the Board assumes, without deciding, that Appellants may be able to establish standing as individuals to raise environmental challenges to BIA’s final approval of the lease.

approval to the lease, and the facility will never be constructed. See generally Hayes v. Anadarko Area Director, 25 IBIA 50 (1993) (appeal dismissed as premature when no final determination had been made by BIA). Appellants have not suffered, and may never suffer, any concrete adverse effects.

Appellants contend that BIA's conditional approval "substantially moved forward the process of building a nuclear waste facility on the Skull Valley Reservation," and therefore their challenges are ripe for review. But whether or not BIA's conditional approval moved the process forward, the fact remains that the project itself may never be given final approval, and therefore review at this time is premature. The Tenth Circuit's observation with respect to the State of Utah's environmental challenges is equally applicable here: Appellants "can do no more than presently allege that if the lease is approved and the facility developed, it may detrimentally impact the environment. [Appellant's] claimed harms are contingent, not certain or immediate." Utah, 210 F.2d at 1197-98 (dismissing State's environmental challenges as not ripe).

In addition, Appellants will suffer no "significant practical harm" if the Board refrains from reviewing BIA's conditional approval, and instead waits for BIA to give final approval to the project. Assuming that Appellants can establish standing, they will have ample opportunity in the future to challenge BIA's final action authorizing the project. Cf. Utah, 210 F.3d at 1196. Meanwhile, as already discussed, BIA's conditional approval of the lease has caused no present adverse impact on Appellants. 5/

Appellants claim that they have suffered harm, and therefore their appeal is ripe, because they have had to expend their limited resources to oppose the proposed facility. However, the mere voluntary expenditure of time and financial resources to pursue otherwise unripe claims does not create the type of hardship or practical harm that make a litigant's claims ripe for review. See Arkansas Power & Light v. I.C.C., 725 F.2d 716, 726 (D.C. Cir. 1984). Otherwise, every litigant could likely satisfy this element of ripeness. The Board is not

---

5/ While instructive, but not binding on the Board, the analysis of ripeness used by the federal courts reviews three relevant considerations: whether a delay would cause hardship; whether judicial intervention would interfere with further administrative action; and, whether further factual development of the issues is required. Utah, 210 F.3d at 1196. As discussed above, delay in review by the Board will not cause hardship because BIA's conditional approval caused no adverse consequences on Appellants. Putting aside the potential relevance of the second factor, the third consideration weighs in favor of waiting. Additional factual development of the issues would be useful because, until BIA has certified that all four conditions are satisfied (e.g., including modifications to the lease to incorporate environmental mitigation measures), the record of BIA's consideration of environmental impacts, prior to giving final approval to the project, is incomplete.

convinced that the cost to Appellants in challenging the proposed facility is sufficient to constitute a concrete harm for ripeness purposes. The alleged “adverse effect” is of Appellants’ own making, and not one imposed upon them by BIA’s conditional approval of the lease. <sup>6/</sup> Therefore, this alleged impact does not make their individual interest-based claims ripe for review, and the Board concludes that this appeal is premature with respect to those claims.

### Conclusion

In summary, the Board affirms the Regional Director’s dismissal of Appellants’ claims on jurisdictional grounds. Appellants lack standing to raise claims based on the interests of the Tribe. Assuming Appellants also seek to raise claims based on their individual interests, this appeal is premature because those claims are not ripe for review until BIA has taken final action to authorize the project.

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 affirms the Regional Director’s August 20, 2001, dismissal of Appellants’ challenges to the Superintendent’s conditional approval of the lease, on the basis of standing and ripeness.

\_\_\_\_\_  
// original signed  
Colette J. Winston  
Administrative Judge

\_\_\_\_\_  
// original signed  
Steven K. Linscheid  
Chief Administrative Judge

---

<sup>6/</sup> Although “standing and ripeness are technically different doctrines, they are closely related in that each focuses on whether the harm asserted has matured sufficiently to warrant judicial intervention.” Skull Valley Band of Goshute Indians v. Nielson, 376 F.3d 1223, 1234 (10th Cir. 2004).