



## INTERIOR BOARD OF INDIAN APPEALS

Washoe Tribe of Nevada and California v. Western Regional Director,  
Bureau of Indian Affairs

45 IBIA 180 (08/17/2007)



# 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

WASHOE TRIBE OF NEVADA	)	Order Dismissing Appeal
AND CALIFORNIA,	)	
Appellant,	)	
	)	
v.	)	Docket No. IBIA 07-74-A
	)	
WESTERN REGIONAL DIRECTOR,	)	
BUREAU OF INDIAN AFFAIRS,	)	
Appellee.	)	August 17, 2007

The Washoe Tribe of Nevada and California (Tribe) appealed to the Board of Indian Appeals (Board) from an October 24, 2006, decision (Decision) of the Western Regional Director, Bureau of Indian Affairs (Regional Director; BIA). In that decision, regarding a specific parcel of land, the Regional Director stated that BIA would not recognize the Tribe as having a statutory right of first refusal under 25 U.S.C.A. § 2216(f) (Supp. 2006), to purchase trust land within the “Pine Nut Allotments,” located in Douglas County and Carson City, Nevada, when an owner applies to have the trust status removed and the land placed in fee. We dismiss the Tribe’s appeal because prior to filing the appeal, the Tribe disclaimed any interest in purchasing the property that was the subject of the Regional Director’s decision, and therefore it lacks standing to bring this appeal. Although the Tribe argues that the underlying legal issue will arise again, that does not cure the Tribe’s lack of standing to prosecute this appeal, and the Board does not issue advisory opinions.

## Background

By letter dated September 7, 2006, the Regional Director notified the Tribe that it had received six applications for fee patents totaling a one-half undivided interest in Carson City Public Domain Allotment CC-410<sup>1</sup> (Allotment CC-410), containing 116.950 acres, more or less, in Douglas County, Nevada, more particularly described as “Lot 001 of

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<sup>1</sup> The September 7, 2006, letter identified the subject parcel as “CC-140,” but a subsequent letter from the Regional Director to the Tribe, dated December 21, 2006, stated that the earlier identification of the parcel was erroneous and that the actual allotment number is CC-410.

NW $\frac{1}{4}$ NW $\frac{1}{4}$ , and E $\frac{1}{2}$ NW $\frac{1}{4}$ , Section 19, Township 13 North, Range 22 East, MDM, Nevada.” The Regional Director advised the Tribe that because BIA had the fee patent applications pending, he was writing to advise the Tribe how BIA planned to involve the Tribe in BIA’s processing of trust-to-fee applications involving the Pine Nut Allotments.

First, the Regional Director stated that he did not recognize the Tribe as having a statutory right of first refusal under a provision in the Indian Land Consolidation Act, 25 U.S.C.A. § 2216(f), to purchase land within the Pine Nut Allotments. That subsection provides, with an exception not relevant here, that “before the Secretary approves an application to terminate the trust status or remove the restrictions on alienation from a parcel of, or interest in, trust or restricted land, the Indian tribe with jurisdiction over the parcel shall have the opportunity— (A) to match any offer contained in the application; or (B) in a case in which there is no purchase price offered, to acquire the interest in the parcel by paying the fair market value of the interest.” The Regional Director asserted that the right only applied to allotments over which a tribe has unlimited, general jurisdiction, and that the Tribe only had limited tribal jurisdiction over the Pine Nut Allotments.

Second, the Regional Director stated that although he did not recognize that the Tribe has a right of first refusal under subsection 2216(f), he did acknowledge that 25 C.F.R. § 152.2 separately requires that tribes be given a reasonable opportunity to purchase land through negotiations before trust status is removed. Therefore, the Regional Director advised the Tribe that BIA would notify the Tribe of trust-to-fee applications for land within the Pine Nut Allotments, in order to afford it the right to negotiate for the purchase of the property under section 152.2.

With respect to Allotment CC-410, the Regional Director advised the Tribe that it had 15 days to notify BIA that it was interested in purchasing the subject property, and that if it did so, it would be provided with information necessary for the Tribe to negotiate a sale with the landowners. If the Tribe did not notify BIA that it wanted to purchase the property, BIA would proceed with processing the fee patent application. The letter did not provide appeal rights.

On September 20, 2006, the Tribe expressed an interest in purchasing Allotment CC-410, and requested information about the landowners for purposes of negotiating a sale. Subsequently, by letter dated October 1, 2006, the Tribe disputed the Regional Director’s decision that the tribal right of first refusal under subsection 2216(f) did not apply to the Pine Nut Allotments.

On October 24, 2006, the Regional Director issued a decision addressing several leasing and conveyancing issues involving the Pine Nut Allotments. Relevant to this appeal,

the Regional Director repeated his conclusion that the Tribe was not entitled to a right of first refusal to any land within the Pine Nut Allotments that is the subject of a trust-to-fee application. The letter did not provide appeal rights, but on December 4, 2006, the Regional Director provided the Tribe with appeal rights for his October 24, 2006, decision.

By letter dated December 21, 2006, the Regional Director asked the Tribe to immediately confirm whether it was interested in purchasing Allotment CC-410. On December 28, 2006, the Tribe notified the Regional Director that it had “no interest at this time in purchasing [Allotment CC-410 and] ha[d] no objection to [BIA’s] referral of this fee patent request to the Bureau of Land Management for action.” Letter from Chairman of Tribe to Regional Director, Dec. 28, 2006.

On January 16, 2007, the Tribe appealed the Regional Director’s decision to the Board, specifically the Regional Director’s determination that BIA would not recognize the Tribe as having a statutory right of first refusal under 25 U.S.C.A. § 2216(f) to purchase land within the Pine Nut Allotments that is the subject of a trust-to-fee application.<sup>2</sup>

After reviewing the administrative record, the Board ordered the parties to brief whether the Tribe has standing to bring this appeal and whether it is ripe for review. The Board noted, in light of the Tribe’s December 28 letter expressly stating that it had no interest in pursuing the purchase of Allotment CC-410, it is unclear whether the Tribe has suffered “an actual or imminent, concrete and particularized injury” caused by the Regional Director’s decision, and whether this appeal is ripe for Board review. Notice of Docketing and Order for Briefing on Jurisdiction, May 3, 2007, at 3. The parties each submitted briefs in response to the Board’s order.

#### Discussion

Although the Board, as an Executive Branch forum, is not limited by the same constitutional and prudential constraints that apply to the exercise of judicial authority, the Board has a well-established practice of adhering to those jurisdictional constraints as a matter of prudence in the interest of administrative economy. *Quantum Entertainment, Ltd. v. Acting Southwest Regional Director*, 44 IBIA 178, 188 n.12 (2007). These constraints include the requirement that an appellant demonstrate that it has standing. *Id.* The Board follows the three elements of standing described in *Lujan v. Defenders of Wildlife*, 504 U.S.

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<sup>2</sup> Although the Regional Director’s letter advising the Tribe of its appeal rights was dated December 4, 2006, the Tribe stated in its notice of appeal that it had not received that letter until December 18, 2006, thus making its appeal timely.

555, 560-61 (1992). *Arizona State Land Dep't v. Western Regional Director*, 43 IBIA 158, 163 (2006). Under *Lujan*, an appellant must show that (1) it has suffered an actual or imminent, concrete and particularized injury to or invasion of a legally-protected interest; (2) the injury is fairly traceable to the challenged action; and (3) the injury will likely be redressed by a favorable decision. 504 U.S. at 560-61.

The Tribe contends that it has standing to bring this appeal. While noting that the Regional Director's decision "denied the Tribe's first refusal right as to a specific parcel," the Tribe contends that the decision "implemented a broad policy determination that the BIA will not recognize [the Tribe's] rights under [25 U.S.C.A. § 2216(f)] with regard to any and all future trust-to-fee transfers of the Washoe Pine Nut Allotments." Opening Brief on Jurisdiction at 1-2. The Tribe asserts that the Regional Director's decision "presents an actual and concrete threat to the Tribe's ability to receive adequate notice of pending applications and deprives the Tribe of its statutory right of first refusal." *Id.* at 14-15. The Tribe also argues that the Regional Director's decision "raises questions about the Tribe's continued exercise of governmental power on [the Pine Nut Allotments]." *Id.* at 12. Finally, the Tribe asserts that it "risk[s] being precluded from seeking review of [whether it has the statutory right of first refusal under 25 U.S.C.A. § 2216(f)] in a future case." *Id.* at 2.

We conclude that the Tribe has not shown that it has suffered any concrete and actual or imminent injury from the Regional Director's decision and therefore that the Tribe lacks standing to bring this appeal.

Although the Regional Director's decision may have broadly announced his position that the Tribe does not have a statutory right of first refusal for the Pine Nut Allotments, any "implementation" of that position by interfering with the Tribe's asserted right was rendered null when the Tribe renounced any interest in purchasing Allotment CC-410 — the subject of the Regional Director's action. The fact that the Regional Director's position has been clearly stated to the Tribe, or the likelihood that the Regional Director will follow that position when future trust-to-fee applications are submitted, does not mean that the Regional Director's announcement caused any actual, concrete, and particularized injury by denying the Tribe the ability to exercise a statutory right of first refusal.

The Tribe contends that the Regional Director's failure to recognize its statutory right of first refusal has caused it injury because it interferes with the Tribe's right to receive adequate notice of fee-to-trust applications. Under the circumstances present here, we disagree. The Regional Director's September 7, 2006, letter specifically provided the Tribe with notice concerning Allotment CC-410 and clearly stated that in the future, the Regional Director will afford the Tribe notice of trust-to-fee applications and will allow the Tribe

15 days from its receipt of notice to state its intent to purchase. *See* Letter from the Regional Director to Chairman of Tribe, Sept. 7, 2006, at 2. The October 24 decision is not to the contrary, and in fact the Tribe acknowledges that “[t]he Regional Director offers to afford the Tribe notice.” Opening Brief on Jurisdiction at 11 n.10. The Tribe has not identified how this notice is inadequate or is any different from the notice it would receive if the Regional Director recognized a statutory right of first refusal.<sup>3</sup>

The Tribe’s argument that the Regional Director’s decision raises questions about the Tribe’s continued exercise of governmental power on the Pine Nut Allotments, and that therefore the Tribe has suffered an injury, states an alleged injury that is too generalized and speculative to provide a sufficient basis to establish standing. Whatever opinions the Regional Director may have offered concerning the nature of the Tribe’s jurisdiction over the Pine Nut Allotments, his decision only purports to interpret the meaning and intent of a specific statutory provision: 25 U.S.C.A. § 2216(f). In any event, the Tribe does not even allege any specific injury resulting from the Regional Director’s statement that the Tribe only has limited jurisdiction over those lands. The Tribe offers several affidavits as evidence that the *loss* of trust lands will hinder the Tribe’s ability to provide law enforcement services or protect its natural resources. But these affidavits do not change the fact that the Tribe disclaimed any interest in purchasing Allotment CC-410 and expressly stated that it had no objection to BIA’s referral of the fee patent request to BLM. Therefore, the Tribe cannot complain about the effect of the loss of those lands. And none of the affiants contend that the Regional Director’s statements characterizing the Tribe’s jurisdiction as “limited,” by themselves have had any direct consequences for law enforcement or natural resource protection on other trust lands.

The Tribe also contends that because the Regional Director advised the Tribe of its appeal rights, the Tribe was required to appeal — and the Board must necessarily have jurisdiction — because otherwise the Tribe may be “precluded from seeking review of the same issue in a future case.” Opening Brief on Jurisdiction at 2. We agree that it was prudent for the Tribe to file an appeal with the Board from the Regional Director’s decision. It does not follow, however, that all of the jurisdictional elements for pursuing an

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<sup>3</sup> Assuming that the Regional Director does not change his position that subsection 2216(f) is not applicable to the Tribe, if the Tribe seeks to exercise a right of first refusal in response to a future notice of a trust-to-fee application, the Regional Director must issue a decision, provide the Tribe with appeal rights, and allow any timely-filed appeal to be decided before he may take final action on the trust-to-fee application. Thus, because BIA is committed to providing notice to the Tribe, the Tribe’s claim to a right of first refusal under subsection 2216(f) will be adequately protected.

appeal are necessarily satisfied. Moreover, in the present case, the Regional Director advised the Tribe of its appeal rights *before* the Tribe had renounced its interest in purchasing Allotment CC-410 — i.e., before it could be determined whether the Tribe was injured by the decision. By the time the Tribe filed its appeal, it could no longer demonstrate injury. In addition, now that the Board has determined that the Tribe lacks standing based on the absence of a concrete and particularized injury, it follows that our dismissal does not bar the Tribe from raising the merits regarding subsection 2216(f) in a future appeal from a decision that *does* cause injury to the Tribe.<sup>4</sup>

### Conclusion

We conclude that the Tribe lacks standing to bring this appeal because the Regional Director's decision did not result in any concrete and particularized injury to the Tribe.<sup>5</sup>

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<sup>4</sup> Quoting from *Wopsock v. Western Regional Director*, 42 IBIA 117, 121 (2006), the Tribe asserts that “what defines the issues on appeal before the Board is the nature of the decision made or the action taken by the official.” Opening Brief on Jurisdiction at 11. We agree, but that simply begs the question about the nature of the decision or action. Under the circumstances present here, we conclude that the Regional Director's decision that the Tribe did not have a statutory right of first refusal to purchase Allotment CC-410, even though it included a more general pronouncement of his position regarding the Tribe's rights under subsection 2216(f), did not result in any actual, concrete, and particularized injury to the Tribe.

<sup>5</sup> Even if we had concluded that the Tribe has standing, there would remain the question of whether this appeal would be ripe for Board review. *Cf. Wind River Resources Corp. v. Acting Western Regional Director*, 43 IBIA 1, 3 (2006), and cases cited therein; *Bullcreek v. Western Regional Director*, 40 IBIA 196, 202 n.5 (2005); *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1234 (10th Cir. 2004). The Tribe contends that the appeal is ripe for Board review because the Regional Director's decision “rules out a different outcome in this or any subsequent trust-to-fee transactions involving Washoe Pine Nut Allotments.” Opening Brief on Jurisdiction at 19-20. However likely that result may appear to the Tribe, we note that the Tribe remains free to attempt to convince the Regional Director to alter or reverse his legal position concerning the Tribe's rights under subsection 2216(f), whether broadly, or on the basis of a fact-specific record concerning a particular allotment, or on the basis of developments in other contexts concerning the Tribe's jurisdiction. In addition, to the extent that in the course of this appeal the Tribe has articulated arguments that were not previously considered by the Regional Director, it would be advisable for him to consider them before issuing a future decision if and when the Tribe seeks to exercise a right of first refusal regarding a trust-to-fee application.

The Board does not issue advisory opinions, *Wopsock*, 42 IBIA at 121, and therefore we conclude that this appeal should be dismissed.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board dismisses this appeal for lack of jurisdiction.

I concur:

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Steven K. Linscheid  
Chief Administrative Judge

          // original signed            
Debora G. Luther  
Administrative Judge