



INTERIOR BOARD OF INDIAN APPEALS

Rogers and Antonia M. Hardy and Dean C. Gentry v. Northwest Regional Director,
Bureau of Indian Affairs

51 IBIA 152 (02/25/2010)

Reconsideration denied:
51 IBIA 170

Related Board case:
49 IBIA 117



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

ROGERS and ANTONIA M. HARDY)	Order Dismissing Appeals
and DEAN C. GENTRY,)	
Appellants,)	
)	
v.)	Docket Nos. IBIA 08-89-A
)	IBIA 08-91-A
NORTHWEST REGIONAL)	
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	February 25, 2010

Rogers and Antonia M. Hardy (No. IBIA 08-89-A) and Dean C. Gentry (No. IBIA 08-91-A) (collectively Appellants) have appealed a March 31, 2008, Record of Decision (ROD) issued by the Northwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA), adopting Alternative B of the Final Programmatic Environmental Impact Statement (FPEIS) for implementation through an Integrated Resource Management Plan (IRMP) for the Coeur d'Alene Tribe (Tribe).¹ When developed, the purpose of the IRMP will be to provide (1) general programmatic level recommendations (as opposed to specific management actions² directly impacting land, water, or resources) to guide land use, natural resource enhancement and protection, residential/commercial growth and development planning, and cultural preservation for the Tribe's Reservation and (2) general programmatic level recommendations specifying general management guidelines for natural, cultural, and environmental resources within the Tribe's aboriginal territory.

¹ These two appeals were consolidated with appeals filed by Eric and Marianne Besaw (No. IBIA 08-88-A) and Jim Nichols (No. IBIA 08-90-A). Pursuant to the request of these appellants, their appeals were dismissed as part of a resolution reached with BIA. *Besaw v. Northwest Regional Director*, 49 IBIA 117 (2009).

² The FPEIS defines "management action" as "[a]ny activity that impacts lands, waters or resources." See FPEIS (Administrative Record (AR) 12) at 396.

Appellants, non-Indians who own private fee land within the area to be encompassed by the IRMP not currently subject to the Tribe's jurisdiction, question the adequacy of the public participation component of the process used to develop the FPEIS, which was prepared pursuant to the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4332(2)(c). They also object to the application of the ROD and IRMP to non-tribal, non-Indian, privately owned fee lands lying within the external boundaries of the Tribe's Reservation and aboriginal territory. They further assert that they have standing to bring these appeals because the ROD and IRMP will adversely affect their rights as non-Indian fee owners over whom the Tribe has no authority, and urge that the ROD and IRMP be implemented only on tribal and Indian lands, not on private fee lands.

We find that Appellants lack standing to bring these appeals. The ROD only adopts Alternative B for implementation through the Tribe's not-yet developed IRMP³; it does not authorize any action that could adversely affect Appellants. Additionally, the April 3, 2009, Addendum to the ROD explicitly states that the "IRMP does not provide new regulatory or jurisdictional authority applicable to non-Indian fee lands within the Coeur d'Alene Reservation and aboriginal territory."⁴ Since the ROD does not authorize any specific actions, and, as clarified by the Addendum, does not provide any new regulatory or jurisdictional authority over Appellants' private fee land, Appellants have not shown that they could be adversely affected by the ROD. Accordingly, we find that they lack standing and dismiss the appeals.

Background

In July 2000, the Tribe completed an "Environmental Action Plan (EAP) Assessment of Environmental Concerns on and near the Coeur d'Alene Reservation" report (AR 35), which identified natural resources and environmental issues on and near the

³ The Regional Director states in his Answer Brief that the IRMP had not been issued as of the brief's May 18, 2009, filing date. Answer Brief at 5.

⁴ BIA lacks authority to amend a decision during the pendency of an appeal of the decision before the Board, unless authorized by the Board. See *Bullcreek v. Western Regional Director*, 39 IBIA 100, 101 (2008), and cases cited. In the present case, the Board stayed the appeal to permit the parties to discuss settlement. The Addendum issued by the Regional Director resolved two of the appeals of the ROD filed with the Board. See *supra* n.1. Under the circumstances, we accept it as a clarification of intent regarding the not-yet-developed IRMP.

Reservation.⁵ The Tribe proposed the development of an IRMP in order to address resources and concerns identified in the EAP report. *See* FPEIS Executive Summary (AR 12)⁶ at ES 4; ROD (AR 8) at 1. When developed, the IRMP is expected to guide management of tribal natural, environmental, and cultural resources for the next 20 years by providing programmatic level recommendations (1) for land use, natural resource enhancement and protection, residential and commercial growth and development planning, and cultural resource preservation for the Reservation and (2) for natural, cultural, and environmental resource management for the Tribe's aboriginal territory. *See* FPEIS Executive Summary (AR 12) at ES 4.

The Tribe and BIA prepared the FPEIS (AR 12) to facilitate the formulation of the IRMP.⁷ The FPEIS identifies resource management alternatives ascribing varying importance to the natural, environmental, and cultural resources of the Reservation and aboriginal territory, and evaluates the impacts of the preferred and alternative resource usage priorities. The IDT designed the alternatives to meet a set of goals and objectives developed from issues identified in the public involvement and scoping process, and integrated comments and suggestions obtained from public workshops, public meetings, questionnaires, State and Federal agency representatives, and the IRMP CAC. FPEIS

⁵ The Coeur d'Alene Reservation encompasses 334,471 acres in northwestern Idaho; the Tribe's aboriginal territory includes over 5 million acres in both northwestern Idaho and eastern Washington. *See* FPEIS (AR 12) at 2.

⁶ The FPEIS, FPEIS Executive Summary, and FPEIS Errata and Response to Comments are all included in AR 12.

⁷ BIA and the Tribe first developed a draft PEIS based on input from the Tribe's IRMP Interdisciplinary Team (IDT), the IRMP Community Advisory Committee (CAC), governmental agencies, tribal members, and the public through a series of meetings held between October 2000 and October 2004. Notice of the availability of the draft PEIS was published in the Federal Register, 70 Fed. Reg. 57,277 (Sept. 30, 2005). After a series of public meetings and a 60-day public comment period, the draft PEIS was revised, and the Assistant Secretary - Indian Affairs approved the FPEIS on August 23, 2007, while leaving the authority to issue a ROD to BIA. The FPEIS was circulated for public comment in October 2007 and received 11 comments, all of which raised issues previously mentioned in the comments on the draft PEIS and addressed in the FPEIS Errata and Response to Comments. ROD (AR 8) at 1-2.

Executive Summary (AR 12) at ES 5.⁸ The four alternatives analyzed in the FPEIS include: Alternative A, the No Action Alternative; Alternative B *Stqghesiple*' Integrated Resource Alternative,⁹ the preferred alternative; Alternative C, the Natural Resource Conservation Alternative; and Alternative D, the Growth and Development Alternative. Each of these alternatives places different weight on, and assigns varying amounts of acreage to, six land use designations — development, conservation, rural, recreation, agriculture, and forest — and provides management recommendations to enhance the priorities associated with each of these land use categories. *See id.* at ES 6 - ES 19. The FPEIS also compares the 100-year desired future conditions and 20-year goals for each alternative (*id.*, Table 2.4.3, ES 22 - ES 38) and the environmental, social, and economic consequences of each alternative (*id.*, Tables 4.1.1 and 4.1.2, ES 41 - ES 47).

In the ROD, the Regional Director explained that the Reservation had been divided into Land Management Areas (LMAs) based on watershed boundaries to facilitate land use planning, but that recommendations to be included in the IRMP were only for the *Reservation* portions of each LMA watershed. He suggested that management activities for the entire watershed be based on coordination and cooperation between the Tribe and other governmental agencies. ROD (AR 8) at 2. In evaluating the alternatives, the Regional Director noted that Alternative B would (1) enhance natural and cultural resources on the Reservation while maintaining its rural character; (2) manage Reservation ecology and biodiversity to ensure their restoration and maintenance to provide for tribal subsistence and cultural uses of these resources; and (3) allocate 11,136 acres for development, manage 76,149 acres for conservation, retain the rural character of 61,123 acres, manage 92,565 acres for agricultural uses, and leave 95,558 acres forested. He outlined the applicable natural environment desired future conditions, including the maintenance of healthy portions of the ecosystem; the restoration, where feasible, of lost ecological components; and the conservation of farmland that had not been restored to pre-settlement vegetation. He also described the human environment desired future conditions and 20-year goals under this alternative, which are to ensure the health and safety of tribal members and Reservation residents by managing environmental factors responsible for contamination, disease transmission, and personal injuries; to allow for moderate visually

⁸ The goals and objectives include 100-year desired future conditions and 20-year goals and objectives for four main resource categories: landscape, culture, natural environment, and human environment.

⁹ "*Stqghesiple*' is a shortened version of 'k'wne' chstqghesiple' hnkhwkhwlstutnet' which translates from the Coeur d'Alene language into English as 'The future course of our renewal.'" ROD (AR 8) at 3 n.1.

pleasing, energy-efficient development in designated areas with high standard infrastructure; to ensure reliable power and telecommunications infrastructure with multiple access points; and to assist in providing a high quality of life for all Reservation residents. *Id.* at 3-4.

The Regional Director determined that Alternative B (1) provided the best balance of physical, biological, social, and tribal cultural elements to meet the Tribe's overall desired future conditions on the Reservation and (2) would facilitate coordination among the Tribal Council agencies, the general public, and other jurisdictional agencies to meet identified landscape and tribal cultural goals and objectives for the Tribe's aboriginal territory. *Id.* at 5. In so doing, he discussed the impacts of Alternative B and the other alternatives on specific resource categories and related resource elements, and addressed implementation and monitoring, noting that the Tribe "*will* write the [IRMP] based on the decision made in this [ROD]." *Id.* at 14 (emphasis added). Therefore, after thoroughly reviewing the alternatives, the potential environmental impacts, and the comments received from the public, the Regional Director adopted Alternative B for implementation through the IRMP. *Id.* at 15.¹⁰

Appellants, who own land not currently regulated by the Tribe, appealed the ROD to the Board. In their Notice of Appeal, the Hardys question the adequacy and validity of the public participation element of the process used to develop the FPEIS and object to the application of the ROD and IRMP to non-tribal, non-Indian, privately owned fee lands lying within the boundaries of the Tribe's Reservation and aboriginal territory. In his Notice of Appeal, Gentry similarly disputes BIA's and the Tribe's authority to apply the ROD and IRMP to privately owned non-Indian fee lands, which, he asserts, represent the vast majority of the land within the external boundaries of the Reservation and the Tribe's

¹⁰ Although in the Introduction to the ROD, the Regional Director states that the ROD "adopts and approves for immediate implementation the Coeur d'Alene Tribe's Integrated Resource Management Plan," ROD (AR 8) at 1, it is clear from the record that the IRMP has not yet been written. *See, e.g., id.* at 14 ("The Coeur d'Alene Tribe will write the [IRMP] based on the decision made in the [ROD]"); *id.* at 15 ("Alternative B is adopted for implementation through the IRMP."); *see also* FPEIS Executive Summary (AR 12) at ES ii (the "Tribe is developing a programmatic level recommendation . . ."); *id.* at ES 4 (the "Tribe is developing an [IRMP] . . ."); BIA Answer Brief at 5 (IRMP has not been issued as of the May 18, 2009, filing of the brief). Thus, it is clear that the ROD did not (and, indeed, could not) approve the immediate implementation of a non-existent IRMP. We also note that at least a portion of the IRMP, when drafted, will require further BIA approval. *See* BIA Response to Order for Clarification From the Regional Director, Aug. 21, 2008, at 3.

aboriginal territory, and challenges the entire NEPA process leading to the FPEIS and ROD.

In response to a Board order seeking clarification of various matters, the Regional Director, *inter alia*, disputes Appellants' standing to bring the appeals. He contends that the ROD will not result in any actual management of resources within the Reservation and aboriginal territory because any such actions have to await the development of the IRMP. He therefore asserts that Appellants cannot demonstrate that they have any interests that could be adversely affected by the ROD and thus have no standing under 43 C.F.R. § 4.331 and 25 C.F.R. § 2.2. To resolve the question of Appellants' standing, the Board, in its September 2, 2008, Notice of Docketing and Order Setting Briefing Schedule, directed Appellants to demonstrate their standing to challenge the ROD as part of their opening briefs.

In their joint opening brief, Appellants address their standing. Essentially, they contend that the application of the ROD and IRMP to their private, non-Indian fee lands would adversely affect their ownership interests in their private lands and allow the Tribe, a sovereign governmental entity in which they have no participatory rights, to usurp the authority that the State and local governments, which they elect, now have over their private fee lands. They further claim that the injuries they will suffer will be redressed by limiting the application of the ROD and IRMP to tribal and individual Indian trust lands only. *See* Joint Opening Brief at unnumbered 4, 10, 11.

The Regional Director filed an answer brief seeking dismissal of the appeals on ripeness and standing grounds. The Regional Director also included a copy of an April 3, 2009, Addendum to the March 31, 2008, ROD. The Addendum clarifies that “[t]he IRMP . . . will only recommend programmatic goals and objectives. Therefore, the BIA is issuing this addendum to the March 31, 2008 ROD to state that the IRMP does not provide new regulatory or jurisdictional authority applicable to non-Indian fee lands within the Coeur d’Alene Reservation and aboriginal territory.” *See* Attachment to Answer Brief.¹¹

Appellants did not file a reply brief, and the appeals are now ready for review.

¹¹ This language conforms to the language that the Joint Opening Brief indicates will be sufficient to redress Appellants' injuries, i.e., that any Alternative selected to be implemented through the IRMP would “*not* cause any jurisdictional and/or regulatory authority of the [Tribe] over nonmember fee owned land within the external boundaries of the 1891 Reservation and within the . . . Tribe’s aboriginal territory.” Joint Opening Brief at unnumbered 11.

Discussion

The issue now before us is whether Appellants have established that they have standing to appeal the Regional Director's adoption of Alternative B for implementation through the IRMP. We conclude that Appellants do not have standing to pursue these appeals because the ROD does not authorize any specific actions and, as clarified by the Addendum, will not provide any new regulatory or jurisdictional authority over Appellants' private fee land. Appellants thus have not shown that they could be adversely affected by the ROD, and we dismiss the appeals for lack of standing.

Applicable Legal Principles and Standard of Review

Under the applicable regulations, in order to have standing, an appellant must be an interested party whose interests could be adversely affected by the decision being appealed. *See* 43 C.F.R. § 4.331 (limiting standing to interested parties affected by a final administrative action or decision of a BIA official¹²); 43 C.F.R. § 4.330 (adopting the definitions set out in 25 C.F.R. § 2.2); 25 C.F.R. § 2.2 (defining "interested party" as "any person whose interests could be adversely affected by a decision in an appeal"); *see also* *Rosebud Indian Land and Grazing Ass'n and its Members v. Acting Great Plains Regional Director*, 50 IBIA 46, 53 (2009); *Northern Cheyenne Livestock Ass'n and its Members v. Acting Rocky Mountain Regional Director*, 48 IBIA 131, 137 (2008). Appellants have the burden of establishing standing. *Parker v. Southern Plains Regional Director*, 45 IBIA 310, 317 (2007).

Analysis

The crux of Appellants' assertions of standing rests on their claim that imposition of the ROD on their privately owned fee land will adversely affect their interests as landowners and allow the Tribe, which currently does not exercise any authority over them, to usurp the jurisdiction over that land now exercised by the local and State governments elected by the people to protect and regulate their interests. The ROD, however, simply selects the

¹² Although the Regional Director contends that the ROD is not a final administrative action or decision, we assume, for purposes of this decision, that the ROD is, in fact, a dispositive decision on a substantive matter before BIA. *See* *Picayune Rancheria of the Chukchansi Indians v. Acting Pacific Regional Director*, 48 IBIA 241, 244 (2009); *Yakama Nation v. Northwest Regional Director*, 47 IBIA 117, 118 (2008). The finality of the ROD, however, is distinct from the question of whether that decision could adversely affect Appellants' interests.

alternative to be implemented in an IRMP. Appellants have not shown how the mere adoption of Alternative B as the preferred *alternative* to be implemented through the IRMP, as opposed to the approval of specific *directives* limiting or controlling activities on their private fee land, will adversely affect their interests as landowners and private citizens.

Additionally, to the extent that Appellants assert that the IRMP could adversely affect their interests, such an assertion rests on sheer speculation since the IRMP has not yet been completed and its specific content and concomitant potential to impact Appellants' interests are currently unknown. Thus, the question of the IRMP's potential effect, if any, on Appellants' interests is not yet ripe for review. In any event, as the April 3, 2009, Addendum to the ROD makes abundantly clear, the IRMP not only will simply "recommend programmatic goals and objectives," rather than direct or control specific activities, but, consistent with Appellants' demands, it also will "not provide new regulatory or jurisdictional authority applicable to non-Indian fee lands within the [Tribe's] Reservation and aboriginal territory." Appellants have failed to show that their interests could be adversely affected by the ROD.

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 the appeals for lack of standing.

I concur:

// original signed
Sara B. Greenberg
Administrative Judge*

// original signed
Debora G. Luther
Administrative Judge

*Interior Board of Land Appeals, sitting by designation.