INTERIOR BOARD OF INDIAN APPEALS

Preservation of Los Olivos and Preservation of Santa Ynez v. Pacific Regional Director, Bureau of Indian Affairs

58 IBIA 278 (06/03/2014)

Related Board cases:
42 IBIA 189
45 IBIA 98
56 IBIA 233

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

PRESERVATION OF LOS OLIVOS and PRESERVATION OF SANTA YNEZ, Appellants,	)	Order on Remand and Order Dismissing Appeal and Addressing the Merits in the Alternative
v.	)	Docket No. IBIA 05-050-1
PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	June 3, 2014

This is an appeal to the Board of Indian Appeals (Board) by Preservation of Los Olivos (POLO) and Preservation of Santa Ynez (POSY) (collectively, Appellants), from a January 14, 2005, decision (Decision) of the Pacific Regional Director (Regional Director), Bureau of Indian Affairs (BIA), to accept a 6.9-acre parcel (Parcel) of land in Santa Barbara County, California, in trust for the Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation, California (Tribe). Appellants are two organizations whose members strongly oppose BIA taking land in trust for the Tribe. The Tribe plans to construct a cultural museum, park, and retail commercial space on the parcel, which Appellants contend "can just as well be developed under state and local law without placing the land in trust." Appellants' Opening Brief (Br.), Feb. 8, 2010, at 16.

The appeal is on remand to the Board from the U.S. District Court for the Central District of California, which vacated two Board decisions dismissing the appeal for lack of standing.[1] In dismissing the appeal, the Board applied judicial principles of standing, finding that Appellants' members had failed to demonstrate injury-in-fact or causation for their non-economic interests, as relevant to their NEPA[2] claims, and that their members'

[1] *See Preservation of Los Olivos v. U.S. Dep't of the Interior*, 635 F. Supp. 2d 1076 (2008) ("*POLO II*") (vacating *Santa Ynez Valley Concerned Citizens v. Pacific Regional Director*, 42 IBIA 189 (2006) ("*Concerned Citizens*") (dismissing appeal) and *Preservation of Los Olivos v. Pacific Regional Director*, 45 IBIA 98 (2007) ("*POLO I*") (affirming dismissal after limited reopening)).

[2] National Environmental Policy Act, 42 U.S.C. § 4321 *et seq*.

economic interests, even if satisfying the injury and causation requirements of standing, were not arguably within the zone of interests for either NEPA or the trust acquisition statute and implementing regulations, *see* 25 U.S.C. § 465, 25 C.F.R. Part 151.

In vacating the Board's decisions, the Court did not disagree—at least not expressly—with our conclusion that Appellants failed to demonstrate standing to challenge the Decision within the context of judicial principles of standing. And the Court recognized that the Board has a long history of using judicial standing principles to determine standing in administrative appeals, and that the origin of that practice was the Board's interpretation of its appeal regulations and those of BIA. But the Court suggested that a revision to the Board's regulations in 1989 appeared to have adopted a looser standard, even though the Board continued to use judicial standing principles to evaluate standing in administrative appeals, as we did for Appellants' appeal.

The Court concluded that, at a minimum, it was arbitrary and capricious for the Board not to have articulated the reasons why we applied judicial standing principles to Appellants' administrative appeal. *POLO II*, 635 F. Supp. 2d at 1089. While clarifying that it was not directing the Board to reach a different result, the Court ordered the Board to issue a decision that specifically accounts for our appeal regulations and any other factors we might deem relevant, *see id*. at 1095, and to "articulate [the Board's] reasons (functional, statutory, or otherwise) for its determination of standing, taking into account the distinction between administrative and judicial standing and the regulations governing administrative appeals," *id*. at 1080.

Overview of Our Decision on Remand

As an initial matter, we explain our earlier failure to address an alleged conflict between our appeal regulations and our longstanding use of judicial principles of standing in administrative appeals. Although the issue of Appellants' standing was squarely raised in the earlier proceedings, and Appellants themselves noted the possible distinction between administrative and judicial standing, Appellants did not argue to the Board that any conflict existed between the two. *See* POLO/POSY Response to Motion to Dismiss, Aug. 11, 2005, at 2 ("Appellants do not agree or disagree that the three part *Lujan* [*v. Defenders of Wildlife*, 504 U.S. 555 (1992) ("*Lujan*")] test for standing in the federal courts is the appropriate standard to apply to an IBIA appeal."). Thus, the Board did not consider it necessary to explain or revisit our precedent, or to analyze an issue not in dispute.

The Court's remand order, however, requires us to address the Board's use of judicial standing principles for determining administrative standing, and more particularly to address whether that practice can be squared with our appeal regulations. On this issue, as further explained below, we conclude that the 1989 rule revision was not intended as,

nor to require, a departure from the Board's use of judicial standing principles. The rule revision in 1989 removed outdated regulatory language that was originally derived from outdated judicial standing decisions. We are not convinced that by removing that outdated language, either BIA or the Board intended to foreclose the Board's use of *modern* judicial standing principles in the broad range of appeals that are adjudicated by the Board. In our view, the Board's regulations track judicial standing principles in key respects, particularly for the elements of standing relevant in the present case. Thus, we reaffirm our use of judicial standing principles as consistent with our appeal regulations.

Our decision to reaffirm our use of judicial standing principles in administrative appeals might suffice to end our consideration of the remand and the appeal, except for two considerations. First, although the Court did not appear to question our analysis of Appellants' standing, within the context of judicial principles of standing, several statements made by the Court—and its own determination of its jurisdiction (albeit framed within a different context)—arguably suggest that the Court viewed Appellants' allegations and supporting affidavits more favorably than did the Board, at least with respect to certain elements of standing. Second, after the case was remanded to the Board, the U.S. Supreme Court issued a decision that requires us to overturn our conclusion that Appellants' interests do not satisfy the zone-of-interest test for their claims arising under the trust acquisition statute and regulations. *See Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 132 S. Ct. 2199 (2012) (plaintiff-owner of property near site of proposed trust acquisition for tribal casino had prudential standing; interests raised were arguably within the zone of interests protected or regulated by 25 U.S.C. § 465). Thus, although the Court did not require us to revisit our analysis of Appellants' standing, assuming we justified our use of judicial principles, we revisit our analysis as warranted to consider the Court's statements and as required by *Patchak* to exclude the zone of interests as a basis to deny Appellants standing.

Based upon our reexamination of the issue, we again conclude that Appellants' allegations, as offered through declarations of their members, fail to demonstrate that Appellants have standing to challenge the Decision under NEPA. Our conclusion is reinforced by, although not dependent upon, Appellants' change of position on remand with respect to the effect of the trust acquisition: Appellants now contend that the trust acquisition will not have the effect of divesting state and local governments of any regulatory jurisdiction over the Parcel, with the exception of its exemption from real property taxation. Regardless of our views on the merits of that contention, it would appear to conflict with Appellants' reliance on declarations of their members, who took a contrary legal position, to demonstrate Appellants' standing to raise NEPA challenges to the Decision to convert the Tribe's fee title to the Parcel to trust title held by the United States.

With respect to Appellants' challenges to BIA's compliance with the trust acquisition regulations, 25 C.F.R. Part 151, even assuming that one or more of Appellants' members individually demonstrated the necessary elements of standing with respect to economic interests allegedly injured by the fee-to-trust Decision, Appellants have made no attempt to show that those members' interests are germane to either Appellant organization. The alleged injuries to businesses owned by several members of Appellant organizations are premised on corresponding economic benefits to other non-tribal businesses. Appellants identify the purposes of their organizations as protecting the rural character, and the air and water quality, of the Santa Ynez Valley—not as protecting the economic business interests of their members against other businesses that would be willing to do business with the Tribe. Thus, Appellants have not demonstrated their standing as organizations to appeal.

Although we again conclude that Appellants lack standing to challenge the Decision, we also recognize that this case has remained unresolved for many years, and that additional litigation may be likely. Thus, to reduce the possibility of further delay, we assume, in the alternative, that Appellants have made a sufficient showing to demonstrate their standing, and we address their claims on the merits. On the merits, we would affirm, concluding that Appellants have not demonstrated that the Decision is arbitrary and capricious or that the Regional Director committed legal error or failed to support the Decision with sufficient evidence.

Background

I. The Board's Previous Decisions in this Appeal: *Concerned Citizens* and *POLO I*

In 2005, Appellants, originally joined by two other organizations, timely appealed to the Board from the Regional Director's decision to accept the Parcel in trust for the Tribe. The Tribe's application for the trust acquisition set forth plans to (1) construct a cultural center and museum; (2) create a community commemorative park; and (3) construct a 27,600-square-foot, two-story commercial retail building that would generate revenue for the upkeep of the cultural center and park. *Concerned Citizens*, 42 IBIA at 190-91. In their statement of reasons for the appeal, Appellants contended that the Decision failed to comply with NEPA, failed to properly consider 25 C.F.R. § 151.10 (factors for on-reservation trust acquisitions), and failed to address the potential gaming uses of the Parcel. Appellants' Statement of Reasons, Feb. 22, 2005, at 3-4.[3]

[3] Appellants also contended generally, independent of the allegation that BIA failed to comply with its trust acquisition factors, that the Decision was arbitrary and capricious. *Id.* at 4-5.

The Regional Director and the Tribe moved to dismiss the appeal for lack of standing. In the motion to dismiss, the Regional Director and the Tribe contended that Appellants lacked standing under the principles of judicial standing set forth in *Lujan*, which the motions noted were used by the Board to determine standing.[4] In their response, Appellants did not challenge the use of the *Lujan* test to determine their standing. *See* POLO/POSY Response to Motion to Dismiss, Aug. 11, 2005, at 2.[5] In their briefs, the parties addressed whether Appellants had standing based on an application of judicial standing principles, and Appellants submitted 11 declarations of members to support Appellants' standing. *Concerned Citizens*, 42 IBIA at 193.[6]

In *Concerned Citizens*, it was undisputed that the environmental and economic interests asserted by one or more of Appellants' members are cognizable or legally protected interests for purposes of demonstrating standing. At issue was whether the declarants had—beyond identifying admittedly cognizable interests—alleged injury in fact (specific,

---

[4] In *Lujan*, the Supreme Court described the Article III constitutional elements of standing as follows:

> [T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact" — an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) "actual or imminent, not 'conjectural' or 'hypothetical,'" . . . . Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." . . . Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

504 U.S. at 560-61. As relevant to this case, *Lujan* also noted that when a plaintiff is not the subject of the government action complained of, and the existence of one or more elements of standing depends on independent choices made by a third party, standing will be more difficult to establish. *Id*. at 562.

[5] Appellants did contend that the *Lujan* test itself had been affected significantly by *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005). We rejected that argument. *Concerned Citizens*, 42 IBIA at 192.

[6] "[W]here, as here, the appellant is an organization that claims to have standing to sue on behalf of its members, it must show that (1) its members would have standing to sue in their own right, (2) the interests it seeks to protect are germane to the organization's purpose, and (3) the issues to be resolved do not require the individual participation of the members." *Concerned Citizens*, 42 IBIA at 192-93.

concrete, and particularized harm to the declarants); whether the injury in fact, if sufficiently alleged, was caused by (fairly traceable to) the Decision to accept title to the Parcel in trust; and finally, if injury and causation were demonstrated, whether the declarant(s) had prudential standing, i.e., whether the interests raised were arguably within the zone of interests protected or regulated by the statute in question. *See Concerned Citizens*, 42 IBIA at 194-205.

For the most part, we concluded that the declarations did not demonstrate injury in fact because the declarants complained of pre-existing injuries unrelated to the Decision (injuries allegedly caused by the Tribe's existing casino), or they alleged only generalized injuries without identifying any specific and particularized harm to the declarant, or their allegations of harm were too speculative, conjectural, or hypothetical to establish injury or causation traceable to the fee-to-trust Decision. *Id*. at 194-196.

We did find, however, that one declarant-member of Appellants—Jon Bowen, an owner of commercial properties near the Parcel—arguably satisfies the three-part constitutional test for standing set forth in *Lujan* (injury-in-fact, causation, and redressability), and thus we assumed for purposes of our decision that he did so. *Id*. at 201.[7] We proceeded to examine whether Bowen met the requirements of prudential standing—whether his interests alleged to be injured by the trust acquisition fell "within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Id*. at 202 (quoting *Lujan v. Nat. Wildlife Fed'n*, 497 U.S. 871, 883 (1990)). Relying on judicial precedent, we first concluded that the economic interests asserted by Bowen are not within the zone of interests for NEPA, and thus he, and accordingly Appellant organizations, lack standing to assert a NEPA challenge to the Decision. *Concerned Citizens*, 42 IBIA at 202. In addition, while recognizing that the zone-of-interests test is not a stringent test, we nevertheless concluded that Bowen's economic interest fell outside the zone of interests for the authorizing statute, 25 U.S.C. § 465, and the trust acquisition regulations, 25 C.F.R. Part 151. *Id*. Because we concluded that none of Appellants' members had demonstrated their individual standing, we granted the motion to dismiss the appeal, thus finding it unnecessary to consider whether Appellants satisfied the additional requirements for organizational standing. *See supra* note 6 (organizational standing).

---

[7] We subsequently found that Ed Hamer, a small business owner and member of POLO, was at best similarly situated to Bowen. *See POLO I*, 45 IBIA at 110-11. We also found that the declaration of another business owner, Michele Hinnrichs, a member of Concerned Citizens, was also comparable to that of Bowen. *See Concerned Citizens*, 42 IBIA at 198, 201.

Appellants filed suit in Federal court challenging our decision in *Concerned Citizens* dismissing their appeal. During the initial proceedings, the Court granted a motion by the Department of the Interior (Department) for a limited remand, after determining that the administrative record submitted to the Board by BIA had not been complete. *See POLO I*, 45 IBIA at 98. The remand was limited to considering whether any of the documents omitted from the original administrative record would affect our standing determination. In the limited remand, we reaffirmed our dismissal of the appeal, concluding that Appellants had not shown that any of the previously omitted documents required us to alter our earlier analysis or conclusion that Appellants lacked standing to appeal the Decision to the Board. *Id*. at 99. We also declined to consider or to revisit matters outside the scope of the limited remand proceedings. *Id*. We reaffirmed our dismissal of the appeal, *id*. at 116, and the parties returned to court.

II. *POLO II*: The Court's Decision Vacating the Board's Decisions

In determining its own jurisdiction to consider Appellants' claim that the Board had improperly denied them a procedural right to present their merits claims, the Court found it unnecessary to determine—at least directly—whether the Board's analysis of Appellants' standing to raise their underlying substantive challenges to the Decision was correct within the context of judicial principles of standing. The Court did, however, rely on the same declarations evaluated by the Board, and did discuss the Board's analysis, in making the Court's own determination of its jurisdiction to consider Appellants' procedural challenge to the Board's decision.

In discussing the injury-in-fact element of standing, the Court stated that "the declarations submitted by [Appellants] establish that certain of their members have concrete environmental and economic interests." *POLO II*, 635 F. Supp. 2d at 1086. The Court recognized, as we noted previously, that there was no dispute about whether the interests asserted by Appellants (e.g., environmental, aesthetic, economic) were cognizable interests for purposes of judicial standing. *See, e.g., id*. (no dispute that "aesthetic, recreational and other quality of life values affected by the physical environment are cognizable injuries-in-fact under Article III"). With respect to a showing of injury to those interests, the Court found that "the declarants have shown that they live sufficiently close to the proposed development that they are likely to suffer environmental consequences that may ensue. Together, this evidence shows that at least some of [Appellants'] members have a concrete interest that is threatened by the [Board's] failure to address the merits of their appeal." *Id*.

With respect to economic injuries alleged by Bowen and Hamer, the Court noted that, in the litigation, the Department contended that these injuries were "highly speculative." *Id*. at 1086-87. The Court found that Bowen "provided a lengthy account of the economic impact he believes trust status has on non-tribe businesses—namely that the

Tribe's plans to offer commercial and retail space using its tax-exempt status will place non-tribe businesses, such as his commercial property rental business, at a competitive disadvantage." *Id*. at 1087 (citing Bowen Decl. ¶ 3). The Court described the Department's litigation position as parting ways with the Board, which "acknowledged that Bowen probably did state a sufficiently concrete and imminent economic injury." *Id*. (citing *Concerned Citizens*, 42 IBIA at 198-99). The Court stated that it "agree[d] with the [Board's] assumption that Bowen does state a sufficient economic injury. . . . Given the proximity of Bowen's building to the Tribe's proposed building, the fact that they will both be renting to business tenants, and the fact that the Tribe will not be subject to most of the state and local regulatory and tax requirements that Bowen is subject to, the Court finds that Bowen has sufficiently established that he has a concrete interest at stake in this case." *Id*.

With respect to the causation and redressability elements of constitutional standing, the Court stated that "[g]iven that the relief [Appellants] seek in this action is merely the opportunity to present to the [Board] the merits of their challenge to the BIA's decision, causation and redressability are not real issues." 635 F. Supp. 2d at 1087 (discussing language in *Lujan* stating that plaintiffs seeking to enforce a procedural requirement need not meet the "normal standards" for redressability and immediacy). The Court found that the injury to Appellants' alleged procedural right to an administrative appeal was traceable to the Board's order of dismissal and redressable by a court decision vacating the Board's order. *Id*. Thus, the Court concluded that it had standing to consider Appellants' procedural challenge to the Board's dismissal of their appeal.

Turning to the merits of that procedural challenge, the Court noted that in their original briefs the parties had "relied on principles of judicial standing in analyzing [Appellants'] standing to seek redress under NEPA and [25 U.S.C. § 465]." 635 F. Supp. 2d at 1086. The Court also noted that after briefing was completed on Appellants' motion for summary judgment, the Court "ordered supplemental briefing on whether it was improper for [the Board] to assess standing under principles of judicial, as opposed to administrative, standing." *Id*. at 1085.

The Court concluded that our collective decision in *Concerned Citizens* and *POLO I* was arbitrary and capricious because we had failed to account for our application of judicial standing principles to an administrative appeal. The Court noted that in neither decision did we mention our own appeal regulations. *POLO II*, 635 F. Supp. 2d at 1090. Even assuming we had construed our own regulations when we adopted the use of judicial principles of standing, the Court stated that such a construction would not necessarily command judicial deference because, in the Court's view, the requirements of judicial standing are "difficult to square with the plain language of [the Board's] very broad and permissive regulations on standing." *Id*. (citing 43 C.F.R. § 4.331 and 25 C.F.R. § 2.2 as

"confer[ring] appellate standing on anyone 'whose interest could be adversely affected by a decision.'").

The Court expressed concern about whether the Board's reliance on judicial standing principles was consistent with the Department's intent when, in 1989, the Board removed language requiring that an appeal be based on an alleged violation of a "right or privilege"—language that originated from much older judicial standing principles. The Court suggested that the remaining language resulted in a "markedly looser standard." *Id.* at 1094. Instead of using judicial standing principles, the Court thought that the language in our regulations invites a five-part functional analysis of administrative standing outlined by Judge Bazelon in a concurring opinion in *Koniag, Inc. v. Andrus*, 580 F.2d 601, 614-15 (D.C. Cir. 1978), a case involving the Department's implementation of the Alaska Native Claims Settlement Act (ANCSA). 635 F. Supp. 2d at 1095.[8]

In the present case, the Court vacated our decisions in *Concerned Citizens* and *POLO I*, and ordered us to issue a decision that "articulate[s the Board's] reasons (functional, statutory, or otherwise) for its determination of standing, taking into account the distinction between administrative and judicial standing and the regulations governing administrative appeals." *POLO II*, 635 F. Supp. 2d at 1080. In vacating our decisions and

---

[8] In *Koniag*, the court of appeals upheld a decision by the Secretary of the Interior (Secretary) to afford administrative standing, as "interested parties," to the U.S. Fish and Wildlife Service and the U.S. Forest Service, to appeal a decision made under ANCSA. The court rejected the argument that the Secretary was required to import judicial standing requirements in implementing ANCSA. 580 F.2d at 606. Judge Bazelon concurred in the decision, but also offered his separate view that administrative standing "should be determined in light of the function of an administrative agency, and whether a would-be participant would contribute to fulfilling those functions." *Id.* at 611. While stating that "[g]eneralizations are hazardous," *id.* at 614, and that "[s]uch a standard would have to be flexible . . . and the appropriate variables might well vary from one context to another," *id.* at 616, Judge Bazelon outlined five factors that he believed would go into a functional analysis:

> (1) The nature of the interest asserted by the potential participant.
> (2) The relevance of this interest to the goals and purposes of the agency.
> (3) The qualifications of the potential participant to represent this interest.
> (4) Whether other persons could be expected to represent adequately this interest.
> (5) Whether special considerations indicate that an award of standing would not be in the public interest.

Id.

remanding the case, the Court also stated that "Congress placed the procedural requirements pertaining to administrative proceedings primarily in the hands of the agency," and thus the "Court is not directing the [Board] to reach a different result," and is "*not* requiring the [Board] to take a more lenient approach to standing." *Id*. at 1095.

III. Proceedings on Remand: Order Vacating Regional Director's Decision in Part and Briefing on Remaining Issues

On remand, the Board ordered the parties to brief both standing and the merits of the appeal. In their opening brief on remand, Appellants argued that the Supreme Court's decision in *Carcieri v. Salazar*, 555 U.S. 379 (2009), invalidated the Regional Director's conclusion that the Secretary has statutory authority to accept land in trust for the Tribe. Opening Br. at 11-13; *see* Decision at 5 (addressing 25 C.F.R. § 151.10(a) and 25 U.S.C. § 465). Appellants also argued that another Supreme Court decision, *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009), separately put in question the authority of the United States to accept title to land that was once ceded to a state. Opening Br. at 13. The Regional Director subsequently moved for a voluntary limited remand on the issue of the Secretary's authority to accept title to the Parcel in trust for the Tribe.

The Board, without determining the issue of Appellants' standing, granted the Regional Director's motion for a limited remand and vacated the portion of the Decision finding that 25 C.F.R. § 151.10(a) is satisfied. Order Vacating Decision in Part and Remanding in Part, May 17, 2010. The Board remanded that issue to the Regional Director for further consideration in light of *Carcieri* and *Office of Hawaiian Affairs*. The Board instructed the Regional Director to comply with 25 C.F.R. § 2.7 by issuing a written decision on the remanded issue and by providing appeal rights for that decision. Pending resolution of the remanded issue, and any appeals from the Regional Director's decision on remand, the Board stayed these appeal proceedings on the remaining portion of the Decision.

On June 13, 2012, the Regional Director issued a new decision to address § 151.10(a), again concluding that the Secretary has authority to accept land in trust for the Tribe. *See* Letter from Regional Director to Tribe, June 13, 2012 (2012 Decision). Appellants and several other organizations attempted to appeal the 2012 Decision, but the Board dismissed the appeals as untimely. *See No More Slots v. Pacific Regional Director*, 56 IBIA 233 (2013).

In the absence of any timely appeals from the 2012 Decision to consolidate with the present appeal on the remaining, unvacated portions of the Decision, the Board lifted the stay and scheduled the completion of briefing. The Regional Director filed an answer brief on the merits (the Tribe had done so prior to the limited remand to the Regional Director),

and Appellants filed a reply brief.[9] The Regional Director and the Tribe filed a Joint Motion to Strike Portions of Appellants' Reply Brief, to which Appellants filed a response.

Discussion

I. Introduction

In addressing the Court's remand, we first provide a history and background of the regulations applicable to appeals to the Board, and the Board's use of judicial standing principles to determine administrative standing. We then respond specifically to the Court's order for us to explain and justify our use of judicial standing principles and to address the distinction between administrative and judicial standing, including alleged inconsistencies between the two, as argued by Appellants. As explained below, we are not convinced that the language of BIA's and the Board's regulations requires a different or looser standard for determining administrative standing than *modern* judicial standing jurisprudence—the standards we applied in this case, in which there was never a question that the interests identified by Appellants were cognizable interests for purposes of standing. Thus, we reaffirm our use of judicial standing principles as consistent with the general appeal regulations.

We then revisit Appellants' standing, to the extent we think it warranted by the Court's statements about Appellants' members declarations, and as required by the *Patchak* decision. We remain unconvinced that Appellants have made a sufficient showing to demonstrate standing based on alleged injuries to environmental interests. Our conclusion is reinforced by, though not dependent upon, Appellants' newly embraced contention (contrary to the position of their member-declarants) that the only effect of BIA taking the Parcel into trust will be its exemption from property taxes, and that state and local laws and regulations will continue to apply. It is difficult to square this contention with Appellants' contention that their members will suffer environmental injuries as a result of the decision to accept title to the Parcel in trust. As for the alleged injuries to the economic interests of Bowen and Hamer—assuming the causation element is not too speculative—Appellants have not shown that those interests are germane to Appellant organizations' purposes to protect the rural character, and the air and water quality, of the Santa Ynez Valley.

Finally, in the alternative, and assuming that Appellants have made a sufficient showing to establish their standing as organizations, through their members' declarations,

---

[9] As Appellants note, the Board's May 17, 2010, order effectively granted in part Appellants' request that the Board vacate the Decision. Appellants' Reply Br., July 1, 2013, at 2.

to bring this appeal, we address the merits of Appellants' challenges to the Decision. We conclude that Appellants have not demonstrated that the Regional Director's exercise of discretion was arbitrary and capricious, or that the Decision is not in accordance with law or not supported by the record.

II. History and Background of Standing for Appeals from BIA Decisions

A. Pre-1989 Appeals Regulations

BIA's appeal regulations were first promulgated in 1960. *See* 25 Fed. Reg. 9106 (Sept. 22, 1960) (adding new 25 C.F.R. Part 2); *see also* 24 Fed. Reg. 9545 (Nov. 28, 1959) (proposed rulemaking). As a general rule, under the new Part 2 regulations, "any interested party adversely affected by a decision" of a BIA official was authorized, in accordance with the procedures in the rule, to appeal the decision. 25 Fed. Reg. at 9107 (§ 2.3). The rule defined "interested party" to mean "any person whose interests would be adversely affected by proceedings conducted under this part." 25 Fed. Reg. at 9107 (§ 2.1(b)). The rule defined an "appeal" as "a written request for correction of an action or decision claimed to violate a person's legal rights or privileges." *Id*. (§ 2.1(d)); see also *id*. (§ 2.2 (incorporating rights-or-privileges language)).[10]

In 1975, the Department amended the appeal regulations of BIA and of the Office of Hearings and Appeals (OHA) to streamline the process for appealing BIA decisions.[11] The most significant change in the rule was to add the Board to the appeals process for BIA administrative decisions, vesting in the Board the authority to exercise the Secretary's review authority, except as limited by the regulations. *See* 40 Fed. Reg. 20625 (May 12, 1975) (amending BIA's regulations, 25 C.F.R. Part 2); 40 Fed. Reg. 20819 (May 13, 1975) (amending OHA's regulations, 43 C.F.R. Part 4). Except to change the term "petitioner" to "appellant," the rulemaking did not change the definitions of terms. The definitions in

---

[10] The term "right" was defined as "a favorable position in a legal relationship the continued enjoyment of which may not be withdrawn save by a change in fundamental constitutional law." The term "privilege" was defined as "a favorable position in a legal relationship the continued enjoyment of which may be withdrawn only upon a change in law, statute or regulations upon which the relationship is based." *Id*. (§ 2.1(f) & (g)).

[11] OHA was established in 1970 and is located in the Office of the Secretary, separate and apart from agencies within the Department such as BIA, in order to provide impartial and independent review, on behalf of the Secretary, of decisions of certain agency and Departmental officials. When OHA and the Board were first established, the Board was delegated authority to hear appeals in Indian probate cases. *See* 35 Fed. Reg. 12081 (July 28, 1970).

BIA's appeal regulations were incorporated in the Board's regulations, *see* 40 Fed. Reg. at 20820 (§ 4.350), as was language corresponding to §§ 2.2 and 2.3 in BIA's regulations, including the right-or-privilege language, *see* 40 Fed. Reg. at 20820 (§ 4.353); *see also id*. (§ 4.351). The subject matter jurisdiction of the Board broadly extended to BIA decisions "issued under regulations in 25 C.F.R.," *id*. § 4.351, except as otherwise limited. Sections 4.353 and 4.351 were subsequently deleted and replaced with newly created §§ 4.331 and 4.330, which contained the same right-or-privilege language. 46 Fed. Reg. 7334, 7337 (Jan. 23, 1981).

B. Pre-1989 Board Decisions on Standing

As the Court noted, the Board has a longstanding practice of using judicial standing principles to guide its analysis of administrative standing. *See, e.g.*, *Kuykendall v. Commissioner of Indian Affairs*, 9 IBIA 90, 91-92 (1981) (discussing the judicial case-or-controversy requirement, and making analogy to the Board's regulations); *cf. Flast v. Cohen*, 392 U.S. 83, 94-95 (1968) (jurisdiction of federal courts is limited by Article III of the U.S. Constitution to "cases and controversies").

In *Hawley Lake Homeowners' Ass'n v. Deputy Assistant Secretary – Indian Affairs (Operations)*, 13 IBIA 276 (1985), the Board found instructive a lengthy excerpt from the Supreme Court's 1975 decision *Warth v. Seldin*, 422 U.S. 490, noting that "[a]lthough administrative review forums are not subject to the case-or-controversy restrictions established in Article III of the United States Constitution, they are bound by their authorizing regulations, which can impose the same type of restriction." 13 IBIA at 284 (citing 43 C.F.R. § 4.331 (1982)). In 1986, citing *Hawley Lake*, the Board noted that it had "previously discussed the similarity between Article III restrictions and its own authorizing regulations in the context of standing," even though "[a]s an executive/administrative forum, the Board is not bound by the Constitutional restrictions on judicial branch review." *Estate of Peshlakai v. Navajo Area Director*, 15 IBIA 24, 33 (1986).[12]

C. 1989 Revisions to the Appeals Regulations

In 1987, BIA and the Board concurrently initiated rulemakings to revise their respective appeals regulations. The reason given for BIA's revisions was "to facilitate and

[12] In *Peshlakai*, the issue was one of mootness. The Board noted that "[a]s a quasi-judicial body" it had "consistently applied the doctrine of mootness in the interest of economy of judicial resources" *id*. at 33, although in that case the Board concluded that an exception to the mootness doctrine applied.

expedite the total appeals process," by eliminating BIA Central Office action on most appeals and instead requiring that they be sent directly to the Board. 52 Fed. Reg. 43006, 43006 (Nov. 6, 1987).[13] The Board proposed corresponding revisions "in order to ensure compatibility" between the Board's and BIA's regulations. 52 Fed. Reg. 43009, 43009 (Nov. 6, 1987). The primary author for the Board's rulemaking was Chief Administrative Judge Kathryn Lynn. *See id.*; 54 Fed. Reg. 6483 (Feb. 10, 1989). The final rules were promulgated in 1989. 54 Fed. Reg. 6478 (Feb. 10, 1989) (BIA's rule); 54 Fed. Reg. 6483 (Board's rule). In neither the proposed nor the final rulemaking preambles did BIA or the Board suggest that one of the purposes of the rulemaking was to depart from the use of judicial elements of standing to evaluate administrative standing.

In the proposed and final rulemakings, without explanation, both BIA and the Board dropped the right-or-privilege language from their respective regulations. BIA made several revisions to the definitions. As revised, BIA's regulation defined "appeal" to mean "a written request for review of an action or the inaction of an official of the Bureau of Indian Affairs that is claimed to adversely affect the interested party making the request." 54 Fed. Reg. at 6480 (codified at 25 C.F.R. § 2.2). The definition of "interested party" was revised to mean "any person whose interests could be adversely affected by a decision in an appeal." *Id*.

Revised § 2.3 provides that except as otherwise provided, Part 2 applies to all appeals "by persons who may be adversely affected by [BIA] decisions." 54 Fed. Reg. at 6480. As proposed, § 2.3 referred to persons who "are or will be" adversely affected, but BIA changed the wording to "may be," to "clarify that appellants do not have to prove that they are adversely affected, only to allege it." 54 Fed. Reg. at 6478.

As revised, the Board's § 4.331 of 43 C.F.R., also dropped the right-or-privilege language, to read, with exceptions not relevant here: "Any interested party affected by a final administrative action or decision of an official of the Bureau of Indian Affairs issued under regulations in Title 25 of the Code of Federal Regulations may appeal to the Board of Indian Appeals . . . ." 54 Fed. Reg. at 6487.

D. Post-1989 Board Decisions on Standing

A year after BIA and the Board revised their regulations, the Board, in an opinion by Chief Judge Lynn, held that an appellant lacked standing to raise a certain argument because he was not within the zone of interests established by the statute he sought to

[13] The primary author for BIA's rulemaking was a BIA management analyst in its Division of Personnel. *See* 52 Fed. Reg. at 43006; 54 Fed. Reg. at 6478.

enforce. *Kombol v. Acting Assistant Portland Area Director*, 19 IBIA 123 (1990). In applying "the standing question" and the zone-of-interests test, the Board again relied on *Warth*, 422 U.S. 490. *Kombol*, 19 IBIA at 130. The Board's only mention of the 1989 revisions was to explain that under the new appeal procedures, decisions of a BIA area (now regional) director were appealed directly to the Board. *Id*. at 128 n.8.

In *Johnson v. Acting Phoenix Area Director*, another decision authored by Chief Judge Lynn, the Board noted that it was possible that one of the appellants might lack standing under § 2.2 (the definitions of terms) because he might have "no valid or legally protected interest" in the licenses and leases, although that potential obstacle was not present for the other appellant. 25 IBIA 18, 19 n.1 (1993). But the Board did dismiss the appeal in part for lack of standing, relying on *Kombol* and accepting BIA's argument that both appellants were outside the zone of interests for the statutes upon which one of their claims was based. *Id*. at 25-27. In *Gossett v. Portland Area Director*, 28 IBIA 72, 75 (1995), the Board again applied the zone-of-interests test in finding that the appellants in that case lacked standing to raise a certain claim. And in *Chehalis Tribe v. Portland Area Director*, 34 IBIA 100 (1999), the Board dismissed an appeal for lack of standing because the appellant tribes had failed to show that they had any legally protected interest that would be affected by a cooperative agreement between BIA and the Quinault Nation.

In 2002, in *Friends of East Willits Valley v. Acting Pacific Regional Director*, 37 IBIA 213, the Board dismissed an appeal for lack of standing, discussing and applying the doctrine of standing as set forth by the Supreme Court in *Lujan*, and finding that that the appellant "fail[ed] entirely to describe any concrete injury which affects it 'in a personal and individual way.'" 37 IBIA at 216-17. The Board, in an opinion concurred in by Chief Judge Lynn, stated that it employs a standing analysis "which is based on the analysis developed in the Federal courts." *Id.* at 217.

Since the regulations were amended in 1989, the Board continued to apply the judicial elements of standing, frequently citing *Lujan*, in administrative appeals involving a broad range of subjects and law implicated by BIA decisions issued under Title 25 of the Code of Federal Regulations. *See, e.g.*, *Evitt v. Acting Pacific Regional Director*, 38 IBIA 77, 79 (2002) (fee-to-trust decision; "Board has been guided by the standing analysis employed in the Federal courts"); *Shawano County Concerned Property Taxpayers Ass'n (SCCPTA) v. Midwest Regional Director*, 38 IBIA 156, 157 (2002) (Lynn, C.J.) (fee-to-trust decision; "Board has relied on . . . *Lujan* . . . in addressing the standing of private individuals and associations challenging trust acquisition decisions."); *see also Young v. Great Plains Regional Director*, 40 IBIA 261 (2005) (trust land exchange); *Caldwell v. Acting Northwest Regional Director*, 41 IBIA 222 (2005) (gift deeds); *Cheyenne River Sioux Tribe v. Acting Great Plains Regional Director*, 41 IBIA 308 (2005) (grazing rate); *Jenkins v. Western Regional Director*, 42 IBIA 106 (2006) (tribal ordinance); *Quantum Entertainment, Ltd. v. Southwest Regional*

Director, 44 IBIA 178 (2007) (management agreement);[14] *Parker v. Southern Plains Regional Director*, 45 IBIA 310 (2007) (tribal government dispute); *Wadena v. Midwest Regional Director*, 47 IBIA 21 (2008) (Secretarial election). On the other hand, when the governing regulations expressly contain different requirements for standing, the Board has departed from its use of judicial standing principles as required by the more specific governing law. *See Center for Biological Diversity v. Navajo Regional Director*, 43 IBIA 31, 34 (2006) (the standing requirements of 25 C.F.R. § 163.33 are more restrictive than the "broad range of 'interests'" that could serve as the basis for standing under 25 C.F.R. § 2.2).

III. Response to Court's Remand: Administrative Standing for Appeals to the Board

A. Did the Court Require the Board to Adopt Judge Bazelon's Five-Part Functional Analysis to Determine Appellants' Standing?

Appellants contend that the Court "adopted" the test and functional analysis for standing outlined by Judge Bazelon in his concurring opinion in *Koniag*, *see supra* note 8, and that they meet that test. Opening Br. at 1-8. We disagree that the Court adopted and imposed on the Board the five-part analysis outlined by Judge Bazelon, or that the Court required us to apply some other "functional" analysis. As we understand the Court's decision, the Court ordered us to articulate our reasons, "functional, statutory, *or otherwise*," for our determination of Appellants' standing, "taking into account the distinction between administrative and judicial standing and the regulations governing administrative appeals." 635 F. Supp. 2d at 1080. The Court also made clear that it was "not directing the [Board] to reach a different result," and was "*not* requiring the [Board] to take a more lenient approach to standing." *Id*. at 1095 (emphasis in original).[15]

B. Did the Department Intend, in the 1989 Rule Revisions, to Adopt Looser Standards for Administrative Standing than Modern Judicial Standing Jurisprudence?

As the Court noted, prior to 1989, several Board decisions expressly linked judicial standing principles to standing-related provisions in the appeal regulations of BIA and of

---

[14] *Remanded on other grounds*, 597 F. Supp. 2d 146 (D.D.C. 2009), *decision on remand*, 52 IBIA 289 (2010), *aff'd*, 848 F. Supp. 2d 30 (D.D.C. 2012), *aff'd*, 714 F.3d 1338 (D.C. Cir. 2013).

[15] We note that Appellants appear to presume that a so-called *Koniag* functional analysis would yield a different result for them, i.e., more favorable than the application of judicial standing principles. That is not necessarily the case.

the Board. The Court also observed that even while the Board, in its 1985 *Hawley Lake* decision, was interpreting the appeal regulations as consistent with and as generally intended to track judicial standing principles, those principles had in fact markedly evolved, substantially broadening judicial standing beyond what BIA's and the Board's regulatory language arguably would recognize, dating as it did to 1960 and apparently grounded in part in concepts embraced in a 1939 Supreme Court decision. *See* 635 F. Supp. 2d at 1091 n.9 (noting that by the time *Hawley Lake* cited a 1939 Supreme Court decision on standing, judicial standing barriers had been "substantially lowered," making it "difficult to regard *Hawley Lake's* citation to [the 1939 case] as accurately applying the judicial standing principles of the day.").[16]

Appellants argue that in making "substantial revisions" to the Board's appeal regulations in 1989—removing the right-or-privilege language—"the Secretary clearly intended . . . to loosen the standards for standing to appeal and broaden the categories of persons who possess such standing." Opening Br. at 2. We agree that dropping the restrictive and outdated right-or-privilege language might reasonably be construed as evincing an intent to depart from outdated concepts of what constitutes a cognizable "interest" for purposes of standing, and in that sense may be construed as "loosening" that element of standing. But we disagree that in doing so the Department intended to abandon judicial principles of standing altogether, as opposed to removing restrictions that interfered with the Board's ability to apply modern judicial standing jurisprudence, with its "substantially lowered" standing barriers, 635 F. Supp. 2d at 1091 n.9, in relation to 1939 standing jurisprudence.

By 1989, the right-or-privilege language in the Board's regulations was outdated when compared to modern judicial standing principles, at least to the extent that language may have been understood as more restrictive than current judicial understandings of what constitutes a cognizable or legally protected "interest" for purposes of judicial standing. Although the right-or-privilege language was dropped by the Board from its appeal regulations in 1989, the change was made without any suggestion that the Board intended its regulations to depart from an overall approach of tracking judicial principles of standing, e.g., continuing to analogize the case-or-controversy doctrine and to apply the zone of interests test. If, except for discarding the arguably overly restrictive right-or-privilege language, the Board intended to abandon altogether the constraints reflected in modern judicial standing jurisprudence of what constitutes a "cognizable interest," "legally protected

---

[16] In *Hawley Lake*, 13 IBIA at 284, the Board construed the right-or-privilege language in the pre-1989 regulations in reference to the Supreme Court's discussion of a "legal right" in *Tennessee Power Co. v. TVA*, 306 U.S. 118 (1939).

interest," or "legally cognizable interest,"[17] it is difficult to understand why such intent would not have been expressed in some way during the rulemaking.

Under the revised rule, an "interested party" must still have an "interest" that could be "adversely affected" by a decision in an appeal. 25 C.F.R § 2.2. As the Court noted, the word "interest" is "scarcely self-defining." POLO II, 635 F. Supp. 2d at 1090 (quoting *Envirocare of Utah Inc. v. Nuclear Regulatory Comm'n*, 194 F.3d 72, 76 (D.C. Cir. 1999)). But it does not follow, in our view, that the Board intended the word "interest" to be any broader than that encompassed in judicial standing principles, particularly in light of the injury and causation elements retained in the rule. The Department's silence in the rulemaking on the issue of standing makes sense, in our view, if the purpose of dropping the right-or-privilege language was simply one of housekeeping—to drop outdated language that no longer corresponded to what constitutes a cognizable interest in modern judicial standing jurisprudence.

In this regard, we note that the author of the Board's rule revisions was Chief Judge Lynn, not a Departmental official removed from the Board and its practices, or from OHA. Chief Judge Lynn's subsequent decisions show no indication that she understood the revisions that she drafted to have been intended to abandon judicial principles, or to loosen the Board's standing requirements beyond the constraints of those judicial principles, i.e., to afford access to Board review to individuals who would not have standing to challenge a final Departmental decision in court. Nor is there evidence that BIA's rule revisions were intended to unmoor administrative standing from judicial standing principles. As noted earlier, the stated purpose of the 1989 BIA rule revisions was "to facilitate and expedite the total appeals process," by eliminating BIA Central Office action on most appeals. 52 Fed. Reg. at 43006.

In our view, the revisions to the appeal regulations in 1989, dropping the right-or-privilege language, cannot be construed as evincing an affirmative intent by BIA and the Board to make them more permissive than *modern* judicial standing jurisprudence, i.e., the standard that the Board applied in this case. And as discussed below, we believe the language in the post-1989 regulations fits well with the judicial elements of standing, which in turn fit well with the role of the Board within the Department.

---

[17] *See Lujan,* 504 U.S. at 560 ("plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest") and 562-63 ("cognizable interest"); *see also Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013) ("a plaintiff must demonstrate that he possesses a legally cognizable interest").

C. Does the Language of BIA's and the Board's Appeal Regulations Preclude the Use of Modern Judicial Standing Principles, Both Constitutional and Prudential, to Determine an Appellant's Right to Appeal?

Having concluded that the Department (the Board) did not affirmatively intend in the 1989 rulemaking to uncouple its own general administrative standing requirements from those embodied in judicial standing principles, we next address whether the language remaining in the regulations somehow inadvertently required the Board to adopt standards looser than modern judicial standing principles. We are not convinced that is the case.

1. Constitutional Elements of Standing

Our appeal regulations provide that "[a]ny interested party affected by a final administrative action or decision of a BIA official" may appeal to the Board. 43 C.F.R. § 4.331. The term "interested party" includes "any person whose interests could be adversely affected by a decision in an appeal." 25 C.F.R. § 2.2. An "appeal" means a written request for review of an action or the inaction of a BIA official that "is *claimed to adversely affect the interested party making the request*." *Id*. (emphasis added).[18] In our view, this language continues to capture, either directly or indirectly, the constitutional requirements of standing.

First, an appellant must be an interested party, which is someone whose interests, i.e., whose own interests, could be adversely affected by a decision in an appeal. An appellant, as opposed to interested parties generally, must claim (allege) that the challenged action or decision, in fact, "adversely affect[ed]" *the appellant*. 25 C.F.R. § 2.2; *see* 43 C.F.R. § 4.331 (interested party "affected by" a BIA decision may appeal to Board). We think the regulatory language reasonably corresponds to the injury-in-fact element of constitutional standing: an appellant must claim (allege) actual (concrete and particularized) injury to (adverse effect on) the appellant's (own) interests.

[18] As noted earlier, in the rulemaking BIA clarified that "appellants do not have to prove that they are adversely affected, only to allege it." 54 Fed. Reg. at 6478. We do not construe that to mean that bare, unsupported allegations may suffice. While no ultimate showing of proof need be made before an appeal may proceed, the Board has required evidence, such as the declarations filed by Appellants' members in this case, to support allegations of injury. In fact, if further evidence demonstrates that an appellant *could not be* adversely affected, the appeal may be dismissed for lack of standing (or on grounds of mootness), even if the allegations and evidence offered at the outset of the appeal sufficed to pass the threshold standing inquiry.

Second, an appellant must allege that it was injured "by" the final administrative action or decision of the BIA official that is being appealed, which incorporates the element of causation found in judicial standing requirements. And in our view, the causation requirement logically encompasses the judicial precedent recognizing that when an appellant itself is not the subject of BIA's action, and the elements of standing may depend on the independent choices of a third party, standing is not precluded, "but it is ordinarily 'substantially more difficult' to establish." *Lujan*, 504 U.S. at 562.

The third constitutional element of standing—redressability—is not directly reflected in any express regulatory language, but we think it is both a reasonable extension of the causation requirement in many cases (i.e., if a BIA decision has caused injury, and the Board otherwise has subject matter jurisdiction, the Board may redress the injury by vacating or reversing the decision), or is consistent with the overall intent of the regulations to provide an appeal forum for some meaningful purpose—to obtain relief from injury. If the Board has no ability to redress an injury, it makes little sense to permit an appeal or to expend the Board's limited resources.

2. The Zone-of-Interests Test

In contrast to the "irreducible" constitutional elements of standing, *Lujan*, 504 U.S. at 560, the zone-of-interests test is based on prudential and statutory limitations on the judicial exercise of authority. In the present appeal, no question has arisen whether environmental interests alleged by Appellants' members are within the zone of interests for NEPA. Instead, the Board's conclusion that Appellants failed to establish their standing to raise their NEPA claims, premised on environmental injuries, was based on the insufficiency of Appellants' members' declarations to demonstrate individual injury to the declarant or causation traceable to the fee-to-trust title conversion approved by the Decision.

In contrast, we found that the economic interests of Appellants' member-declarants who arguably satisfied the constitutional elements of standing were outside the zone of interests for the trust acquisition statute and regulations. On remand, however, we agree with Appellants that *Patchak* effectively overrules our earlier conclusion that Appellants' interests are not arguably within the zone of interests for the trust acquisition statute and regulations. Although we understood that the zone-of-interests test is not especially demanding, *see Concerned Citizens*, 42 IBIA at 192, *Patchak* shows that we applied it too narrowly to § 465. In *Patchak*, the Supreme Court recognized that the owner of property near the site of a proposed trust land acquisition, a necessary step for a tribal casino development, had prudential standing to challenge BIA's trust acquisition decision. 132 S. Ct. 2199. The plaintiff in that case alleged a variety of injuries based on

environmental and economic interests, which the Court held were arguably within the zone of interests protected or regulated by 25 U.S.C. § 465.[19] Thus, the Court held that the plaintiff had standing to challenge the Secretary's authority to acquire the property for the tribe in that case. 132 S. Ct. at 2203, 2210-12.

In light of the *Patchak* decision, we conclude that the zone-of-interests test does not present a bar for Appellants in this appeal. To the extent that the Court's remand would otherwise have required us to address our use of prudential judicial standing principles in determining administrative standing, we consider the issue moot.

D. The Distinction between Administrative and Judicial Standing

From the Board's earliest invocation of judicial standing principles in an administrative appeal, the Board has recognized that it is not bound by the same constitutional and statutory constraints on judicial power, thus recognizing the distinction between administrative and judicial standing. Judicial standing is based on constitutional power vested in the courts, as limited by the Supreme Court's interpretation of the case-or-controversy language in the U.S. Constitution, by judicially-imposed prudential limitations on the exercise of that constitutional power, and by statutory limitations. The practical result, however, is that the judicial standing doctrine effectively defines the right of a party to seek redress in court. The regulations that define administrative standing in appeals to the Board are not framed in terms of direct limitations on the Board's *power* to exercise the Secretary's authority, but as terms and conditions under which a party has a right to appeal.

In that respect—defining standing in terms of a party's right, rather than as an express limitation on the Board's authority—the Board has recognized that it may not always use the use of the term "standing" in the same way as would a court. *See Williamson-Edwards v. Acting Minneapolis Area Director*, 29 IBIA 261, 262 (1996) ("The Board uses the term 'standing' to describe the distinction between appellants who are entitled to pursue an appeal of a particular BIA decision before the Board and those who are not so entitled."); *see also McKay v. Pacific Regional Director*, 40 IBIA 26, 30 (2004) (dismissing appeal for lack of standing because appellant failed to demonstrate that he had authority under tribal law to bring the appeal). As a result, in some cases, an appellant arguably might meet judicial standing requirements, but might raise a claim upon which no relief may be granted, thus implicating the merits. In such cases, the Board has exercised greater flexibility to dismiss, for lack of "standing," appeals in which an appellant—even assuming he or she has standing under § 2.2—has no legal substantive right upon which the appellant

[19] It was not disputed in *Patchak* that the plaintiff satisfied the constitutional elements of standing.

could prevail in the appeal. In that context, that Board may have addressed an appellant's "legal right" or "legal interest" in a way that was not strictly confined to the judicial standing context, while ultimately characterizing the issue as one of "standing" because the Board concluded that the appellant had no right to obtain relief through an appeal.

Thus, the Board may have exercised a linguistic flexibility not available to courts under prevailing Supreme Court precedent. *Cf. Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 112-13, 119 n.9 (1998) (Stevens, J., dissenting). Just as the word "jurisdiction" may have multiple meanings, *see id*. at 90 (Scalia, J., for the Court), the Board has sometimes used the word "standing" in more than one way. But while the Board has used the term "standing" to describe more broadly the basis upon which it determines that an appellant is or is not entitled to "pursue" an appeal, *Williamson-Edwards*, 29 IBIA at 262, the Board is unaware of any situation in which the Board held that an appellant was entitled to pursue an appeal under 25 C.F.R. Part 2 and 43 C.F.R. Part 4 *without* meeting the judicial requirements of standing.

In the present case, the above distinction has not come into play—our dismissal of Appellants' appeal was not based on an evaluation of the underlying merits—and we are not convinced that the theoretical distinction between administrative and judicial standing carries any significance. *Cf. Western Watersheds Project v. BLM*, 182 IBLA 1, 7 (2012) ("despite the theoretical distinctions between administrative and judicial standing, the differences as a practical matter are difficult to discern").[20] But we have addressed the theoretical distinction between administrative and judicial standing to comply with the Court's remand instructions.

[20] Unlike this Board, the Interior Board of Land Appeals (IBLA) has perhaps at times given greater emphasis to the theoretical distinction between administrative and judicial standing, although it is not clear that any different outcome has resulted. Even when emphasizing the distinction, IBLA nevertheless has recognized the usefulness of looking to judicial standing principles to interpret and apply its own regulations. *See, e.g.*, *Laser, Inc.*, 136 IBLA, 271, 273-74 (1996); *In re Pacific Coast Molybdenum*, 68 IBLA 325, 331-32 (1982). And with respect to the zone-of-interests test, which IBLA overtly rejected as controlling its standing inquiries, IBLA nevertheless has noted that court decisions applying that test provided "analogous authority in deciding whether an interest is 'adversely affected.'" *Western Watersheds Project*, 182 IBLA at 8 & n.4.

E. Assuming that the Regulatory Language Invites a *Koniag*-Based Analysis, Does *Koniag* Compel a Different Result?

Even though we do not understand the Court to have ordered us to adopt a *Koniag*-based analysis to address the remand and further explain the Board's administrative standing, we address the Court's suggestion that our regulations invite a functional analysis under *Koniag*. The Court focused on the five-factor functional analysis posited by Judge Bazelon. But Judge Bazelon's rationale and underlying assumptions are perhaps more instructive in the present case. Judge Bazelon's observations are useful for putting in context the Board's longstanding use of judicial standing principles and our understanding—both express and implied—that our appeal regulations and judicial principles of standing are consistent with, and not "opposed to," one another.

In *Koniag*, the issue was not whether the Secretary had improperly restricted administrative standing to judicial standards, but whether he was required to do so, instead of affording broader standing in implementing a single statute, ANCSA. In joining the majority opinion rejecting the argument that the Secretary was *required* to use judicial standards, Judge Bazelon observed:

> Courts are confined to the resolution of particular disputes in an adversary setting. Administrative agencies, however, have unique resources for establishing broad, prospective policies. Unlike courts, administrative agencies can devote uninterrupted attention to relatively narrow problem areas, and can call upon technical staff assistance in formulating solutions. Unlike courts, they are not limited to the adjudicatory format, but have the flexibility to proceed by adjudication, legislative hearings, rulemaking, investigation or in other ways. And unlike courts, agencies do not have to wait for a plaintiff to file suit; they have the power to institute an investigation or an action on their own initiative.

Koniag, 580 F.2d at 612-13.

Each of the above observations about the limited role of courts corresponds to the limited role of the Board. The role of the Board is different from the broader policy and programmatic role of "administrative agencies" as described by Judge Bazelon. Like courts, the Board is "confined to the resolution of particular disputes in an adversary setting," is "limited to an adjudicatory format," and must "wait for [an appellant] to file [an appeal]." *Id*. The Board does not have resources (nor authority) "for establishing broad, prospective policies" (except to the limited extent its procedural rules create policy through notice-and-comment rulemaking), and does not have resources (nor authority) to devote to "narrow problem areas," except—as is the case with courts—as they arise in the context of deciding a

specific issue in the context of a specific appeal. Nor can the Board institute an investigation or take action on the Board's own initiative without waiting for an appeal. The Board only has authority to consider and decide, in a formal adversarial proceeding, specific appeals initiated by appellants challenging specific BIA action (or inaction) that they allege adversely affected them. And unlike the regulation at issue in *Koniag*, implementing a single statute, the Board's appeal regulations govern appeals involving hundreds of various statutory and regulatory provisions involving a broad range of subject matters. Thus, in our view, the Board's use of judicial standing principles to determine administrative standing, including the use of the 3-part constitutional test as well as prudential requirements, is well "tailored to the functions" of the Board. *Id*. at 616.

IV. Appellants' Standing

As we have already noted, there has never been a question in this case whether the *interests* upon which Appellants, through their member-declarants, allege injury are cognizable or legally protected interests for purposes of alleging injury, within the meaning of modern judicial standing jurisprudence and that of the Board. Both environmental (including aesthetic) and economic interests are cognizable for purposes of alleging injury in fact.

In our earlier decision, however, we concluded that Appellants' member-declarants had failed to satisfy the injury-in-fact and causation elements of standing with respect to their alleged environmental interests and injuries to support standing for their NEPA claim, and we only assumed, for purposes of addressing Appellants' § 465 and Part 151 claims, that Bowen (and Hamer) satisfied those elements. On remand, Appellants have made no further arguments in support of their standing, within the context of judicial standing principles, to assert NEPA claims, except to assert generally that they satisfy the modern judicial principles of standing. *See* Opening Br. at 10-11. But it *was* the modern judicial principles of standing that the Board applied in this case. We recognized that the types of environmental and economic interests that Appellants identified were cognizable, legally protected interests, but concluded that for the environmental interests, the declarations fell short of establishing injury-in-fact or causation. On the other hand, the Court, while not questioning our analysis of the declarations within the context of judicial standing principles, made several statements that suggest a more favorable finding than our own relevant to the showing made by Appellants' member-declarants.

First, the Court stated that "the declarations submitted by [Appellants] establish that certain of their members have concrete environmental and economic interests." *POLO II*, 635 F. Supp. 2d at 1086. The Court found that "the declarants have shown that they live sufficiently close to the proposed development that they are likely to suffer environmental consequences that may ensue. Together, this evidence shows that at least some of

[Appellants'] members have a concrete interest that is threatened by the [Board's] failure to address the merits of their appeal." *Id*. Although framed only in terms of the Court's jurisdiction to consider Appellants' procedural challenge to the Board's dismissal of their appeal, the Court's statement would appear to implicate the sufficiency of Appellants' demonstration of standing with respect to their underlying substantive challenge to the Regional Director's trust acquisition decision.[21] On the other hand, the Court did not expand upon what "environmental consequences" would ensue from the fee-to-trust title conversion that is the subject of the Decision, except as discussed by the Board in addressing the marginal implications of fee versus trust status with respect to the Tribe's proposed development of the Parcel.

Aside from the Court's statements, we now face a new issue with respect to Appellants' standing to raise NEPA claims, either as originally evaluated by the Board or as viewed by the Court in evaluating Appellants' procedural standing to challenge our earlier decisions. In the declarations submitted by Appellants' members, the declarants alleged that they would be injured by the Decision of BIA to accept title to the Parcel from, and hold it in trust for, the Tribe, because once the land is taken in trust, state and local laws and regulations that would otherwise protect them will no longer apply. *See, e.g*., Herthel Decl. ¶ 14 (environmental injuries caused by "placing [the Parcel] outside all the principal state and local laws which protect us, our properties and the quality of our lives");[22] Cleary Decl. ¶¶ 7 & 8 ("acquisition of this land also removes it from state and local control;" "State and local laws and regulations are the only protection my family has from the hazards and damages resulting from [the] acquisition . . . which, if approved, . . . renders it . . . not regulated by state and local controls protecting myself and other non-Indian residents."); Rheinschild Decl. ¶ 2 ("If this land is taken into trust [state and local governments] will no longer have jurisdiction" to address pollution spreading from adjacent property). And even in their opening brief, Appellants argued that if the property is taken into trust, state

---

[21] *See Summers v. Earth Island Institute*, 555 U.S. 488, 496 (2009) ("[D]eprivation of a procedural right without some concrete interest that is affected by the deprivation—a procedural right *in vacuo*—is insufficient to create Article III standing. Only a 'person who has been accorded a procedural right to protect *his concrete interests* can assert that right without meeting all the normal standards for redressability and immediacy.'") (quoting *Lujan*, 504 U.S. at 572 n.7); *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 938 (9th Cir. 2005) ("a plaintiff asserting a procedural injury does not have standing absent a showing that the 'procedures in question are designed to protect some threatened concrete interest of his that is the ultimate basis of his standing'" (quoting *Lujan*, 504 U.S. at 573 n.8); "A free-floating assertion of a procedural violation, without a concrete link to the interest protected by the procedural rules, does not constitute an injury in fact.").

[22] Herthel identifies himself as the President of POLO. *Id*. ¶ 1.

common law will not apply, Opening Br. at 17, and implied that state and local law generally would not apply, *id*. at 16.

In their reply brief and response to the joint motion to strike portions of the reply brief, Appellants now contend that state and local law will continue to apply, even if the property is taken into trust. *See, e.g*., Reply Br. at 29 ("Although the [§ 465] exempts trust land from state and local taxation, trust land was not exempted from State and local regulation;" "regardless of whether the land is owned in fee by the [Tribe] or owned by the United States in trust for the [Tribe], it is subject to State laws and regulations."); Appellants' Response to Joint Motion to Strike at 19 (same).[23] Thus, Appellants now assert that the *sole* legal effect of the decision by BIA to accept title from the Tribe and hold it in trust is that the Parcel will become exempt from property taxes. Nothing, of course, prevents Appellant organizations from taking a legal position that contradicts the legal position of individual members. But we find it difficult now to reconcile Appellants' reliance on their members' allegations of injuries to establish Appellants' standing, when the declarants' alleged injuries are premised on a legal position that conflicts with that of Appellants. Whether or not we would agree, on the merits, with Appellants' legal position that state and local law will continue to apply, we would ordinarily accept that position for purposes of evaluating their standing.[24]

Even if we were to disregard, for purposes of standing, Appellants' position that the Parcel will remain subject to state and local laws, as we noted in our earlier decision, Appellants at one time, and again during these proceedings, conceded that the Tribe's planned development of the property could go forward even if the Parcel remains in fee and subject to state and local law. *See* Opening Br. at 16 (the project contemplated by the Tribe "can just as well be developed under state and local law"). As we recognized in *Concerned Citizens*, the issue was one of marginal effect. For example, if the Tribe were to proceed with its plans to develop the land, while leaving it in fee, including construction of a parking lot, the fact that casino patrons might use it as an "adjunct" or "overflow" parking

---

[23] Nothing in Appellants' final briefs suggest that they are asserting these arguments in the alternative, nor do Appellants even acknowledge their earlier position. We note that after their opening brief was filed in 2010, and before the Board lifted the stay in 2013, Appellant organizations changed their legal counsel, which may account for the change in their legal position. However, because Appellants are afforded the final word in briefing an appeal, we would expect to be able to rely on their final brief to most accurately reflect their final position in an appeal.

[24] A court may reject frivolous legal claims that are offered in *support* of standing, but we see no reason to disregard an appellant's legal claims that would undermine its own arguments in support of standing.

to casino parking is not something that could be said to be "caused" by the decision to accept title to the Parcel in trust. Thus, proximity alone carries no necessary implications with respect to the consequences of changing title to the Parcel. Whether viewed in light of Appellants' previous legal position, or their current one, with respect to the applicability of state and local laws, we are not convinced that our earlier analysis of their members' declarations was in error with respect to meeting the injury and causation requirements for standing to assert their NEPA claims.[25]

On the other hand, it is undisputed that if the Parcel is accepted in trust, it will no longer be subject to property taxes. Thus, the economic injuries and causation alleged by Bowen and Hamer (assuming they are not overly speculative) would be traceable to the Decision because, but for taking the Parcel into trust, it will remain subject to property taxes, the exemption from which is the source of the alleged economic injury.

With respect to economic injuries alleged by Bowen and Hamer, the Court seemingly rejected the Department's litigation position that these injuries were "highly speculative," saying that it,

> agree[d] with the [Board's] assumption that Bowen does state a sufficient economic injury. . . . Given the proximity of Bowen's building to the Tribe's proposed building, the fact that they will both be renting to business tenants, and the fact that the Tribe will not be subject to most of the state and local regulatory and tax requirements that Bowen is subject to, the Court finds that Bowen has sufficiently established that he has a concrete interest at stake in this case.

POLO II, 635 F. Supp. 2d at 1087. Thus, while the Board only assumed that Bowen and Hamer arguably met the constitutional elements of standing, the Court's "agreement" appears to go beyond agreement with that proposition as an assumption.

Particularly in light of the Court's statements, and to avoid potentially improperly departing from them, or reading too much into them, we continue to assume that Bowen and Hamer have shown that they satisfy the 3-part *Lujan* test. We nevertheless conclude that Appellants have failed to demonstrate Appellants' standing because at no time have they produced evidence to show that the interests Bowen and Hamer assert are germane to

---

[25] Although the NEPA documents in this case included both BIA's fee-to-trust decision and the Tribe's development proposal in the alternatives, Appellants have not argued in this case that, but for the trust acquisition, the Tribe could not or will not ultimately proceed with its plans.

either Appellant organization, which is an additional element for standing when an organization claims to have standing to sue on behalf of its members. *See supra* note 6.

Bowen is the lessor of commercial property, and allegedly will be injured because the Tribe may lease its commercial space, for less, to businesses that would otherwise lease from Bowen, but who will now benefit by the Tribe passing along to lessees a portion of the benefit of the tax-exempt status of the trust parcel. *See* Bowen Decl. ¶ 3 (citing Roasted Bean Coffeehouse as a current tenant and Coldwell Banker as a recent tenant). Hamer describes himself as a "small business owner," although we do not know the nature of his business. *See* Hamer Decl. ¶ 1. Viewing his declaration favorably to Appellants however, i.e., as showing an additional basis for standing not duplicative of Bowen's, we might assume that Hamer is a lessee, and thus would compete against other local business competitors who will gain a special advantage by renting from the Tribe at a reduced rate.

In 2005, in response to the motion to dismiss the appeal, Appellants identified themselves as citizen groups, collectively numbering about 150, "formed to protect the rural character, water quality and air quality of the Santa Ynez Valley." Response to Motion to Dismiss, Aug. 11, 2005, at 3. In their opening brief in these remand proceedings, Appellants identify POLO as "formed to protect the rural character, natural resources, and water and air quality of the Santa Ynez Valley." Opening Br. at 4. Similarly, POSY is identified as "formed to protect the rural character, water quality and air quality of the Santa Ynez Valley." *Id*. Appellants have not asserted that the protection of the business interests of their members is among the purposes for which their organizations were formed. Appellants have the burden to demonstrate that the interests, identified through their member-declarants, and sought to be protected in this appeal, are germane to them as organizations. In this case, Appellants have failed to offer any evidence to demonstrate that the protection of business interests is germane to either organization.[26]

---

[26] Even if Appellants had identified the protection of local business interests generally as among their purposes, they would have had to explain how the specific interests identified by Bowen and Hamer—protection against other local businesses who are willing to do business with the Tribe—are germane to the organizations' purposes. Both Bowen's and Hamer's injuries appear to be premised on an economic advantage that the Tribe allegedly would offer to induce other local businesses to locate to the Tribe's commercial retail center. Thus, the economic protection sought by Bowen and Hamer is limited to some, but not other, businesses. We note that Bowen is not opposed to tax breaks afforded to local businesses, per se, acknowledging as he does that one of his properties obtains such a benefit. *See* Bowen Decl. ¶ 5. Bowen and Hamer object to a tax benefit to the Tribe, which the Tribe allegedly would then pass along to their competitors or potential customers.

V. Review of Appellants' Challenge to the Decision on the Merits

A. Introduction and Standard of Review

Although we again have concluded that Appellants have not demonstrated that they meet the requirements for standing, we address their merits arguments, in the alternative, in the interest of avoiding further delay, should this case return to court.

In reviewing a BIA trust acquisition decision, which involves the exercise of discretion delegated to BIA, the Board does not substitute its judgment for that of BIA. *Village of Hobart v. Midwest Regional Director*, 57 IBIA 4, 12 (2013); *Shawano County v. Acting Midwest Regional Director*, 53 IBIA 62, 68-69 (2011). But the Board does review BIA discretionary decisions to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of that discretion, including any limitations on its discretion that may be established in regulations. *Village of Hobart*, 57 IBIA at 12. An appellant bears the burden of proving that BIA did not properly exercise its discretion. *Id.*; *South Dakota v. Acting Great Plains Regional Director*, 39 IBIA 283, 291 (2004), *aff'd sub nom. South Dakota v. U.S. Dep't of the Interior*, 401 F. Supp. 2d 1000 (D.S.D. 2005), aff'd, 487 F.3d 548 (8th Cir. 2007).

Similarly, we review a BIA Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) "to determine whether [they are] supported by the record and whether [they] 'articulate[] a rational connection between the facts found and the choice made.'" *Voices for Rural Living v. Acting Pacific Regional Director*, 49 IBIA 222, 240 (2009) (citations omitted). "In general, we will not second-guess BIA's determination of how much discussion to include on each topic in a NEPA document, and how much data is necessary to fully address each issue." *Id.* We evaluate the EA and FONSI to determine if they collectively contain a "reasonably thorough discussion of the significant aspects of the probable environmental consequences" of BIA's action, in this case to accept a conveyance of title to the Parcel from the Tribe, to be held in trust for the Tribe. *Id.* (citation omitted).

In the case of both Part 151 and NEPA compliance, proof that the Regional Director considered the necessary legal prerequisites must appear in the record, but there is no requirement that BIA reach a particular conclusion. *See Shawano County*, 53 IBIA at 68-69. Simple disagreement with or bare assertions concerning BIA's decisions are insufficient to carry an appellant's burden of proof. *Id.* at 69. And the trust acquisition factors need not be "weighed or balanced in a particular way or exhaustively analyzed." *Id.*; *see also County of Sauk, Wisconsin v. Midwest Regional Director*, 45 IBIA 201, 206-07 (2007), *aff'd sub nom. Sauk County v. U.S. Dep't of the Interior*, No. 07-cv-543-bbc, 2008 WL 2225680 (W.D. Wis. May 29, 2008). We must be able to discern from the Regional Director's

decision, or at least from the record, that due consideration was given to timely submitted comments by interested parties. *Village of Hobart*, 57 IBIA at 13.

The Board reviews legal issues *de novo*, as it does the sufficiency of evidence in the record to support a BIA decision. *Roanhorse v. Navajo Regional Director*, 58 IBIA 110, 116 (2013). The scope of the Board's review ordinarily is "limited to those issues that were before the . . . BIA official on review." 43 C.F.R. § 4.318. Thus, the Board ordinarily will decline to consider for the first time on appeal matters that could have been but were not first raised before the Regional Director. *See Kansas v. Acting Southern Plains Regional Director*, 53 IBIA 32, 36 (2011).

B. Appellants' Arguments on the Merits[27]

1. Failure to Consider Potential Gaming Uses of the Parcel

Appellants contend that the Decision should be set aside because the Regional Director failed to consider potential gaming uses of the Parcel, and the applicability of the Indian gaming statute, *see* 25 U.S.C. § 2719.[28] But the record does not support the proposition that the Tribe plans to use the Parcel for gaming, and the Tribe reiterates in this appeal that it "never intended—and does not intend—to use [the Parcel] for gaming." Joint Motion to Strike Portions of Appellants' Reply Brief at 5. Even if gaming on the Parcel might be lawful, BIA is only required to consider a tribe's intended uses of property it seeks to have taken into trust, not all lawful purposes for which a property could be used.[29]

---

[27] Appellants' arguments on the merits include the argument that the Regional Director failed to consider 25 C.F.R. § 151.10(a)—whether the Secretary has authority to accept the Parcel in trust, *e.g.*, under 25 U.S.C. § 465 as interpreted by the Supreme Court in *Carcieri*. As noted earlier, that portion of the Decision was vacated by the Board in 2010 and thus the issue is no longer within the scope of this appeal. Although Appellants acknowledge that the Regional Director made a new and separate decision on that issue in 2012, they fail to acknowledge that the 2012 decision provided new appeal rights (as required by the Board in its remand order) and that the Board dismissed their appeal as untimely. *See No More Slots*, 56 IBIA 233. Appellants' argument that the § 151.10(a) issue has rejoined their appeal from the remaining portions of the Decision is incorrect and the Board will not address it further.

[28] Section 2719 contains provisions governing gaming on lands acquired in trust after October 17, 1988. *See also* 25 U.S.C. § 2703 (definitions of gaming).

[29] We express no opinion, of course, of what uses of the property might be lawful under § 2719 or consistent with the Tribal-State Gaming Compact.

Appellants argue that the parking area constructed for the commercial facility on the Parcel will be used as an "ancillary facility" and "overflow" parking by casino patrons, and that this is a gaming-related use and impact of the trust acquisition that the Decision was required, but failed, to consider. Opening Br. at 14. Appellants have pointed to no evidence in the record to suggest that the Tribe's existing parking garage for its casino is inadequate, or that use of the commercial retail parking facility on the Parcel would be more convenient for casino patrons, and thus this projected use and impact is speculative. But even assuming some casino patrons will use the commercial retail parking facility, Appellants have not shown how such use of the parking facility would differ if the facility were built with the Parcel remaining in fee, *see id*. at 16, rather than if the Parcel is taken into trust. Nor have they shown what impact such use would have on them, or how this alleged use should have been considered by the Regional Director in order to give proper consideration to Appellants' interests. Thus, we are not convinced that this potential use of the Tribe's parking facility is a matter that the Regional Director was required to consider in deciding whether or not to accept title to the property in trust for the Tribe.

Appellants also argue that the Regional Director failed to consider "compliance with" § 2719 in deciding whether to accept the Parcel in trust. *Id*. at 14. But § 2719 applies to gaming on Indian lands, which is not a planned use of the Parcel. Moreover, that provision imposes no obligations or requirements with which to "comply" in taking land in trust. On the contrary, § 2719(c) states that "[n]othing in this section shall affect or diminish the authority and responsibility of the Secretary to take land into trust."

2. Failure to Consider the Parcel as an "Off-Reservation" Acquisition, Noncontiguous to Tribe's Existing Reservation

Appellants argue that the Regional Director erred in treating the Parcel as "contiguous" to the Tribe's existing reservation, thus limiting the factors that BIA considered in deciding whether to accept the Parcel in trust. Appellants contend that the Regional Director should have considered the Parcel as a noncontiguous, "off-reservation" trust acquisition, which would trigger additional requirements. *See* 25 C.F.R. § 151.11. We disagree. The record supports the Regional Director's treatment of the Parcel as contiguous to the Tribe's reservation.[30]

---

[30] The Regional Director suggests that we "already dispensed" with this issue in connection with the Parcel. Regional Director's Answer Br. at 24 (citing *Concerned Citizens*, 42 IBIA at 190 (describing the Parcel as "contiguous" to the Tribe's reservation)). And both the Tribe and the Regional Director argue that the issue "was resolved as part of the [Regional] Solicitor's preliminary title opinion" issued in 2003. Joint Motion to Strike Portions of

(continued…)

When evaluating a tribal request for BIA to accept in trust land that is "located within or contiguous to an Indian reservation," BIA need only consider the "on-reservation" criteria. 25 U.S.C. § 151.10. If land proposed for a trust acquisition is "located outside of and noncontiguous to the tribe's reservation," BIA must consider the on-reservation criteria and satisfy additional requirements. *See* 25 C.F.R. § 151.11; *County of San Diego v. Pacific Regional Director*, 58 IBIA 11, 13 (2013); *Kansas v. Acting Southern Plains Regional Director*, 56 IBIA 220, 221 (2013).

The term "contiguous" is not defined in Part 151, but the Board has held that to be contiguous under Part 151, "at a minimum, the lands must touch." *Jefferson County, County, Oregon, Board of Commissioners v. Northwest Regional Director*, 47 IBIA 187, 206 (2008). Parcels that share a boundary are contiguous. *Id*. at 205-06. In *County of Sauk,* the Board stated that "[t]he fact that a highway easement separates the actual land surfaces of the two parcels does not render them any less contiguous for purposes of section 151.10." 45 IBIA at 213. On the other hand, it is not necessarily permissible for BIA to simply assume that the existence of highways separating two parcels is irrelevant, and that parcels on each side of the highways necessarily are contiguous—i.e. that they necessarily *do* share a common boundary. *See County of San Diego*, 58 IBIA at 27-28 (vacating BIA decision because Regional Director did not properly consider whether the parcel was contiguous to existing tribal trust lands, from which it was separated by several highways, and the record appeared to be incomplete). Instead, the existence of a highway may require a careful analysis of title records.

Appellants first argue that even though the Board has construed the term "contiguous" to include parcels that share a common boundary, notwithstanding the existence of an easement or right-of-way, the term should be defined in relation to "the qualitative nature of the occupation and use" of the land to be acquired in trust. Opening Br. at 15. According to Appellants, even if a parcel is geographically and physically contiguous to reservation land, that contiguity may be defeated where, as Appellants argue is the case here, there is "an economic and cultural divide" between the Tribe's reservation on the south side of State Highway 246, which the Tribe uses for its casino, and the Parcel

---

(…continued)
Appellants' Reply Brief at 18. We disagree. The Regional Solicitor's conclusion is not a determination that is binding on Appellants, nor is it binding on the Board. It may form the basis for BIA's conclusion, but BIA's decision is subject to our review. And a determination of contiguity was not necessary in *Concerned Citizens* to address Appellants' standing; thus, the Board's description cannot be construed as making such a determination on this issue.

on the north side of Highway 246, in an area "occupying" the Town of Santa Ynez, and which the Tribe plans to use for a park and commercial retail space. Opening Br. at 14.[31] We find no basis in the regulatory language to conclude that a qualitative, cultural test, rather than or in addition to a geographical test, was intended by BIA's use of the term "contiguity" in its trust acquisition regulations. Even though the term may have somewhat varying meanings in varying contexts, the common thread is that the definitions are based on geographic and physical proximity. *See Jefferson County*, 47 IBIA at 203-06. Appellants provide no evidence or convincing argument that BIA intended to depart from that approach in promulgating Part 151.

In their reply brief, for the first time, Appellants also argue that the Parcel is not contiguous to the Tribe's existing reservation because the "fee title to the land under Highway 246" is owned by the State of California, and Highway 246 "is owned in fee by the public." Reply Br. at 3 n.2, 24 (citing Cal. Sts. & High. Code § 233 & 546). Appellants also assert in their reply brief that BIA asked for a Solicitor's opinion on the contiguity issue "[b]ut, if there was a response . . . it is not in the record," and that the record does not support the "unsubstantiated" statement in the Decision that the Parcel is contiguous to the Reservation. Reply Br. at 25

Ordinarily, the Board will not consider arguments raised for the first time in a reply brief when they could have been raised in an opening brief. *See Citation Oil and Gas Corp. v. Acting Navajo Regional Director*, 57 IBIA 234, 245 n.13 (2013); *Seminole Tribe of Florida v. Eastern Regional Director*, 53 IBIA 195, 219 (2011). Appellants offer no excuse for not raising this argument in their opening brief, and thus it is properly considered to have been waived.

But even if we were to consider the argument, we would conclude that Appellants' reliance on the state statutes is misplaced. Neither of the provisions cited by Appellants states that land underneath public highways is, as a matter of law, "owned" by the State or the public. Instead, Cal. Sts. & High. Code § 233 states that "[a]ll title acquired" by the public or any state governmental agency to real property, "*or interests therein*" (emphasis added), used for rights of way of any highway, "is vested in the name of the people of the State of California."[32] Section 233 does not, by its terms, determine what type of "interests" are acquired, e.g., fee or a right of way, surface or subsurface. Thus, contrary to

---

[31] Although not material to our resolution of the contiguity issue, the EA states that the Parcel is "adjacent" to the Town of Santa Ynez. EA at 1-1; *see also id*., Figure 2 (project vicinity map).

[32] Section 546 simply describes terminal points for Route 246, but does not address ownership.

Appellants' argument, *see* Reply Br. at 3 n.2, § 233 does not provide that the State owns the "fee title to the land under Highway 246."

Appellants also contend, that the record does not contain any response from the Solicitor's office on the issue of contiguity, and that such a finding is unsupported by the record. The first contention is contradicted by the existence in the record of a memorandum from the Solicitor's Office, dated January 29, 2003, responding to BIA's request. *See* Administrative Record (AR), Pt. 2, Tab 4(B). Admittedly, the response from the Solicitor's Office is both cursory and conclusory, and thus, if this issue had properly been raised in Appellants' opening brief, we could not rely on the memorandum alone to evaluate the argument that the record itself does not support a finding of contiguity. But unlike the record in *County of San Diego*, 58 IBIA at 28, we would find that the evidence in the record in this case is sufficient to support a finding of contiguity as a matter of law.

A copy of an assessor's map in the record shows that a portion of the northwest boundary of the reservation, and a portion of the southwest boundary of the Parcel (part of lot 12 and lot 11, in Block 20, Assessor's parcel no. 143-241-02 (Mansfield/McCrae conveyance to Tribe)) are separated only by State Highway 246. *See* AR Pt. 2, Tab 4(C) (Assessor's Map Bk. 143-Pg. 24); AR Pt. 2, Tab 5(F) (Environment Assessment map showing location of "McRae Parcel" portion of 6.9-acre Parcel); *see also* AR Pt. 1, Tab 3(B) (map showing 6.9-acre Parcel and portion of Tribe's reservation); POLO/POSY Response to Motion to Dismiss and Order of July 11, 2005, Ex. B (map showing 6.9-acre Parcel and Tribe's "Original Trust Land"). The Tribe acquired the western portion of the Parcel in 2000 from Lowell Sherman Mansfield, Jr. and Cathleen Ann McRae. AR Pt. 2, Tab 4(C) (Grant Deed, June 22, 2000). In 1953, the predecessors-in-interest to Mansfield and McRae granted to the State of California portions of Lots 5 to 12, in Block 20, "[e]xcepting and reserving to the grantors herein, their successors and assigns," numerous enumerated subsurface (including oil, gas, and minerals) and other rights. *Id*. (Grant Deed, Dec. 23, 1953, Book 1213, Pages 417-19). The bottom of the 1953 deed states that the grantor understands that the grantee's intention "is to construct and maintain a public highway on the lands hereby conveyed in fee . . . ." *Id*.

The administrative record indicates that the State of California may have acquired and currently owns fee title to the *surface* of the portions of Lots 5 to 12 in Block 20 that Highway 246 occupies, and possibly also owns certain interests to the extent they might be deemed included in the conveyance for highway purposes. But the record does not show, as Appellants suggest, that the State owns fee title to *all* surface *and subsurface* interests on and under Highway 246. On the contrary, the record indicates that the Tribe, as the successor-in-interest to the interests reserved by the grantors in 1953, owns subsurface rights beneath Highway 246. And Appellants concede that a segment of the Parcel borders Highway 246. Appellants' Response to Joint Motion to Strike at 16. We have never

construed the contiguity requirement in Part 151 to require that a common boundary between existing trust land and a parcel subject to a trust acquisition request extend the entire length of either parcel, and we decline to do so now. Part 151 reflects and implements BIA policy for taking land into trust, and the character of the additional off-reservation factors, e.g., the property's "distance from the boundaries of the tribe's reservation," 25 C.F.R. § 151.11(b), supports our conclusion that the existence of any common boundary suffices to create contiguity, within the meaning intended for Part 151.[33] Thus, notwithstanding the existence of a surface right-of-way or surface fee ownership interest, we conclude that the record supports the Regional Director's determination that the Parcel is contiguous to the Tribe's existing reservation, because they share a common boundary or, at a minimum, touch one another, through subsurface interests owned by the Tribe.

3. Failure to Properly Consider § 151.10(b)—Whether the Tribe Needs Additional Land

In their opening brief, Appellants argue that there is no evidence that the Tribe needs to have the land placed in trust. Appellants contend that

> [t]here is no evidence that the project contemplated by the [Tribe] for the property cannot be, and should not be, developed pursuant to the laws and regulations of the State of California and local government. In short, the cultural museum, park and retail commercial space can just as well be developed under state and local law without placing the land in trust.

Opening Br. at 16. Appellants argue that "the reason" that the Tribe wishes to place the Parcel in trust is that the Tribe "intends to use the[] [P]arcel for casino purposes." *Id*. These arguments necessarily presume that if the Parcel is taken into trust, tribal and Federal jurisdiction will largely displace state and local civil jurisdiction.

In their reply brief, Appellants adopt a contrary legal position, arguing that BIA's analysis of the Tribe's need for the Parcel is flawed because BIA considered an advantage of trust status to be that the Tribe's civil regulatory jurisdiction would displace state and local jurisdiction. Reply Br. at 29. Appellants now contend that BIA's acquisition of title to the

---

[33] This case does not raise the issue of whether parcels that touch at a single point are contiguous, within the meaning of Part 151, although we note that Appellants contend that the definition of "contiguous" in 25 C.F.R. § 292.2, which would include such parcels, should be applied to trust acquisitions. *See* Appellants' Response to Joint Motion to Strike at 16.

property in trust for the Tribe will *not* divest the state and local governments of regulatory jurisdiction. According to Appellants, even if the Parcel is taken into trust, the Tribe's proposed development will be subject to state and local laws, thus rendering trust status of no benefit to the Tribe except for the property's tax exemption. Reply Br. at 29; Appellants' Response to Joint Motion to Strike at 19.

In the present case the Regional Director considered the Tribe's need for the land in relation to the absence of suitable existing reservation lands for the planned development, special cultural and archaeological resources on the Parcel, and the advantage that trust status would provide to the Tribe. Even if we were to accept Appellants' current legal position that jurisdiction over the property will not change once it is placed in trust, we would find no abuse of discretion by the Regional Director in considering the Tribe's need.

It was reasonable for the Regional Director to consider the Tribe's need based on a presumption that tribal civil regulatory jurisdiction would displace state and local regulatory jurisdiction over the activities of the Tribe on the Parcel. First, Appellants and their members, in comments to the Regional Director, took that very same position—that trust status would mean that state and local regulatory jurisdiction will be displaced with respect to the Tribe's planned development of the Parcel. We will not hold that the Regional Director abused her discretion by failing to consider a legal theory that was not posited by Appellants until after the Decision issued. Second, the Regional Director's (and Appellants' original) understanding of the jurisdictional implications of trust status was reasonable. We have held that a tribe is presumed to have jurisdiction over its trust properties. *County of San Diego*, 58 IBIA at 29; *Aitkin County, Minnesota v. Acting Midwest Regional Director*, 47 IBIA 99, 106-07 (2008). Conversely, state law presumptively does not apply to tribes and their members on their reservations unless Congress expressly provides otherwise. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207 (1987). The Decision reasonably presumes that the Tribe will assert civil regulatory jurisdiction over the property, and that as a general matter tribal jurisdiction will displace state and local civil jurisdiction over tribal activities on the Parcel. In that context, the Regional Director reasonably considered the Tribe's need for the property and the advantages to the Tribe if the land is held in trust. Whether State or local civil jurisdiction will also apply in any respect, *e.g.*, to a lessee if a portion of the property is leased or held under an agreement with the Tribe, *see* 25 C.F.R. § 1.4, is not a determination that is required for purposes of the Regional Director's consideration of the Tribe's need under § 151.10(b).

In addition, if we consider the issue based on Appellants' former legal position—that trust status will divest the Parcel of state and local regulatory jurisdiction—we would still conclude that the Regional Director's consideration of the Tribe's need was reasonable. First, to the extent that Appellants argue that the Tribe does not need to have the land held in *trust* to pursue its development objectives, the Board has consistently interpreted

§ 151.10(b) to allow, but not to require, BIA to consider whether *trust* status is necessary for a tribe to pursue its objectives. *See Kansas*, 56 IBIA at 225; *Cass County, Minnesota v. Midwest Regional Director*, 42 IBIA 243, 247-48 (2006); *South Dakota*, 39 IBIA at 293.[34]

In the present case, of course, the Regional Director did consider the Tribe's need, as the Tribe defined it, in reference to the Tribe's interest in being able to exercise its sovereignty and jurisdiction over the property, to preserve and protect the Parcel, and to execute its own land use goals and development objectives within the context of tribal, not state and local, regulatory authority. *See* Decision at 8. Whether some of those objectives *could* be achieved if the land stays in fee, the fact remains that the Tribe defined its need in a comprehensive way that included objectives and values associated with the Parcel being held in trust. It is not for Appellants to define the Tribe's need, or lack thereof, for the Parcel. As long as the Regional Director gave consideration to the need articulated by the Tribe in making her decision, she has fulfilled her obligations under § 151.10(b). *See County of Sauk,* 45 IBIA at 209.

4. Failure to Properly Consider § 151.10(f)—Jurisdictional Problems and Land Use Conflicts

In their opening brief, Appellants argued that the Regional Director failed to consider significant jurisdictional problems and conflicts of land use because (1) California common law will not apply and "an unwary public will use the facilities unaware that the laws and regulations normally applicable" will not offer them protection, yet the Regional Director "did not take evidence on this factor" or discuss it in the Decision; and (2) the Decision does not mention or discuss the "conflict" between the Santa Ynez Valley Community Plan, which is part of the County's Master Plan, and the Tribe's "further commercial development," presumably referring to development of the Parcel. Opening Br. at 17.

In their reply brief, Appellants add three more arguments: (3) the Tribe's attempt to assert jurisdiction "could cause major jurisdictional and land use conflicts," thus requiring a detailed comparison by the Regional Director between state and local laws and tribal laws

---

[34] Appellants correctly note that § 151.10(b) refers to consideration of the Tribe's "need for additional land." Opening Br. at 15. Because the Tribe already owns the Parcel, Appellants contend that § 151.10(b) thus "applies . . . to require the Regional Director to determine the need, if any, to take the land into trust status." *Id*. Section 151.10(b) does not require BIA to "determine" a tribe's need, only to consider it, and as noted, we have rejected the argument that § 151.10(b) requires BIA to consider a tribe's need to have the land in trust status.

to ensure that the environment and public are protected; (4) the Regional Director abused her discretion by failing to discuss a 1965 Secretarial order, which Appellants contend makes state laws, not tribal laws, applicable to tribal trust lands in California; and (5) the Regional Director incorrectly "implies" that the Tribe will have "exclusive" jurisdiction over the Parcel—i.e., exclusive of Federal jurisdiction. Reply Br. at 30.

Appellants' first argument is based on a premise that they now reject—that state law will no longer apply. But even if Appellants were to revert to their earlier position, and accept the displacement of state and local regulation as a legal consequence of trust status, we would not find grounds to vacate the Decision. Appellants' first argument seeks to assert the interests of third parties—an unidentified "public" who will use the facilities on the Parcel. Appellants do not claim that any of their members intend to enter or use the Parcel in any respect, whether or not the Parcel is taken in trust. The Board generally does not permit appellants to assert the interests of third parties. *Voices for Rural Living*, 49 IBIA at 247; *Hartman v. Acting Great Plains Regional Director*, 50 IBIA 138, 148 (2009). We see no policy reasons in this case for departing from our precedent for Appellants. The Department affords appeal rights to appellants to give them an opportunity to vindicate their own interests, not to use an appeal to raise a host of arguments which are at best relevant to third parties who have not appealed. Moreover, as the Tribe points out, the allegation that the health and safety of an "unwary public" will be placed at risk on the Parcel presumes, with no support, that the Tribe will afford the public less protection than state and local governments now do.

Appellants' second assertion—that the Santa Ynez Community Plan "conflicts" with the Tribe's planned development of the Parcel was not raised in Appellants' comments on the EA, nor does it appear to be consistent with Appellants' own position that the Tribe "can just as well proceed" with its plans under state and local laws and procedures. *See* Opening Br. at 16; *see also* Letters from Hamer and Herthel to Regional Director, undated ("As proposed, the development plan for the site appears to provide a valid use within the underlying zoning thereby presenting a project with a viable prospect of County approval subject to codes and regulations."), *quoted in POLO I*, 45 IBIA at 109 n. 12. Moreover, Appellants fail to identify what, specifically, in the Tribe's development plans for the Parcel, conflicts with the Community Plan. Appellants allude to the overall purpose of the Master Plan as intended to preserve "the rural character of the community, including agricultural and open space," Opening Br. at 17, but the Parcel is already zoned Highway Commercial and is located 900 feet from the Santa Ynez Airport. *See* EA 3.8, at 3-19. Appellants do not contend that the Community Plan would prohibit development on property currently zoned to allow commercial development. The Regional Director need not consider issues that have not been raised, nor will we find error in a BIA decision based on generalized and unsupported assertions.

Appellants' third, fourth, and fifth arguments were raised for the first time in their reply brief, and were therefore waived. But even if we were to consider them, we would reject them. Appellants' third argument is simply a broad-based contention that the Tribe's assertion of jurisdiction "could cause major jurisdictional and land use conflicts." Reply Br. at 30. Such a bare contention, without more, is insufficient to demonstrate that the Regional Director failed to consider potential jurisdictional and land use conflicts. Appellants' fourth argument misreads the 1965 Secretarial order, which pertains to 25 C.F.R. § 1.4 and the applicability of state law to Indian trust property "leased from or held or used under agreement with" a tribe or individual Indian, which has no apparent applicability to the Decision to accept the Parcel in trust.[35] Appellants' fifth argument—that the Decision "implies" that the Tribe will have jurisdiction that is exclusive of Federal jurisdiction—is without foundation. The Decision's failure to expressly acknowledge that both tribal and Federal laws may apply on trust property—i.e., the Regional Director's failure to state the obvious—cannot reasonably be construed as "implying" that the Regional Director believed that Federal law would not apply.[36]

---

[35] Section 1.4, by its terms, applies to trust or restricted "property leased from or held or used under agreement with" and belonging to a tribe or individual Indian. *See* 30 Fed. Reg. 7520 (June 9, 1965) (purpose of § 1.4 is to enunciate that state and local laws are inapplicable to trust or restricted Indian property "held or used under lease or other agreement;" concern about conflicts between attempts of state and local governments to enforce regulatory laws and the "provisions of leases or other agreements" under which Indian trust or restricted property is used). Apart from § 1.4, to the extent Appellants argue that Federal preemption of state and local laws on property acquired in trust is unconstitutional, we have no authority to review that argument. *Village of Hobart*, 57 IBIA at 12; *Thurston County, Nebraska v. Acting Great Plains Regional Director*, 56 IBIA 62, 66 (2012).

[36] Appellants argue for the first time in their reply brief that one "extremely important federal land use law," not discussed in the Decision, is the "potential impact of applying the federal reserved water rights doctrine to land acquired in trust." Reply Br. at 30. Appellants provide no explanation about how this has any effect on them or their members. Appellants neither claim to hold existing water rights that could somehow be affected by the reservation of a Federal reserved water right in connection with accepting title to the Parcel, nor do they claim that they are in the process of acquiring new water rights that would be junior to the Tribe's if the Parcel is acquired before their own water rights are created. To the extent the Tribe's existing title to the Parcel carries any implications for water rights, it is not clear how Appellants contend that a change of title would affect them.

5. Failure to Comply with NEPA

Appellants' final set of arguments is that the Decision fails to comply with NEPA because (1) the traffic and circulation report is outdated; (2) the Decision failed to consider the impact on traffic of increased foot traffic between the proposed parking lot on the Parcel and the Tribe's casino across Highway 246, implicating safety concerns for pedestrians; (3) the Decision failed to adequately assess air quality impacts of the project; (4) the Decision does not address whether the noise levels from the project will exceed Santa Barbara County regulations; (5) it was not supportable for the EA to conclude that increased noise from traffic and operation of the facility will not have a significant impact on surrounding residences; and (6) the mitigation measures for traffic and circulation "are ineffective and likely counterproductive." Opening Br. at 18-19. In their reply brief, for the first time, Appellants also argue that BIA should have considered the "cumulative impacts" of three trust applications from the Tribe—one for the Parcel, one for a 5.68-acre parcel, and one for a 1400-acre parcel.

The EA considered traffic and circulation, air quality, and noise issues. See FONSI at 2-3; EA Sections 3.3, 4.1.3, and 5.3, pages 3-7 to 3-9, 4-5, and 5-2, and Appendix E (air quality); EA Sections 3.7, 4.1.7, and 5.7, pages 3-15 to 3-18, 4-9, and 5-5, and Appendix C (traffic); EA Sections 3.10, 4.1.10, and 5.10, pages 3-22 to 3-23, 4-15 to 4-17, and 5-5 (noise). And both the Tribe and the Regional Director, in their answer briefs, convincingly respond to Appellants' NEPA arguments. Appellants' bare assertions that the EA's analysis is outdated, or that the EA's consideration of those issues was deficient, or that mitigation measures will be ineffective, are insufficient to meet Appellants' burden of proof to show that the Regional Director violated NEPA. *See Stand Up for California! v. U.S. Department of the Interior*, 919 F. Supp. 2d 51, 79 (D.D.C. 2013) ("cursory, undeveloped argument does not state a colorable claim that an agency violated the NEPA").

Appellants' argument that the Decision should be set aside because it failed to consider the "cumulative impact" of three tribal *applications* to have land taken into trust is raised for the first time in their reply brief, and thus waived.[37] But were we to consider it,

[37] The Tribe and the Regional Director jointly move to strike the portions of Appellants' reply brief that raise arguments for the first time, as well as arguments that the Tribe and Regional Director characterize as false and scandalous. *See* Joint Motion to Strike Portions of Appellants' Reply Brief at 2-5. We agree that Appellants' arguments raised for the first time in the reply brief are waived, although we address them in the alternative because they are at least within the scope of matters that could have been considered in this appeal. We grant the motion to strike Appellants' assertions and arguments attacking the legitimacy of the Tribe, and raised in connection with arguments that are outside the scope of this appeal

(continued…)

we would reject it. First, the Tribe's application for the 5.8-acre parcel apparently post-dates the Decision. *See* Appellants' Amended Statement of Reasons, Dec. 2009, at 2 (Tribe submitted a trust application for 5.8-acre parcel "[s]ince this appeal was originally filed"). And it is not clear that the Tribe has submitted an application for a 1400-acre parcel. Second, a tribe's trust *application*, by itself, is not a reasonably foreseeable action under NEPA, because although it may be proposed by the tribe, it is dependent upon a contingency: BIA's future evaluation and action on the application. *See Voices for Rural Living*, 49 IBIA at 243. Each trust application must be considered and decided on its own merits. And BIA's future evaluation of additional tribal applications to have land accepted into trust will be undertaken in the context of an environmental baseline that includes prior trust acquisitions and related development. Thus, the Regional Director was not required to consider the cumulative "impact" of tribal trust *applications*, because the applications by themselves have no actual or reasonably foreseeable environmental impact.

We conclude that the EA contains "a reasonably thorough discussion of the significant aspects of the probable environmental consequences" of the trust acquisition, *Voices for Rural Living*, 49 IBIA at 240, and thus we reject Appellants' argument that the Regional Director failed to comply with NEPA.[38] In fact, to the extent the *Tribe's* planned development of the Parcel could just as well proceed under state and local laws and regulations, BIA arguably went beyond what was strictly required to comply with NEPA to evaluate the effects of the Federal action of taking title to the Parcel in trust.

Conclusion

For the reasons discussed above, we reaffirm the Board's use of judicial principles of standing in applying the Board's appeal regulations to determine the minimum requirements of administrative standing to appeal to the Board. Upon reexamination and reconsideration of Appellants' standing, in light of the District Court's statements regarding Appellants' members' declarations, and in light of the Supreme Court's decision in *Patchak*,

---

(…continued)
and which pertain to Appellants' unsuccessful attempt to appeal the Regional Director's 2012 Decision.

[38] Although the Court suggested that Bowen's declaration, expressing "general concerns about the aesthetic impact of the proposed development" of the property, might satisfy both constitutional and prudential standing for Appellants' NEPA claims, *see POLO II*, 635 F. Supp. at 1082-83, Appellants raise no arguments that the Regional Director failed to consider the aesthetic impact of the Tribe's planned development of the Parcel. As noted earlier and in *Concerned Citizens*, Appellants' members' other declarations focused largely on existing impact from the Tribe's casino, rather than impacts of development of the Parcel.

we reaffirm our conclusion that Appellants have failed to demonstrate their standing to bring the appeal. In the alternative, if Appellants were to have standing, we would affirm the Decision.

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	//original signed
Steven K. Linscheid	Janet A. Goodwin, Director
Chief Administrative Judge	Office of Hearings and Appeals
	Ex Officio Member