



INTERIOR BOARD OF INDIAN APPEALS

Picayune Rancheria of the Chukchansi Indians v. Acting Pacific Regional Director,
Bureau of Indian Affairs

48 IBIA 241 (01/30/2009)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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PICAYUNE RANCHERIA OF THE)	Order Dismissing Appeal
CHUKCHANSI INDIANS,)	
Appellant,)	
)	
v.)	
)	Docket No. IBIA 08-127-A
ACTING PACIFIC REGIONAL)	
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	January 30, 2009

The Picayune Rancheria of the Chukchansi Indians (Picayune Rancheria or Picayune) filed an appeal with the Board of Indian Appeals (Board) from a June 27, 2008, letter (Letter) from the Acting Pacific Regional Director, Bureau of Indian Affairs (Regional Director; BIA), addressed to Analytical Environmental Services (AES) (a BIA contractor), directing AES not to consider the “Old Mill Site” as a reasonable alternative to be analyzed in preparing an Environmental Impact Statement (EIS) for a fee-to-trust acquisition proposed by the North Fork Rancheria of Mono Indians (North Fork Rancheria or North Fork) for a casino, hotel and spa resort (casino complex).

The Regional Director has moved to dismiss this appeal on the grounds that the Letter is not appealable to the Board because it is not a “final administrative action or decision” by the Regional Director, which is a predicate for the exercise of the Board’s jurisdiction. *See* 43 C.F.R. § 4.331. It is undisputed that the Regional Director has not approved a Final Environmental Impact Statement (FEIS), or issued a Record of Decision, or otherwise issued a decision on the North Fork Rancheria’s fee-to-trust acquisition proposal. We therefore grant the Regional Director’s motion and dismiss this appeal as premature because the Letter does not constitute a final administrative action or decision by the Regional Director and is not appealable to the Board.

Background¹

The impetus for this appeal is the Picayune Rancheria's vehement opposition to an apparent proposal by the North Fork Rancheria for BIA to accept certain off-reservation land along Highway 99 (Highway 99 Property), near Madera, California, in trust for North Fork, for a casino complex. Picayune is located some distance northeast of Madera, in Coarsegold, California, and North Fork lies to the east of Picayune. According to Picayune, Highway 99 is the region's most heavily traveled highway, and if North Fork is allowed to "leapfrog" to the Highway 99 Property and build a casino there, Picayune's own casino, located on its Rancheria, will be placed at a significant economic disadvantage. Picayune prefers the Old Mill Site for North Fork's casino complex because the Old Mill Site is located away from Highway 99 and on the east side of Picayune, closer to North Fork.²

In February of 2008, BIA released for public comment a Draft Environmental Impact Statement (DEIS) for North Fork's proposed fee-to-trust acquisition for the Highway 99 Property. The Picayune Rancheria submitted comments and contended that the Old Mill Site should have been included and analyzed in the DEIS as a reasonable alternative location for North Fork's casino.

Following correspondence from Picayune, and an exchange of memoranda between the Assistant Secretary - Indian Affairs (Assistant Secretary) and the Regional Director, the Regional Director sent a letter to AES, which was preparing the EIS for the proposed acquisition, directing AES not to add the Old Mill Site to the alternative sites under consideration for North Fork's casino.³ The Regional Director's letter provided several

¹ The factual background is taken from Picayune's notice of appeal and statement of reasons, and the pleadings (and exhibits) filed by the parties concerning the Regional Director's motion to dismiss. Pending resolution of the motion to dismiss, the Regional Director did not file an administrative record.

² The Old Mill Site consists of approximately 135 acres of land located adjacent to the town of North Fork, California, and is owned by the North Fork Community Development Council, Inc. (NFCDC).

³ In a memorandum dated May 12, 2008, the Assistant Secretary initially directed the Regional Director to add the Old Mill Site as an alternative to be considered in the DEIS. Following a reply from the Regional Director, dated May 15, 2008, the Assistant Secretary left it to the Regional Director's discretion "to determine whether consideration of the Old
(continued...)

reasons for concluding that the Old Mill Site “can not be considered as a reasonable alternative to be analyzed in the DEIS for North Fork Rancheria.” Letter at 1.⁴

Picayune appealed the Regional Director’s Letter to AES to the Board, contending that the Regional Director’s decision to eliminate the Old Mill Site as a reasonable alternative to be analyzed in the DEIS violates the Indian Reorganization Act, the Indian Gaming Regulatory Act, and the National Environmental Policy Act (NEPA). As relief, Picayune seeks to have the Board vacate the Letter, direct the Regional Director to prepare a revised DEIS, and order the Regional Director to analyze and consider the Old Mill Site as a reasonable alternative. *See* Statement of Reasons for the Appeal and Statement of the Relief Sought, Relief Sought ¶¶ 1-3.

The Regional Director filed a motion to dismiss this appeal for lack of jurisdiction, arguing that BIA’s correspondence with a contractor preparing a DEIS is not a final agency action or decision, and thus is not subject to appeal to the Board. The Board allowed briefing on the motion to dismiss. Picayune filed a brief in opposition to the motion to dismiss, and the Regional Director filed a reply.

Discussion

The Tribe seeks an interlocutory appeal from an interim decision. The Board’s jurisdiction extends only to final decisions by BIA officials, as set forth in 43 C.F.R. § 4.331: “Any interested party affected by a *final* administrative action or decision of an official of [BIA] . . . may appeal to the [Board].” (Emphasis added.) Although the Regional Director’s Letter might fairly be characterized as an “action” or a “decision,” it does not constitute a “final” administrative action or decision within the meaning of section 4.331. As the Board has noted previously, the word “final” denotes a dispositive

³(...continued)

Mill Site as an alternative site in the DEIS is still warranted.” Memorandum from Assistant Secretary to Regional Director, May 23, 2008.

⁴ Among the reasons given by the Regional Director was that NFCDC, the owner of the Old Mill Site, had made it clear that the site was not available for gaming purposes. A letter from NFCDC to BIA, which is attached to Picayune’s notice of appeal, states that NFCDC “will not sell [the Old Mill Site] to the North Fork Rancheria of Mono Indians for the development of a casino project.” Letter from NFCDC President to Regional Director, June 8, 2008; *see also* Letter from NFCDC President to Assistant Secretary, May 20, 2008 (“Redevelopment of the [Old Mill] site for a tribal casino is not part of our master plan.”).

decision on the substantive matter before BIA. *See, e.g., Yakama Nation v. Northwest Regional Director*, 47 IBIA 117, 118 (2008) (the Board’s jurisdiction pursuant to 43 C.F.R. § 4.331 extends only to final administrative action, and not to interim rulings unless a specific regulation provides otherwise).

Picayune seeks to distinguish *Yakama* by arguing that the Regional Director’s Letter was not a procedural ruling, as was the subject of the appeal in *Yakama*, but was both a “substantive” and “dispositive” decision not to consider or evaluate the Old Mill Site as part of the DEIS or FEIS. Thus, according to Picayune, because BIA will not evaluate the Old Mill Site as part of the FEIS, the Letter is a “final” decision. But Picayune construes *Yakama* too narrowly, and mischaracterizes the “matter” that is before BIA. The “matter” before BIA is whether to approve or disapprove a fee-to-trust acquisition proposal by the North Fork Rancheria. And BIA’s last word on the matter will be the decision on the trust acquisition proposal. To define “matter” more narrowly would mean that each and every interim decision at each and every fork along the road during an environmental review process would be separately appealable, unless BIA could establish that the specific interim decision was only tentative in nature and subject to being revisited later. We find no support, either in a reasonable reading of the regulation or in any Board precedent, for such an interpretation of the phrase “final administrative action or decision.”

The Regional Director’s motion to dismiss did not use the regulatory language requiring a “final administrative action or decision,” but instead states that the Board lacks jurisdiction because neither the DEIS nor the Letter constitutes “final agency action subject to appeal.” Motion to Dismiss at 1-2. Picayune seeks to capitalize on this choice of language by arguing that the Regional Director relies on the wrong standard, namely the Administrative Procedure Act, *see* 5 U.S.C. § 704 (Actions reviewable), rather than the Board’s regulations. Picayune contends that the APA requirement of “final agency action” as a predicate to judicial review is a stricter standard than the regulatory standard of “final administrative action or decision” that governs the Board’s jurisdiction. But Picayune cites no Board decisions that have held that the regulatory standard allows for less finality than the APA — except, of course, that the APA’s use of “final agency action” refers to finality at a Departmental level, whereas the regulation’s use of “final administrative action or decision” refers to finality at the level of BIA as an agency within the Department. But the underlying concepts are the same: to be a “final administrative action or decision,” a BIA action must mark the culmination of BIA’s decision making process and not be merely tentative or interlocutory in nature, and must be an action by which rights or obligations have been determined or from which legal consequences will flow (if allowed to become final and effective for the Department, *see* 25 C.F.R. § 2.6). *Cf. Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (describing conditions for agency action to be “final” under the APA).

Whether or not any meaningful distinction may exist, in a given context, between the regulatory meaning of “final” for purposes of pursuing an administrative appeal to the Board, and the APA meaning of “final” for purposes of pursuing judicial review, we are not convinced that any such distinction exists in this case. We need only look to the Board’s own regulations to conclude that we lack jurisdiction over this interlocutory appeal.⁵

Picayune complains that if a final fee-to-trust acquisition decision is issued by the Assistant Secretary, it will not have a right of appeal to the Board, reasoning that this must mean that it has a right to appeal from the Regional Director’s interim decision regarding the Old Mill Site. We disagree. There is no absolute right to have a matter reviewed by the Board. Rather, the Board’s jurisdiction is specifically prescribed by regulation. *See* 43 C.F.R. § 4.330(a) & (b). The Assistant Secretary has the prerogative to be the decision maker on a matter, and if that is the case, there is no further right of administrative review within the Department, unless the Assistant Secretary provides otherwise. 25 C.F.R. § 2.6(c).⁶

The DEIS is part of an on-going analysis conducted pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq., which will culminate in the issuance of a final decision regarding North Fork’s fee-to-trust acquisition proposal. At that

⁵ Picayune does not suggest that the Board has jurisdiction over an interlocutory appeal from a decision by a Regional Director. In *Navajo Nation v. Navajo Area Director*, 20 IBIA 118 (1991), while noting that 43 C.F.R. § 4.28 gives it authority to review interlocutory rulings entered by Administrative Law Judges, the Board concluded that no similar regulation authorizes it to review interlocutory rulings of BIA officials.

⁶ Picayune also contends that “[t]he exclusion of the Old Mill Site from the FEIS eliminates all reasonable alternatives from consideration,” rendering the NEPA process “fatally flawed.” Opposition to Motion to Dismiss at 5, 15. This argument, of course, goes to the underlying merits of BIA’s environmental review. But Picayune never articulates how BIA’s exclusion of the Old Mill Site in the course of the NEPA process, but prior to a decision on North Fork’s proposed trust acquisition, has resulted in an actual or imminent, concrete and particularized injury to Picayune, *cf. Northern Cheyenne Livestock Ass’n v. Acting Rocky Mountain Regional Director*, 48 IBIA 131, 136 (2008) (requirements for standing), or why its argument could not be raised as part of a challenge to the trust acquisition decision. Thus, principles of standing and ripeness reinforce our conclusion that the Regional Director’s letter does not constitute a “final administrative action or decision” within the meaning of the Board’s regulations.

time, the matter may be ripe for parties whose interests are adversely affected by the decision to pursue either administrative or judicial remedies, as appropriate. However, at this time, such an appeal is premature.

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 grants the Regional Director's motion and dismisses this appeal for lack of jurisdiction.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge