

1 their administrative appeal. They also seek injunctive relief precluding defendants
2 from enforcing a BIA Order dated January 14, 2005, which approved the application,
3 until the IBIA has reviewed the merits of that appeal.

4 Plaintiffs have filed a motion for summary judgment on their First Amended
5 Complaint. Their motion requests the Court to reverse and vacate the IBIA Order
6 and to direct the IBIA to issue an order granting them standing to pursue their
7 administrative appeal.

8 For the reasons stated below, the Court GRANTS-IN-PART and DENIES-IN-
9 PART Plaintiffs' motion for summary judgment. The Court VACATES the IBIA
10 Order and REMANDS this case to the IBIA for consideration of Plaintiffs' standing
11 under the principles set forth in this ruling. Specifically, the IBIA must articulate its
12 reasons (functional, statutory, or otherwise) for its determination of standing, taking
13 into account the distinction between administrative and judicial standing and the
14 regulations governing administrative appeals.

15 16 **II. BACKGROUND**

17 **A. Factual Background**

18 The Tribe is the only federally recognized Chumash Tribe in the United States.
19 Today, it occupies the Santa Ynez Indian Reservation, located in Santa Barbara
20 County. Of the 139 acres of the Reservation, about 100 acres are developed,
21 containing residential housing, the tribal center, a health center, and a casino, while
22 the remaining acreage is unsuitable for development. *Santa Ynez Valley Concerned*
23 *Citizens v. Pac. Reg'l Dir.*, BIA, 42 IBIA 189, 190 (Feb. 3, 2006) ("*Santa Ynez I*").

24 On November 8, 2000, the Tribe submitted an application to the BIA asking
25 it to take into trust 6.9 acres of land contiguous to the Reservation. Trust status for
26 the land would make Indian property on the land immune to taxation by state or local
27 governments unless expressly authorized by Congress. *See Oklahoma Tax Comm'n*
28 *v. Sac and Fox Nation*, 508 U.S. 114, 128 (1993) (holding that states do not have

1 jurisdiction to tax tribal members who live and work in Indian country, whether the
2 particular territory consists of a formal or informal reservation, allotted lands, or
3 dependent Indian communities, absent explicit congressional direction to the
4 contrary).

5 The regulation that implements the Indian Reorganization Act's ("IRA")
6 provisions concerning trust acquisitions, 25 C.F.R. Part 151, provides that the
7 Secretary of the Interior may take land into trust for a tribe "(1) when the property
8 is located within the exterior boundaries of the tribe's reservation or adjacent thereto,
9 or within a tribal consolidation area; or (2) when the tribe already owns an interest
10 in the land; or (3) when the Secretary determines that the acquisition of the land is
11 necessary to facilitate tribal self-determination, economic development, or Indian
12 housing." 25 C.F.R. § 151.3.

13 In its initial application, the Tribe proposed to develop the 6.9 acres as a tribal
14 administration and community center. After the remains of a Chumash burial site and
15 intact Chumash village were discovered on the property, the Tribe revised its trust
16 application. Its revised application proposed (1) a cultural center and museum, (2)
17 a 3.5 acre commemorative park that would focus on the history of the Chumash
18 people and act as a preservation buffer for the archeological site, and (3) a 27,600-
19 square foot, two-story commercial retail building that would help generate revenues
20 for the upkeep of the cultural center, museum and park. *Santa Ynez I* at 190-91, 200.
21 The BIA issued a public notice of the trust application and solicited comments from
22 various local and state government offices. Certified Administrative Record ("AR")
23 4134.

24 As required by the National Environmental Policy Act ("NEPA"), the BIA
25 assessed the environmental impact of taking the land into trust. NEPA requires a
26 federal agency to prepare a detailed Environmental Impact Statement (EIS) for all
27 "major Federal actions significantly affecting the quality of the human environment."
28 42 U.S.C. § 4332(2)(C). Federal regulations permit an agency that is planning a
major federal action to conduct a less exhaustive Environmental Assessment (EA)

1 beforehand, in order to determine whether the proposed action will “significantly
2 affect” the environment so as to require an EIS in the first place. 40 C.F.R. §§
3 1501.4(b), 1508.9. If the EA shows that the proposed action will have no significant
4 impact, “the agency may issue a finding of no significant impact (‘FONSI’) and then
5 execute the action.” *Sierra Club v. Babbitt*, 65 F.3d 1502, 1505 (9th Cir. 1995); *see*
6 *also* 40 C.F.R. §§ 1508.9, 1508.13.

7 The BIA conducted a Phase I Contaminant Survey. *Santa Ynez I*, 42 IBIA at
8 191. The survey noted that the property is adjacent to a fuel service station that is a
9 listed Leaking Underground Storage Tank (“LUST”) site. However, relying on a
10 November 2001 report, the survey noted that soil and groundwater testing indicated
11 that the contamination posed no immediate threat to the Property. Hence, the survey
12 found no hazardous substances on the Property. The Tribe prepared an EA, which
13 the BIA adopted and disseminated for public comment. Based on the EA, on
14 September 22, 2004 the BIA issued a FONSI, finding that the decision to take the
15 land into trust would have no significant impact on the environment and that the
16 preparation of an EIS was unnecessary. *Santa Ynez I*, 42 IBIA at 191. The finding
17 of no significant impact was also circulated for public review.

18 On January 14, 2005, the BIA approved the Tribe’s trust application. In its
19 Notice of Decision, the BIA Pacific Regional Office reviewed in summary fashion
20 the comments it had received on the trust application. AR 4134-4235. Then the BIA
21 decision reviewed the factors set forth in 25 C.F.R. § 151.10 for evaluating a trust
22 application. AR 4135-4139. Specifically, the BIA considered (1) the need of the
23 Tribe for additional land; (2) the purposes for which the land will be used; (3) the
24 impact on the State and its political subdivisions resulting from the removal of the
25 land from the tax rolls; (4) jurisdictional problems and potential conflicts of land use
26 which may arise; (5) whether the BIA is equipped to discharge the additional
27 responsibilities resulting from the acquisition of land in trust status; and (6) whether
28 or not contaminants or hazardous substances may be present on the property. AR

1 4135.

2 The BIA also reviewed the steps it had taken to comply with NEPA, namely
3 the preparation and circulation of the EA and the FONSI. AR 4139. Finally, in the
4 conclusion section of the Notice, the BIA referred to an enclosed list of entities to
5 which it was sending the notice. AR 4140. It stated: "Should any of the below listed
6 known interested parties feel adversely affected by this decision, an appeal may be
7 filed. . .in accordance with the regulations in 43 CFR 4.310-4.340 (copy enclosed)."

8 *Id.*

9 **B. The IBIA Appeal**

10 On February 22, 2005, Plaintiffs POLO and POSY, along with two other
11 organizations that are not parties here¹ filed a "Notice of Appeal" of the BIA's
12 decision.

13 The appeal requested that the IBIA vacate the BIA decision to take the
14 property into trust and remand the matter to the Pacific Regional Director. The
15 appellants included a "Statement of Reasons" that set forth their grounds for appeal,
16 namely: (1) the BIA's decision failed to comply with NEPA because its decision was
17 based on an inadequate Environmental Assessment prepared by the Tribe, and a
18 comprehensive environmental impact statement was required; (2) the BIA failed to
19 consider all facts in its analysis of the factors for on-reservation acquisitions set forth
20 in 25 C.F.R. § 151.10; (3) the BIA failed to address the potential gaming uses of the
21 land and the applicability of 25 U.S.C. § 2719, which the Tribe initially cited as
22 authority for this trust acquisition²; and (4) the BIA's failure to comply with 25
23 C.F.R. Part 151 was arbitrary and capricious. (First Am. Compl., Ex. E.)

24

25 ¹The other administrative appellants were Santa Ynez Valley Concerned
26 Citizens and Women's Environmental Watch of the Santa Ynez Valley.

27 ²25 U.S.C. § 2719 prohibits the use of off-reservation land taken into trust for
28 gaming uses.

1 The Regional Director and the Tribe moved to dismiss the appeal, arguing that
2 the Appellants lacked standing. In opposition to that motion, Plaintiffs relied on the
3 declarations of nine individuals who were members of POLO or POSY: Doug
4 Herthel, Kathryn Cleary, S. Chris Rheinschild, Michelle Griffoul, Michael Byrne,
5 Keith Sarloos, Zoe Carter, Ed Hamer, and Jon Bowen, as well as a supplemental
6 declaration from Doug Herthel. Reply, Exs. 1, 2 (AR 2300-2301, 2597-2602, 2605-
7 2607, 2609-2616).

8 Doug Herthel's supplemental declaration provided information about the
9 declarants' membership in POLO and POSY. Herthel, the president of POLO, stated
10 that Bowen, Rheinschild, Cleary, Griffoul, Saarloos, Hamer, Bryne, and Carter were
11 members of POLO at the time they signed their declarations. Herthel Supp. Decl. ¶¶
12 2, 7. He further stated that Bowen was President of POSY.³ *Id.* ¶ 7.

13 POLO and POSY allege both economic and noneconomic injury-in-fact. As
14 to noneconomic injuries, a number of declarants expressed concern about the
15 negative effects on air quality, traffic and crime following the construction of the
16 Tribe's existing casino. (*See* Cleary, Carter, Bryne, Hamer, Griffoul, Saarloos, and
17 Rheinschild Declarations.) In addition, a number of declarants expressed concern
18 about soil and water quality as a result of existing development on Tribe land. (*See*
19 Herthel, Cleary, Carter, Bryne, Griffoul, Saarloos, and Rheinschild Declarations.)
20 Furthermore, some declarants claimed that their water supply is threatened by MTBE
21 contamination from the LUST site because they live within 3.5 miles, five miles, and
22 in one declarant's case, one mile of the subject property. Byrne Decl. ¶ 1; Griffoul
23 Decl. ¶ 1; Hamer Decl. ¶ 1; Saarloos Decl. ¶ 1 (AR 2605-07, 2614-16). Finally, one
24

25 ³Although Bowen's own declaration does not state his association with POSY,
26 Federal Defendants did not dispute that Plaintiffs have made a sufficient showing that
27 one of the declarants was a *bona fide* member of POSY. Although Plaintiffs did not
28 cite to it here, the IBIA acknowledged in its decision on remand that Bowen had filed
a declaration dated April 18, 2007 attesting that he is the President of POSY. 45 IBIA
116 n. 20.

1 declarant expressed general concerns about the aesthetic impact of the proposed
2 development. Bowen Decl. ¶ 9 (AR 2612).

3 After considering these declarations, on February 8, 2006, the IBIA dismissed
4 Plaintiffs' appeal for lack of standing. The IBIA first noted: "Although the Board is
5 not bound by the case or controversy requirement of Article III of the U.S.
6 Constitution, as a matter of prudence, the Board generally limits its jurisdiction to
7 cases in which the appellant can show standing." *Santa Ynez I*, 42 IBIA at 192
8 (citing *Citizens for Safety and Environment v. Acting Northwest Reg'l Dir.*, 40 IBIA
9 87, 92 (2004)). It then set forth the requirements for Article III standing and
10 prudential standing under federal judicial precedent. *Id.* (citing *Lujan v. Defenders*
11 *of Wildlife*, 504 U.S. 555 (1992)). Applying those standards to the case, the IBIA first
12 eliminated from consideration those declarants who had not identified their
13 membership affiliation with any of the appellant organizations. *Id.* at 193. It then
14 noted that none of the declarants was identified as a member of POSY or Women's
15 Environmental Watch, and that therefore those two organizations had failed to
16 establish their standing.

17 As to the remaining declarants the IBIA concluded that most of the declarants
18 who had identified themselves as members of POLO and Concerned Citizens had not
19 established "injury in fact," because their complaints regarding the impact of the
20 development on the quality of life were too generalized and their complaints of
21 contamination of the water supply from gasoline and MTBE were too conjectural and
22 hypothetical. *Santa Ynez I*, 42 IBIA at 194-95.

23 The IBIA assumed for the purpose of further analysis that certain declarants
24 alleged sufficiently concrete and particularized injuries. *Id.* at 196. The IBIA
25 assumed that Elizabeth Newham, Michael De Witt and Eleanor De Witt⁴ alleged
26 sufficient environmental injuries because Newnham lived three houses away from the

27
28 ⁴They were members of Concerned Citizens, one of the administrative
appellants that did not join in this federal action.

1 Property and the De Witts lived 10 yards away, so they would be affected by the
2 increased traffic, noise, and pollution. *Id.* at 196-97. The IBIA concluded that these
3 declarants did not meet the causation and redressability requirements, however,
4 because the Tribe's development "could almost certainly proceed whether or not the
5 Property is taken into trust." *Id.* at 199. Even if the Tribe's development were
6 subject to state and local regulatory procedures it was mere speculation that a
7 favorable court decision would lead to additional regulatory restrictions that would
8 enable these declarants to avoid injury. *Id.* at 200-01.

9 The IBIA also assumed that Jon Bowen and Michele Hinnrichs, business
10 owners, alleged sufficient economic injury. *Santa Ynez I*, 42 IBIA at 198-99. The
11 IBIA did not address causation and redressability with respect to these two declarants
12 specifically. Instead, the Board found that they lacked prudential standing. Purely
13 economic injuries, the Board noted, are not within the zone of interests of NEPA.
14 Moreover, their economic injuries are not within the zone of interests protected by
15 25 C.F.R. § 151.10, the regulation implementing the trust acquisition provision of the
16 Indian Reorganization Act. *Santa Ynez I*, 42 IBIA at 202. Even considering the
17 relaxed nature of the zone of interests test, the Board stated, the economic interests
18 of non-Indian individuals and private businesses "are unrelated to and inconsistent
19 with the purposes of the regulations at 25 C.F.R. § 151.10 and the statutory provision
20 they implement, 25 U.S.C. § 465." *Id.*

21 After the IBIA dismissed the appeal, POLO and POSY filed this action,
22 seeking review of the IBIA's decision under the Administrative Procedure Act
23 ("APA") and the Declaratory Judgment Act.

24 C. Procedural Background of This Federal Action

25 Shortly after this action was filed, the Court granted the Tribe's motion to
26 intervene in this action. On September 25, 2006, the Federal Defendants sought a
27 voluntary remand back to the IBIA because the BIA had inadvertently omitted
28 documents from the administrative record transmitted to the IBIA. On October 6,

1 2006, the Court remanded this matter to the IBIA for the limited purpose of allowing
2 it to reconsider its decision regarding Plaintiffs' standing in light of the documents
3 that were inadvertently omitted. Those documents consisted primarily of public
4 comment letters concerning the fee-to-trust application and architectural and
5 archeological reports about the proposed development site. The IBIA allowed
6 briefing on the limited issue of whether the additional documents warranted reversal
7 of its decision regarding standing.

8 On July 29, 2007, the IBIA again dismissed Plaintiffs' appeal for lack of
9 standing. In doing so, it declined to consider arguments that were or could have been
10 raised in the earlier proceedings but were not. *Santa Ynez Valley Concerned Citizens*
11 *v. Pacific Reg'l Dir.*, 45 IBIA 98, 99 (Jul. 29, 2007) ("*Santa Ynez II*"). With respect
12 to the public comment letters in the supplemental record, the IBIA rejected
13 Appellants' argument that their members have standing because they represent
14 widespread public opinion. *Id.* at 107. The IBIA also held that nothing in the
15 supplemental record provided a basis to reverse its conclusion that Bowen lacked
16 prudential standing. Finally, the IBIA rejected the notion that Plaintiffs' participation
17 in the BIA's notice-and-comment process affected their legal standing to challenge
18 the BIA's decision, stating:

19 Even if the Regional Director actually solicited and considered the
20 public comment letters contained in the record with respect to the
21 fee-to-trust regulatory factors, it would not follow that private
22 individual interests are within the zone of interests created by the statute
23 or regulations. The Regional Director cannot create legal standing under
24 a statute or regulation where it does not otherwise exist. *See Hall v.*
25 *Great Plains Regional Director*, 43 IBIA 39, 45-46 (2006). It may well
26 be within the discretion of BIA to consider comments from private
27 individuals on the regulatory fee-to-trust factors, but the fact of doing
28 so does not bring those individuals within the legal zone of interests of

1 the statute or regulations. *Cf. id.* (whether or not BIA refers to
2 potentially affected individuals as “interested parties” does not affect
3 whether they in fact have legal standing to challenge a decision.);
4 *Consolidated Edison Co. of New York v. O’Leary*, 131 F.3d 1475, 1481
5 (Fed. Cir. 1997) (agency may permit parties to participate in
6 administrative proceedings without creating a right of judicial review).

7 *Santa Ynez II*, 45 IBIA 98, at 116.

8 Thereafter, Plaintiffs filed a First Amended Complaint (“FAC”) in this action.

9 In this motion, Plaintiffs seek summary judgement from the Court that they do
10 have standing to pursue their administrative appeal. Federal Defendants seek
11 affirmance of the IBIA’s ruling that Plaintiffs lack standing. On May 13, 2008, after
12 their respective papers were filed, the Court ordered supplemental briefing on
13 whether it was improper for the IBIA to assess standing under principles of judicial,
14 as opposed to administrative, standing. In their response to that order, Federal
15 Defendants raised a challenge to this Court’s jurisdiction. The Court now turns to
16 that threshold issue.

17
18 **III. PLAINTIFFS’ STANDING IN FEDERAL COURT**

19 Federal Defendants argue that the Court cannot evaluate the IBIA’s decision
20 concerning Plaintiffs’ administrative standing without first addressing its own Article
21 III jurisdiction to consider Plaintiffs’ judicial challenge. Their position is that
22 Plaintiffs lack judicial standing (for the reasons set forth in Federal Defendants’
23 original opposition brief), and therefore the Court lacks subject matter jurisdiction.
24 This contention betrays a conceptual confusion between this Court’s jurisdiction and
25 Plaintiffs’ standing. The Court certainly does not lack jurisdiction to evaluate
26 whether Plaintiffs have the requisite standing to seek judicial review of the IBIA’s
27 decision. *See* 5 U.S.C. § 704 (“Agency action made reviewable by statute and final
28 agency action for which there is no other adequate remedy in a court are subject to

1 judicial review.”). Thus the Court construes Federal Defendants’ so-called
2 jurisdictional challenge to be a challenge to Plaintiffs’ standing to bring this federal
3 action. As to that issue, Plaintiffs unquestionably do have standing to seek review
4 of the IBIA Order, as the following analysis demonstrates.

5 **A. Principles of Judicial Standing**

6 The standing inquiry focuses on whether a party has a sufficient stake in the
7 outcome of a controversy to obtain judicial resolution of that controversy. *Sierra*
8 *Club v. Morton*, 405 U.S. 727, 731 (1972). The party invoking federal jurisdiction
9 bears the burden of establishing the requirements for standing as to each claim she
10 seeks to press. *See DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006).

11 Standing has two components, constitutional and prudential.⁵ To demonstrate
12 standing under Article III’s case-or-controversy requirement, Plaintiffs must show:
13 (1) they have suffered an injury in fact, which is concrete and particularized and
14 actual or imminent; (2) the injury is “fairly traceable” to the IBIA’s refusal to hear
15 their appeal; and (3) the injury will likely be redressed by a favorable decision from
16 this Court. *Nuclear Info. & Resource Serv. v. Nuclear Regulatory Comm’n*, 457 F.3d
17 941, 949 (9th Cir. 2006); *Lujan*, 504 U.S. at 560-61 (1992). Prudential standing
18 under the APA requires: (1) a final agency action; and (2) an injury falling within the
19 “zone of interests” protected by the statutory provision the plaintiff claims was
20 violated. *Nuclear Info.*, 457 F.3d at 950.

21 To begin with, the precise injury at stake in this action is the IBIA’s very
22 refusal to hear the merits of Plaintiffs’ appeal. *See Bensman v. United States Forest*
23 *Service*, 408 F.3d 945, 950 (7th Cir. 2005) (“[t]he injury that they assert is the
24 [agency’s] refusal to hear those appeals.”). That is not the same as whether on the
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26 ⁵An association has standing to bring a suit on behalf of its members when: (1)
27 its members would otherwise have standing to sue in their own right; (2) the interests
28 it seeks to protect are germane to the organization’s purpose; and (3) neither the claim
asserted nor the relief requested requires participation of the individual members.
Hunt v. Washington State Apple Advertising Com’n, 432 U.S. 333, 343 (1977).

1 merits the IBIA should have reversed the BIA's approval of the Tribe's application.
2 In essence, Plaintiffs claim they have right to participate in the administrative appeals
3 process, as provided by the regulations cited in the BIA's Notice of Decision. In their
4 original briefs, to be sure, the parties relied on principles of judicial standing in
5 analyzing Plaintiffs' standing to seek redress under the NEPA and IRA. However,
6 now Plaintiffs do not seek judicial review of whether the BIA's trust acquisition
7 decision was reached in violation of NEPA and IRA; they simply want to have the
8 IBIA address the merits of their position on those questions. Therefore, any standing
9 inquiry must proceed from the premise that the only injury at stake is to Plaintiffs'
10 claimed procedural right to have the IBIA consider their administrative appeal.

11 **B. Injury In Fact**

12 Plaintiffs have shown that they have suffered a procedural injury in the IBIA's
13 refusal to hear their appeals. However, for Article III purposes, a procedural injury
14 is cognizable only if "the plaintiff also asserts a 'concrete interest' that is threatened
15 by the failure to comply with that requirement." *City of Sausalito v. O'Neill*, 386
16 F.3d 1186, 1197 (9th Cir. 2004).

17 In this case, the declarations submitted by Plaintiffs establish that certain of
18 their members have concrete environmental and economic interests. The evidence
19 indicates that the Tribe's existing development already has contributed to a decline
20 in air, water and soil quality and an increase in traffic and crime. The evidence also
21 shows that the Tribe's proposed development is adjacent to a LUST site that some
22 declarants believe may lead to MBTE contamination of the water supply. Finally, the
23 declarants have shown that they live sufficiently close to the proposed development
24 that they are likely to suffer the environmental consequences that may ensue.
25 Together, this evidence shows that at least some of Plaintiffs' members have a
26 concrete interest that is threatened by the IBIA's failure to address the merits of their
27 appeal. *See Cantrell v. City of Long Beach*, 241 F.3d 674, 679 (9th Cir. 2001)
28 (plaintiffs have a "concrete interest" if there is a "geographic nexus between the

1 individual asserting the claim and the location suffering an environmental impact.”)
2 (internal quotation and citation omitted); *see also Friends of the Earth v. Laidlaw*
3 *Environmental Services*, 528 U.S. 167, 183 (2000) (“environmental plaintiffs
4 adequately allege injury in fact when they aver that they use the affected area and are
5 persons ‘for whom the aesthetic and recreational values of the area will be lessened’
6 by the challenged activity.”) (quoting *Sierra Club v. Morton*, 405 U.S. 727, 735
7 (1972)).

8 Federal Defendants do not dispute that aesthetic, recreational and other quality
9 of life values affected by the physical environment are cognizable injuries-in-fact
10 under Article III or that the declarants who asserted such injuries have the required
11 geographic nexus. *See Friends of the Earth*, 528 U.S. at 183-84 (affidavits of
12 organization’s members demonstrated effects of defendant’s pollution on their
13 recreational, aesthetic and economic interests); *Ecological Rights Foundation v.*
14 *Pacific Lumber Co.*, 230 F.3d 1141, 1149 (9th Cir. 2000) (concluding that injury in
15 fact established where evidence is “sufficient to make credible the contention that the
16 [plaintiff]. . .really has or will suffer in his or her degree of aesthetic or recreational
17 satisfaction. . .if the area in question remains or becomes environmentally degraded).

18 Instead, Federal Defendants contend that the economic injuries claimed by
19 Bowen and Hamer are high speculative. They direct their argument primarily toward
20 Bowen, who provided a lengthy account of the economic impact he believes trust
21 status has on non-tribe businesses - - namely that the Tribe’s plans to offer
22 commercial and retail space using its tax-exempt status will place non-tribe
23 businesses, such as his commercial property rental business, at a competitive
24 disadvantage. Bowen Decl. ¶ 3. In disputing Bowen’s account, the Federal
25 Defendants actually part ways with the IBIA, which acknowledged that Bowen
26 probably did state a sufficiently concrete and imminent economic injury. *Santa Ynez*
27 *I*, 42 IBIA at 198-99.

28 The Court agrees with the IBIA’s assumption that Bowen does state a

1 sufficient economic injury. Bowen owns a three-story building containing 15,000
2 square feet of commercial and retail space. Bowen Decl. ¶ 4. It is located 500 yards
3 from the Tribe's proposed commercial building. *Id.* ¶ 7. The Tribe has proposed a
4 27,600-square foot, two-story commercial retail building. *Santa Ynez I*, 42 IBIA at
5 190-91, 200. According to Bowen's declaration, the Tribe is exempt from property
6 taxes, corporate income taxes, and taxes on construction materials, and it is not
7 subject to other regulatory burdens, such as the requirement that it carry liability
8 insurance. Bowen Decl. ¶ 7. Given the proximity of Bowen's building to the Tribe's
9 proposed building, the fact that they will both be renting to business tenants, and the
10 fact that the Tribe will not be subject to most of the state and local regulatory and tax
11 requirements that Bowen is subject to, the Court finds that Bowen has sufficiently
12 established that he has a concrete interest at stake in this case.

13 C. Causation and Redressability

14 The parties have focused on whether the environmental, aesthetic, and
15 economic impacts of which Plaintiffs' members complain are "fairly traceable" to the
16 BIA's approval of the trust and whether, as the IBIA concluded, these impacts could
17 not be redressed because "the Tribe's development could almost certainly proceed
18 whether or not the Property is taken into trust." 42 IBIA 199. *Lujan*, 504 U.S. 561.

19 Given that the relief Plaintiffs seek in this action is merely the opportunity to
20 present to the IBIA the merits of their challenge to the BIA's decision, causation and
21 redressability are not real issues. At this stage, Plaintiffs need not establish that the
22 BIA would have reached a different conclusion had they been allowed to have the
23 merits of their appeal decided by the IBIA or even that the IBIA would in fact reach
24 a different conclusion regarding their standing. *See Lujan*, 504 U.S. at 572 & n. 7
25 (observing that plaintiffs "seeking to enforce a procedural requirement the disregard
26 of which could impair a separate concrete interest of theirs" can establish standing
27 "without meeting all the normal standards for redressability and immediacy.")
28 Indisputably the injury to Plaintiffs' alleged right to an administrative appeal is fairly

1 traceable to the IBIA Order, and a court decision vacating the IBIA's ruling on
2 standing *could* redress that injury.

3 **D. Prudential Standing**

4 The Administrative Procedure Act provides that "a person ... adversely affected
5 or aggrieved by agency action within the meaning of a relevant statute, is entitled to
6 judicial review thereof." 5 U.S.C. § 702. The Supreme Court has interpreted this
7 provision as imposing a prudential standing requirement that "the interest sought to
8 be protected by the complainant [must be] arguably within the zone of interests to be
9 protected or regulated by the statute . . . in question." *Ass'n of Data Processing Serv.*
10 *Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970). "The zone of interests test is not
11 intended to impose an onerous burden on the plaintiff." *See Clarke v. Sec. Indus.*
12 *Ass'n*, 479 U.S. 388, 399 (1987). "The test is not meant to be especially demanding;
13 in particular, there need be no indication of congressional purpose to benefit the
14 would-be plaintiff." *Id.* at 399–400. But when, as here, the plaintiff is not "the
15 subject of the contested regulatory action, the test denies a right of review if the
16 plaintiff's interests are so marginally related to or inconsistent with the purposes
17 implicit in the statute that it cannot reasonably be assumed that Congress intended to
18 permit the suit." *Id.* at 399.

19 The parties' briefing before this Court focused on whether the IBIA correctly
20 assessed Plaintiffs' prudential standing in light of the zone of interests of the NEPA
21 and IRA. However, the Court need not decide whether Plaintiffs have prudential
22 standing to challenge the BIA's trust acquisition decision under those statutes.
23 Rather, the question is whether Plaintiffs have prudential standing to challenge the
24 IBIA's decision regarding standing in this Court.

25 The Ninth Circuit faced a similar question in *Stock West Corp. v. Lujan*, 982
26 F.2d 1389 (9th Cir. 1993), where it held that plaintiff did have prudential standing to
27 challenge judicially a decision of the IBIA that plaintiff's administrative appeal to the
28 IBIA was untimely and therefore barred. The district court had held that under 25

1 U.S.C. § 81, which requires BIA approval of certain contracts entered into by Indian
2 tribes, plaintiff lacked prudential standing to sue in federal court. The Court of
3 Appeals reversed, noting that the question was not whether plaintiff had prudential
4 standing to challenge the BIA's decisions under 25 U.S.C. § 81, but rather whether
5 the plaintiff had prudential standing to challenge the IBIA's ruling that its
6 administrative appeal was untimely. *Id.* at 1396-97. Thus, the court only needed to
7 consider "whether Stock West has been subject to the agency's rules governing
8 administrative appeals. . .in a manner which permits [it] to challenge these
9 regulations." *Id.* at 1396. The court answered this question in the affirmative:

10 Stock West's interest in obtaining administrative review of the BIA
11 Area Director's decisions is directly affected by the agency action at
12 issue here, *i.e.*, the IBIA's decision that the appeal was untimely. Due
13 to Interior Department rules regarding appeals to the IBIA, and the
14 agency's interpretation and application thereof, Stock West is stymied
15 in its efforts to avoid having its contracts with the Tribe nullified.

16 *Id.* at 1396-97.

17 For purposes of Plaintiffs' standing before this Court, *Stock West* controls the
18 analysis. As in *Stock West*, the issue before this Court is not whether Plaintiffs have
19 prudential standing under the NEPA or IRA, the statutes on which they base their
20 merits claims before the IBIA, but whether they have "an interest directly regulated
21 by the agency action in question." *Id.* at 1397. Here, as in *Stock West*, IBIA applied
22 its rules concerning administrative appeals to Plaintiffs in a way that prevented them
23 from obtaining administrative review of the merits of the BIA's decision. As such,
24 Plaintiffs unquestionably have "an interest directly regulated by the agency action in
25 question." *Id.* at 1397. Therefore, Plaintiffs have prudential standing to challenge
26 the IBIA's refusal to hear the merits of the administrative appeal. Accordingly,
27 POLO and POSY have standing to seek judicial review.

28

1 **IV. REVIEW OF IBIA ORDER**

2 **A. Standard of Review Under the Administrative Procedure Act**

3 Plaintiffs challenge the IBIA's refusal to hear the merits of their appeal as
4 "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
5 law." 5 U.S.C. § 706(2)(A). Known as the "arbitrary and capricious" standard,
6 section 706(2)(A) allows a court to set aside an agency action if

7 the agency has relied on factors which Congress has not intended it to
8 consider, entirely failed to consider an important aspect of the problem,
9 offered an explanation for its decision that runs counter to the evidence
10 before the agency, or is so implausible that it could not be ascribed to
11 a difference in view or the product of agency expertise.

12 *Motor Vehicle Mfrs. Ass'n of U.S. Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S.
13 29, 43 (1983). This inquiry must "be searching and careful," *Marsh v. Oregon*
14 *Natural Res. Council*, 490 U.S. 360, 378 (1989), but "[t]he scope of review under the
15 'arbitrary and capricious' standard is narrow and a court is not to substitute its
16 judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43.
17 Nevertheless, "the agency must examine the relevant data and articulate a satisfactory
18 explanation" for its decision and, "i]n reviewing that explanation, [the court] must
19 consider whether the decision was based on a consideration of the relevant factors
20 and whether there was a clear error in judgment." *Id.* (quotation and citation
21 omitted).⁶

22
23 **B. The IBIA Failed to Account for Its Application of Judicial Standing**
24 **Principles**

25
26 ⁶Plaintiffs incorrectly contend that the Court must review the IBIA Order *de*
27 *novo*. Courts of appeals do review lower courts' analysis of judicial standing *qua*
28 judicial standing using a *de novo* standard, see *Hall v. Norton*, 266 F.3d 969, 975 (9th
Cir. 2001) (citation omitted), but this case involves judicial review of an agency
decision about administrative standing.

1 For the reasons stated below and those set forth in the Court's order dated May
2 13, 2008, the Court holds that the IBIA's dismissal of Plaintiffs' appeal failed to meet
3 the "arbitrary and capricious" standard of review under APA § 706(2)(A).

4 The starting point for the Court's review of the IBIA Order is the language of
5 the statutes and regulations that provide for an administrative hearing, appeal or
6 intervention. Title 43, section 4.331 of the Code of Federal Regulations provides, in
7 relevant part: "Any interested party affected by a final administrative action or
8 decision of an official of the Bureau of Indian Affairs issued under regulations in
9 Title 25 of the Code of Federal Regulations may appeal to the Board of Indian
10 Appeals." An "interested party" is defined as "any person whose interests could be
11 adversely affected by a decision in an appeal." 25 C.F.R. § 2.2. There is no question
12 that these regulations are binding on the BIA and IBIA. As Plaintiff stresses, the
13 BIA even attached a copy of the chapter containing section 4.331 to its Notice of
14 Decision.

15 In their supplemental brief, Federal Defendants urge the Court to defer to the
16 IBIA's ruling on standing. Citing *Envirocare of Utah, Inc. v. Nuclear Regulatory*
17 *Comm'n*, 194 F.3d 71 (D.C. Cir. 1999), Federal Defendants argue that *Chevron*
18 deference is warranted. But *Chevron* applies only to an agency's statutory
19 interpretations. (In *Envirocare*, the Nuclear Regulatory Commission was interpreting
20 the right of appeal contained in a statute.) A different line of cases stemming from
21 *Auer v. Robbins*, 519 U.S. 452 (1997), applies to an agency's interpretation of its own
22 regulations. Although the IBIA did carefully and clearly explain its application of
23 judicial standing, in neither its first or second orders did it construe or even mention
24 its own regulations, 43 C.F.R. § 4.331 and 25 C.F.R. § 2.2.⁷

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27 ⁷In its post-remand order, *Santa Ynez II*, the IBIA wrote that the Regional
28 Director's solicitation of public comment letters "does not create legal standing under
a statute or regulation where it does not otherwise exist." *Santa Ynez II*, 45 IBIA 115.
This was not a reference to standing under the agency's regulations. Rather, it was

1 Even assuming that the IBIA construed its own regulations to import judicial
2 standing principles, such a construction would not necessarily command deference.
3 As set forth in *Auer v. Robbins*, 519 U.S. 452, 463 (1997) and as clarified in
4 *Christensen v. Harris County*, 529 U.S. 576, 588 (2000), although courts will defer
5 to an agency's construction of a regulation that is ambiguous, deference is not
6 required when the agency's interpretation is inconsistent with the plain language of
7 the regulation itself, conflicts with agency intent at the time of promulgation, or
8 exceeds the statute's limits.

9 Under the standards of *Auer* and its progeny, the IBIA's decision to limit
10 standing to only those who can meet the requirements for judicial standing is difficult
11 to square with the plain language of its very broad and permissive regulations on
12 standing. Taken together, 43 C.F.R. § 4.331 and 25 C.F.R. § 2.2 confer appellate
13 standing on anyone "whose interests could be adversely affected by a decision." See
14 *Koniag, Inc., Village of Uyak v. Andrus*, 580 F.2d 601, 614 (D.C. Cir. 1978) ("Such
15 a general and indefinite provision [as 43 C.F.R. § 4.331] suggests no concrete
16 standards for determining who should have standing to appeal."). Examining a
17 similarly worded statute governing the right of intervention in Nuclear Regulatory
18 Commission proceedings, the D.C. Circuit characterized the word "interest" as
19 "scarcely self-defining." *Envirocare of Utah, Inc. v. Nuclear Regulatory Comm'n*,
20 194 F.3d 72, 76 (D.C. Cir. 1999). Citing various judicial opinions about standing,
21 the *Envirocare* court noted that "interest" could mean, "an academic or organizational
22 interest in a problem," "an interest in avoiding economic harm or in gaining an
23 economic benefit from agency directed at others" or an interest in "aesthetic,
24 conservational and recreational values." *Id.* (Internal quotations and citations
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27

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commentary on whether appellants were within the legal zone of interests of the
NEPA and IRA, in the context of Article III prudential standing.

1 omitted).⁸

2 The IBIA's reliance on judicial standing principles also appears inconsistent
3 not only with the plain language of its regulations but with the agency's intent. When
4 the Department of the Interior promulgated the current version of section 4.331 in
5 1989, it *removed* restrictive language from the previous version in order to make
6 section 4.331 consistent with its companion regulation at 25 C.F.R. § 2.2. *See* 54
7 Fed. Reg. 6483-01 (Feb. 10, 1989). The previous language of section 4.331 is telling
8 for what it reveals about the current provision.

9 Prior to 1989, section 4.331 provided a right of appeal to "any interested party
10 affected by a final administrative action or decision. . . protested as a violation of a
11 right or privilege of the appellant." *Hawley Lake Homeowners' Ass'n v. Deputy*
12 *Assistant Sec'y*, 13 IBIA 276, 284 (1985); *see also Redfield v. Acting Deputy*
13 *Assistant Sec'y*, 9 IBIA 174, 176 (1982) (citing 43 C.F.R. § 4.331 (1981), 41 Fed.
14 Reg. 7337 (Jan. 23, 1981)). That formulation was based on a version of 25 C.F.R.
15 § 2.2 that provided that an appeal may be taken from an action or decision of a BIA
16 official "where the action or decision is protested as a violation of a right or privilege
17 of the appellant. Such rights or privileges must be based upon fundamental
18 constitutional law, applicable Federal statutes, treaties, or upon Departmental
19 regulations." *Hawley Lake*, 13 IBIA at 284 (citing 25 § C.F.R. 2.2). The regulations
20 further defined "right" as "a favorable position in a legal relationship, the continued
21 enjoyment of which may not be withdrawn save by a change in fundamental
22 constitutional law" and "privilege" as "a favorable position in a legal relationship, the
23 continued enjoyment of which may be withdrawn only upon a change in law, statute
24 or regulations upon which the relationship is based." *Hawley Lake*, 13 IBIA at 284

25
26 ⁸The court also observed, however, that these judicial opinions do not provide
27 definitive insight into the meaning of "interest" in the statute governing the right of
28 intervention in Nuclear Regulatory Commission proceedings. *See id.* ("But whatever
the judicial mind thinks of today as an 'interest' affected by a proceeding is not
necessarily what Congress meant when it enacted this provision in 1954.")

1 (citing 25 § C.F.R. 2.1(f), (g)).

2 Such restrictive language for standing was very similar to Article III
3 restrictions, according to the IBIA's analysis in *Hawley Lake*. In that decision the
4 IBIA explained the requirement of an adversely affected "legally protected interest"
5 in reference to the Supreme Court's explanation - - in 1939 - - that a legal right is
6 "one of property, one arising out of contract, one protected against tortious invasion,
7 or one founded on a statute which confers a privilege." *Hawley Lake*, 13 IBIA at 284
8 (citing *Tennessee Elec. Power Co. v. TVA*, 306 U.S. 118, 137-38 (1939)). Hence, the
9 IBIA drew upon "the similarity between Article III restrictions and its own
10 authorizing regulations in the context of standing" in order to define standing under
11 previous version of section 4.331. *Estate of Mary Dodge Peshlakai v. Area Dir.*, 15
12 IBIA 24, 33 (1986) (citing *Hawley Lake*).⁹

13 Whereas the previous text of section 4.331 was similar to the Supreme Court's
14 language regarding judicial standing in *Tennessee Elec. Power Co.*, the current text
15 of section 4.331 does not contain a comparable linguistic similarity to the
16 constitutional and prudential standards articulated in *Lujan* and later cases. The
17 current version of section 4.331 no longer contains the "right or privilege" language,
18 leaving only the general requirement that the appellant be an "interested party."
19 Similarly, the current version of 25 C.F.R. § 2.2 also no longer limits standing to
20 those who protest a violation of "rights or privileges. . . based upon fundamental
21 constitutional law, applicable Federal statutes, treaties, or upon Departmental
22

23 ⁹In the decades since the Supreme Court decided *Tennessee Elec. Power Co.*,
24 "[judicial] standing barriers have been substantially lowered." *United States v.*
25 *Richardson*, 418 U.S. 166, 193, 94 S.Ct. 2940, 2954, 41 L.Ed.2d 678 (1974) (Powell,
26 J., concurring); see also *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S.
27 150, 153 (1970) (criticizing the so-called "legal interest test" as overly conducive to
28 blending issues of standing with the merits of the claim). Given that by 1985
Tennessee Elec. Power Co. had been cited disapprovingly, it is difficult to regard
Hawley Lake's citation to *Tennessee Elec. Power Co.* as accurately applying the
judicial standing principles of the day.

1 regulations.” Rather, it affords standing to “any person whose interests could be
2 adversely affected.” In light of this history and the broad language of these
3 regulations, the IBIA’s “interpretation,” which simply imports judicial standing “as
4 a matter of prudence,” *Santa Ynez I*, 42 IBIA 192, does not deserve deference under
5 the *Auer* standard. *Cf. Auer*, 519 U.S. at 461 (upholding the Secretary of Labor’s
6 interpretation of his own regulation because it was not inconsistent with the plain
7 language of the regulation).

8 In an effort to fill the gap left by the IBIA, Federal Defendants point to a
9 number of cases in which the IBIA has stated that it “has a well-established practice
10 of adhering to those jurisdictional constraints as a matter of prudence to further
11 administrative economy.” *LeCompte v. Acting Great Plains Reg’l Dir.*, 45 IBIA 135,
12 146 (2007) (citing *Quantum Entm’t, Ltd. v. Acting Southwest Reg’l Dir.*, 44 IBIA
13 178, 188 n.12 (2007)). Those decisions, like the IBIA’s rulings here, do not even refer
14 to the Department of Interior regulations governing appeals. Courts that have
15 deferred to an agency’s judgment about the need to promote administrative economy
16 -- *i.e.*, conserve resources -- have done so because the agency explained its priority-
17 setting and resource allocation processes. *See, e.g., Intercity Transp. Co. v. U.S.*, 737
18 F.2d 103, 110 (D.C. Cir. 1984) (agency’s refusal to grant declaratory relief was not
19 arbitrary or capricious where it made a judgment that such remedy would be an
20 imprudent and inefficient allocation of agency resources and where it articulated
21 coherently those circumstances where it considers the institution of declaratory order
22 proceedings to be appropriate). Even if an agency’s decision on standing may
23 legitimately be based on the need to conserve agency resources, the IBIA rulings that
24 Federal Defendants cite provide nothing to support their bare assertion about
25 promoting administrative economy.

26 Nonetheless, given the generally applicable deferential standard of review
27 required by section 706(2)(A) of the APA, the Court has independently undertaken
28 an extensive review of the IBIA case law to determine whether the IBIA previously

1 provided an interpretation of 43 C.F.R. § 4.331 or 25 C.F.R. § 2.2 or a functional and
2 pragmatic explanation for its application of standing requirements, one that could
3 apply to this case. The Court was guided by Judge Bazelon's suggestion in *Koniag*
4 that a functional analysis of administrative standing is appropriate, where the
5 governing regulation is as general as 43 C.F.R. § 4.331. "Such an analysis would
6 examine the nature of the asserted interest, the relationship of [the proponent of
7 standing's] interest to the functions of the agency, and whether an award of standing
8 would contribute to the attainment of these functions." *Koniag, Inc., Village of Uyak*
9 *v. Andrus*, 580 F.2d 601, 614-15 (D.C. Cir. 1978). Judge Bazelon outlined five
10 factors that would go into a functional analysis:

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

20 *Koniag*, 580 F.2d at 616.

21 Unfortunately, none of the IBIA decisions the Court has reviewed interprets
22 the regulations or provides any functional explanation. The cases the IBIA cited in
23 the orders at issue here relied on the same language it used in this case: "As a prudent
24 matter, the Board limits its jurisdiction to cases in which an appellant can show
25 standing, even though the Board is not bound by the case or controversy restriction
26 in Article III of the United States Constitution, applicable to federal courts." *Citizens*
27 *for Safety and Environment v. Acting Northwest Reg'l Dir.*, 40 IBIA 87, 92 (2004)
28 (cited at *Santa Ynez I*, 42 IBIA at 192); *Arizona State Land Dep't v. Western Reg'l*

1 *Dir.*, 43 IBIA 158, 163 (2006) (cited in *Santa Ynez II*, 45 IBIA at 1000). The Court
2 has located three additional decisions in which the IBIA does explicitly cite the
3 current (post-1989) version of section 4.331, but they do not provide any
4 interpretation that could apply to this case. Two of those decisions summarily dealt
5 with whether unincorporated groups were “interested parties” under 25 C.F.R. § 2.2.
6 *See Reindeer Herders Ass’n v. Juneau Area Dir.*, 23 IBIA 28, 44 (1992); *Noyo River*
7 *Indian Community v. Acting Sacramento Area Dir.*, 19 IBIA 63, 65 (1990). The third
8 case simply stated in a footnote that a Ph.D. student who had done research on the
9 appellant tribe and who had written a letter to the Board in connection with an appeal
10 was not an “interested party.” *White Earth Band of Chippewa Indians v. Minneapolis*
11 *Area Dir.*, 23 IBIA 216, 227 n. 1 (1993). None of these three cases involved appeals
12 from BIA trust acquisition decisions.¹⁰

13 In the only IBIA case the Court found that discussed the phrase “interested
14 party” in 25 C.F.R. § 2.2, the IBIA merely observed that section 2.2 was broader than
15 25 C.F.R. § 163.33. *See Van Mechelen v. Acting Portland Area Dir.*, 34 IBIA 202,
16 203 n. 2 (2000). Section 163.33 restricted standing to appeal BIA approvals of
17 commercial contracts to “any person whose own direct economic interest is adversely
18 affected by an action or decision.” 25 C.F.R. § 163.33. The IBIA explained that the
19 “regulation drafters. . .intended by this provision to establish a tighter standing
20 requirement than is included in the present version of 25 C.F.R. Part 2, BIA’s general

21
22 ¹⁰The Court located one IBIA decision involving a trust acquisition in which the
23 BIA decision being reviewed specifically referred to the definition of “interested
24 party” in 25 C.F.R. § 2.2, but the IBIA ruling did not mention that regulation or
25 incorporate the BIA’s discussion of that regulation. *See Shawano County Concerned*
26 *Property Taxpayers Ass’n v. Midwest Reg’l Dir.*, 38 IBIA 156, 157 (2002). In
27 reviewing the Regional Director’s decision, the IBIA applied Article III principles of
28 standing before the IBIA to standing before a BIA Regional Director, but did not cite
or discuss the regulation concerning “interested parties.” *See id.* (stating that the
Board relies on *Lujan* in addressing the standing of private individuals and
associations challenging trust acquisition decisions).

1 appeal regulations.” *Van Mechelen*, 34 IBIA at 203 n. 2. Although *Van Mechelen*
2 does not provide a controlling standard for determining who is an “interested party”
3 for purposes of challenging a BIA trust acquisition decision, it does reinforce the
4 proposition that the standard is meant to be relatively broad.

5 Finally, the Court has reviewed *Evitt v. Acting Pacific Reg’l Dir.*, 38 IBIA 77
6 (2002), a trust acquisition decision that the IBIA has cited several times in its case
7 law and that Federal Defendants cite also. In *Evitt*, several individuals who lived in
8 the vicinity of the subject property in Amador County, California appealed a decision
9 of the BIA Regional Director to take the land into trust for a tribe. *Id.* at 77. The
10 IBIA dismissed their appeal based on reasoning similar to that in the IBIA Order in
11 this case. Applying the standard of *Lujan*, the IBIA concluded that the appellants did
12 not have standing because they did not show that tribe could not proceed with its
13 development plans without trust status. *Id.* at 81-82. But once again, the IBIA did
14 not cite the applicable regulations, although it reviewed its own case law in a general
15 manner:

16 In previous Board cases, appellants have been found to lack standing
17 where they failed to show they had suffered a “legal wrong,” *Utah v.*
18 *Acting Phoenix Area Director*, 32 IBIA 169, 176 (1998), or to show that
19 the decision on appeal adversely affected the appellants’ enjoyment of
20 a legally protected interest. *Hawley Lake Homeowners’ Ass’n v. Deputy*
21 *Assistant Secretary- Indian Affairs (Operations)*, 13 IBIA 276, 284
22 (1985); *Redfield v. Acting Deputy Assistant Secretary-Indian Affairs*
23 *(Operations)*, 9 IBIA 174, 175 (1982). In addressing standing, the Board
24 has been guided by the standing analysis employed in the Federal
25 courts, even though the Board is not bound by the case-or-controversy
26 restrictions in Article III of the United States Constitution. [Citations
27 omitted.]

28 *Evitt*, 38 IBIA at 79. Like the other cases reviewed above, *Evitt* does not

1 explain why the IBIA relied on judicial standing. Moreover, *Evitt* cites
2 *Hawley Lake* and *Redfield* without acknowledging that those decisions relied
3 on the pre-1989 regulations and outdated principles of judicial standing. *See*
4 *supra* note 11. Thus, *Evitt* does not persuade the Court that the IBIA was
5 correct in using judicial standing principles to assess Plaintiffs' standing to
6 challenge trust acquisition decisions or even that the IBIA correctly applied
7 judicial standing principles.

8 The IBIA has applied judicial standing principles for many years.
9 Federal Defendants suggest the Court should defer to this longstanding
10 practice. The longstanding practice of an agency, as reflected in agency
11 rulings, interpretations and opinions, "while not controlling upon the courts by
12 reason of their authority, do constitute body of experience and informed
13 judgment to which courts and litigants may properly resort for guidance."
14 *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). However, the weight the
15 Court is to afford the IBIA's longstanding practice depends on "the
16 thoroughness evident in its consideration, the validity of its reasoning, its
17 consistency with earlier and later pronouncements, and all those factors which
18 give it power to persuade, if lacking power to control." *Id.* In this case, the
19 IBIA's case law reflects a longstanding practice of relying on, or at least
20 invoking, judicial standing principles of "legal wrong," constitutional standing
21 and prudential standing, without explaining why it has adopted those Article
22 III restrictions in the face of a markedly looser standard in 43 C.F.R. § 4.331
23 and 25 C.F.R. § 2.2. Therefore, the mere fact that the IBIA has purported to
24 rely on judicial standing principles for many years does not allow the Court to
25 conclude that it articulated a "satisfactory explanation" based on the relevant
26 factors. *Motor Vehicle Mfrs. Ass'n of U.S. Inc. v. State Farm Mut. Auto. Ins.*
27 *Co.*, 463 U.S. 29, 43 (1983).

28 Nor, contrary to Federal Defendants' contention, does *Envirocare* allow,

1 much less require, the Court to approve the IBIA Order. *See Envirocare of*
2 *Utah, Inc. v. Nuclear Regulatory Comm'n*, 194 F.3d 71 (D.C. Cir. 1999)
3 Indeed, that decision indicates that the opposite conclusion is in order. In
4 *Envirocare*, the D.C. Circuit affirmed the Nuclear Regulatory Commission's
5 standard for administrative standing, which was more restrictive than judicial
6 standards. *Envirocare*, 194 F.3d at 78. It did so because the Commission
7 articulated specific reasons based on its own responsibilities and functions and
8 on the purposes of its enabling statute and the statute governing the decision
9 that was being challenged. *See Envirocare*, 194 F.3d at 76-78 (noting the
10 reasons provided by the Nuclear Regulatory Commission support its
11 interpretation of statute to deny standing to competitors asserting economic
12 injury). The D.C. Circuit emphasized that "the Commission made explicit its
13 view that judicial standing doctrines were not controlling in the administrative
14 context and that its duty was to interpret the 'interest[s]' Congress intended to
15 recognize in § 2239(a)(1)(A): 'Our understanding of the [Atomic Energy Act]
16 requires us to insist that a competitor's pecuniary aim of imposing additional
17 regulatory restrictions or burdens on fellow market participants does not fall
18 within those 'interests' that trigger a right to hearing and intervention under [§
19 2239(a)(1)(A)].'" *Id.* at 78 (quoting *International Uranium Corp.*, 48 N.R.C.
20 259, 264 (1998)). If anything, *Envirocare* illustrates that the real question here
21 is whether the IBIA provided a sufficient explanation for its conclusion
22 regarding Plaintiffs' administrative standing, in light of 43 C.F.R. § 4.331 and
23 25 C.F.R. § 2.2. And the answer to that question is "no," because the IBIA
24 ignored those provisions altogether and simply announced that it was using
25 judicial standing principles.

26 The IBIA's action is erroneous under the APA not merely because it
27 applied principles of judicial standing or concluded that Plaintiffs lacked
28 standing; its error was in apparently assuming, without any explanation, that

1 the concepts rooted in constitutional and prudential limitations on federal
2 courts should be applied without regard to the IBIA's regulations. In this
3 regard, then, the IBIA "entirely failed to consider an important aspect of the
4 problem[.]" *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43, given that those
5 regulations invite analysis of the nature of Plaintiffs' asserted interests, the
6 relationship of their interests to the functions of the agency, and whether
7 granting standing would aid the agency's fulfillment of its functions. *See*
8 *Koniag, Inc., Village of Uyak v. Andrus*, 580 F.2d 601, 614-15 (D.C. Cir.
9 1978). Although the IBIA has "broad discretion in formulating both
10 substantive policies and procedural rules," *Koniag*, 580 F.2d at 613, the APA
11 requires that it "examine the relevant data and articulate a satisfactory
12 explanation." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. The IBIA's failure
13 to examine factors that may be relevant under its regulations, such as those just
14 mentioned, and its failure to provide the requisite explanation leave the Court
15 no choice but to vacate its decision and remand the matter for further
16 consideration.

17 Contrary to Federal Defendants' apparent concerns, in remanding this
18 matter to the IBIA, this Court is *not* requiring the IBIA to take a more lenient
19 approach to standing. —Indeed, to do so would contravene established
20 principles of judicial review of administrative action. *See Fla. Power & Light*
21 *Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("The reviewing court is not generally
22 empowered to conduct a *de novo* inquiry into the matter being reviewed and
23 to reach its own conclusions based on such an inquiry."); *Vermont Yankee*
24 *Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S.
25 519, 543-49 (1978) (holding that courts may not impose any procedures on an
26 agency when a statute does not require them). Congress placed the procedural
27 requirements pertaining to administrative proceedings primarily in the hands
28 of the agency, which is uniquely positioned to consider how such standards

1 should be fashioned to best enable it to fulfill its mission and achieve the
2 purposes of the statutes it enforces. That is why the Court is not directing the
3 IBIA to reach a different result, but instead to render a decision on Plaintiffs'
4 standing that specifically accounts for its regulations governing administrative
5 appeal and any other factors that it deems relevant to the determination of
6 standing. *See INS v. Orlando Ventura*, 537 U.S. 12, 16 (2002) ("Generally
7 speaking, a court ... should remand a case to an agency for decision of a matter
8 that statutes place primarily in agency hands.") The IBIA Order, despite its
9 extensive analysis, clearly does not accomplish this. *See Fla. Power & Light*
10 *Co.*, 470 U.S. at 744 ("If the record before the agency does not support the
11 agency action, if the agency has not considered all relevant factors, or if the
12 reviewing court simply cannot evaluate the challenged agency action on the
13 basis of the record before it, the proper course in most cases is to remand to the
14 agency for additional investigation or explanation.")

15 For their part, in their supplemental brief Plaintiffs offer several legal
16 arguments why the Court should not remand to the IBIA for further
17 consideration of standing, but instead rule that they do have standing. The
18 cases they cite do not support the conclusion that remand is inappropriate in
19 this case. More importantly, this Court is not empowered to decide the
20 administrative standing issue *de novo*, regardless whether the IBIA will likely
21 reach the same result. *See Vermont Yankee*, 435 U.S. at 549 (1978) (courts
22 may not impose on an agency any procedural rules which a statute does not
23 require, but instead may only review the rules by the appropriate standard of
24 review); *BizCapital Business & Indus. Dev. Corp. v. Comptroller of the*
25 *Currency of the U.S.*, 467 F.3d 871, 874 (5th Cir. 2006) (that the agency is
26 likely to reach the same result after properly applying its regulations does not
27 render remand a mere formality).

28

1 **V. CONCLUSION**

2 For the foregoing reasons, the Court VACATES the IBIA Order and
3 REMANDS the case to the IBIA for further consideration consistent with this
4 ruling.¹¹

5 No hearing is necessary. Fed.R. Civ. P. 78: L.R. 7-15.

6
7 IT IS SO ORDERED.

8 DATED: July 9, 2008



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A. HOWARD MATZ
United States District Judge

¹¹Docket No. 66.