



INTERIOR BOARD OF INDIAN APPEALS

Joan Maurice Williams, Charles Campbell, Fay Zackuse, Jewel Baker, Elaine Maurice, Sabrina Daniels, Theresa Maurice Baker, John Campbell, Joan Duplessis, William Zackuse, Jr., Teri Starr Foulkes, Carma Moses, Walter Campbell, and Joanna Spencer v. Northwest Regional Director, Bureau of Indian Affairs

59 IBIA 218 (11/04/2014)



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

JOAN MAURICE WILLIAMS,)	Order Dismissing Appeal
CHARLES CAMPBELL, FAY)	
ZACKUSE, JEWEL BAKER, ELAINE)	
MAURICE, SABRINA DANIELS,)	
THERESA MAURICE BAKER, JOHN)	
CAMPBELL, JOAN DUPLESSIS,)	
WILLIAM ZACKUSE, JR., TERI)	
STARR FOULKES, CARMA MOSES,)	
WALTER CAMPBELL, and JOANNA)	Docket No. IBIA 12-054
SPENCER,)	
Appellants,)	
)	
v.)	
)	
NORTHWEST REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	November 4, 2014

Fourteen individuals (Appellants), who own or previously owned a collective minority interest in Tulalip Allotment 8-B (Allotment), jointly appealed to the Board of Indian Appeals (Board) from a November 10, 2011, decision of the Northwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA).¹ The Regional Director upheld a decision by BIA's Puget Sound Agency Superintendent (Superintendent) not to approve a lease, which was supported by Appellants, for the Allotment. The Superintendent concluded that BIA lacked authority to approve the lease because it did not have majority consent from the landowners. The owner of a majority interest in the Allotment, the Tulalip Tribe (Tribe), opposed the lease and would not consent.

¹ Appellants are Joan Maurice Williams, Charles Campbell, Fay Zackuse, Jewel Baker, Elaine Maurice, Sabrina Daniels, Theresa Maurice Baker, John Campbell, Joan Duplessis, William Zackuse, Jr., Teri Starr Foulkes, Carma Moses, Walter Campbell, and Joanna Spencer. All are represented by Gabriel S. Galanda, Esq. of Galanda Broadman, PLLC.

We conclude that the Appellants who sold their interests before appealing to the Board lack standing to appeal from BIA's decision not to approve the lease because, in the absence of an ownership interest, they have identified no legally protected interest that was adversely affected by BIA's decision not to approve the proposed lease. For the same reason, we conclude that the appeal is now moot with respect to the Appellants who sold their interests to the Tribe during this appeal.² Any legally protected interest that these Appellants might have had in the proposed lease was derived from their ownership interest in the Allotment, or at least from a colorable claim of entitlement to such an interest. But it is undisputed that these individuals do not have a current ownership interest in the Allotment. And after initially arguing that the Board should "intercede" and "void" the Tribe's purchases, Supplemental Opening Brief (Br.) at 8, Appellants now expressly state that they "are not requesting that the Board void any deed," Reply Br. at 26. In the absence of even attempting to assert a claim to recover their title (i.e., reverse their sales transactions), Appellants who sold their interests cannot meet the threshold requirements to demonstrate standing to appeal from BIA's decision not to approve the lease.

Only two Appellants have not sold their interests (totaling 10.2%) to the Tribe. For a different reason, we conclude that these Appellants also lack standing to appeal from BIA's decision not to approve the lease. In an apparent attempt to "undo" the Tribe's majority interest, and gain additional interests that might contribute to majority consent to the lease, Appellants contend that BIA denied them a statutory right to purchase the interests of the landowners who sold to the Tribe, by matching the Tribe's offer. As a threshold matter, the statutory provision upon which Appellants rely only applies to a landowner who was in "actual use and possession of [the] tract for at least three years preceding the tribal [purchase] initiative." 25 U.S.C. § 2204(b). We reject Appellants' argument that an ownership interest alone is sufficient to constitute "actual use and possession," within the meaning of § 2204, and thus § 2204(b) does not apply to Appellants. Even were that not the case, it would not follow that Appellants would have standing. Appellants have made no attempt to show that any of them, individually or jointly, were prepared to exercise a right to match the Tribe's offers, purchase the interests of the selling landowners, and in doing so obtain the necessary majority consent to the lease. Appellants' claim that they were injured by BIA's decision not to approve (and not to further consider) the lease, because they were denied a statutory right to match the Tribe's offers, is premised on both a misreading of the statute and on speculation, and their claims

² It is possible that the entire appeal is moot, even if some Appellants could demonstrate standing. Appellants contend that "the developer has long-since pulled out of the deal," Notice of Appeal and Opening Br. at 11, and it appears that the viability of the lease between the landowners and Katrina Jim Corporation was dependent upon a separately negotiated agreement with a developer.

of injury resulting from BIA's refusal to approve the lease are even more speculative. Thus, we dismiss these claims as well for lack of standing.

Background

I. Katrina Jim Corporation and Appellants' Plans to Develop the Allotment

Appellants are 14 descendants of Behalh, also known as Katrina Jim, the original allottee-owner of Allotment 8-B. Opening Br. at 2.³ The Allotment consists of 56.64 undeveloped acres on the northeast side of the Tulalip Indian Reservation, and is zoned for commercial use. *Id.* at 3. In 2008, Appellants and 13 other descendants of Behalh formed "Behalh Corporation, Inc., a/k/a Katrina Jim Corporation, Inc.," (Corporation)⁴ with the stated purpose of developing and leasing the Allotment for income that would benefit all of the landowners. *Id.* at 3-4. Over the next year, the Corporation commissioned architectural illustrations of retail space for the property, and began the process of securing a developer. *Id.* at 5. In April 2009, the Corporation obtained a signed Letter of Intent from a commercial real estate developer to enter into a 30-year sublease for a portion of the Allotment for \$815,000 per year. *Id.* at 5-6. Assuming that the Corporation procured a lease, that the sublease was finalized, and that development proceeded as planned, the Corporation expected to earn more than \$24 million over the course of the deal. *Id.*

In light of the pending sublease, counsel for the Corporation met with the Superintendent on June 16, 2009, to discuss a ground lease of the Allotment between the landowners, as lessors, and the Corporation, as lessee. Decision at 4 (Administrative Record (AR) Tab 1); Opening Br. at 4. In response to issues raised by the Superintendent during the meeting, the Corporation submitted a modified draft lease for BIA's review on

³ During briefing, six individuals (James Lee Jim, Lorene Bourdon Zackuse, Robert S. Baker, Jr., Laurie Starr, Ricky Spencer, and Viola Spencer (Intervenors)), represented by the same counsel as Appellants, sought to join the appeal as appellants. All six sold their interests to the Tribe. We grant intervention to these individuals, *see* 43 C.F.R. § 4.313 (amicus curiae; intervention; joinder motions), but do not decide whether they are entitled to join the appeal as appellants proper, because we cannot determine whether such joinder would be timely. Their status as intervenors rather than appellants does not affect our disposition of this appeal.

⁴ We refer to the "Corporation" to mean both the corporate entity and the 27 landowners who formed the Corporation. Similarly, because Appellants' counsel at the time was representing both the Corporation and the 27 landowners, and not yet separately representing the 14 Appellants in this appeal, we refer to him, in relation to the proceedings before the Superintendent, as counsel for and acting on behalf of the Corporation.

July 8, 2009. Letter from Galanda to Superintendent, July 8, 2009, at 1 (AR Tab 53); Decision at 4; Opening Br. at 5.

One month later, the Solicitor's Office, which was assisting the Superintendent in her review, informed the Corporation that BIA would be asking for an appraisal from the Office of Appraisal Services (OAS), Office of the Special Trustee, to determine the fair annual rental value of the Allotment. Letter from Lynch to Galanda, Aug. 6, 2009, at 2 (AR Tab 52). The Solicitor's Office also advised the Corporation that BIA approval of a proposed lease would depend on an assessment of what is in the best interests of all of the landowners, and not simply a majority who consent to the lease, if such consent were obtained. *Id.* at 1. The Solicitor's Office requested confirmation that the Corporation had been formed under tribal law and was recognized as such by the Tribe, and also expressed some concern about the manner in which the proposed lease was structured with respect to the distribution of proceeds to landowners who were not part of the Corporation. *Id.* The Corporation's counsel quickly responded, and requested that BIA "rush" the appraisal process because "[t]ime of course is money." Letter from Galanda to Lynch, Aug. 12, 2009, at 2 (AR Tab 51).

An appraisal was completed in November 2009 (2009 Appraisal). Northwest Regional Office Review, Nov. 12, 2009, at 1 (unnumbered) (AR Tab 50); Summary Appraisal Report, Nov. 4, 2009 (AR Tab 50). The 2009 Appraisal determined that the fair market value of the Allotment was \$9,260,000, and the fair annual rental value was \$555,600. *Id.* at iii. The Solicitor's Office sent a copy of the 2009 Appraisal to the Corporation on November 20, 2009. Letter from Lynch to Galanda, Nov. 20, 2009 (AR Tab 49).

In January 2010, the Solicitor's Office contacted the Corporation requesting additional information to assist in BIA's review of the proposed ground lease, and solicited a response from the Corporation regarding one of the factors that influenced the appraisal, specifically the appraiser's conclusion that water and sewer service were not presently available on the Allotment. Letter from Lynch to Galanda, Jan. 22, 2010, at 1-2 (AR Tab 48). Two months later, the Corporation responded with the requested information, taking issue with the appraiser's conclusion regarding the availability of water and sewer service on the Allotment. Letter from Counsel to Lynch, Mar. 19, 2010, at 2 (unnumbered) (AR Tab 47).

Over the next several months, the Solicitor's Office and the Corporation continued to communicate regarding the draft ground lease. *See, e.g.*, Letter from Lynch to Galanda, Mar. 30, 2010 (AR Tab 46); Letter from Lynch to Galanda, May 7, 2010 (AR Tab 44); Email Chain from Lynch to Galanda, May 27, 2010 (AR Tab 42). The Superintendent expressed particular concern with protecting the rights of the minority landowners who had

not joined the Corporation or agreed to the proposed ground lease, prompting revisions to include provisions in the lease intended to adequately protect their interests. Final drafts of the proposed lease were circulated between the parties during the first week of July, 2010. *See* Email Chain from Lynch to Galanda, July 8, 2010 (AR Tab 41). The Superintendent mailed a copy of the final proposed lease to all of the landowners, requesting that they review the lease in anticipation of an upcoming meeting of the landowners to discuss approval of the lease. Letter from Superintendent to Landowners, July 9, 2010 (AR Tab 40).

II. The Tribe's Purchases and the Superintendent's Decision

At the landowners meeting, the Tribe, which at the time held a small ownership interest in the Allotment, unexpectedly announced its plan to purchase additional interests from other owners. Decision at 5. The Tribe followed this announcement with a notice to the landowners that it was offering to purchase those interests for a price determined by multiplying the respective selling landowner's fractional interest by \$10,700,000, the price to be payable to the landowner within 10 days after signing the deed. Letter from Tribe to Landowners (Offer Letter), July 23, 2010, at 1 (unnumbered) (AR Tab 39). The Tribe's offer was based on a higher value than that determined by the 2009 Appraisal, but slightly below the value determined by an earlier appraisal conducted in 2008, which estimated the fair market value at that time to be \$10,760,000. *See* Decision at 5. The Tribe's offer noted that "[t]here is a limit of funds available for purchase and sellers will be paid in order of completion of BIA paperwork." Offer Letter at 1-2. Within weeks, BIA received numerous applications from landowners to sell their interests to the Tribe, including applications from some of the Appellants. *See* Applications for Sale of Indian Land (AR Tabs 31-38).

As the Tribe's ownership interest in the Allotment grew, so did the Corporation's sense of urgency that the lease be approved. *See* Email Chain Between Lynch and Galanda, Aug. 19-20, 2010 (AR Tab 24). By letter dated August 19, 2010, the Solicitor's Office informed the Corporation that the Tribe had purchased undivided ownership interests totaling 32.837% in the Allotment, and that additional applications from landowners to sell to the Tribe continued to be received. Letter from Lynch to Galanda, Aug. 19, 2010, at 1 (AR Tab 25). In light of the "somewhat fluid situation" and the Tribe's newly acquired ownership interests, the Solicitor's Office noted that while the proposed lease was ready for final distribution to the landowners for their action (i.e., either consenting or not consenting to the lease), the Superintendent had not made any final determination on whether BIA's approval of the lease would be in the best interest of all of the landowners.

Id. The Solicitor's Office advised the Corporation that the Superintendent would give the landowners a reasonable period of time to consent to the proposed lease. *Id.*⁵

On August 23, 2010, BIA mailed Landowner Consent Packages to the landowners with a copy of the proposed lease. Landowner Consent Package, Aug. 23, 2010 (AR Tab 23). The cover letter requested that the landowners check a form indicating whether they did or did not consent to the lease, and, in language objected to by the Corporation, advised landowners that "this lease does not guarantee that landowners will receive rent." *Id.* at 1; AR Tab 24 at 2. The cover letter also described the rent payment schedule and noted that the lease would automatically terminate if water and sewer utilities were not obtained within 48 months of the commencement of the lease. AR Tab 23 at 1.

One month later, the Superintendent received a letter from the Tribe, taking the position that BIA had "been divested . . . of its authority to enter into any lease on behalf of the Tulalip Tribes involving [the Allotment]." Letter from Chairman to Superintendent, Sept. 17, 2010 (AR Tab 22). At the time of the letter, the Tribe had acquired a 33.763% ownership interest in the Allotment, and landowner consent to the lease totaled 24.604%. Sales Chart, Sept. 20, 2010 (AR Tab 21). Individual landowners continued to sell to the Tribe, and as of October 18, 2010, the Tribe had purchased 51.726% of the ownership interests, while consent to the lease remained unchanged. Sales Chart, Oct. 18, 2010 (AR Tab 19).

On October 21, 2010, the Superintendent issued her final decision, finding that the Tribe owned a majority interest in the Allotment and had advised BIA that it did not consent to the lease. Decision of the Superintendent, Oct. 21, 2010, at 1 (AR Tab 20). In the absence of majority consent, and given the Tribe's ability to block such consent, the Superintendent disapproved the proposed lease. *Id.*

III. The Regional Director's Decision

Appellants appealed the Superintendent's decision to the Regional Director. Notice of Appeal, Nov. 19, 2010 (AR Tab 18). Appellants asserted that they owned 45% of the undivided interests in the Allotment, arguing that although eight of them had sold their interests to the Tribe, those sales were "unquestionably null and void as *ultra vires* under federal law." *Id.* at 1 (unnumbered). Appellants pursued two lines of argument to set aside

⁵ Originally the Superintendent intended to allow the landowners 45 days to respond to the consent package. However, the Superintendent later decided to leave the consent period open-ended, and to inform the Corporation when BIA received close to 50% consent. *See* Email Chain Between Lynch and Galanda, Aug. 20, 2010 (AR Tab 24).

the Superintendent's decision and resurrect BIA's consideration of the lease. First, as relevant to those landowners who had sold to the Tribe, Appellants argued that the 2009 Appraisal had been flawed, that BIA had breached its fiduciary duty to the landowners by allowing the Tribe to purchase interests in the allotment for less than fair market value, and that those sales were therefore void. *Id.* at 2 (unnumbered). Second, apparently in reference to the subset of Appellants who had not sold their interests, Appellants argued that BIA had failed to notify landowners of pending sales to the Tribe in order to give non-selling landowners a right to match the Tribe's offer and become the purchaser of those interests in lieu of the Tribe. *Id.* Appellants contended that 25 U.S.C. § 2204 gave them the right to match the Tribe's offers. *Id.*

Section 2204(a), which is part of the Indian Land Consolidation Act (ILCA), provides tribes, with certain conditions, a right to purchase interests in trust or restricted lands. 25 U.S.C. § 2204(a). As relevant to Appellants' argument, § 2204(b) provides that the tribal purchase right applies "on the condition that . . . any Indian owning any undivided interest, and in actual use and possession of such tract for at least three years preceding the tribal initiative, may purchase such tract by matching the tribal offer." *Id.* § 2204(b). Based on BIA's failure to afford them the individual landowner right under § 2204(b) to match a tribe's offer, Appellants argued that these land sales to the Tribe must also "be voided and set aside." Supp. Notice of Appeal, Feb. 7, 2011, at 2 (AR Tab 13).

In response to Appellants' objections to the appraisal, BIA ordered a new appraisal from OAS, retrospective to July 27, 2010, for the purpose of estimating the market value of the Allotment in relation to the Superintendent's approval of the individual landowners' sales to the Tribe. Retrospective Appraisal, Feb. 14, 2011 (2011 Appraisal), at 9 (AR Tab 11). The Retrospective Appraisal determined that the market value of the Allotment, on July 27, 2010, was \$9,235,000. *Id.* at 6. Appellants criticized the Retrospective Appraisal, arguing that BIA had failed to consult with them on the appraisal, questioning whether there was any authority for BIA to appraise property on a retrospective basis, and arguing that the appraisal was arbitrary and capricious. Letter from Galanda to Regional Director, May 9, 2011, at 1-3 (unnumbered) (AR Tab 4). Appellants reiterated their contention that BIA had failed to consult with Appellants on the sales, that the sales to the Tribe violated Federal law, and that BIA was acting in bad faith. *Id.* Appellants again argued that the sales must be voided. *Id.* at 3.

Appellants also argued that BIA had failed to comply with their requests for documents regarding the land sales and retrospective appraisal of the Allotment, thus breaching BIA's trust responsibilities to Appellants. Third Supp. Notice of Appeal, July 28, 2011, at 1 (unnumbered) (AR Tab 3). They further complained that their written request for notice and consultation prior to future action on the property had been ignored by BIA. *Id.* at 1-2 (unnumbered). Appellants asked that the Superintendent's decision be

“reversed,” *id.* at 2 (unnumbered), apparently seeking to have the lease consent process and BIA’s consideration of the lease reopened.

The Regional Director affirmed the decision of the Superintendent. Decision (AR Tab 1). As relevant to Appellants’ first line of arguments, the Regional Director concluded that Appellants’ objections to the appraisals were without merit. *Id.* at 11-16. The Regional Director found that Appellants had not submitted evidence that would warrant a change in BIA’s acceptance of the 2011 appraisal, noting that “Appellants were free to have their own appraisal performed in accordance with [the guidelines] and did not do so.” *Id.* at 15. The Regional Director concluded that BIA had authority to order and accept the 2011 Appraisal to determine, retrospectively, the market value for the Allotment at the time of the land sales, and he determined that the conclusions reached in the 2011 Appraisal were reasonable. *Id.* at 15-16. As relevant to Appellants’ second line of argument, the Regional Director concluded that BIA had approved the sales to the Tribe pursuant to statutory authority found elsewhere than § 2204, and thus § 2204 was “not implicated.” *Id.* at 8-10.⁶ The Regional Director further concluded that even if § 2204 in general governed the sales, it did not apply to Appellants because they did not satisfy the requirement that a landowner be “in actual use and possession of [the property]” for the 3 years preceding the purchase offer, in order to have a right to match a tribe’s offer. *Id.* at 10. The Regional Director interpreted the requirement of “actual use and possession” as contemplating residence on the property, and because “the property was vacant with no improvements,” the Regional Director determined that Appellants were not entitled under § 2204 to notice and the opportunity to match the Tribe’s purchase offer. *Id.*

The Regional Director also found that there was no basis in the record to conclude that the Superintendent acted arbitrarily or capriciously in refusing to approve the proposed lease to the Corporation. *Id.* at 17. He responded to Appellants’ complaints about BIA’s response to their FOIA request by stating that the matter was outside the scope of the appeal from the Superintendent’s decision because appeals from FOIA requests are governed by a separate administrative process. *Id.* at 19-20.

IV. Appellants’ Arguments on Appeal to the Board

Appellants appealed the Decision to the Board, filing an opening brief with their notice of appeal, and later filing a supplemental opening brief. BIA filed an answer brief

⁶ The Regional Director stated that BIA had approved the sales pursuant to 34 Stat. 1018, which provides that Indian landowners may sell all or part of their interest in land pursuant to rules and regulations prescribed by the Secretary of the Interior. Decision at 9; 25 U.S.C. § 405.

and Appellants filed a reply brief. On July 30, 2012, BIA filed a supplemental answer brief notifying the Board that as of that time, all but two Appellants, Elaine Maurice and Joan Duplessis, had sold their ownership interests to the Tribe.⁷

On appeal, Appellants pursue the same two lines of argument that they presented to the Regional Director in order to challenge the validity of the Tribe's majority interest: (1) BIA breached its trust duty by approving landowners' sales to the Tribe at below fair market value, and (2) BIA breached its duty to notify Appellants of their right to match the Tribe's offer and purchase the interests sold to the Tribe by other landowners, pursuant to 25 U.S.C. § 2204(b). The Regional Director, while responding on the merits to Appellants' arguments, contends that Appellants lack standing to challenge BIA's decision not to approve the lease.

Discussion

I. Standing

To bring an appeal to the Board, an appellant must show that he or she has standing to bring the appeal. *Thompson v. Great Plains Regional Director*, 58 IBIA 240, 241 (2014). The Board has construed its regulations as incorporating the judicial elements of standing articulated by the United States Supreme Court in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). *Preservation of Los Olivos and Preservation of Santa Ynez v. Pacific Regional Director*, 58 IBIA 278, 292 (2014). To establish standing, an appellant must first show that he or she has suffered an invasion of a legally protected interest that is concrete, particularized, and actual or imminent. *Thompson*, 58 IBIA at 241. The injury complained of must not be hypothetical or conjectural. *Lujan*, 504 U.S. at 560. Second, the injury must be traceable to the BIA decision that is challenged, and not some independent action of a party not before the Board. *See id.* Third, the injury must be capable of redress by a favorable decision of the Board. *See id.* at 561. An appellant must assert his or her own legal rights and interests, and cannot bring a claim on behalf of the rights and interests of others. *Thompson*, 58 IBIA at 241.

II. The Appellants Who Sold Their Interests Lack Standing to Challenge BIA's Lease Disapproval Decision.

As noted, all but two of the Appellants have sold their ownership interests in the Allotment to the Tribe, either before or during this appeal. As also noted, Appellants now

⁷ BIA advised the Board that the estate of Joan Duplessis is under the control of a Guardian. Supp. Answer at 2 n.1.

take the position that they are not seeking to void their sales to the Tribe, i.e., they are not seeking to reverse the sales transactions and void the deeds. Reply Br. at 26.⁸ However, Appellants argue that regardless of their ownership interest in the property, they have standing because the Supreme Court has held that “nearby property owner[s]” have standing to challenge the “economic, environmental, and aesthetic harm” resulting from fee-to-trust acquisitions. Reply Br. at 6. (citing *Match-E-Be-Nash-She-Wish Band of Pottawatomí Indians v. Patchak*, 132 S. Ct. 2199, 2210 (2012) (hereinafter *Match-E-Be-Nash-She-Wish Band*). In the alternative, Appellants contend that their standing to allege BIA’s breach of fiduciary duty does not “run with the land,” and is “enforceable regardless of subsequent losses of interest in the trust corpus itself.” *Id.* at 7 (citing *Beckett v. Air Line Pilots Ass’n*, 995 F.2d 280, 286 (D.C. Cir. 1993)).

In the absence of an ownership interest in the Allotment, or of making a colorable claim to recover title,⁹ Appellants who sold their interests have not identified any legally protected interest that was adversely affected by BIA’s decision not to approve the proposed lease to the Corporation. Their reliance on *Match-E-Be-Nash-She-Wish Band* is misplaced in several respects. First, Appellants have produced no evidence that they are “nearby property owners,” nor have they articulated what legally protected interest such owners might have that could be adversely affected by BIA’s decision *not* to approve a lease of the Allotment. Second, in *Match-E-Be-Nash-She-Wish Band*, the plaintiff had demonstrated the threshold elements of standing. *Match-E-Be-Nash-She-Wish Band*, 132 S. Ct. at 2210. The issue in that case was whether the plaintiff nevertheless lacked prudential standing. *Id.* In the present case, the Appellants who sold their interests have not satisfied even the threshold elements of standing—injury, causation, and redressability.

In addition, Appellants’ attempt to separately pursue a breach of fiduciary duty “claim” against BIA relating to their sales, in this appeal arising from the lease disapproval decision, is also misplaced, and affords them no basis to establish standing to challenge the Decision. Whether or not BIA breached a duty to the Appellants who sold their interests, setting aside BIA’s lease disapproval decision would not redress that grievance. It would have no legal effect on any legal right or interest held by these Appellants. Similarly, the adequacy of BIA’s consultation with the Appellants who sold their interests to the Tribe is

⁸ We note that no Appellant who sold to the Tribe has indicated a willingness to refund the sales price to the Tribe in exchange for recovering title, assuming there were a basis to require that the transaction be reversed.

⁹ We do not suggest that Appellants, under the facts of this case, could make such a colorable claim. We only find that we need not reach that issue, in evaluating Appellants’ standing, because Appellants are not seeking to void their deeds and reverse their sales to the Tribe.

moot because that issue would, at most, appear to be relevant to whether they gave their informed consent to sell, which in turn would at most be relevant if they were seeking to have their sales voided, which they are not. The same is true for Appellants' attempts, through this appeal, to challenge the validity of the appraisal upon which BIA relied in approving their sales to the Tribe. The Board does not issue advisory opinions, *Alcantra v. Pacific Regional Director*, 58 IBIA 252, 253 (2014), and in the context of this appeal from BIA's decision not to approve the lease, Appellants have, at best, postulated that the appraisal would be relevant to an action to declare their sales void, reverse the transactions with the Tribe, and require BIA to resurrect its consideration of the lease.¹⁰

Therefore, the Appellants who sold their interests to the Tribe lack standing and their claims are dismissed.

III. Appellants Who Still Own Interests in the Allotment Lack Standing to Challenge the Decision Because They Fail to Show That They Had a Statutory Purchase Right

Two Appellants continue to hold an ownership interest in the Allotment. Because they cannot assert the rights of other landowners arising from the sale of their property, these Appellants, as co-owners of the Allotment, attempt to invoke their statutory right to challenge the procedure by which BIA conducted the sales. These Appellants, however, lack standing to challenge the land sales to the Tribe because they were not in actual use and possession of the property at the time of the sales. For this reason, the claims of the remaining Appellants are dismissed.

Section 2204 of the ILCA provides that an "Indian tribe may purchase, at not less than fair market value and with the consent of the owners of the interests, part or all of the interests in . . . any tract of trust or restricted land within the boundaries of the reservation of the tribe." 25 U.S.C. § 2204(a). The statute, in turn, requires that "any Indian owning any undivided interest, and in actual use and possession of such tract for at least three years preceding the tribal initiative, may purchase such tract by matching the tribal offer." *Id.* § 2204(b). The phrase "actual use and possession" is undefined in the statute.

Appellants argue that BIA violated § 2204(b) and breached its trust obligations to them by failing to notify them of the pending land sales or provide them with a meaningful

¹⁰ To the extent that any Appellant were to seek to have BIA reverse his or her sales transaction, nothing in our decision precludes him or her from doing so, in which case BIA may issue a decision on that request. But in the absence of such a claim, we find no basis to separately consider or address the underlying complaints made by Appellants as grounds to support setting aside their sales.

opportunity to match the Tribe's purchase offer. Opening Br. at 17. The Regional Director found that even if § 2204 applied to the sales, Appellants were not entitled to the opportunity to match the Tribe's offers because they did not reside on the property, and thus were not in "actual use and possession" as contemplated by the statute. Decision at 10. However, Appellants contend that they do meet the requirements of § 2204(b) because the word "possession," as commonly understood in property law, means "any legally recognizable interest therein," and "use" means the exercise of a legal right. Opening Br. at 21. According to Appellants, the phrase "actual use and possession" includes control over a legally protected interest in property, and does not require a physical presence on the land, especially where interests in an allotment are highly fractionated. *See id.* at 21-22.

We disagree with Appellants' interpretation of § 2204(b). Without deciding the precise contours of the phrase "actual use and possession," we disagree with Appellants that ownership alone is sufficient. The plain language of the statute requires that to be eligible for the right to match a tribe's purchase offer, an Indian must "own" an undivided interest in the property, *and* be in "actual use and possession" of the property. 25 U.S.C. § 2204(b). If ownership alone were sufficient, the words "actual use and possession" would be surplusage. Appellants have not shown anything more than their ownership interest, and there is nothing in the record to suggest that any of them physically occupied or used the property in any "actual" respect. Therefore, the Board concludes that Appellants have not made the threshold factual showing that they had the right afforded by § 2204(b) to match the Tribe's offer, and thus lack standing to assert a claim that BIA failed to consult with them and afford them such a right.¹¹ We also note that Appellants have not shown that they were prepared to purchase the land if they had been afforded the opportunity to match, further undermining any claim that they suffered an actual injury resulting from BIA's alleged failure to give them notice of the Tribe's purchases.

In addition, Appellants have no general right as landowners to be consulted by BIA when other landowners choose to sell their interests. The sale by one owner to another owner does not affect the titles of third-party co-owners of an allotment, nor does it affect any other legally protected interest in the absence of a statute or regulation granting such an interest (such as the right to match granted to certain landowners in actual use and possession).

¹¹ Appellants also contend that BIA violated the notice provisions in § 2204(c), but that subsection applies to the partition of highly fractionated Indian lands, and thus has no applicability to the Tribe's purchases in the present case. *See Estate of Sandra G. Bodendick*, 55 IBIA 251, 263 (2012) (§ 2204(c) not applicable to Tribe's purchase at probate).

Thus, we also dismiss the appeals from the Decision by the Appellants who retain an ownership interest for lack of standing.

Conclusion

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.

I concur:

 // original signed
Steven K. Linscheid
Chief Administrative Judge

 //original signed
Thomas A. Blaser
Administrative Judge