INTERIOR BOARD OF INDIAN APPEALS

Preservation of Los Olivos and Preservation of Santa Ynez v.
Pacific Regional Director, Bureau of Indian Affairs

45 IBIA 98 (06/29/2007)

Affirming after limited reopening:
42 IBIA 189

Judicial review of this case:
Vacated and remanded, *Preservation of Los Olivos v. U.S. Department of the Interior*, 635 F.Supp. 2d 1076 (C.D. Cal. 2008)

Decision on Remand: 58 IBIA 278

Related Board case:
56 IBIA 233

United States Department of the Interior

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PRESERVATION OF LOS OLIVOS and PRESERVATION OF SANTA YNEZ, Appellants,	)	Order Affirming Dismissal After Limited Reopening
v.	)	Docket No. IBIA 05-50-A
PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	June 29, 2007

This appeal by Preservation of Los Olivos (POLO) and Preservation of Santa Ynez (POSY) (collectively "Appellants") was dismissed by the Board of Indian Appeals (Board) on February 3, 2006, for lack of standing because the Board concluded that Appellants had not established that any of their members had demonstrated individual standing to bring the appeal. *Santa Ynez Valley Concerned Citizens v. Pacific Regional Director,* 42 IBIA 189 (2006).[1] Appellants had appealed to the Board from a decision of the Pacific Regional Director, Bureau of Indian Affairs (Regional Director; BIA), dated January 14, 2005, to accept a 6.9-acre parcel of land in Santa Barbara County, California, in trust for the Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation, California (Tribe).

Following the Board's dismissal, Appellants filed suit against the Department of the Interior (Department) in Federal court in the Central District of California. Subsequently, the Department filed a motion to have the matter remanded after determining that the administrative record submitted to the Board by BIA in the earlier proceedings was not complete. On October 6, 2006, the court granted the Department's motion for a remand,

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[1] When an association brings an action on behalf of its members, as is the case here, one requirement is that at least one of its members would otherwise have standing to sue in his or her own right. *Id.* at 192-93, and cases cited therein.

The appellants in the original appeal included Santa Ynez Valley Concerned Citizens (Concerned Citizens) and Women's Environmental Watch of the Santa Ynez Valley. Only POLO and POSY sought judicial review. Accordingly, the caption of this case on remand has been modified and limited to POLO and POSY as Appellants.

directed BIA to file a supplemented and complete administrative record, and ordered the Board to issue another order on an expedited basis in light of the full record. *See Preservation of Los Olivos v. U.S. Dep't of the Interior*, No. CV 06-1502 AHM (CTx) (C.D. Cal. Oct. 6, 2006) (minute order).

We affirm the Board's dismissal of this appeal for lack of standing because Appellants have not shown that any of the documents that were omitted from the original administrative record alter our earlier analysis or decision finding that Appellants' members failed to demonstrate their standing to bring this appeal, and therefore Appellants as organizations also failed to show standing. In reaching this decision, we consider only the arguments of the parties that are predicated on the supplemental record. We decline to consider or to revisit matters that are outside the scope of these limited remand proceedings, including arguments — repeated, refined, or new — that were or could have been raised in the earlier proceedings but were not. We also strike two portions of Appellants' briefs — one attacking the legitimacy of the Tribe and the other raising equal protection and anti-discrimination claims — that are not only outside the scope of these remand proceedings but also clearly violate an express order by the Board setting forth the scope of briefing for these proceedings.

Background

I. Initial Proceedings

This case involves a request by the Tribe for BIA to accept a 6.9-acre parcel of property, located in Santa Barbara County, California, in trust for the Tribe.[2] The parcel is contiguous to the Tribe's existing reservation, and the Tribe presently owns the 6.9-acre parcel in fee. The Tribe plans to use the property for (1) a cultural center and museum, (2) a 3.5-acre community commemorative park, which would serve in part to protect archaeological and cultural resources discovered on the property, and (3) a 27,600-square-foot commercial retail building. *Concerned Citizens,* 42 IBIA at 190-91. If the land is placed in trust, it will not be subject to County property taxes or subject to state and county jurisdiction, except as otherwise allowed by Federal law.

Prior to making the decision to accept the land in trust, BIA solicited comment from state and local governments, and from southern California tribes, for the purpose of obtaining information to enable BIA to analyze the potential impact of the proposed

[2] Additional background information is provided in the Board's previous decision, *Concerned Citizens,* 42 IBIA at 190-91.

acquisition on local governments. The Tribe prepared an Environmental Assessment (EA), which BIA used to determine whether the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, required preparation of an environmental impact statement (EIS). BIA adopted the EA and issued a finding of no significant impact (FONSI) after determining that an EIS was not required.

The Regional Director issued his decision on January 14, 2005, to accept the parcel in trust. No state, county, or local government appealed the decision. Appellants, however, appealed the Regional Director's decision to the Board, contending that the EA prepared in conjunction with the acquisition did not satisfy the requirements of NEPA and that the Regional Director failed to properly consider the applicable regulatory factors for taking land into trust, *see* 25 C.F.R. § 151.10.[3] The Regional Director and the Tribe moved to dismiss the appeal, arguing that Appellants lacked standing.[4]

In response to the motion to dismiss, Appellants filed declarations by eleven individuals to demonstrate standing: Doug Herthel, Kathryn Cleary, Steven Pappas, Zoe Carter, Michael Byrne, Michelle Griffoul, Susan Herthel, Jon Bowen, Keith Saarloos, S. Chris Rheinschild, and Ed Hamer. The original record contained several letters from some of those declarants. *See, e.g.,* Letter from Hamer to Regional Director, undated, at Original Record (O.R.) Tab 8 (compact disc), DATA\IMAGES\00\16\42 [01642],

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[3] The factors include, for example, the Tribe's need for the land, the impact on the state and its political subdivisions resulting from removing the land from the tax rolls, and jurisdictional problems and potential conflicts of land use. 25 C.F.R. § 151.10.

[4] As a matter of prudence, the Board generally limits its jurisdiction to cases in which an appellant can show constitutional and prudential standing under the judicial doctrine of standing. *Arizona State Land Dep't v. Western Regional Director,* 43 IBIA 158, 163 (2006). Constitutional standing requires that an appellant show (1) an injury to a legally protected interest that is concrete and particularized, as well as actual or imminent, not conjectural or hypothetical; (2) that the injury is causally connected with or fairly traceable to the actions of the appellee and not caused by the independent action of a third party; and (3) that it is likely, as opposed to speculative, that the injury will be redressed by a favorable decision. *Concerned Citizens,* 42 IBIA at 192 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Prudential standing requires that a claimant must show that the interest sought to be protected is arguably within the zone of interests to be protected or regulated by the statute in question. *Id.* (citing *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 396 U.S. 150, 153 (1970)).

reprinted at Supplemental Record (S.R.) Tab 8(c), No. C-55; Letter from D. Herthel to Regional Director, undated, at *id.*, DATA\IMAGES\00\16\50 [01650], *reprinted at* Supplemental Record (S.R.) Tab 8(c), No. C-59; Letter from Moniot, D. Herthel, Bowen, and Herrera to Centeno, June 20, 2004, at *id.*, DATA\IMAGES\00\15\28-30 [01528-01530], *reprinted at* Supplemental Record (S.R.) Tab 8(c), No. B-7; Letter from D. Herthel and Bowen to Allan, BIA, June 23, 2004, at *id.*, DATA\IMAGES\00\14\62-63 [01462-63], *reprinted at* Supplemental Record (S.R.) Tab 8(c), No. B-4. The original record also contained hundreds of additional letters from individuals concerning the 6.9-acre trust acquisition, some in support but most in opposition. In the earlier proceedings before the Board, Appellants did not refer to or rely on the letters in the record, either specifically or generally, to support their standing.

From the declarations filed by Appellants, the Board concluded that only one declarant, Bowen, arguably satisfied the constitutional requirements for standing.[5] In his declaration, Bowen identified himself as the owner of two commercial properties, with a combined total of 19,000 square feet of retail space, located approximately 250 and 500 yards from the subject property. Bowen alleged that the Tribe's property tax exemption, if the 6.9-acre parcel is taken into trust, would place him at a commercial disadvantage by affecting the rate he could charge his tenants. The Tribe argued that Bowen's economic

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[5] Two of the declarations submitted by Appellants were from individuals who were not identified as members of either POLO or POSY (Steven Pappas; Susan Herthel), and were therefore not considered. *Concerned Citizens,* 42 IBIA at 193. Of the remaining nine declarations submitted by Appellants, the Board concluded that except for the one from Bowen, the declarations stated only generalized injuries to the community or were too speculative, conjectural, or hypothetical to establish the individualized injury to the declarant necessary for standing. *See id.* at 194-96. None of the declarants claimed to be a member of POSY, and on that basis the Board concluded that POSY had failed to establish standing. *Id.* at 194.

The Board did find that three members of Concerned Citizens had alleged injuries that the Board assumed were sufficiently concrete and particularized to meet the injury prong of standing, but the Board concluded that the causation prong was not satisfied because Concerned Citizens had itself stated that trust status was unnecessary for the Tribe's proposed development and the "marginal" injuries alleged by Concerned Citizens' declarants were too speculative. *Id.* at 199-201. The Board also found that one member of Concerned Citizens, Michele Hinnrichs, arguably satisfied constitutional standing based on allegations similar to those made by Bowen but that she, like Bowen, lacked prudential standing. *Id.* at 201-05.

injury claim was speculative, but in the absence of any countering evidence from the Tribe, the Board assumed that Bowen had satisfied the injury prong of standing. The Board then concluded that because the Tribe's property tax exemption (the source of the alleged injury) would be directly caused by the trust acquisition, it appeared that Bowen satisfied both the causation and redressability prongs of standing. *Concerned Citizens,* 42 IBIA at 201.

The Board next examined whether Bowen satisfied the requirements of prudential standing. The Board found that Bowen lacked prudential standing with respect to Appellants' NEPA claims because purely economic concerns are not within the zone of interests of that statute. *Id.* at 202.

The Board also evaluated the statutory source of authority for the trust acquisition, 25 U.S.C. § 465, and the related regulations, 25 C.F.R. § 151.10, and concluded that "[n]either the statute nor the regulations evince concern for the impacts of taking land into trust on private businesses." *Id.* Therefore, the Board found that Bowen lacked prudential standing to raise claims under section 151.10. In reaching that conclusion, the Board noted that section 151.10 provides for public participation only by and through state and local governments, and provides no role or mechanism for the consideration of private individual concerns. *Id.* at 204.

Because no member of POLO or POSY had demonstrated his or her individual standing to challenge the Regional Director's decision to place the 6.9-acre parcel into trust, the Board concluded that Appellants, as organizations, lacked standing. *Id.* at 205.[6]

II. Judicial Litigation and Remand, Procedures on Remand, and Briefing

Following the Board's decision, Appellants filed suit against the Department in Federal district court, challenging the dismissal of their appeal. After determining that the record that had been certified to the Board in the earlier proceedings was incomplete, the Department moved to remand the matter to the Department. The Department sought a remand to allow the Board "to reconsider its decision in light of the documents that were not included in the record" in the earlier proceedings, and "to determine whether the excluded documents affect its determination that [Appellants] lacked standing to appeal." Federal Defendants' Memorandum in Support of Motion for Remand at 2. On October 6,

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[6] The Board described but did not otherwise address or decide the additional elements of organizational standing: the members' interests the organization seeks to protect must be germane to the organization's purpose and the issues to be resolved must not require the individual participation of the members. *Id.* at 192-93.

2006, the Court granted the Department's motion and ordered BIA to complete the administrative record and provide it to the Board. The Court ordered the Board to expedite its consideration and to issue another order in light of the full, supplemented record.

On November 6, 2006, the Regional Director requested that the Board "conduct a limited reopening of this matter and reconsider its . . . Order Dismissing Appeal in light of documents that were inadvertently omitted from the Administrative Record." Regional Director's Petition for Limited Reopening and Reconsideration at 4. On November 30, 2006, the Regional Director submitted a four-volume "Supplement to the Administrative Record," together with a table of contents. The table of contents submitted by the Regional Director identified the documents that had been omitted from the original record, which the Board described as the "supplemental record" on remand. *See* Procedures on Remand and Order Granting Request to Limit Disclosure of Historic Preservation Related Documents (Procedures on Remand), Feb. 21, 2007, at 2. In addition to the previously-omitted documents, the Regional Director included with his submission hard copies of certain documents that had been previously submitted on compact disc as part of the original record. *See* S.R. Tab 3(h) (EA), *copied from* O.R. Tab 3(h)[7] compact disc; S.R. Tab 8(c) (numerous comment letters on the fee-to-trust acquisition), *copied from* O.R. Tab 8 compact disc.[8] The Regional Director also submitted to the Board approximately 1,300 pages of additional public comment letters regarding the Tribe's activities on its lands or efforts to place lands into trust. The Regional Director states that these additional comment letters are not part of his administrative record for the 6.9-acre trust acquisition decision and are not relevant to Appellants' standing. He explains that they were submitted "in the interests of providing the Board with the complete record of

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[7] The compact disc for the EA included with the original record is labelled as "TAB 3(h)," although the table of contents to the original record refers to the EA as "Tab 3(g)." Tab 3(h) for hard copies of documents in the original record contains draft EA materials.

[8] The Regional Director's table of contents for the four-volume supplemental documents identifies S.R. Tabs 3(b), (f), and (I) as hard copies of certain documents from an unidentified compact disc, but does not indicate that they were omitted from the original record. The Board has not been able to locate these documents on either of the two compact discs or among the hard copies of documents that comprised the original record. Thus, it appears that some of these documents, at least in part, may also have been omitted from the original record, although the FONSI (S.R. Tab (f)) apparently was provided to Appellants at the time it was issued in 2004. To the extent these documents might be construed as relevant to Appellants' arguments regarding the supplemental record, the Board has considered them as well.

comments predating the Regional Director's decision." Regional Director's Report Recommending Procedures on Remand, at 5.

On February 21, 2007, after allowing Appellants and the Tribe an opportunity to review the supplemental record, and after allowing the parties to propose procedures on remand, the Board issued an order establishing the remand procedures and scheduling briefing. In that order, the Board rejected Appellants' proposal that the Board reopen and reconsider without limitation the issue of Appellants' standing and consider several new issues raised for the first time. Instead, the Board only allowed briefing on the relevance and effect, if any, of the supplemental record on the Board's decision that Appellants lacked standing. Procedures on Remand, at 5.

Appellants filed an opening brief, which addressed their standing to challenge the Regional Director's decision under NEPA and under the Indian Reorganization Act (IRA), 25 U.S.C. §§ 461 *et seq.,* and the related fee-to-trust regulations. In addition, Appellants briefed their standing to assert new claims under the Equal Protection Clause of the U.S. Constitution and related Federal anti-discrimination statutes. In raising the latter claims, Appellants contend that the Tribe is a "group of loosely affiliated Indians who did not qualify to be an IRA tribe," Opening Brief at 26, and therefore BIA's decision to take the land into trust violates the Equal Protection Clause and related Federal anti-discrimination statutes.

The Regional Director and the Tribe filed responses to Appellants' opening brief. Both also filed motions to strike and procedural objections to portions of Appellants' opening brief, on the grounds that some of Appellants' arguments are beyond the scope of these proceedings and are non-responsive to or violate the Board's remand procedures.

Appellants filed a reply brief and opposition to the motions to strike. The Regional Director and the Tribe filed reply briefs to Appellants' opposition to their motions to strike.

Discussion

I. Introduction

We first consider the motions to strike and related objections by the Regional Director and the Tribe to portions of Appellants' opening brief. We grant the Tribe's motion to strike the portions of Appellants' brief regarding the Tribe's status and equal protection and anti-discrimination claims because these arguments are plainly outside of

and unrelated to the scope of these proceedings and violate the Board's procedural order. We deny the Regional Director's motion to formally strike much of the remainder of Appellants' brief. We conclude that arguments improperly raised in those portions of Appellants' brief are best excluded from consideration on procedural grounds in the course of our discussion, rather than by striking additional sections of Appellants' brief from the record.

Following our action on the motions to strike, we address the issue that is the subject of these limited remand proceedings: whether the omitted documents warrant reversal of our prior decision dismissing this appeal for lack of standing. We conclude that no such reversal is warranted. The supplemental record does not alter the nature or sufficiency of the evidence relied upon by Appellants to demonstrate that their members have individual constitutional standing, nor do they provide any basis for us to reconsider our zone-of-interest analysis concerning prudential standing under the trust acquisition statute and related regulations. Therefore, upon limited reopening of this appeal and after consideration of the supplemental record, we affirm our dismissal of this appeal from the Regional Director's decision to take the 6.9-acre parcel into trust.

II. Motions to Strike

The Regional Director has moved to strike all of Appellants' opening brief except for limited portions that refer specifically to the supplemental record. *See* Regional Director's Motion to Strike at 2 ("In twenty-seven pages of briefing, Appellants' [opening brief] only refers to the Supplemental Record . . . approximately eight times."). The Tribe, while contending that the Board would be justified in striking the majority of Appellants' opening brief, moves to strike only two specific portions concerning the Tribe's status as a Federally-recognized tribe and Appellants' equal protection and anti-discrimination claims.

In opposition, Appellants contend that their legal arguments and authority provide the "contextual framework" for the Board's consideration of "the record, including but not limited to the supplemental record." Appellants' Reply to Regional Director's Brief at 2. Appellants argue that the Board must consider the entirety of the evidence, "both for context . . . and to take the opportunity to reconsider the merits and correct on remand" the Board's earlier dismissal. Appellants' Reply to Tribe's Brief at 1. Appellants also argue that the status of the Tribe relates directly to the Regional Director's decision, and therefore Appellants should be allowed to raise arguments concerning the Tribe's status and equal protection and anti-discrimination claims.

As Appellants acknowledge, the Board previously considered and rejected their proposal that we allow and consider arguments regarding the Federally-recognized status of

the Tribe. *See* Procedures on Remand at 5-6. In that order, we determined that this issue is outside the scope of the Regional Director's decision and outside the scope of these proceedings. *Id.* Appellants' new equal protection and anti-discrimination arguments are similarly outside the scope of these proceedings and unrelated to the supplemental record.[9] Because Appellants' claims regarding equal protection, anti-discrimination, and the Tribe's status are clearly outside the scope of these proceedings and violate the Board's order establishing procedures on remand, we grant the Tribe's motion and strike these portions of Appellants' brief.[10]

We decline, however, to formally strike a majority of the remaining portions of Appellants' opening brief, as the Regional Director proposes. While we agree with the Regional Director that a substantial part of Appellants' brief contains arguments that are not directly related to the supplemental record, including new arguments (in addition to those we have already stricken) that could have been but were not raised in the earlier proceedings, Appellants intersperse these arguments with arguments that either do pertain to the supplemental record or which arguably provide some context for the arguments predicated on the supplemental record. Therefore, we decline to grant the Regional Director's motion to strike portions of Appellants' brief wholesale. Instead, we conclude that those arguments that exceed the scope of these proceedings are best excluded from consideration on procedural grounds in the course of our discussion, rather than through granting the Regional Director's motion. To the extent these new arguments provide

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[9] We note that in their proposed procedures for this remand, Appellants did not specifically identify or propose briefing on standing related to equal protection and anti-discrimination claims. Instead, in seeking to challenge the Tribe's status on remand, Appellants referred to the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701 *et seq.,* and only generally referred to "constitutional interests at stake," without identifying which constitutional provisions were at issue. Appellants' Report Recommending Remand Procedures at 12-18.

We also note that among the evidence relied upon by Appellants in raising the tribal status and equal protection arguments is a letter that Appellants submitted to the Board during the original appeal proceedings. *See* Letter from Siggins to Superintendent, Aug. 26, 2005 (enclosure to Letter from D. Herthel and Bowen to Secretary, Oct. 7, 2005, submitted to Board in box with petitions). However, in the original proceedings, Appellants never raised either argument.

[10] We find these grounds sufficient to grant the Tribe's motion to strike, and therefore need not consider whether Appellants' arguments are, as the Tribe also contends, sufficiently inflammatory, scandalous, and derogatory to warrant granting the motion to strike.

context or background for Appellants' arguments that are within the scope of these proceedings, we consider them in that limited capacity.

III. Effect of the Supplemental Record on the Board's Determination that Appellants Lack Standing

A. Introduction

We now turn to an examination of the supplemental record to determine whether the Board should reverse its earlier determination that Appellants failed to show that they have standing to bring this appeal because they failed to demonstrate that one or more of their members have individual standing. First, we address Appellants' apparent argument that their members generally must have standing to bring this appeal because they represent the "will of the community." Appellants' Reply to Regional Director's Brief at 1. We reject this argument because standing requires an individualized showing and Appellants cite no authority for the proposition that an organization may have standing simply by demonstrating that it represents widespread public opinion. Second, for the eight member-declarants who we found lacked constitutional standing, we examine whether Appellants have identified anything in the supplemental record that would warrant reversal of our decision, and conclude that they have not. Third, we address the standing of the one remaining member-declarant — Bowen — who was assumed to satisfy constitutional standing. We conclude that the supplemental record does not provide a basis for us to reverse our conclusion that Bowen lacked prudential standing because the interests asserted in his declaration are outside the zone of interests of the statutes and regulations upon which Appellants' claims rest.

In their opening brief, Appellants contend that the administrative record, as supplemented, demonstrates that (1) Appellants, "independently and as fair representatives of their community," have standing to challenge the Regional Director's decision on NEPA grounds; (2) BIA invited and considered voluminous public commentary on this project and therefore the community, including Appellant community groups, have standing under the IRA and the fee-to-trust regulations, 25 C.F.R. Part 151; and (3) members Bowen and Hamer will suffer palpable economic harm as a result of the trust acquisition and therefore have standing. Opening Brief at 1.

In their reply to the Regional Director's brief, Appellants argue that "[a]t its essence, this case involves whether legitimate and representative community groups, such as Appellants, have any voice whatsoever in decisions by the Regional Director of the [BIA] to accept substantial blocks of real property into federal trust status for the benefit of Indian

tribes." Appellants' Reply to Regional Director's Brief at 1. Appellants argue that they have demonstrated standing in their own right and that "the supplemental record which includes literally hundreds upon hundreds of letters from other neighbors . . . reveals beyond any doubt that Appellants['] pursuit of this appeal is . . . the will of the community." *Id.* Appellants contend that the hundreds of letters from the public in the supplemental record "further support[]" Appellants' standing and that the Board should consider them because "a court may accept and consider declarations by other members of an association that were not filed with [an] opening brief." *Id.* at 7. In addition, in their reply brief, Appellants assert that the supplemental record demonstrates that declarant Bowen is a member of both POLO and POSY, and therefore the Board erred in concluding that POSY could not show standing because none of the declarants was identified as a member of POSY.

B. Standing Based on Representation of Broader Public Opinion

Appellants apparently contend that the numerous individual letters in the record expressing opposition to the 6.9-acre trust acquisition somehow confer standing upon Appellants as "fair representatives of their community." Opening Brief at 1. Appellants also urge us to consider these letters as an evidentiary basis for their standing because "a court may accept and consider declarations by other members of an association that were not filed with [an] opening brief." Appellants' Reply to Regional Director's Brief at 7. Without identifying any specific members (except Bowen and Hamer, discussed below), Appellants argue that "numerous members would otherwise have standing to sue under NEPA in his or her individual right." Opening Brief at 3.

There are at least three problems with these arguments — one procedural and two substantive. First, in the earlier proceedings before the Board, Appellants failed to raise this argument or to rely on the numerous public comments, even though the original record contained hundreds of letters in opposition to the proposed trust acquisition. *See* S.R. Tab 8(c), *copied from* O.R. Tab 8 compact disc.[11] Appellants did not rely on these letters to support either constitutional or prudential standing. As a general rule, the Board will not consider arguments raised for the first time on appeal or for the first time in a reply brief.

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[11] Appellants suggest that we treat these letters as part of the supplemental record because in the original proceedings before the Board the letters were only submitted in electronic form. We disagree. The letters were readily accessible to the parties on the compact disc and could have been relied upon, had Appellants chosen to do so. The Board has had no difficulty accessing the documents on the compact disc.

See Edwards v. Pacific Regional Director, 45 IBIA 42, 54 n.18 (2007); *Wasson v. Western Regional Director,* 42 IBIA 141, 156 (2006). The same principle applies to these remand proceedings. Appellants provide no reason why they could not have raised this argument in the earlier proceedings, and therefore we decline to consider it now.

Even if we were to consider Appellants' argument, Appellants would face two additional substantive problems. First, standing is determined on an individual-specific basis, regardless of whether other individuals in the community might be similarly situated. *See Lujan*, 504 U.S. at 560 (injury must be concrete and particularized); *Concerned Citizens,* 42 IBIA at 194 (declarants must show specific, particularized harm they will suffer). Appellants may not assert the standing of non-appellants, but must personally satisfy the requirements of standing. In order for an organization to demonstrate standing for a suit brought on behalf of its members, it must demonstrate, among other things, that one or more of its members *individually* can demonstrate constitutional and prudential standing. *Concerned Citizens,* 42 IBIA at 192-93. Even assuming that the views of the organization and of its individual members are "representative" of widespread views within the community, that does not relieve the organization, through one or more members, from satisfying the specific requirements of standing.[12] Appellants cite no authority to the contrary.

Second, we reject Appellants' argument that we should "accept" these letters as support for their standing because a court may consider declarations of "other members of an association" that were not filed with an opening brief. This argument has no relevance here. Appellants have not identified letters in the supplemental record from individuals who claim to be "other members" of Appellant organizations in addition to those whose

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[12] We express no opinion, of course, whether the views of Appellants are, in fact, shared by a majority of the community, or whether the letters in the record fairly represent the local population. We do note, however, that while many letters in the record, including some from Appellants' declarants, express opposition to taking the land into *trust*, they do not necessarily oppose the Tribe's plans for the 6.9-acre parcel. *See, e.g.,* Letter from Hamer to Regional Director, undated, at O.R. Tab 8 (compact disc), DATA\IMAGES\00\16\42 [01642], *reprinted at* Supplemental Record (S.R.) Tab 8(c), No. C-55 ("As proposed, the development plan for the site appears to provide a valid use within the underlying zoning thereby presenting a project with a viable prospect of County approval subject to codes and regulations."); Letter from D. Herthel to Regional Director, undated, at *id.*, DATA\IMAGES\00\16\50 [01650], *reprinted at* Supplemental Record (S.R.) Tab 8(c), No. C-59 (same).

declarations were submitted in the original proceedings.[13] Moreover, although three letters that Appellants include in an appendix to their reply to the Regional Director's brief were signed by a member-declarant,[14] Appellants do not explain how these are materially different from the declarations and record before the Board in the earlier proceedings, except to show that Bowen is a member of POSY in addition to being a member of POLO, which we discuss below, *see* note 20.

Finally, and contrary to Appellants' contention, this case does not determine "whether legitimate and representative groups, such as Appellants, have any voice whatsoever in decisions by the Regional Director . . . to accept substantial blocks of real property into federal trust status for the benefit of Indian tribes." Appellant's Reply to Regional Director's Brief at 1. Our inquiry was, and remains, more limited — determining whether these particular Appellants, as represented by the members whose declarations they submitted, have demonstrated their standing to challenge this particular trust acquisition.

C. Standing of Appellants' Member-Declarants Other than Bowen

With respect to nine individuals upon whose declarations Appellants relied to demonstrate standing — Pappas, S. Herthel, D. Herthel, Cleary, Carter, Byrne, Griffoul, Saarloos, and Rheinschild — Appellants make no attempt to argue that the supplemental record provides a basis for the Board to reverse its prior finding that the first two were not identified as members of Appellant organizations and that the remaining individuals had not demonstrated that they have constitutional standing to appeal the Regional Director's decision. Therefore, we affirm our prior decision with respect to these individuals.

With respect to a tenth member-declarant, Hamer, a small business owner in Santa Ynez, Appellants contend that his declaration demonstrated that he will suffer economic harm if the land is taken into trust. Appellants argue that the Board's prior decision ignored

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[13] Of course, even if Appellants had identified letters in the supplemental record from other members of their organizations, they presumably would have had access to those letters and could have introduced them in the original proceedings to show standing, whether or not they were in BIA's administrative record.

[14] Two letters were signed by both Doug Herthel and Bowen, and one letter was signed by Herthel. The remaining letters included in the appendix to Appellants' reply brief are from individuals who were neither declarants nor identified as members of Appellant organizations.

his declaration. Hamer's declaration alleged that businesses such as his generate tax revenue that is used to fund public services and, by removing the 6.9-acre parcel from the tax rolls, the County would lose tax revenue from established businesses unable to compete with businesses in a "tax free zone," and at the same time the County would experience an increasing demand for public services. Hamer Declaration ¶¶ 2-4. Hamer also declared that he was concerned about the increase in crime in the town of Santa Ynez. *Id.* ¶ 6.

We decline to reconsider in these remand proceedings our earlier conclusion that Hamer's declaration was insufficient to demonstrate injury to him because Appellants' arguments are neither dependent on nor related to any documents omitted from the original record.[15] In addition, even if Hamer's declaration were sufficient to satisfy the constitutional requirements of standing, he would at best be similarly situated to Bowen, who is also a business owner and who, as we conclude below, has not demonstrated standing based on the supplemental record.

D. Bowen's Prudential Standing

In our prior decision, we assumed that Bowen's declaration and the evidence in the record was sufficient to demonstrate that he satisfied the constitutional requirements of standing with respect to his private economic and business interests. *See Concerned Citizens,* 42 IBIA at 201. We concluded, however, that Bowen lacked prudential standing because his private economic interests are outside the zone of interests of NEPA and outside the zone of interests of the trust acquisition statute and its implementing regulations, 25 U.S.C. § 465 and 25 C.F.R. § 151.10. *Id.* at 202-05.

On remand, Appellants make three arguments for why we should reverse our prior decision finding that Bowen failed to demonstrate standing. We decline on procedural grounds to consider Appellants' first two arguments because they are raised for the first time in these remand proceedings and are not related to or dependent upon the supplemental record. Appellants' third argument is related to the supplemental record, although in large part the argument could have been, but was not, raised in the earlier proceedings based on the original record. In any event, whether we consider Appellants' third argument only to the extent it relies on the supplemental record or in conjunction with the original record, we are not persuaded that our prior decision was in error.

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[15] The fact that the Board did not separately address or describe in detail Hamer's declaration in our prior decision does not mean that the Board ignored it. *See Concerned Citizens,* 42 IBIA at 194-95 (discussing alleged impact on County from loss of property taxes).

1. Bowen's Interests and NEPA's Zone of Interests

Appellants now contend that Bowen's interests fall within the zone of interests of NEPA because Bowen averred that the Tribe's tax advantage would harm the "overall health of [the] community." Opening Brief at 11.[16] Appellants argue that this averment states an environmental interest under NEPA because Bowen was contending that the economic harm alleged would, in turn, undermine the existing economic and financial condition of the community. *See* Bowen Declaration ¶¶ 2, 9; Appellants' Opening Brief at 10-11 (interest in averting blight and deterioration of the central business district arguably falls under NEPA) (citing *Dalsis v. Hills,* 424 F. Supp. 784, 786-87 (W.D.N.Y. 1976)).

This argument is not related to nor dependent upon the supplemental record, but instead seeks to revisit the Board's determination of the nature of the allegedly injured interests asserted in Bowen's declaration. In addition, we note that during briefing in the original Board proceedings, Appellants did not contend that Bowen's declaration could or should be construed to aver that the competitive advantage resulting from the property tax exemption for the Tribe's proposed 27,600-square-foot retail center would cause blight and deterioration or undermine the financial condition of the town center.

Because this argument is not related to the supplemental record, it is outside the scope of these remand proceedings and we do not consider it further.[17]

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[16] Bowen's declaration contained an allegation that Tribe's "trust acquisition plans will create fundamental inequities that harm the overall health of our community, and more directly, my wife's and my economic interests." Bowen Declaration ¶ 2. Elsewhere, Bowen declared that "[t]he fact that the Tribe will not have to pay [property] taxes on . . . commercial space [comparable to Bowen's] if the 6.9-acre parcel goes into trust provides the Tribe with a competitive advantage that directly harms [my wife's] and my interests," and is "fundamentally unfair to the Tribe's competitors, such as my wife and myself." *Id.* ¶¶ 6, 8.

[17] If we were to consider this argument, we would, of course, first be required to address whether the declaration can fairly be given the construction that Appellants now proffer, and second to determine whether, if so construed, the averment would satisfy the requirements for constitutional standing, *see supra* notes 4 & 5, before reaching the issue of prudential standing.

2. Zone of Interests for 25 U.S.C. § 465

Second, Appellants argue that the zone-of-interests test for a fee-to-trust acquisition must be determined by reference to the IRA as a whole, and not simply the trust acquisition authority found in 25 U.S.C. § 465, and therefore the Board construed the zone of interests for section 465 too narrowly. This argument is also unrelated to the supplemental record and was not raised during the earlier proceedings, and therefore we decline to consider it.

3. BIA's Solicitation and Consideration of Public Comment as Reflecting or Creating the Zone of Interests for Fee-To-Trust Acquisitions

Third, Appellants contend that BIA invited and considered voluminous public comment on this project and therefore the community, including Appellants and their members, have standing under the IRA and the fee-to-trust regulations, 25 C.F.R. Part 151. In support of this assertion, Appellants argue that

> the Supplemental Record . . . Tab 5(f) contains [a] notice of application which was distributed for comment, not only to state and local governments, but to all the Southern California Tribes. [S.R.] Tab 8[(b)] contains comment letters solicited by the Tribe from politicians and a few others in support of the project and [S.R. Tabs 8(a) and (c) contain] many, many letters in opposition from the community.

Opening Brief at 23.[18] Appellants also refer to "Letters from Local Organizations," *id.* at 3, and assert that "several of the comment letters set forth under Tabs 8 and a and b state concern for the unfair competition and unfair tax advantage given the Tribe," in apparent reference to S.R. Tab 8(c), letters No. B-1 through B-7, and possibly to individual letters in opposition to the trust acquisition contained at S.R. Tab 8(c), letters No. C-1 *et seq.* With

[18] Appellants also contend that "Tabs a and b contain, respectively, '1/2 cubic foot' of comment letters and '1 cubic foot of comment letters,' all opposing the project." *Id.* The Regional Director's table of contents to the supplemental record includes references to "[d]uplicates of various administrative records and comments letters from CD," subdivided in the table of contents without reference to a numerical tab as "a. ½ cubic foot of various administrative records and comment letters" and "b. 1 cubic foot of comment letters from pertaining to other projects."

their reply brief, Appellants attach as exhibits examples of individual letters in opposition to the trust acquisition, which are from S.R. Tab 8(c). Appellants contend that because BIA actually considered public comment, "interests such as Jon Bowen's must logically be within the 'zone' [of interests] of the fee-to-trust scheme." *Id.* at 23.

As a procedural matter, this argument also suffers from the fact that it could have been raised in the earlier proceedings: Tab 8(c) of the documents submitted by the Regional Director consists of hundreds of pages of letters from state and local governmental officials, local organizations (including Appellants), and individuals, all of which were included in the original record. Thus, to the extent that Appellants argue that BIA's consideration of public comment is relevant to determining the zone of interests created by the trust acquisition regulations, Appellants do not explain why they could not have raised this argument in the earlier proceedings, even if some of the letters in opposition were omitted from the original record. *Compare* S.R. Tab 8(a) (letters omitted from original record) *with* S.R. Tab 8(c) (letters included in original record).

Appellants do, however, rely on certain documents that were omitted from the original record to argue that BIA actively solicited comment on the trust acquisition and therefore community interests, including those of Appellants generally and Bowen individually, must fall within the zone of interests of the trust acquisition regulations. Specifically, Appellants contend that S.R. Tab 5(f), which was not included in the original record, contains notice of the Tribe's application, which was distributed for comment not only to state and local governments but to all the Southern California Tribes. Opening Brief at 23.

We disagree with Appellants that BIA's solicitation of comment from state, local, and tribal governments indicates Departmental intent in the fee-to-trust regulations to include individual private interests within the zone of interests. To the contrary, it reinforces our conclusion that third-party interests reflected in 25 C.F.R. § 151.10 are limited to governmental interests. BIA's notice of the EA and acceptance of public comments pursuant to *NEPA* is not relevant to the zone-of-interests issue for the *fee-to-trust statute and regulations*. NEPA and 25 U.S.C. § 465 are two different statutes serving different purposes and interests. The documents relied upon by Appellants, whether in the supplemental or original record, do not, as Appellants contend, demonstrate that BIA solicits comments from individuals regarding individual private interests pursuant to the trust acquisition statute or regulations. Instead they show only the solicitation of comments

from governments regarding governmental interests potentially affected by the fee-to-trust acquisition.[19]

Even if the Regional Director actually solicited and considered the public comment letters contained in the record with respect to the fee-to-trust regulatory factors, it would not follow that private individual interests are within the zone of interests created by the statute or regulations. The Regional Director cannot create legal standing under a statute or regulation where it does not otherwise exist. *See Hall v. Great Plains Regional Director*, 43 IBIA 39, 45-46 (2006). It may well be within the discretion of BIA to consider comments from private individuals on the regulatory fee-to-trust factors, but the fact of doing so does not bring those individuals within the legal zone of interests of the statute or regulations. *Cf. id.* (whether or not BIA refers to potentially affected individuals as "interested parties" does not affect whether they in fact have legal standing to challenge a decision.); *Consolidated Edison Co. of New York v. O'Leary,* 131 F.3d 1475, 1481 (Fed. Cir. 1997) (agency may permit parties to participate in administrative proceedings without creating a right of judicial review).

Nothing in the documents relied upon by Appellants in the supplemental record undermines our conclusion that the private economic interests asserted by Bowen are not

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[19] Indeed, S.R. Tab 8(d) (DVD), which was not included with the original record, contains statements by an opponent of trust acquisitions that are consistent with our interpretation of the fee-to-trust regulations. *See, e.g.,* Remarks of Cheryl Schmit, "Chapter 9" section of DVD ("[t]he Code of Federal Regulations really only says that governments have the ability to oppose these land acquisitions;" "[t]his, I believe, is one of the rules that needs to be changed;" "it's very important that your letters are somehow copied and collected by one person or one representative, so that that government official can present your case for you"). *Cf. Oversight Hearing on Taking Lands Into Trust: Hearing Before the Committee on Indian Affairs, U. S. Senate,* 109th Cong. 371 (2005) (prepared statement of Concerned Citizens, POLO, and POSY) ("BIA regulations have no provision that provides for public comment [on trust land requests], they only provide for local governments with jurisdiction over the subject lands to submit information on tax loss and jurisdictional conflicts. The only way public comment occurs is through related legal requirements, such as the National Environmental Policy Act [NEPA].").

within the zone of interests of the fee-to-trust statute or regulations. We therefore affirm that holding.[20]

Conclusion

Appellants have not shown that any documents that were omitted from the original administrative warrant reversal of our earlier decision, in which we found that none of Appellants' members have demonstrated his or her individual standing to bring this appeal and therefore Appellants, as organizations, lack standing to bring this appeal. In addition, as discussed above, we strike the portions of Appellants' brief regarding the Tribe's status and newly-raised equal protection and anti-discrimination claims, and we decline to consider other arguments raised by Appellants that are not within the limited scope of these proceedings.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, and upon consideration of the supplemental record, the Board affirms the dismissal of this appeal.

I concur:

// original signed	// original signed
Steven K. Linscheid	Debora G. Luther
Chief Administrative Judge	Administrative Judge

[20] Appellants argue that the supplemental record demonstrates that Bowen is a member of both POLO and POSY, and therefore the Board erred in summarily concluding that POSY could not demonstrate associational standing because none of the declarants was identified as a member of POSY. In his declaration in the original proceedings before the Board, Bowen only identified himself as a member of Concerned Citizens, Bowen Declaration ¶ 2, but a supplemental declaration of Doug Herthel attested, based on personal knowledge, that Bowen was also a member of POLO. D. Herthel Supp. Declaration ¶ 7. In these remand proceedings, Appellants submitted with their reply brief a new declaration from Bowen, in which he states that he is the President of POSY, and to which he attaches two letters reflecting that status, both of which were contained in the original record. *See* Bowen Declaration, Apr. 18, 2007. Because we conclude that Bowen does not have individual standing, our conclusion that POSY lacks standing remains the same, even if we were to consider Bowen's new declaration of membership in POSY.