



INTERIOR BOARD OF INDIAN APPEALS

James Cantrell, Janice Stand Funk, James Gilmore, Tammy Gilmore Springer, and Joanna Stand v. Eastern Oklahoma Regional Director, Bureau of Indian Affairs

62 IBIA 61 (12/31/2015)

Related Board case:

62 IBIA 70



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

JAMES CANTRELL, JANICE STAND)	Order Dismissing Appeal
FUNK, JAMES GILMORE, TAMMY)	
GILMORE SPRINGER, AND JOANNA)	
STAND,)	
Appellants,)	
)	Docket No. IBIA 14-047
v.)	(Escrowed Funds Appeal)
)	
EASTERN OKLAHOMA REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	December 31, 2015

James Cantrell, Janice Stand Funk, James Gilmore, Tammy Gilmore Springer, and Joanna Stand (Appellants), members of the Quapaw Tribe of Oklahoma, appealed to the Board of Indian Appeals (Board) from a December 20, 2013, decision of the Eastern Oklahoma Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director’s decision was issued in response to an appeal by Appellants regarding their request that BIA accept and deposit into their Individual Indian Money (IIM) trust accounts certain funds that have been escrowed by Bingham Sand & Gravel, Inc. (Bingham), relating to the removal and sale of chat from the Sooner chat pile.¹ Bingham has been operating under a contract with Appellants’ non-Indian co-owner of the chat, the Estate of Joseph E. Mountford (Estate), but does not have a contract with the Indian owners, and has been escrowing a portion of proceeds from its sales in proportion to the Indian ownership. Appellants contend that Bingham is operating unlawfully, and in the proceedings below argued that BIA was obligated to accept the escrowed funds as trespass damages. The Regional Director remanded the dispute back to the BIA Miami Agency Superintendent with directions that the Superintendent and Appellants attempt to enter

¹ “Chat” refers to the gravel-like waste material generated from milling operations to recover lead and zinc from metal-bearing ore in the Tri-State Mining District of Southwest Missouri, Southeast Kansas, and Northeast Oklahoma. *See* 40 C.F.R. § 278.1(b); U.S. Environmental Protection Agency Final Rule, 72 Fed. Reg. 39331, 39334 (July 18, 2007) (Criteria for the Safe and Environmentally Protective Use of Granular Mine Tailings Known as “Chat”).

into an approved Chat Sales Agreement and Surface Lease between Bingham and Appellants.

On appeal, Appellants make clear that they have no interest in seeking any agreement with Bingham, arguing that the Board should order the Regional Director to accept Bingham's escrowed funds and distribute them into Appellants' IIM accounts. We dismiss the appeal because Appellants have not demonstrated that their alleged injury—not having the escrowed funds deposited into their IIM accounts—was caused by the Regional Director's decision. The record indicates that Bingham's previous tender of the funds to BIA was part of an offer to which Appellants objected. BIA's alleged "refusal" to accept Bingham's escrowed funds presumes willingness by Bingham to remit the funds to BIA without conditions, or on conditions acceptable to Appellants. Appellants concede that they cannot predict whether Bingham is willing to tender the funds unconditionally. Thus, Appellants lack standing to bring the appeal because the alleged injury and redressability of that injury are, at this time, dependent upon Bingham's independent action, not caused by the Regional Director's decision.

Background

Appellants own undivided fractional interests in the Sooner chat pile, which is co-owned by the Estate.² Since 2002, the Estate has entered into contracts with Bingham authorizing Bingham to remove and sell chat from the Sooner pile. *See* Agreement for Purchase and Removal of Chat, Jan. 25, 2002 (Administrative Record (AR) 3). The Estate and Bingham have agreed on a royalty to be paid for each ton removed, and under the agreements, Bingham pays royalty to the Estate in proportion to the Estate's ownership interest in the chat.³ *Id.* at 2, ¶ 3. The contracts provide that Bingham will be responsible to other owners of the remaining undivided interests for the value of chat removed "at such price as may be negotiated between [Bingham] and the remaining owners." *Id.*

BIA has been attempting for years to facilitate an agreement between the Indian co-owners of the Sooner pile and Bingham, but to date no agreement has been reached that

² The Estate owns or claims to own an approximately two-thirds interest in the chat, and Appellants and other Indian owners collectively own or claim to own an approximately one-third interest in the chat.

³ For example, the 2002 contract set the royalty at 50 cents per ton, paid to the Estate in proportion to its ownership interest, resulting in the Estate receiving royalty payments of 33 1/3 cents per ton. The royalty rate has increased over the years.

has received final BIA approval.⁴ In the interim, Bingham has been escrowing a portion of the proceeds from its chat sales, based on the percentage of the royalty that would be owed to the Indian owners, using the price agreed upon between Bingham and the Estate.⁵

After it began escrowing the funds, Bingham apparently made overtures to BIA to accept the funds on behalf of the Indian owners. Bingham also offered to pay the Indian owners directly for their proportionate share of the escrowed funds, but only if they signed a release and indemnification agreement. *See* Release and Indemnification Agreement, June 2010 (Ex. C to Appellants' Statement of Reasons, June 24, 2013) (AR 47).

In May 2010, Bingham transmitted an offer to BIA for an agreement with the Indian owners of the Sooner pile chat, in which Bingham stated that "it is still our desire to transfer the Sooner royalty account to the BIA for distribution to the rightful heirs." Letter from Bingham to Superintendent, May 21, 2010 (AR 4(a)). Bingham subsequently submitted a formal proposal, which included an offer that "the [Indian] Owners will be reimbursed for chat removed from the original date of the contract," according to various

⁴ Under a Memorandum of Understanding between the Department of the Interior and EPA, BIA approval of chat sales agreements by Indian owners clears the way for the parties to obtain liability protection that might otherwise attach because of the presence of hazardous substances in chat. Appellants contend that, as a matter of Federal law, Indian-owned chat is restricted against alienation by the Indian owners without BIA's approval, separate and apart from any requirements that EPA may impose to receive liability protection.

BIA contends, and Appellants do not disagree, that a collective majority of the Indian-owned interests in the chat are willing to enter into an agreement with Bingham. To date, Appellants have successfully blocked final approval of such an agreement, arguing that the royalty paid by Bingham to the Estate, and several higher offers made to the Indian owners, are below market value. Bingham contends that the pricing in its contracts with the Estate represents fair market value or exceeds fair market value. Affidavit of Thomas M. Williams, Dec. 8, 2015 (Ex. 2 to Supplemental Brief by Interested Party, Bingham Sand & Gravel Co., Dec. 9, 2015).

⁵ Bingham also has taken the position that the Indian owners are free to negotiate their own agreement for the sale and removal of chat with another purchaser, and has offered to co-locate chat removal operations or otherwise cooperate with another purchaser. *See, e.g.,* Bingham and Weatherford Answer, Apr. 14, 2011, at 2 (AR 29); *Quapaw Tribal Remediation Authority v. Acting Eastern Oklahoma Regional Director*, 61 IBIA 55, 63 (2015). Thus, it appears that Bingham takes the position that the chat within the Sooner pile is fungible, but that to the extent that may not be the case, it is prepared to account to the Indian co-owners for the chat it has removed based on their ownership percentage.

terms set forth in the proposal. Proposal for Purchase and Removal of Chat – Minority Sooner Chat Pile Owners, June 3, 2010 (AR 4(b)).

The Superintendent transmitted Bingham’s offer to the Indian chat owners for their consideration and response. Letter from Superintendent to (Sooner Pile Indian) Chat Owners, July 29, 2010, at 1 (unnumbered) (AR 12). In transmitting the offer, the Superintendent explained that “Bingham has advised . . . that it is willing to pay you for the chat that has been removed from 2004 through May 31, 2010,” that the funds have been deposited in an escrow account in a bank, and that “[u]pon approval of a Chat Sales Agreement the money will be deposited into your IIM account.” *Id.* The Superintendent stated that the Indian owners had a right to determine for themselves whether to accept Bingham’s proposal. *Id.*

Construing the Superintendent’s transmittal of Bingham’s offer as his approval of that offer, Appellants filed an appeal with the Regional Director. Among other things, Appellants objected to the Superintendent’s correspondence as “seek[ing] to implement an improper escrow arrangement.” Appellants’ Consolidated Statement of Reasons, Sept. 3, 2010, at 2 (AR 17). Appellants noted that Bingham had made release of the escrowed funds contingent upon the Indian owners’ approval of its offer, which Appellants argued was improper. *Id.* at 14. Instead, according to Appellants, what the Superintendent’s letter “should state” is that “any funds Bingham offers should be deposited into the restricted owners’ IIM accounts—without any strings attached—as *partial* payment for trespass claims.” *Id.*; *see also id.* at 15-16 (BIA should seek trespass damages against Bingham and “should be required to take the money in escrow . . . as a payment toward the ultimate amount owed for trespass and restitution”).

The Regional Director dismissed Appellants’ appeal as premature, concluding that the Superintendent’s correspondence was not the Superintendent’s approval of Bingham’s offer, but was simply a transmittal of that offer to the Indian owners for their consideration and response. Letter from Regional Director to Appellants, Dec. 3, 2010 (AR 24). Nevertheless, the Regional Director also “vacate[d]” the Superintendent’s correspondence from which Appellants had appealed, “to the extent (albeit unlikely) [that it] could be construed to constitute a ‘decision’ that any [escrowed] funds *associated with Bingham’s offer* must be accepted into an IIM account.” *Id.* at 10 (emphasis added).

Subsequently, Appellants began pressing the Superintendent to accept Bingham’s escrowed funds into their IIM accounts. Appellants’ Appeal from Inaction, Feb. 12, 2013, at 1 (AR 34). Without referring to the terms of Bingham’s offer, Appellants stated that Bingham “has attempted to provide [the escrowed] funds to [BIA],” and argued that, pursuant to 25 C.F.R. § 115.702 (What specific source of money will be accepted for

deposit into a trust account?), BIA “must accept” Bingham’s funds “as trespass damages.” *Id.* at 2.

The Superintendent responded that the Agency continued to believe that a chat sales agreement and lease would be in the best interest of the Indian owners, and that “[p]ending the receipt of [a] response” from Appellants on that issue, “the Agency prefers not to determine whether to accept the escrow payments from Bingham at this time.” Letter from Superintendent to Appellants, May 30, 2013, at 1 (AR 43).⁶ Appellants appealed to the Regional Director, asserting that Bingham was on record as attempting to present the escrowed funds to BIA, and asking the Regional Director to direct the Superintendent to “[i]mmediately receive into [Appellants’ IIM accounts the escrowed funds,] under the trespass provisions of 25 C.F.R. § 115.702.” Statement of Reasons: Receipt of funds into IIM Accounts, July 19, 2013, at 7 (AR 50).

On December 20, 2013, the Regional Director issued the decision that is the subject of the present appeal. The Regional Director stated that “Bingham has advised that it has been escrowing royalties owed the restricted Indian undivided owners of the Sooner Pile and made payment of those back royalties part of the offer” that the Superintendent had transmitted to the Indian owners in 2010 for consideration. Decision at 3 (unnumbered) (AR 64). As had the Superintendent, the Regional Director concluded that the “best mechanism for accomplishing [Appellants’ stated objective] would be . . . to enter into a BIA approved Chat Sales Agreement.” *Id.* Without addressing the merits of Appellants’ argument that BIA was required to accept the escrowed funds as trespass damages, the Regional Director remanded the matter back to the Superintendent to work with the parties to attempt to enter into an approved chat sales agreement and surface lease. *Id.*

Appellants appealed to the Board from BIA’s “continued refusal to accept funds that have been escrowed by Bingham.” Notice of Appeal, Jan. 8, 2014, at 1. In their notice of appeal, Appellants argue that BIA has “mandatory trust responsibilities” to accept the funds, and ask the Board to order BIA to immediately receive those funds “under the trespass provisions of 25 C.F.R. § 115.702,” and “continue to accept” funds proffered by Bingham under the same provision. *Id.* at 6. In their opening brief, Appellants argue that BIA is required to accept the escrowed funds as “proceeds from the sale of restricted property.” Opening Brief (Br.), June 30, 2014, at 7-8. Appellants also continue to argue that BIA is required to accept “penalties for trespass on trust lands or restricted fee lands.” *Id.* at 9.

⁶ The Superintendent sent two letter decisions to Appellants on September 30, 2013, one addressing their request regarding the escrowed funds, and another addressing their requests for accountings and action to remove Bingham from the Sooner pile and pursue trespass damages. *See* AR 42.

The Regional Director argues that 25 C.F.R. Part 115 does not apply to the funds escrowed by Bingham because they are not derived from a BIA-approved sale of Indian-owned chat, and are not penalties that BIA has assessed against Bingham in a trespass action. Regional Director's Answer Br., Aug. 22, 2014, at 7.

Following completion of briefing on the merits, the Board solicited supplemental briefing on several issues. As relevant to our disposition of this appeal, the Board asked Appellants to identify evidence in the record demonstrating with reasonable certainty that Bingham is prepared, if the Board were to order BIA to accept the escrowed funds, to remit those funds to BIA without any conditions or only under conditions acceptable to Appellants. Order for Supplemental Briefing, Oct. 13, 2015, at 2-3. The Board also asked the Regional Director to address whether any terms or conditions were attached to what Bingham previously represented as "several attempts" to tender the funds to BIA. *Id.* at 2.

Appellants respond that it is "irrelevant" whether Bingham would voluntarily pay the funds to BIA unconditionally.⁷ Appellants' Supplemental Br., Nov. 6, 2015, at 6. Appellants argue that whether or not Bingham is presently willing to remit the funds to BIA, a ruling from the Board would "establish that the BIA was wrong to have refused the payment initially," and would serve as a "directive to accept the funds if again tendered by Bingham unconditionally." *Id.* The Regional Director responds by stating that he "is advised that Bingham requires the signing of the attached Release prior to paying out any escrowed funds." Regional Director's Supplemental Br., Nov. 6, 2015, at 5. Bingham submitted a response that largely reproduces the Regional Director's answers to the Board's questions, sometimes adding language and sometimes omitting language, with no explanation or distinction between its own responses and those of the Regional Director. *See* Bingham Response, Nov. 6, 2015. Bingham repeats the Regional Director's language that he "is advised that Bingham requires" execution of the release prior to paying out any escrowed funds." *Id.* at 4.

In the final round of supplemental briefing, Appellants reiterate their arguments that BIA's regulations require it to accept the escrowed funds, either as the proceeds from the sale or use of restricted resources, or as a credit toward trespass damages. Appellants do not respond to the Regional Director's assertion that Bingham requires a release prior to paying out funds from the escrow account.

⁷ In a related appeal, which the Board is also deciding today, Appellants acknowledge that the escrowed funds are "exclusively under Bingham's control." Appellant's Opening Br., June 30, 2014, at 9 n.7, *Cantrell v. Acting Eastern Oklahoma Regional Director*, Docket No. IBIA 14-048.

Discussion

We dismiss the appeal for lack of standing because Appellants have not demonstrated that they were injured by the Regional Director's decision. In order to have standing to bring an appeal, an appellant must make the required showings of injury, causation, and redressability, with respect to the BIA decision or action being appealed. *See Preservation of Los Olivos v. Pacific Regional Director*, 58 IBIA 278, 296-97 (2014). Appellants allege that they have been injured by BIA's "refusal" to accept Bingham's escrowed funds into Appellants' IIM accounts, to be held in trust for them. Arguably, that is a sufficient allegation of injury. But the causation and redressability elements fail because whether the funds even become available to BIA for deposit is dependent on the actions of a third party, Bingham.

Under the doctrine of standing, Appellants' burden to show causation substantially increases when the elements of causation and redressability "depend[] on the unfettered choices made by independent actors not before the courts and whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992). In such circumstances, "it becomes the burden of the [appellant] to adduce facts showing that those choices have been or will be made in such a manner as to produce causation and permit redressability of injury." *Id.*; *see Voices for Rural Living v. Acting Pacific Regional Director*, 49 IBIA 222, 232-36 (2009) (discussing elements of standing).

When the issue of depositing the escrowed funds into IIM accounts first arose, Appellants vehemently objected to the fact that Bingham made the release of the funds to BIA, for deposit into IIM accounts, contingent upon the Indian chat owners agreeing to, and BIA approving, Bingham's proposal. *See* Appellants' Consolidated Statement of Reasons, Sept. 3, 2010, at 14 (AR 17); Bingham Proposal for Purchase and Removal of Chat, June 3, 2010 (AR 4(b)). At the same time Bingham was making that proposal, it was offering to release funds directly to individual Indian owners, but only upon their execution of a release that Appellants also find objectionable. *See* Release and Indemnification Agreement, June 2010 (Ex. C to Appellants' Statement of Reasons, June 24, 2013) (AR 47). Although Bingham represented at times, and in general terms, that it had "attempted on several occasions to tender" the escrowed funds to BIA, and that BIA had "refused," *see, e.g.*, Answer of Interested Parties, Oct. 8, 2010, at 3 (AR 22), Appellants point to no evidence in the record to show that Bingham tendered the funds to BIA unconditionally, or would do so now.

Appellants argue that Bingham's willingness to pay the escrowed funds to BIA is "irrelevant." We disagree. Unless Bingham is willing to remit the escrowed funds to BIA without conditions, or on terms that Appellants would find acceptable, the issue of whether

BIA would then be required to accept the funds does not arise.⁸ The admitted uncertainty over whether Bingham would unconditionally remit the escrowed funds to BIA, and the evidence in the record to the contrary, leads us to conclude that any injury caused to Appellants by the failure of the funds to be deposited into their IIM accounts does not “result from” the Regional Director’s decision. Instead, whether the funds are made available to BIA to deposit into IIM accounts is wholly dependent upon the action of a third party—Bingham. And Appellants have not shown that Bingham will make an acceptable tender to BIA. Thus, we conclude that Appellants have not demonstrated that they have standing to appeal from the Decision.⁹

In effect, Appellants seek an advisory opinion from the Board, to give direction to BIA “if” Bingham re-tenders the escrow funds “unconditionally.” Appellants’ Supplemental Br., Nov. 6, 2015, at 6. The Board does not issue advisory opinions. *Wopsock v. Western Regional Director*, 42 IBIA 117, 121 (2006); *Grand Traverse Band of Ottawa and Chippewa Indians v. Acting Deputy to the Assistant Secretary*, 18 IBIA 450, 453 (1990).¹⁰

⁸ Appellants argue that it is “not possible . . . to predict” whether Bingham “would voluntarily comply with an order from the Board.” Appellants’ Supplemental Br., Nov. 6, 2015, at 6. That is not the issue. The issue of whether BIA could “order” Bingham to remit the escrowed funds, in the absence of any approved sales agreement and in the absence of any trespass proceedings, was not raised below and is not within the scope of this appeal. Bingham may be an interested party to this appeal, but the appeal is not an action “against” Bingham; it is an action by Appellants against the Regional Director. As such, Bingham is not “before the court,” within the meaning of *Defenders of Wildlife*, 504 U.S. at 562, in the sense that the Board could order it to remit the proceeds to BIA.

⁹ Both the Regional Director and Bingham contend that Bingham has paid out over \$1.1 million to 20 Indian chat owners, including two Appellants who have signed the release agreement. But neither contends that Bingham’s escrow fund has been exhausted through such payments, and we do not find these contentions relevant to our dismissal.

¹⁰ Although we dismiss the appeal, we note that Appellants’ argument that the funds must be accepted as the proceeds from the sale or use of restricted property was not raised below. In the proceedings below, Appellants only argued that BIA must accept the funds under the trespass provisions of 25 C.F.R. § 115.702, which applies to “[p]enalties for trespass on trust lands or restricted lands.” In a related appeal, which is also being decided today, the Board is remanding to BIA the issue of whether BIA should take action against Bingham with respect to its chat removal operations under contract with the Estate. See *Cantrell v. Acting Eastern Oklahoma Regional Director*, 62 IBIA 70 (2015).

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 appeal.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge