



INTERIOR BOARD OF INDIAN APPEALS

Crest-Dehesa-Granite Hills-Harbison Canyon Subregional Planning Group;
Dehesa Valley Community Council, Inc.; Waldon G. Riggs and Carolynn P. Riggs;
David O'Connor and Delia O'Connor; Geraldeane Fox; and Irene M. Harper v.
Acting Pacific Regional Director, Bureau of Indian Affairs

61 IBIA 208 (08/21/2015)



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

CREST-DEHESA-GRANITE HILLS-)	Order Dismissing Appeals in Docket
HARBISON CANYON)	Nos. 13-140 and 13-142, Vacating
SUBREGIONAL PLANNING GROUP;)	Decision in Part and Remanding, and
DEHESA VALLEY COMMUNITY)	Dismissing Appeals or Affirming
COUNCIL, INC.; WALDON G. RIGGS)	Decision in Remaining Part
and CAROLYNN P. RIGGS; DAVID)	
O'CONNOR and DELIA O'CONNOR;)	
GERALDEANE FOX; AND IRENE M.)	Docket Nos. IBIA 13-140
HARPER,)	IBIA 13-142
Appellants,)	IBIA 13-143
)	IBIA 13-144
v.)	IBIA 13-145
)	IBIA 13-146
ACTING PACIFIC REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	August 21, 2015

The Crest-Dehesa-Granite Hills-Harbison Canyon Subregional Planning Group (Planning Group); the Dehesa Valley Community Council, Inc. (DVCC); and Waldon G. Riggs and Carolynn P. Riggs, David O'Connor and Delia O'Connor, Geraldeane Fox, and Irene M. Harper (Appellant Individuals) appealed to the Board of Indian Appeals (Board) from an August 1, 2013, decision (Decision) by the Acting Pacific Regional Director (Regional Director), Bureau of Indian Affairs (BIA), to accept into trust for the Sycuan Band of the Kumeyaay Nation (Tribe), 17.51 acres of land and associated easements located in San Diego County, California.¹

We dismiss the appeals from the Planning Group and DVCC for lack of standing. With respect to the appeals by Appellant Individuals, we vacate the Decision in part because neither in the Decision, nor on appeal, did the Regional Director address Appellant

¹ The Greyhound Adoption Center also filed an appeal from the Decision, which the Board dismissed as untimely. *Greyhound Adoption Center v. Acting Pacific Regional Director*, 58 IBIA 228 (2014).

Individuals' contentions that BIA's acceptance of certain easements in trust for the Tribe will interfere with their own property interests in parcels served by those easements and their shared ownership of the easements themselves. We affirm the Decision or dismiss the appeals in remaining part because to the extent Appellant Individuals attempt to raise additional issues regarding the Regional Director's discretionary decision, they fail to meet their burden of proof, and because Appellant Individuals lack standing to raise certain claims.

Background

In May of 2010, the Tribe submitted an application to BIA for the United States to accept, in trust for the Tribe, several parcels of land currently owned in fee by the Tribe, totaling 17.51 acres and located in San Diego County, California. Letter from Tribe to Regional Director, May 12, 2010 (Administrative Record IBIA – Scan (AR IBIA – Scan) at 563) (TOC 60).² The land is apparently used for tribal housing, and the Tribe has no plans to change that use. *Id.* The parcels are identified as Assessor's Parcel Nos. 516-030-16-00 (referred to as Parcel A in the Decision), 516-030-18-00 and 516-030-19-00 (referred to as Parcel B), and 516-030-020-00 (referred to as Parcel C).³ *Id.* at 563, 566, 637, 679-82.

In acquiring fee ownership of the parcels, the Tribe apparently also acquired ownership of various easements, including a number of easements for ingress and egress, which serve one or more of the three parcels. In seeking to have the 17.51 acres accepted

² The administrative record for the Decision was submitted to the Board in electronic format, containing individual Adobe PDF® files numbered 1 through 13, and several unnumbered PDF files, including the bulk of the record that is contained in a single PDF file titled "IBIA – Scan – Admin Record," consisting of 695 pages, with no dividers. The Regional Director submitted a table of contents that uses a numbering system associated with documents in the IBIA – Scan file, although the descriptions in the table of contents do not always conform to the record itself, e.g., the table of contents identifies the Tribe's fee-to-trust application as dated May 17, 2010, a reference to a follow-up letter from the Tribe. In order to identify the documents in the record, the Board will use "AR No. [#]" to refer to a separately numbered PDF file, and "AR IBIA – Scan at [pages]" to refer to a document in that file by the page number within the PDF, sometimes with the additional parenthetical reference "(TOC [#])" to refer to the numbering used in BIA's table of contents.

³ Parcel A is also referred to as the "Sperry" property, *see* AR No. 11 at 107-08; Parcel B is also referred to as the "Cooper and Carter" properties, *see* AR IBIA – Scan at 631-632; and Parcel C is also referred to as the "Ruis" property, *see* AR IBIA – Scan at 633.

by the United States in trust, the Tribe also sought to have its ownership interest in the associated easements accepted into trust. *See* Notice of (Non-Gaming) Land Acquisition Application, Oct. 18, 2011 (AR IBIA – Scan at 397-99 (legal descriptions) and 410 (map depicting “lands transferred” and “easements transferred”)) (TOC 45).

On October 18, 2011, BIA provided notice to the State of California (State), the County of San Diego (County), other government officials, and various tribes, of the proposed trust acquisition. *Id.* at 396-405. Although they apparently were not provided with individual notice, both the Planning Group and DVCC submitted comments to BIA objecting to the trust acquisition. Neither raised any concerns regarding the taking of easements in trust for the Tribe. *See* Letter from Ulm to BIA Pacific Regional Office, Nov. 15, 2011 (AR IBIA – Scan at 320-21) (TOC 33) (Planning Group); Letter from Walls to BIA Pacific Regional Office, undated (AR IBIA – Scan at 322) (TOC 34) (DVCC). The County objected to the proposed trust acquisition on several grounds, including opposition to the incorporation of any easements held by the County or other agencies into the trust acquisition on the ground that it would constitute a taking of public property. *See* Decision at 11 (AR IBIA – Scan at 92) (TOC 12).

The distribution list for BIA’s notice of the proposed acquisition does not include Appellant Individuals, nor has any party contended that they were provided notice of the proposed acquisition. Maps included in the record indicate that the easements to be transferred as part of the trust acquisition are located on or border seven parcels of land that are not, except for the easements, the subject of the trust acquisition. *See* AR IBIA – Scan at 409-410, 492-93; *see also* Planning Group Notice of Appeal, Aug. 15, 2013 (AR IBIA – Scan at 12) (TOC 2) (identifying allegedly affected parcels by Assessor’s Parcel Numbers). Appellant Individuals did not submit comments on the proposed acquisition prior to issuance of the Decision.

On August 1, 2013, the Regional Director issued the decision to accept the 17.51 acres, and associated easements, in trust for the Tribe. Decision (AR IBIA – Scan at 82-103) (TOC 12). The Decision responded to comments received from the State, the County, the Planning Group, and DVCC, and addressed the various factors in 25 C.F.R. Part 151 that BIA must consider in deciding whether to take land in trust for a tribe. Responding to the County’s objection regarding easements, the Regional Director stated: “Easements and dedicated rights of way presently on title would be maintained as a result of the Proposed Action. This would not constitute a taking of public property.” Decision at 14 (AR IBIA – Scan at 95).

Appeals to the Board

The Planning Group, DVCC, and Appellant Individuals appealed to the Board.⁴ Both the Planning Group and DVCC contended that privately owned properties that have access and utility easements through the properties to be acquired in trust would be directly affected by the Decision by rendering those property and easement interests unmarketable. DVCC Notice of Appeal, Aug. 22, 2013, at 1; Planning Group Notice of Appeal (AR IBIA – Scan at 12) (TOC 2). Appellant Individuals contended that the acquisition would constitute a taking of their private property, and also contended that the Decision contained a description of easements to be taken into trust “that have never been granted, nor recorded, in San Diego County.” *See, e.g.*, Waldon G. Griggs andCarolynn P. Riggs Notice of Appeal, Aug. 31, 2013, at 2. Appellant Individuals noted that, following issuance of the Decision, the Supervisory Realty Specialist in BIA’s Pacific Regional Office had acknowledged that the Decision contained inaccurate legal descriptions of the property to be taken in trust. *Id.* In their notices of appeal, Appellant Individuals also incorporated “all of the reasons opposing” the trust acquisition that were contained in pre-decisional comments submitted by the State, the County, the Planning Group, and DVCC. *See id.* at 3.

Prior to briefing on the merits of the appeals, the County advised the Board that the Planning Group is not a separate entity from the County and did not have authority to file an appeal from the Decision. Letter from Crumley to Board, Oct. 3, 2013. The Board allowed the Planning Group to respond within the timetable set for filing briefs on the merits. Order Regarding Planning Group’s Appeal, Nov. 18, 2013, at 2. The Planning Group did not respond.

DVCC and Appellant Individuals filed a joint opening brief, arguing that the decision “to take certain easements on Non-Indian lands into trust” adversely affected Appellants’ interests and rights, and constituted a taking of Appellants’ private property without due process. Opening Brief (Br.), Jan. 3, 2014, at 1-2. Appellants reiterated their argument that the Decision contains descriptions of easements that have never been granted, nor recorded. *Id.* at 2. Appellants argued that the Decision “purports to take into trust all valid and enforceable easements on Appellants’ properties, thereby rend[er]ing the title to their properties unmarketable.” *Id.* at 6. Appellants contended that while the Tribe purports to recognize Appellants’ easements, the Tribe’s sovereignty over the easements, if they are taken in trust by the United States, would make Appellants’ easements “less enforceable against others, and unenforceable against the [T]ribe, should there be any impermissible encroachment on the easements in the future.” *Id.*

⁴ Neither the State nor the County appealed the Decision.

Neither the Regional Director nor the Tribe filed an answer brief responding on the merits to Appellants' allegations. However, within the time allowed for answering Appellants' opening brief, the Regional Director filed a motion to dismiss, arguing that Appellants had identified no particularized injury to any legally protected interest resulting from the Decision. *See* Motion to Dismiss, Feb. 7, 2014, at 2 (unnumbered). Upon receipt of the motion, the Board advised Appellants that when the issue of standing is raised, the burden is on the appellants to demonstrate standing. Order Concerning Regional Director's Motion to Dismiss, Feb. 18, 2014, at 2. The Board allowed Appellants to respond to the motion to dismiss in their reply brief on the merits. *Id.*

DVCC did not respond to the motion to dismiss with any evidence of a legally protected interest that it has that would be adversely affected by the Decision. Appellant Individuals responded with a sworn joint declaration stating that they "hold and share title to the judicially noticeable and properly described easements on Parcels A, A1, A2, B, C, C1, C2, C3, C4, and C5," as described in the Decision. Reply Br., Mar. 20, 2014 (Declarations of Waldon G. Riggs, et al., Mar. 20, 2014, at 2). Appellant Individuals also aver that the Decision's incorporation of "improperly described easements . . . that have never been recorded" would result in an encumbrance of their property "with easements that have never existed." *Id.*

In their reply on the merits, Appellants argue that the Regional Director failed to respond to their allegations of error, and they reiterate their arguments that by taking in trust title to easements on Appellants' properties, the Decision will render title to their properties unmarketable by making the easements less enforceable against others and unenforceable against the Tribe. Reply Br. at 5. Appellants contend that the removal and exclusion of easements from a trust acquisition is not without precedent, citing another trust acquisition case involving San Diego Gas & Electric, and argue that BIA should be compelled to do the same in the present case. *Id.* at 7-8.⁵ Appellants also contend that the Decision must be set aside because BIA's trust acquisition regulations require the removal of easements and encumbrances that would render title unmarketable. *Id.* at 5 (citing 25 C.F.R. § 151.13).

⁵ In the Board's order concerning the Regional Director's motion to dismiss, the Board noted that Appellants' concerns appeared to be similar to those that were resolved amicably by the parties in another trust acquisition case involving easements. Order Concerning Regional Director's Motion to Dismiss, at 2 n.2 (citing *San Diego Gas & Electric Co. v. Pacific Regional Director*, 56 IBIA 205 (2013)). The Board reiterated that it strongly encourages the voluntary resolution of disputes brought before it. *Id.*

Discussion

I. Standard of Review

A decision whether to take land into trust is discretionary, and the Board does not substitute its judgment for BIA's in decisions based upon an exercise of discretion. *City of Lincoln City, Oregon v. Portland Area Director*, 33 IBIA 102, 104 (1999). However, the Board will require that BIA provide sufficient reasoning to support a discretionary decision and that the administrative record provide evidentiary support for the decision. *Crow Leaseholders Ass'n v. Rocky Mountain Regional Director*, 52 IBIA 156, 158 (2010).

An appellant bears the burden of demonstrating that a regional director did not properly exercise her discretion. *City of Lincoln City*, 33 IBIA at 104. An appellant also has the burden to demonstrate that it has standing to bring an appeal. *Voices for Rural Living v. Acting Pacific Regional Director*, 49 IBIA 222, 233 (2009); *Skagit County v. Northwest Regional Director*, 43 IBIA 62, 70 (2006).

II. Planning Group and DVCC Appeals

We dismiss the appeals by the Planning Group and DVCC for lack of standing. The Planning Group did not respond to the County's submission stating that it is not separate from the County and did not have authority to file the appeal. In response to the Regional Director's motion to dismiss for lack of standing, DVCC did not produce any evidence to demonstrate that it has standing to bring the appeal. Thus, neither of these appellants has met its burden to demonstrate standing, and we dismiss the appeals in Docket Nos. 13-140 (Planning Group) and 13-142 (DVCC) accordingly. See *First Interstate Bank v. Rocky Mountain Regional Director*, 60 IBIA 313, 314 (2015) (dismissing appeal when the appellant failed to respond to an order to address its standing).

III. Appellant Individuals' Appeals⁶

A. Appellant Individuals' Standing

The Board has construed its regulations as incorporating the judicial elements of standing. *First Interstate Bank*, 60 IBIA at 314; *Preservation of Los Olivos and Preservation of Santa Ynez v. Pacific Regional Director*, 58 IBIA 278, 292 (2014). To establish standing, an appellant must show that it has suffered an invasion of a legally protected interest that is

⁶ Appellant Individuals' appeals were assigned Docket Nos. IBIA 13-143 (Waldon G. Riggs and Carolyn P. Riggs), 13-144 (David O'Connor and Delia O'Connor), 13-145 (Geraldene Fox), and 13-146 (Irene M. Harper).

concrete, particularized, and actual or imminent, which is traceable to the challenged BIA action, and which is redressable through an appeal. *Preservation of Los Olivos*, 58 IBIA at 296-97.

We conclude that Appellant Individuals have made a sufficient showing that they have standing to bring their appeals based on their claim that BIA should consider the alleged effect of the trust acquisition on their property rights. In their notices of appeal, opening brief, and the declaration accompanying their reply brief, Appellant Individuals contend that they own easements which, by the terms of the Decision, would be taken in trust by the United States, and that they own property that would be rendered unmarketable if those easements are held by the United States in trust for the Tribe. In our view, Appellants have made a sufficient showing of particularized injury to a legally protected interest, and the Regional Director's motion does not seriously contest that setting aside the Decision would redress the alleged injury that the trust acquisition will cloud Appellant Individuals' title to their property or associated easements.⁷ Thus we deny the Regional Director's motion to dismiss.⁸

B. The Merits of Appellant Individuals' Appeals

I. The Decision Failed to Consider Appellant Individuals' Claims That the Trust Acquisition Interferes With Their Property Rights

We next conclude that the Decision to accept the property and easements in trust must be vacated and the matter remanded, with instructions that the Regional Director consider and address Appellant Individuals' allegations that the trust acquisition would interfere with their property rights and therefore should exclude the easements.

BIA's trust acquisition regulations require BIA, in deciding whether to accept land in trust, to consider, among other factors, "[j]urisdictional problems and potential conflicts of land use which may arise" as a result of the trust acquisition. 25 C.F.R. § 151.10(f). In the present case, the only portion of the Decision that addressed easements, in response to the County's comment, concluded that "[e]asements and dedicated rights of way presently on title would be maintained as a result of the Proposed Action." Decision at 14 (AR IBIA –

⁷ In evaluating Appellant Individuals' standing, we express no opinion on the underlying merits of their contention that acceptance of the easements by the United States in trust would render their property unmarketable.

⁸ As we discuss later, Appellant Individuals are confused in suggesting that *their* property interests will be taken into trust, but they have made a sufficient allegation that their property interests could be adversely affected by taking the Tribe's interests in the easements in trust.

Scan at 95). Nothing in the Decision indicates that the Regional Director gave any consideration to the alleged effect of the United States holding title, in trust for the Tribe, on easements to which owners of adjacent or nearby property also claim ownership, or own property that is burdened by easements that are subject to the trust acquisition.

The fact that the Decision does not address Appellant Individuals' contentions is understandable, given the fact that they did not submit comments or objections prior to issuance of the Decision. But as noted, Appellant Individuals also contend that they did not receive adequate notice of the proposed trust acquisition and an opportunity to object, and no party has disputed that contention.⁹

When a BIA discretionary decision fails to directly address a matter raised by an appellant, it remains possible that the administrative record will contain sufficient evidence that the matter was adequately considered, and a sufficient explanation, such that the decision may still be sustained. In the present case, however, the Regional Director did not address the merits of Appellant Individuals' arguments on appeal, and thus has not sought to rely on the record to argue that their concerns were considered and adequately addressed.

Nor has the Board found such evidence in the record. In responding to a post-decisional inquiry whether private property owners would have any legal remedies "available outside the trust application and appeal process should [questions regarding the easements] arise," a BIA staffer responded that "private property owners have the right to appeal within the 30 days of the [Decision] and up to 6 years to litigate from the time of acceptance." Email from Wolfen to Dutschke, Aug. 19, 2013 (AR IBIA – Scan at 31) (TOC 9). By referring only to the appeal process within the trust acquisition process, and challenges to the trust acquisition itself, this statement could be construed to imply that BIA might take the position that Appellant Individuals would have no remedy outside the trust acquisition process—precisely Appellant Individuals' concerns. The same email states that rights of way "will remain in effect," but without addressing Appellant Individuals' allegations that when the Tribe's ownership interest in a shared or coextensive easement is taken into trust, the easement will become less enforceable against other individuals and unenforceable against the Tribe.

Under the circumstances, we conclude that the Regional Director's decision to accept the parcels of land and the associated easements must be set aside, and the Regional

⁹ The general rule that the Board does not consider arguments or evidence not raised in the proceedings below is premised on a party having been afforded an opportunity to have done so. See *Garcia v. Western Regional Director*, 61 IBIA 45, 50 n.3 (2015); *South Dakota v. Acting Great Plains Regional Director*, 39 IBIA 301, 305 (2004); *Nelson v. Acting Portland Area Director*, 26 IBIA 85, 86 (1994).

Director must consider and address Appellant Individuals' property rights claims in relation to the proposed trust acquisition, before deciding whether to accept the land and easements in trust, in whole or in part.

2. Appellant Individuals Lack Standing to Challenge the Decision as Failing to Comply with 25 C.F.R. § 151.13

Although we vacate the Decision as necessary for BIA to consider, in its exercise of discretion, Appellant Individuals' arguments regarding the effect on their property rights of taking the easements into trust, we reject Appellant Individuals' argument that the Decision must be vacated as inconsistent with 25 C.F.R. § 151.13, finding that they lack standing to raise this claim.

If BIA approves a trust acquisition, § 151.13 requires that there be title evidence meeting the *Standards For The Preparation of Title Evidence In Land Acquisitions by the United States*, and provides that before accepting title, BIA "shall" require the elimination of liens, encumbrances, or infirmities if they make title to the land unmarketable. 25 C.F.R. § 151.13. As the Board has previously explained, however, the purpose and scope of § 151.13 concerns the land and property interest *to be taken into trust*—to ensure that the Tribe has marketable title that will be conveyed to the United States. The interest protected by § 151.13 is that of the United States, not the land or property interests of third parties that are not being acquired. *Thurston County, Nebraska v. Acting Great Plains Regional Director*, 56 IBIA 62, 68-69 (2012). Moreover, as we have also noted, § 151.13 is not a factor that BIA must take into consideration before deciding whether to approve a trust acquisition, but applies only after a favorable decision is rendered, as a final condition of accepting the conveyance in trust. *Id.*

In raising a § 151.13 claim, and arguing that the Decision would constitute a "taking," Appellant Individuals appear to be confused about what interests would be acquired by the United States, and more importantly, those that would not, under the Decision. The only interests that will or can be conveyed by the Tribe and acquired by the United States in trust for the Tribe are the property interests already owned by the Tribe. If the Tribe conveys its ownership of easements to the United States, it does not and cannot follow that the Tribe is also conveying Appellant Individuals' shared ownership in those same easements to the United States, or ownership of coextensive easements serving their properties. Thus, to the extent Appellant Individuals contend that inclusion of the *Tribe's* ownership interests in easements in a conveyance to the United States would constitute a taking by conveying *their* ownership interests in the same easements, they are mistaken.

Because § 151.13 pertains only to property interests to be acquired by the United States, and only applies after a final decision to approve a trust acquisition has been made, Appellant Individuals lack standing to challenge the Decision as violating that provision.

3. We Affirm the Decision in Remaining Part

Our decision vacating the Decision is limited solely to vacating it to the extent necessary for the Regional Director to consider and address the easement issues raised by Appellant Individuals, and after doing so to issue a new decision whether to take the land and the easements in trust. Appellant Individuals raised no other arguments in their briefs regarding the Regional Director's consideration of the factors in 25 C.F.R. Part 151 for taking land into trust. To the extent Appellant Individuals sought, in their notices of appeal, to incorporate by reference pre-decisional objections of various governmental entities or other groups to the proposed trust acquisition, we conclude that Appellant Individuals have not met their burden of proof. An appellant has the burden to demonstrate error in a decision being appealed, thus requiring more than a cursory incorporation by reference to pre-decisional comments, without any discussion of the actual decision that is being challenged.

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 vacates the Regional Director's decision to accept the 17.51 acres of land and associated easements into trust, and remands with instructions for the Regional Director to consider and address the alleged effect of the trust acquisition on the property rights of Appellant Individuals.¹⁰ We affirm the Decision in remaining part, i.e., to the extent Appellant Individuals purported to incorporate by reference pre-decisional objections of other parties to the trust acquisition. We dismiss Appellant Individuals' appeal in remaining part, and the appeals of the Planning Group and DVCC, for lack of standing.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge

¹⁰ If the Regional Director again decides to approve the trust acquisition of easements, she must also correct the admitted errors in the legal descriptions that are contained in the Decision. *See* Contact Report (AR IBIA – Scan at 22) (TOC 6) (noting that legal descriptions in the Decision of Parcel C2 and C3 are incorrect).