



## INTERIOR BOARD OF INDIAN APPEALS

Center for Biological Diversity and Adella Begaye, Lena Nakai, Jimmy Smith, Betty Billy, Ray Redhouse, and Diné Citizens Against Ruining Our Environment v. Navajo Regional Director, Bureau of Indian Affairs

43 IBIA 31 (04/24/2006)



# 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

CENTER FOR BIOLOGICAL	:	Order Dismissing Appeals for Lack of
DIVERSITY,	:	Jurisdiction
Appellant,	:	
	:	
and	:	
	:	Docket No. IBIA 05-58-A
ADELLA BEGAYE, LENA NAKAI,	:	05-61-A
JIMMY SMITH, BETTY BILLY, RAY	:	
REDHOUSE, AND DINÉ CITIZENS	:	
AGAINST RUINING OUR	:	
ENVIRONMENT,	:	
Appellants,	:	
	:	
v.	:	
	:	
NAVAJO REGIONAL DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee.	:	April 24, 2006

On March 11, 2005, the Board of Indian Appeals (Board) received a notice of appeal from the Center for Biological Diversity (CBD). CBD seeks review of a January 25, 2005 Record of Decision (ROD) and Final Supplemental Programmatic Environmental Impact Statement (FSPEIS) for the Navajo Nation Ten-Year Forest Management Plan (FMP) for the Navajo Forest, located on the Defiance Plateau and Chuska Mountains on the Navajo Nation. The ROD was signed on January 25, 2005, by the Navajo Regional Director, Bureau of Indian Affairs (Regional Director; BIA), and transmitted to interested persons, organizations, and agencies by letter also dated January 25, 2005.

On March 14, 2005, the Board received a notice of appeal from Adella Begaye, Lena Nakai, Jimmy Smith, Betty Billy, Ray Redhouse, and Diné Citizens Against Ruining Our Environment (Diné CARE) (collectively, the Begaye Appellants). The Begaye Appellants also seek review of the January 25, 2005 ROD and FSPEIS.

In pre-docketing orders dated March 14, 2005 and March 15, 2005, the Board ordered briefing on three threshold jurisdictional issues: (1) whether the appellants timely filed their notices of appeal, (2) whether the appellants satisfy the criteria under 25 C.F.R. § 163.33 for standing to bring their appeals, and (3) whether, apart from 25 C.F.R. § 163.33, the appellants have standing to bring their appeals. On April 5, 2005, the Board issued an order consolidating the two appeals.

CBD, the Begaye Appellants and BIA submitted briefs on these jurisdictional issues. For the reasons discussed below, the Board now dismisses both appeals for lack of jurisdiction. 1/

### Discussion

#### A. Timeliness.

A notice of appeal from a decision by a BIA Regional Director must be filed with the Board within 30 days after receipt by the appellant of the decision from which the appeal is taken. 43 C.F.R. § 4.332(a). A notice of appeal not timely filed with the Board must be dismissed for lack of jurisdiction. Id. A notice of appeal that is filed by mail is considered filed on the date that it is postmarked. Id. § 4.310(a); see also 25 C.F.R. § 2.9(a).

Both CBD and the Begaye Appellants filed their notices of appeal by mail on March 7, 2005. The Begaye Appellants provided evidence that they received the ROD and FSPEIS on February 9, 2005. 2/ Because March 7, 2005 is within 30 days of February 9, 2005, we find that their notice of appeal was timely filed.

CBD, however, was unable to provide evidence as to when it received the January 25, 2005 ROD and FSPEIS. In its brief, CBD states only that the ROD “almost certainly arrived between February 5 and February 9, 2005.” CBD Brief as to Jurisdictional Issues at 4. Although this assertion would otherwise fail to satisfy CBD’s burden to show timely filing, see 43 C.F.R. §§ 4.310(a), 4.332(a), we conclude that CBD’s notice of appeal

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1/ Because we conclude that neither CBD nor the Begaye Appellants have standing to pursue their appeals under 25 C.F.R. § 163.33, we do not address whether either appellant, apart from section 163.33, has standing.

2/ An e-mail from a consultant to Diné CARE to counsel for the Begaye Appellants states that the consultant received the ROD and FSPEIS on Wednesday, February 9, 2005.

may be accepted as timely because CBD (and the Begaye Appellants) complied with the appeal instructions provided in BIA's January 25, 2005 letter. See, e.g., Hendry County, Florida v. Eastern Regional Director, 40 IBIA 135, 136 (2004) ("when an appellant has been given, and complies with, incorrect appeal instructions, an appeal may be accepted as timely").

BIA's January 25, 2005 letter stated that "[n]otices of appeal will be accepted during a 30-day comment period, which begins with the \* \* \* Notice of Availability (NOA) of the ROD and FSPEIS in the Federal Register published on February 4, 2005, with the comment period ending on March 7, 2005." These appeal instructions are inconsistent with the regulatory requirement that appellants have 30 days from the date they receive notice of a BIA action to file an appeal. 43 C.F.R. § 4.332(a); see also 25 C.F.R. § 2.9(a). In their briefs, both CBD and the Begaye Appellants state that they relied upon these instructions in filing their notices of appeal on March 7, 2005. CBD Brief as to Jurisdictional Issues at 5; Begaye Appellants' Brief at 4. Therefore, we may consider both notices of appeal as timely filed. 3/

B. Standing Under 25 C.F.R. § 163.33.

BIA's forestry regulations, found at 25 C.F.R. Part 163, include a specific section on administrative appeals. Section 163.33 provides, in relevant part:

Any challenge to action under 25 CFR part 163 taken by an approving officer or subordinate official exercising delegated authority from the Secretary shall be exclusively through administrative appeal \* \* \* filed in accordance with the provisions of 25 CFR part 2, Appeals from administrative actions, except that an appeal of any action under part 163 of this title shall:

- (a) Not stay any action unless otherwise directed by the Secretary; and
- (b) Define "interested party" for purposes of bringing such an appeal or participating in such an appeal as any person whose own direct economic interest is adversely affected by an action or decision.

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3/ We note that the ROD itself also included an incorrect statement about appeal rights: "The notice of appeal must be signed and mailed within 30 days of the date of this decision." (Emphasis added.) This statement improperly truncates the required 30-day appeal period by starting the appeal period on the date of the decision, rather than on the date that a potential appellant receives notice of the decision.

The exception stated in section 163.33 modifies the Part 2 appeal procedures in two respects. First, an appeal does not automatically stay the action being appealed. This is in contrast to the Part 2 regulations, which provide that the effect of a decision is stayed pending resolution of an appeal, unless the official to whom the appeal is brought makes the decision effective immediately for reasons of “public safety, protection of trust resources, or other public exigency.” 25 C.F.R § 2.6(a).

The second modification to the Part 2 appeal procedures, which is relevant to the instant appeals, provides a more restrictive standard for determining who may administratively appeal an action covered by that section. Unlike the Part 2 regulations, which allow a potential appellant to demonstrate a broad range of “interests” that could be adversely affected by a decision in an appeal, see 25 C.F.R. § 2.2 4/, section 163.33(b) requires that a potential appellant’s “own direct economic interest” be adversely affected by the action being appealed. As explained in the preamble to the forestry regulations, BIA intended in this second exception to establish a tighter standing requirement than is found in the Part 2 regulations. See 60 Fed. Reg. 52250, 52258 (Oct. 5, 1995); see also Mechelen v. Acting Portland Area Director, 34 IBIA 202, 203 n.2 (2000).

CBD argues that it satisfies section 163.33(b) because its members will be adversely affected if the “forestland and riparian areas of the project area [are] ecologically and aesthetically degraded.” CBD Brief as to Jurisdictional Issues at 2. CBD further argues that its members’ economic interests will be adversely affected if the FMP is implemented. Id. CBD specifically asserts that one of its members is a professional photographer who has sold “photographs of raptors that require precisely the kind of habitat the BIA Forest Plan targets for logging.” Id.

The Begaye Appellants do not even argue that their own direct economic interests will be directly and adversely affected by BIA’s decision to approve the FMP. Instead, the Begaye Appellants argue that 25 C.F.R. § 163.33 does not apply to “general appeals of forest management plans,” and applies only to appeals of specific timber sales. Begaye Appellants’ Brief at 7.

Because we would not need to address CBD’s arguments related to standing if we agree with the Begaye Appellants’ position that 163.33 is inapplicable to this case, we will address the Begaye Appellants’ argument first.

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4/ 25 C.F.R. § 2.2 defines a potential appellant as “any person whose interests could be adversely affected by a decision.”

In support of their position that section 163.33 applies only to timber sales, the Begaye Appellants make three specific arguments. We address — and reject — each in turn.

First, the Begaye Appellants rely on language in the January 25, 2005 ROD to support their position that 25 C.F.R. § 163.33 does not apply to forest management plan decisions. Specifically, the Begaye Appellants assert that because the ROD referred potential appellants to 25 C.F.R. Part 2 and did not specify that an appeal must be brought under 25 C.F.R. Part 163, “apparently the BIA believed that any appeals would be brought under Part 2, and not under Part 163.” Begaye Appellants’ Brief at 6.

The ROD’s reference to the Part 2 regulations, however, hardly creates a negative inference that section 163.33 does not apply. Section 163.33 does not provide an independent or mutually exclusive appeal process, separate from the Part 2 appeal process. Rather, section 163.33 incorporates the procedures described in detail in the Part 2 regulations, with two substantive modifications. Regardless of the applicability of these modifications, all appeals necessarily are filed under the procedures set forth in 25 C.F.R. Part 2, and therefore the Regional Director’s reference to the Part 2 appeal procedures was correct, whether or not he also advised potential appellants of the limitations on appeals of forest management decisions provided in section 163.33.

Second, the Begaye Appellants assert that the language of the regulations themselves is evidence of their “narrow scope.” Begaye Appellants’ Brief at 6. The Begaye Appellants state that section 163.33 governs appeals of actions taken by “an approving officer” and that section 163.1 defines “approving officer” as “the officer approving instruments of sale for forest products or his/her authorized representative.” *Id.* Because the definition of “approving officer” limits their role to approving “instruments of sale,” the Begaye Appellants conclude that the specific appeal provisions in Part 163 are applicable only to timber sales.

We conclude, however, that the Begaye Appellants’ attempt to narrowly construe the Part 163 regulations by claiming that the definition of “approving officer” limits the applicability of section 163.33 to timber sales must fail. We recognize that, read by itself, the first clause of section 163.33 — “any challenge to action under 25 CFR part 163 taken by an approving officer or subordinate official exercising delegated authority from the Secretary” — could create some ambiguity as to the scope of the section. But the plain language of the last sentence of the section’s first paragraph makes clear that the limitations in section 163.33 govern far more than challenges to timber sale approvals by “approving officers.” The Begaye Appellants do not recognize the very broad language of the regulation: “an appeal of any action under part 163” is subject to the two modifications of Part 2, including the limitation on “interested party” status. (Emphasis added.) The

Begaye Appellants do not dispute that BIA's approval of a forest management plan is an action under the Part 163 regulations, which it clearly is. See 25 C.F.R. §§ 163.1, 163.3. Accordingly, we conclude that the Begaye Appellants fail to show that the language of section 163.33 does not apply to appeals from approvals of forest management plans.

Finally, the Begaye Appellants assert that Mechelen, cited by the Board in its March 14, 2005 order, is distinguishable from this case because Mechelen involved timber sales and not a forest management plan. The Begaye Appellants state: "The Board's discussion of this section in a footnote in Mechelen simply assumes the issue at question here: does § 163.33's standing language apply to any BIA decision regarding management of Indian forest land, or does it apply only to decisions regarding timber sales." Begaye Appellants' Brief at 6-7. Mechelen involved an appeal of BIA's approval of a five-year timber sale agreement between an Indian tribe and an Indian corporation. There, the Board found that the appellants did not have standing under section 163.33(b) because they did not have any ownership interest in the lands subject to any timber sales scheduled to occur under the agreement at the time of their appeal. Because the Part 163 regulations apply to all forest land management actions, however, including timber sales as well as approvals of forest management plans, we conclude that the fact that Mechelen involved timber sales does not diminish that decision's applicability here.

We therefore conclude that 25 C.F.R. § 163.33 applies to all otherwise appealable BIA forest land management decisions, including decisions to approve forest management plans. Because the Begaye Appellants have not even attempted to show that they satisfy the requirement of section 163.33(b), they have failed to demonstrate that they have standing under the regulation to challenge BIA's approval of the FMP. 5/

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5/ The Begaye Appellants state that if 25 C.F.R. § 163.33 applies to all BIA forest land management decisions, a potential appellant's only remedy is to go to federal court, which would "close off any internal agency review of challenged decisions in the forestry area" and "runs counter to the general requirement of exhaustion of administrative remedies." Begaye Appellants' Brief at 7-8. The Begaye Appellants are correct to the extent that section 163.33(b) limits administrative review of BIA forestry management decisions to appellants who can demonstrate adverse impacts to their own direct economic interest caused by such a decision. We note, however, that section 163.33(b)'s limitation on standing is consistent with section 163.33(a), which makes BIA forest management decisions immediately effective and reverses the usual "automatic stay" under 25 C.F.R. § 2.6. Both 163.33(a) and 163.33(b) reflect BIA's apparent intent to avoid delay in implementing forestry decisions authorized by 25 C.F.R. Part 163, or at least in having these decisions reviewed.

Because we conclude that section 163.33 applies to BIA's approval of the FMP at issue here, we next address CBD's arguments and conclude that CBD also fails to establish standing to proceed with its appeal.

CBD appears to rest its argument that it meets the requirement of section 163.33(b) solely on the possibility that one of its members, a professional photographer of raptors, will suffer adverse economic consequences if the FMP is implemented (presumably because implementation of specific projects under the FMP will harm raptor habitat). As an initial matter, we note the extremely speculative nature of this alleged economic injury, and the failure of CBD to submit an affidavit or other evidence supporting the alleged injury or CBD's assertion that the injury is caused by BIA's approval of the FMP. We also note CBD's failure to show how it has organizational standing to sue on behalf of its members based on an alleged economic injury to one member. See Santa Ynez Valley Concerned Citizens v. Pacific Regional Director, 42 IBIA 189, 192-93 (2006), and cases cited therein.

However, even assuming these problems are curable, giving effect to the plain language of section 163.33(b) we conclude that the regulation requires more to establish standing than the indirect (albeit economic) interest alleged by CBD. We interpret the inclusion of the word "direct" in section 163.33(b) to mean that a potential appellant must have a legally cognizable economic interest in the land or resources that are the subject of the forest land management decision being appealed. Thus, a potential appellant arguably could meet section 163.33(b)'s requirement if he or she has a permit, lease, or contract for an economic activity on the lands at issue or related to the forest resources on the land at issue. In addition, a potential appellant could meet section 163.33(b)'s requirement if he or she has an ownership interest in the lands or forest resources that are the subject of the decision being appealed (e.g., an ownership interest in an allotment on which a timber sale is to occur). The regulation's precise description of what type of interest must be adversely affected to establish standing — a "direct economic interest" — must be construed as being narrower than simply an "economic interest" that has been adversely affected, or even an economic interest that has been "directly affected." Moreover, it is in stark contrast to 25 C.F.R. § 2.2, which requires only that a potential appellant demonstrate an adverse effect to his or her interests, economic or otherwise. Because CBD has not shown that its member photographer has a "direct economic interest" (such as a contract with the Nation allowing him or her access to the lands at issue for purposes of commercial photography) and asserts at most only an indirect economic interest, we conclude that it has not met its burden under the regulation to establish standing.

Our conclusion here is consistent with the Board's decision in Mechelen. As noted above, in that case, the action being appealed was BIA's approval of a five-year agreement between an Indian tribe and an Indian corporation related to timber sales. The appellants

owned interests in forested lands that, under the agreement, could be scheduled for timber sales during the term of the agreement. The appellants, however, did not hold any ownership interests in trust lands that were advertised for timber sale at the time of their appeal. The Board rejected appellants' appeal based on lack of standing, holding that the appellants could not demonstrate that their "own direct economic interests" were adversely affected by BIA's approval of the agreement. In order to have standing under 25 C.F.R. § 163.33, the Board stated that "the Agreement would have to be applied to a sale of timber in which Appellants hold interests," which "may never happen." 24 IBIA at 204. The Board concluded: "Given all the conditions that must be met before Appellants could be affected by the Agreement, it is apparent that Appellants' 'direct economic interest' is not adversely affected at this point." Id.

CBD's alleged economic interest is far more attenuated than the economic interest rejected by the Board in Mechelen. In Mechelen, the appellants had an ownership interest in lands that could be subject to timber sales. Here, neither CBD nor any of its members holds any ownership interest in lands covered by the Navajo Nation FMP. Even assuming CBD had demonstrated that its members had a direct economic interest, just as in Mechelen, CBD has not demonstrated that such interest was adversely affected by the action that BIA has taken up to this point — approval of the FMP.

### Conclusion

We conclude that neither CBD nor the Begaye Appellants has satisfied the requirement of 25 C.F.R. § 163.33(b) to demonstrate that its own direct economic interest is adversely affected by BIA's approval of the Navajo Nation Ten-Year Forest Management Plan. 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 both appeals for lack of jurisdiction.

I concur:

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// original signed  
Amy B. Sosin  
Acting Administrative Judge

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge