



INTERIOR BOARD OF INDIAN APPEALS

Santa Ynez Valley Concerned Citizens, Preservation of Los Olivos, Preservation of Santa Ynez, and Women's Environmental Watch of the Santa Ynez Valley v. Pacific Regional Director, Bureau of Indian Affairs

42 IBIA 189 (02/03/2006)

Affirmed after limited reopening:

45 IBIA 98

Judicial review of this case:

Complaint filed, Preservation of Los Olivos and Preservation of Santa Ynez v.

U.S. Department of the Interior, No. CV 06-1502 AHM (CTx)

(C.D. Cal. Mar. 10, 2006)

Remand by District Court to the Board (Oct. 6, 2006)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

SANTA YNEZ VALLEY CONCERNED : Order Dismissing Appeal
CITIZENS, PRESERVATION OF :
LOS OLIVOS, PRESERVATION OF :
SANTA YNEZ, AND WOMEN'S :
ENVIRONMENTAL WATCH OF THE :
SANTA YNEZ VALLEY, :
Appellants, : Docket No. IBIA 05-50-A
v. :
PACIFIC REGIONAL DIRECTOR, :
BUREAU OF INDIAN AFFAIRS, :
Appellee. : February 3, 2006

Santa Ynez Valley Concerned Citizens, Preservation of Los Olivos, Preservation of Santa Ynez, and Women's Environmental Watch of the Santa Ynez Valley (Appellants) seek review of a January 14, 2005 decision of the Pacific Regional Director, Bureau of Indian Affairs (Regional Director; BIA), approving the acceptance by the United States of a 6.9-acre parcel of land, more or less, in Santa Barbara County, California, in trust for the Santa Ynez Band of Chumash Mission Indians of the Santz Ynez Reservation, California (Tribe). The Regional Director has moved to dismiss the appeal for lack of Appellants' standing. For the reasons discussed below, the Board dismisses the appeal for lack of jurisdiction. 1/

1/ On August 26, 2005, the Board received a "Motion of the County of Santa Barbara for Leave to Intervene or, in the Alternative, to File an Amicus Brief." The Board dismisses the motion as untimely for intervention as an appellant because the 30-day time period for filing an appeal is jurisdictional. See 43 C.F.R. § 4.332(a). The Board also dismisses the County's motion to file an amicus brief, which is rendered moot by this decision. See Big Mountain Lodge, Inc. v. Alaska Regional Director, 40 IBIA 281, 284 n.6 (2005).

Background

Federal regulations provide that, when authorized by Congress, the Secretary of the Interior (Secretary) may acquire land for a tribe in trust status: “(1) when the property is located within the exterior boundaries of the tribe’s reservation or adjacent thereto, or within a tribal consolidation area; or (2) when the tribe already owns an interest in the land; or (3) when the Secretary determines that the acquisition of the land is necessary to facilitate tribal self-determination, economic development, or Indian housing.” 25 C.F.R. § 151.3(a).

Where, as here, the land proposed to be taken into trust status is contiguous to the boundaries of a reservation and the decision to take land into trust is within the Secretary’s discretion, the Secretary must consider factors set forth at 25 C.F.R. § 151.10. This includes evaluating the impact on the state and municipalities of removing the land from the tax rolls and jurisdictional problems and potential land use conflicts that may arise. In addition, BIA must comply with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4370f, and with Departmental policy to determine whether hazardous substances are present.

The current reservation of the Tribe, encompassing 138.95 acres, is located in the community of Santa Ynez, southwest of Highway 246 in Santa Barbara County, California. Prior to 2004, the reservation consisted of approximately 126 acres in two separated blocks of land, the Northern Reservation and the Southern Reservation. These two portions of the reservation are now joined by a 12.6-acre parcel that was accepted into trust on February 4, 2004. The approximately 26 acres of the Northern Reservation is primarily residential housing. The Tribe also operates a casino on a portion of the reservation. The majority of lands in the reservation, however, are located in a floodplain and are unsuitable for significant development.

On November 8, 2000, the Tribe filed an application with BIA to take into trust 6.9 acres owned by the Tribe and contiguous to its reservation (the Property). Originally the Tribe intended to develop the Property for an expanded tribal administration and community center. After its purchase, however, the Property was discovered to be a significant archaeological and cultural site harboring the remains of an ancient, intact Chumash village site.

In response to this discovery, the Tribe submitted a revised application on May 6, 2002, which set forth plans for the Property consisting of three components: (1) a cultural center and museum; (2) a 3.5-acre community commemorative park which would focus on the history of the Chumash people and act as a preservation buffer for the village site; and

(3) a 27,600-square-foot commercial retail building that would help generate revenues for the upkeep of the cultural center and park. The Property is currently under the governmental jurisdiction of Santa Barbara County and is zoned “commercial highway.”

BIA conducted a Phase I Contaminant Survey. The survey found no hazardous substances on the Property. It noted that the Property is adjacent to a fuel service station that is a listed Leaking Underground Storage Tank (“LUST”) site. However, the survey noted, based on a November 2001 report, that soil and groundwater testing indicated that the contamination posed no immediate threat to the Property. It also noted that a “Letter of Commitment” for reimbursement by the State Water Resources Control Board for the cost of Union 76 Station LUST Site Cleanup has been provided should the contamination migrate onto the Property.

The Tribe prepared an Environmental Assessment (EA) which was adopted by BIA. Based on this assessment, BIA made a finding that the decision would have no significant impact on the environment and that the preparation of an environmental impact statement was unnecessary. See Notice of Finding of No Significant Impact for the Proposed Santa Ynez Band of Chumash Indians 6.9-Acre Fee-to-Trust Acquisition, Sept. 22, 2004 (FONSI).

On January 14, 2005, the Regional Director issued a decision approving the Tribe’s land-into-trust application. The Regional Director examined the factors set forth at 25 C.F.R. § 151.10 and concluded that taking land into trust would allow the Tribe to be the ultimate authority on the treatment and disposition of the archeological resources on the Property and to execute its own land use and development goals. The Regional Director found that the removal of the Property from the tax rolls would not incur an adverse impact on the financial situation of Santa Barbara County (County) and that taking the land into trust would not result in jurisdictional or land use problems. The Regional Director noted that the Contaminant Survey reflected that there are no hazardous materials or contaminants on the Property, and that BIA had complied with NEPA.

Appellants filed a timely appeal of the Regional Director’s decision. In their Statement of Reasons, Appellants argued that the Regional Director failed to comply with NEPA, failed to properly consider the section 151.10 factors; failed to address potential gaming use of the land; and lacked any rational basis for approving the Tribe’s application.

On May 5, 2005, the Regional Director filed a motion to dismiss the appeal for lack of standing. The Tribe subsequently joined in this motion. Appellants filed answer briefs and the Tribe filed reply briefs.

Discussion

Although the Board is not bound by the case or controversy requirement of Article III of the U.S. Constitution, as a matter of prudence, the Board generally limits its jurisdiction to cases in which the appellant can show standing. See Citizens for Safety and Environment v. Acting Northwest Regional Director, 40 IBIA 87, 92 (2004). The Board relies on the analysis provided in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992), to evaluate standing. Id. The burden is on the appellant to show: (1) an injury to a legally protected interest that is concrete and particularized, as well as actual or imminent, not conjectural or hypothetical; (2) that the injury is causally connected with or fairly traceable to the actions of the appellee and not caused by the independent action of a third party; and (3) that it is likely, as opposed to speculative, that the injury will be redressed by a favorable decision. Lujan, 504 U.S. at 560-61, cited in Citizens for Safety and Environment, 40 IBIA at 93. 2/

To establish prudential standing in federal courts, a party generally must show that “the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute * * * in question.” Assoc. of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970). The zone of interest test, however, is “not meant to be especially demanding.” Clarke v. Sec. Indus. Assoc., 479 U.S. 388, 399 (1987). A party not the subject of agency action is outside the zone of interests only if its interests are “so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.” Id.

Finally where, 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

2/ Preservation of Los Olivos and Preservation of Santa Ynez argue that the requirements of standing set forth in Lujan have been affected significantly by the Supreme Court’s recent decision in City of Sherrill v. Oneida Indian Nation of New York, 125 S. Ct. 1478 (2005). This argument is incorrect. City of Sherrill held that a tribe’s claim to tax exemption for land it had acquired within the boundaries of its historic reservation was barred by laches given the longstanding, non-Indian character of the land, the regulatory authority exercised over the area by state and local governments over the past two centuries, and the tribe’s long delay in seeking judicial relief. City of Sherrill did not involve the Secretary’s acquisition of trust land or any question of standing.

members. See Friends of the Earth, Inc. v. Laidlaw Env'tl. Serv., 528 U.S. 167, 181 (2000); Hunt v. Washington Apple Adver. Comm'n, 432 U.S. 333, 343 (1977); Hawley Lake Homeowners' Ass'n v. Deputy Assistant Secretary - Indian Affairs (Operations), 13 IBIA 276, 285 (1985).

Appellants present their arguments that they have standing in two different briefs: one submitted by Preservation of Los Olivos (POLO) and Preservation of Santa Ynez (POSY) and the other by Santa Ynez Valley Concerned Citizens (Concerned Citizens) and Women's Environmental Watch of the Santa Ynez Valley (WEW). POLO and POSY submitted 11 declarations with their brief. Concerned Citizens and WEW submitted five declarations with their brief, including one of the same declarations submitted with the POLO and POSY brief. 3/

A. Constitutional Standing of Appellant's Members

First we examine whether these declarations establish that members of the Appellant organizations would have standing to sue in their own right. We note, as a threshold matter, that three of the declarants — Steven Pappas, Susan Herthel, and Mary Garvey — are not identified as members of any of the Appellant organizations. Thus any injuries alleged by these declarants cannot provide the basis for Appellants' standing, and the Board will not consider these declarations further. 4/ See Am. Petroleum Inst. v. U.S. Env'tl.

3/ Appellants argue that mere allegations of injury, without evidentiary support, are sufficient to support their claim of standing in the Board's consideration of appellees' motion to dismiss. Appellants rely on the federal court rule holding that each element of standing must be supported in the same way as any other matter on which the plaintiff bears the burden of proof — i.e., with the same manner and degree of evidence. Lujan, 504 U.S. at 561. In federal court, the evidentiary burden differs depending on whether the court is ruling on a motion to dismiss, on a motion for summary judgment, or after an evidentiary hearing or trial. Id. Board proceedings, however, have no such gradations. Appellants must provide evidence to establish each element of standing, and it is possible that factual determinations as to a party's standing could even require an evidentiary hearing to resolve disputed issues of fact. Here, the Board finds it sufficient to rely on the affidavits supplied by Appellants.

4/ None of the declarations submitted by POLO and POSY identify the declarants to be members of those organizations but, after the declarations were submitted to the Board, POLO's President filed an affidavit attesting to the membership of a number of the

(continued...)

Prot. Agency, 216 F.3d 50, 64 (D.C. Cir. 2000) (member’s affidavit insufficient to support organizational standing where it does not show that individual was member of organization at time legal action was filed). We also note that none of the declarants are identified as members of POSY or WEW; thus those organizations have failed to establish their standing before the Board.

The next question is whether any of the 12 valid declarations establish standing for POLO or Concerned Citizens. We begin by considering whether the declarations allege sufficient injury.

For the most part, the declarations do not allege any concrete and actual or imminent injury to the declarant that would result from the Regional Director’s decision. First, most of the declarations focus heavily on complaints that are immaterial to the question of standing. Most of the declarations complain of pre-existing injuries such as traffic and crime allegedly caused by the Tribe’s existing casino. Appellants do not suggest that these harms result from the Regional Director’s decision at issue here and thus they cannot establish a basis for standing. See Evitt v. Acting Pacific Regional Director, 38 IBIA 77, 78 (2002) (alleged injury already in existence cannot result from proposed trust acquisition). In addition, a number of the declarations complain at length about alleged errors and inadequacies in the Regional Director’s decision, which is relevant only to the consideration of the merits of the Regional Director’s decision and not to standing.

Second, many of the declarations allege only generalized injuries without identifying any specific, particularized harm that the declarant will suffer. Some of the declarations state that the development planned by the Tribe on the Property will harm the quality of life in the community by increasing traffic and causing light and noise pollution, without specifying whether or how the declarants, many of whom do not even live in Santa Ynez, will be personally affected by it. These statements set forth only a generalized injury to the community and not a concrete and particularized injury to the declarant.

Likewise, a number of the declarations — including six nearly identical “form” declarations by members of POLO — allege that removing the Property from the tax rolls will affect the cost and availability of services to the community as a whole. They allege impacts from the loss of property and sales tax revenues, including increased cost to the County of providing protective services and infrastructure and increased taxes to other

4/(...continued)

declarants. Thus, the Board will consider the declarations submitted by the individuals that POLO has identified as members.

property owners. Again, these declarations state a generalized injury to the community that cannot establish that the declarants have standing to sue as individuals.

Third, some of the allegations of harm made in the declarations are too speculative as to whether or how the alleged harm is likely to occur. Specifically, the six form declarations submitted by POLO allege that the declarants' water supplies are threatened by the decision to take the Property into trust because the gasoline and MTBE contamination on the adjacent parcel might migrate into the groundwater under the Tribe's Property. The declarants allege that state and local jurisdictions will no longer have jurisdiction to remediate this pollution if the land is taken into trust.

POLO concedes in its brief, however, that the extent of the contamination is unknown, and POLO does not assert that the contamination has migrated onto the Tribe's Property. POLO argues in its brief that these properties are hydrologically connected to the streams that run through and groundwater that underlies the Property, but provides no declaration or evidence to establish such a connection. Further, POLO provides no evidence as to how likely is the migration of the gasoline contaminants onto the Property, what the ultimate likelihood is that such contamination would reach the aquifer and declarants' water supplies, or why it could not be sufficiently remediated pursuant to federal law, which will still apply to the Property.

Thus, the allegations pertaining to effects on water supply are too conjectural and hypothetical to establish the injury necessary for standing. ^{5/} See, e.g., Central and South West Servs., Inc. v. U.S. Env'tl. Prot. Agency, 220 F.3d 683, 700-01 (5th Cir. 2000) (subjective concerns that town's water supply could be contaminated not sufficient to support standing where unsupported by objective evidence); Am. Petroleum Inst., 216 F.3d at 63-66 (no standing for organization whose members could not establish that contamination complained of came from particular storage tanks that formed basis for the challenge).

^{5/} This reasoning also applies to the contention of Michael and Eleanor De Witt that the Tribe may operate a drycleaner on the site, which may not properly handle chemical storage and disposal, and thus may cause contamination of the aquifer on which they rely or the nearby streams that they enjoy. We also note that it is highly speculative whether a dry cleaner would in fact rent retail space from the Tribe; the EA merely explains that the commercial retail facility is intended to provide space for "professional services such as insurance agencies, attorney's offices, or doctor offices as well as retail space for such venues as produce and grocery stores, dry cleaners, barber shops, and florist's shops." EA at 1-4.

Also too conjectural is another set of complaints asserting that, because the Tribe will not be subject to local land use controls if the land is taken into trust, the Tribe will be able to undertake unspecified uncontrolled development — not described in the EA or fee-to-trust application submitted to BIA — that could harm the quality of life in the community. Appellants are correct that, if and when the Property is acquired into trust, the Tribe will not legally be prohibited from altering its development plans. However, the record states that “[t]here are no other plans for the subject property other than what has been proposed.” FONSI at 14.

Neither the declarations, nor Appellants’ brief provide any basis for concluding that the Tribe will undertake different development than what it has proposed, what any such theoretical alternative development might be, or what harms it might cause and to whom. Cf. City of Lincoln City v. U.S. Dep’t of Interior, 229 F. Supp. 2d 1109, 1123-24 (D. Or. 2002) (rejecting concerns that tribe will use trust land for purpose other than as stated because plaintiffs provided no evidentiary basis for determining what other development might be and noting BIA has no authority to impose restrictions in any event).

Because most of the declarants rely solely on the allegations described above, most of them fail to show that they would have standing to sue in their own right. Four declarants, however, allege injuries that we will assume are sufficiently concrete and particularized injuries to meet the first prong of the Lujan standing test.

Elizabeth Newnham, a member of Concerned Citizens, states that she lives three houses away from the Property. Most of the injuries she complains of are due to the existing casino. She does, however, state that the decision to take the Property into trust will exacerbate existing problems by generating additional automobile and foot traffic, which could state a concrete injury to her. Her specific complaint, however, is that her “understanding” is that foot paths will be constructed to connect the Property with the Tribe’s casino, which she maintains “will likely bring casino patrons, and all of the associated noise, crime, and pollution, closer to our neighborhood and our homes.” Newnham Dec. ¶ 7.

Newnham provides no evidence or record citations to support her assertion that the Tribe plans to construct such foot paths, and the Board sees no reference to plans to connect the two facilities in the EA. Thus, it is doubtful that this particular allegation is sufficient to establish an actual or imminent injury to Newnham. Nevertheless, given the proximity of the Property to Newnham’s home and the fact that there certainly will be increased traffic and people in that vicinity as a result of the Tribe’s development, we will

assume that she has established injury sufficient to support her claim to have standing to appeal. 6/

Michael and Eleanor De Witt, members of Concerned Citizens, state in their declaration that they own a residential rental property located 10 yards from the subject Property. They declare that the Tribe's proposed development will cause increased traffic, noise and air pollution, and loss of privacy that will affect those residing in their rental property. De Witt Dec. ¶ 4. They also assert that they "are concerned" that their property will be impacted by the Tribe's ability to deviate from local zoning requirements such as height restrictions and design and architectural standards. Id. ¶ 5. They contend that the Tribe will be able to operate its outdoor amphitheater without regard to noise and light impacts or time restrictions, which the County of Santa Barbara would otherwise regulate. Id. ¶ 6. They state that all of these impacts will undermine their oversight and maintenance of their rental property and their ability to keep the property rented. Id. ¶ 4.

The De Witts' allegations that the development will affect their property due to increased traffic, noise and air pollution, and loss of privacy would, if they resided on that property, clearly state a concrete injury sufficient for the purposes of standing. It is less clear that these impacts would result in economic harm to them by making it more difficult to rent their property; they have provided nothing to support this contention other than their own belief. However, we need not reach that question because we conclude, as discussed below, that the De Witts fail the causation prong of the standing test because the Tribe could undertake development with these same impacts even if the land were not taken into trust. We will assume, therefore, that the De Witts have established injury resulting from the Tribe's development.

The remainder of the De Witts' allegations of injury differ in that they assert that, assuming the Tribe could proceed with its development even if the Property were not taken

6/ Newnham also contends that granting this Property trust status will make it more likely that future applications by the Tribe to have land taken into trust in the vicinity will be granted because a request to take into trust land that is contiguous to a tribe's reservation is subjected to less scrutiny than if the land were not contiguous with the reservation. Newnham Dec. ¶ 8. With no such applications pending at the time the Regional Director made his decision, and no specific future development planned, Newnham does not and cannot allege any specific injuries that could occur from any such future trust acquisition, making this alleged injury too hypothetical to support her claim to standing. Newnham also generally objects that the Tribe will not have to comply with zoning ordinances or noise or light restrictions, which we discuss in the causation portion of this analysis.

into trust, they will be injured by particular aspects of the development that would not occur if the land were not taken into trust because the County would restrict these aspects of the development. These allegations of such “marginal” injuries anticipate the causation problems with the De Witts’ standing allegations, and we will address them below in our discussion of causation.

Two declarants who are business owners allege that the Tribe’s exemption from property tax will harm their specific business interests. Jon Bowen, a member of both POLO and Concerned Citizens, states that he owns two commercial properties located approximately 250 and 500 yards respectively from the subject Property. He alleges that the Tribe will be able to lease its nearby commercial space at a competitive advantage because if the Property is taken into trust the Tribe will have to pay neither property taxes nor certain other business costs such as corporate income taxes, taxes on construction materials, and liability insurance costs. Bowen Dec. ¶¶ 5, 6, 7.

In addition, Michele Hinrichs, a member of Concerned Citizens, states that she owns a commercial property across from the subject Property that she leases for retail use and similarly alleges that she will be unable to compete with the Tribe for tenants. 7/ Hinrichs Dec. ¶ 7.

The Tribe argues that the claims of individual economic injury are speculative because the fact that the Tribe does not pay certain taxes does not mean that it would not charge the going market rate for rental properties. It is true however, that, if the Property is taken into trust, the Tribe would be in a position to exercise a competitive advantage. It is not unreasonable to assume that an economic downturn may occur, and that the Tribe will likely use its competitive advantage at such time.

The Tribe cites to BIA’s FONSI, which states that the Tribe does not expect significant savings from tax exemptions that would affect the rental values of its retail spaces. See Tribe’s Response to Concerned Citizens at 15 (citing FONSI at 7). Bowen, however, attests in his declaration that the approximately \$27,000 he pays in property taxes on his commercial properties “substantially impact[s]” the rates he charges to tenants, and the Tribe provides no affidavits or other evidence to rebut his contention that the savings from the taxes the Tribe would otherwise pay on the Property, which may range between \$43,000 and \$75,000, would have a similar effect.

7/ Hinrich also alleges concern that the County, in an effort to limit traffic impacts, will prohibit the type of businesses in the vicinity of the Property that would allow her to attract renters. This allegation on its face is completely speculative.

Thus, we will assume that these four declarants have established injury sufficiently concrete and imminent to meet this initial requirement of constitutional standing.

Next we examine the “causation” prong of standing, by determining whether the injuries alleged by any of these four declarants are causally connected with or fairly traceable to the actions of the Regional Director and not caused by the independent action of a third party.

We begin with Newnham and the De Witts, whose injuries derive from alleged environmental harms caused by the Tribe’s proposed development. As all parties to the appeal recognize, the Board has held that environmental injuries resulting from a tribe’s planned use of property that is proposed to be taken into trust are not “caused” by the decision to take land into trust if the use already exists on the property or if there is no contention that the development or use could proceed in the same manner if the property were not taken into trust. See Citizens for Safety and Environment, 40 IBIA at 93-94; Evitt, 38 IBIA at 80-82 (2002). Rather, in such cases, the injury is caused by the independent action of a third party, and cannot form the basis for establishing standing.

The record establishes that the Tribe’s development here could almost certainly proceed whether or not the Property is taken into trust. The Property is currently zoned “highway commercial,” which permits uses that serve the highway traveler such as hotels, motels, restaurants, garages, and service stations. See EA at 3-19. It appears that, if the land were not taken into trust, that the Property would need to be rezoned “general commercial” to accommodate the Tribe’s development, but no party suggests that the Tribe’s general development plans would not be allowed.

Indeed, in its comments on the environmental assessment, Concerned Citizens itself stated: “Trust status is entirely unnecessary for the Band’s proposed development of a commemorative park, cultural center and retail facility. The proposed development can easily take place on land that remains within the County’s jurisdiction.” Letter of Oct. 21, 2004 from Charles A. Jackson to Clayton Gregory, at 3. Concerned Citizens does not state otherwise in its brief. BIA noted in its environmental analysis that commenters on the draft EA generally “asserted that the Tribe could pursue its goals in the same manner if the property remained in fee status.” FONSI at 7. BIA agreed, concluding that “development on the subject property in fee status could take place.” Id. The Tribe likewise takes the position that “the Tribe can proceed with its plans whether or not the land is taken into trust.” Tribe’s Response to Concerned Citizens at 13. Thus, injuries alleged generally to occur from the Tribe’s development, such as increased traffic, noise, air pollution, etc., may occur whether or not the Property is taken into trust and are not caused by the Regional Director’s decision.

In contrast to the circumstances in Evitt, however, Appellants here contend that if the Property is taken into trust, the Tribe may develop the Property in a manner that would not be allowed by the County if the Property remained subject to the County's land use restrictions. Specifically, the De Witts state that they are "concerned that there will be impacts from the development that would not otherwise occur if the County retained jurisdiction over the land," because the development will not have to comply with requirements pertaining to building height and building materials, as well as design and architectural standards. They also state that the Tribe will not have to comply with noise or light restrictions imposed by the Valley and thus will be able to operate its outdoor amphitheater without regard to such impacts.

In essence, in an attempt to meet the causation prong of standing, the De Witts allege a "marginal" injury — the difference between the impacts the Tribe's development would cause if it went through state and local review procedures and if it did not. Thus, as part of our causation analysis, we analyze the sufficiency of these marginal claims of injury.

We conclude that the marginal impacts the De Witts claim that the Tribe's development will cause absent state and local review are speculative and do not constitute concrete and actual or imminent injuries under the Lujan standing analysis. First, the record describes the Tribe's plans regarding the height and design of the proposed structures as well as the building materials to be used. The EA describes the museum and cultural center as follows: "Natural indigenous materials such as stone, wood, and stucco would be used in combination with newer building materials like stainless steel woven to symbolize a Chumash basket." EA at 2-4. The EA further explains that the commercial retail facility "would be a blend of architectural features found in the Santa Ynez Valley and the Chumash Casino. Stone, heavy timber, and pastel colored stucco would be the primary building materials. Wherever possible, materials and techniques would be used to promote sustainability and the Tribe's long history of conservation of the land." Id. at 2-7.

Architectural renditions of both facilities are provided in the EA. See id. at Figures 6 & 7. According to the EA, the highest point of the proposed development would be the top floor of the commercial retail facility, which would be 20 to 25 feet above ground level. Id. at 4-18. In comparison, the height restriction is 35 feet under the County's "Retail Commercial" and "Highway Commercial" zoning rules. Finally, BIA's environmental analysis states that "the Tribe will be following construction and design standards which are consistent with the standard uniform codes." FONSI at 14.

The De Witts provide no explanation as to how the Tribe's two-story facility would violate height requirements, whether and how it is inconsistent with design or building material requirements, or why any such deviations would make it more difficult for them to

obtain tenants for their rental property, especially when the Tribe plans to comply with standard uniform codes. The De Witts' complaints thus constitute mere speculation that the Tribe will not implement the plans it has described and that any such alternate plans will not be in compliance with County building requirements. See Northwest Env'tl. Def. Ctr. v. Bonneville Power Admin., 117 F.3d 1520, 1529 (9th Cir. 1997) (no standing to challenge NEPA compliance based on injury resulting from impact that EA determined was insignificant where plaintiff submitted no contrary evidence).

Similarly, the De Witts' contention that the development will result in noise and light impacts that would not be allowed by the County requires, first, speculation that the Tribe would actually undertake development with noise and light impacts greater than those its potential tenants would consider acceptable and, second, speculation that the County would impose restrictions on what the Tribe proposed to do. These alleged injuries impermissibly rely on an "attenuated chain" of "conjecture about the behavior of other parties." Ecological Rights Found. v. Pacific Lumber Co., 230 F.3d 1141, 1152 (9th Cir. 2000).

Newnham also objects that "[a]ny development on trust land does not have to comply with any of the local zoning ordinances, noise and light restrictions, or other regulations." Newnham Dec. at ¶ 9. Newnham does not identify any specific manner in which the Tribe's proposed development would likely exceed land use regulations or what restrictions the County would be likely to impose, and thus her allegations fail in the same manner as those of the De Witts.

Concerned Citizens argues in its brief that the Tribe's development is not described with sufficient specificity so as to determine its consistency with state and local law. Answer Brief at 21. The injuries that Newnham and the De Witts complain of, however, are addressed in BIA's environmental review and Newnham and the De Witts provide nothing but speculation that the impacts will not be as represented and will be unacceptable.

In contrast, the Tribe's property tax exemption — the source of the injury alleged by Bowen and Hinnrichs — would be directly caused by taking the land into trust. Absent trust status, the Property and activities on it will continue to be subject to the same taxes as other non-trust property, and the Tribe will thus be on the same competitive footing as Bowen and Hinnrichs. It is only if the decision to take the Property into trust stands that the Tribe will obtain beneficial tax treatment with respect to the Property. Thus, the harms alleged by these two individuals, which we have assumed satisfy the injury prong, appear to meet both the causation and redressability prongs of standing. We will therefore assume that they meet the constitutional standing requirements of Lujan.

B. Prudential Standing of Appellants' Members

Next, we examine whether Bowen and/or Hinnrichs meet the requirements of prudential standing. Under the principles of prudential standing, “the plaintiff must establish that the injury he complains of * * * falls within the ‘zone of interests’ sought to be protected by the statutory provision whose violation forms the legal basis for his complaint.” Lujan v. Nat. Wildlife Fed’n, 497 U.S. 871, 883 (1990); see also Bennett v. Spear, 520 U.S. 154, 175-76 (1997) (“the meaning of the zone-of-interests test is to be determined not by reference to the overall purpose of the Act in question * * *, but by reference to the particular provision of law upon which the plaintiff relies.”).

Certainly, Concerned Citizens has not established that the concerns represented by Bowen and Hinnrichs are within the zone of interests protected by NEPA, because it is well established that purely economic concerns are not within the zone of interests of that statute. See Ashley Creek Phosphate Co. v. Norton, 420 F.3d 934, 939-40 (9th Cir. 2005); Ranchers Cattlemen Action Legal Fund United Stockgrowers of America v. U.S. Dept. of Agriculture, 415 F.3d 1078, 1103-04 (9th Cir. 2005); Nevada Land Action Ass’n v. U.S. Forest Service, 8 F.3d 713, 716 (9th Cir. 1993).

The other set of legal requirements that Concerned Citizens alleges that the Regional Director violated are the criteria set forth at 25 C.F.R. § 151.10, which must be considered in evaluating a request to take land into trust. The Board concludes that Bowen and Hinnrich’s allegations of individual economic harm resulting from the tax advantages conferred on trust land do not fall within the zone of interests of 25 C.F.R. § 151.10.

It is true that the zone of interests test, as elucidated by the federal courts, is not a stringent test and that a party not the subject of an agency decision is outside the zone of interests only if its interests are “so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit.” Clarke, 479 U.S. at 399; see also Ocean Advocates v. U.S. Army Corps of Eng’rs, 402 F.3d 846, 861 (9th Cir. 2005) (quoting Clarke). The Board concludes, however, that individual economic interests are unrelated to and inconsistent with the purposes of the regulations at 25 C.F.R. § 151.10 and the statutory provision they implement, 25 U.S.C. § 465.

Neither the statute nor the regulations evince concern for the impacts of taking land into trust on private businesses. 25 U.S.C. § 465 provides that the purpose of trust acquisitions is “providing land for Indians,” and expressly provides that such lands “shall be exempt from State and local taxation.” The statute does not require the Secretary, in exercising her discretion to acquire trust lands, to consider the effect of such acquisition on

any other parties. The statute's legislative history similarly focuses solely on the needs and impacts of Indians, identifying goals of "rehabilitating the Indian's economic life" and "developing the initiative destroyed by * * * oppression and paternalism" of prior Indian land policy and indicates that the Secretary must assure continued "beneficial use by the Indian occupant and his heirs." United States v. Roberts, 185 F.3d 1125, 1137 (10th Cir. 1999) (internal quotations and citation omitted). The statute thus evinces concern only for the protection of Indians, and certainly evinces no purpose to protect the economic welfare of non-Indian, private businesses.

The regulations at 25 C.F.R. § 151.10 describe the manner in which the Secretary exercises the discretion delegated to her by Congress. ^{8/} They are intended to enunciate the Department's trust land acquisition policy and to bring uniformity into the application of that policy. 45 Fed. Reg. 62035 (1980). With respect to land contiguous to an Indian reservation, like the Property at issue here, the regulations require the Secretary to consider the need of the Indians for the land, 25 C.F.R. § 151.10(b); the purpose for which the land will be used, id. § 151.10(c); the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls, id. § 151.10(e); jurisdictional problems and potential land use conflicts that may arise, id. § 151.10(f); and whether BIA is equipped to handle any additional responsibilities that the trust acquisition would impose on the agency, id. § 151.10(g).

Concerned Citizens alleges that the Regional Director failed to adequately consider the Tribe's need for additional lands, jurisdictional problems, and potential conflicts of land use, thus allegedly violating subsections 151.10(b) and (f). See Appellants' Statement of Reasons at 4. Neither of these provisions — indeed, none of the section 151.10 criteria — require or in any manner implicate consideration of impacts of the trust acquisition on private businesses.

^{8/} While courts have declared it would be inappropriate to use regulations to expand the zone of interests protected by a statute beyond what Congress intended, they have looked to regulations to define the scope of the zone of interests. See Ashley Creek Phosphate, 420 F.3d at 943 & n. 4; Town of Stratford v. Fed. Aviation Admin., 285 F.3d 84, 89 (D.C. Cir. 2002). Certainly where, as here, the question is whether a party has standing before an administrative adjudicatory body to challenge the agency's compliance with its own regulations, it is proper for the Board not to confine itself to examining the zone of interests protected by the statute underlying those regulations but also to consider the scope of the zone of interests protected by the challenged regulations.

To the contrary, section 151.10 provides for public participation in the Department's review of the section 151.10 criteria only by state and local governments. Upon receiving an application to take land into trust, the Secretary is required to notify the state and local governments having regulatory jurisdiction over the land to be acquired and to provide them a 30-day period to comment on the acquisition's potential impacts on regulatory jurisdiction, real property taxes, and special assessments. The regulations provide no role or mechanism for the consideration of private individual concerns. Thus, while the regulations evince concern for the impacts on other governmental entities of expanding a tribe's sovereign reach over land within their jurisdiction, the regulations make no provision for consideration of the impacts on third-party individuals. We thus conclude that the regulations at section 151.10 are intended not to permit challenges to compliance with those regulations by individuals claiming they will suffer economic harm as a result of a trust acquisition. ^{9/}

Moreover, to allow Bowen and Hinnrichs to challenge the Regional Director's consideration of the section 151.10 factors could yield a perverse result. In determining whether a party falls within the zone of interest of a statute or regulation, the focus is "on those who in practice can be expected to police the interests that the statute [or regulation] protects." Mova Pharm. Corp. v. Shalala, 140 F.3d 1060, 1075 (D.C. Cir. 1998). There is no reason to expect Bowen or Hinnrichs to police the interests protected by the regulatory provisions challenged by Appellants, which pertain to the Tribe's need for the Property and jurisdictional problems and land use conflicts. None of these factors, or any of the factors in section 151.10, require the Regional Director to consider the impacts of which Bowen and Hinnrichs complain — the potential economic impact of the trust acquisition on them.

^{9/} One federal district court has held that individuals claiming environmental injury are within the zone of interests of the regulations at 25 C.F.R. § 151.10 because "the regulations provide for consideration of land use and NEPA requirements." See TOMAC v. Norton, 193 F. Supp. 2d 182, 190 (D.D.C. 2002) (citing 25 C.F.R. §§ 151.10(f), (h)). The TOMAC court is incorrect that the regulations require consideration of NEPA requirements; rather, they merely require the Secretary to consider the extent to which the applicant has provided information that enables the Secretary to comply with NEPA. See 25 C.F.R. § 151(h). Additionally, the Board is doubtful that the requirement in subsection 151.10(f) to consider "[j]urisdictional problems and potential conflicts of land use" was intended to allow for challenges to compliance with the regulations by private individuals who are excluded from the public comment process set forth in the regulations. We need not reach this question here, however, because Bowen and Hinnrichs allege only private economic (not environmental) harm, the consideration of which is clearly not encompassed in the regulations.

Such private interests, therefore, are clearly unrelated to, and apparently inconsistent with, with the provisions of the regulations that Appellants allege were violated. We hold, therefore, that Bowen's and Hinnrichs' alleged economic injuries are not within the zone of interests of 25 C.F.R. § 151.10.

Because Appellants have failed to show that any of their members have standing to bring this appeal in their own right, and because they base their claim to standing on injury to their members and not the Appellant organizations themselves, Appellants have failed to establish that any of them have standing to bring this appeal.

Conclusion

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 for lack of jurisdiction.

I concur:

// original signed
Katherine J. Barton
Acting Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge