



INTERIOR BOARD OF INDIAN APPEALS

Arizona State Land Department; Salt River Project; John Strathmere; and Arizona Department of Water Resources v. Western Regional Director, Bureau of Indian Affairs

43 IBIA 158 (06/29/2006)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ARLINGTON, VA 22203

ARIZONA STATE LAND DEPARTMENT;	:	Order Dismissing Appeals in Part and Affirming Decision in Part
	:	
SALT RIVER PROJECT;	:	
	:	Docket No. IBIA 04-133-A
JOHN STRATHMERE; and	:	04-134-A
	:	04-135-A
ARIZONA DEPARTMENT OF WATER RESOURCES, Appellants,	:	04-136-A (consolidated)
	:	
v.	:	
	:	
WESTERN REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	:	June 29, 2006

In these consolidated appeals, Appellants Arizona State Land Department (ASLD); Salt River Project (SRP); John Strathmere (Strathmere) 1/; and Arizona Department of Water Resources (ADWR), seek review of a June 28, 2004 decision of the Western Regional Director, Bureau of Indian Affairs (Regional Director; BIA), approving the acquisition in trust of 1,168.9 acres of land, composed of 24 tax parcels located in Yavapai County, Arizona, on behalf of the Yavapai-Apache Nation (Nation). For the reasons discussed below, the Interior Board of Indian Appeals (Board) dismisses the appeals of ASLD (04-133-A), SRP (04-134-A), and Strathmere (04-135-A). In ADWR's appeal (04-136-A), we affirm the Regional Director's decision.

1/ When Strathmere filed his appeal with the Board he was joined by Eric and Cheryl Eberhard, Charles and Jaima Peterson, and E. Burke and Rosalee Scagnelli. On May 22, 2006, the Board received notice that the Eberhards, Petersons and Scagnellis were withdrawing their appeals.

Statutory and Regulatory Background

Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465, authorizes the Secretary of the Interior to acquire land for Indians in his discretion. The regulations governing acquisitions of trust land describe BIA's land acquisition policy, in part, as allowing land to be taken into trust "[w]hen the Secretary determines that the acquisition * * * is necessary to facilitate tribal self-determination, economic development, or Indian housing." 25 C.F.R. § 151.3(a)(3). The regulations require that in evaluating requests to acquire land located within or contiguous to an Indian reservation, BIA must consider the criteria set forth in 25 C.F.R. § 151.10(a) - (h). 2/ These criteria are:

- (a) The existence of statutory authority for the acquisition and any limitations contained in such authority;
- (b) The need of the individual Indian or the tribe for additional land;
- (c) The purposes for which the land will be used;
- (d) If the land is to be acquired for an individual Indian, the amount of trust or restricted land already owned by or for that individual and the degree to which he needs assistance in handling his affairs;
- (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls;
- (f) Jurisdictional problems and potential conflicts of land use which may arise; and
- (g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status.
- (h) The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations.

Standard of Review

The standard of review in trust acquisition cases is well established. Decisions of BIA officials whether to take land into trust are discretionary, and the Board does not substitute its judgment in place of BIA's judgment in decisions based upon the exercise of

2/ 25 C.F.R. § 151.11 (Off-reservation acquisitions) governs BIA's analysis for proposed acquisitions that are located outside of and noncontiguous to a tribe's reservation.

BIA's discretion. Cass County v. Midwest Regional Director, 42 IBIA 243, 246 (2006). Instead, the Board reviews discretionary decisions to determine whether BIA gave proper consideration to all legal prerequisites to the exercise of its discretionary authority, including any limitations on its discretion established in regulations. Id. Thus, proof that the Regional Director considered the factors set forth in section 151 must appear in the record, but there is no requirement that BIA reach a particular conclusion with respect to each factor. See Eades v. Muskogee Area Director, 17 IBIA 198, 202 (1989). Moreover, an appellant bears the burden of proving that BIA did not properly exercise its discretion. Cass County, 42 IBIA at 246; Shawano County v. Midwest Regional Director, 40 IBIA 241, 244 (2005); South Dakota v. Acting Great Plains Regional Director, 39 IBIA 283, 291 (2004). Simple disagreement with or bare assertions concerning BIA's decision are insufficient to carry this burden of proof. Cass County, 42 IBIA at 246-47.

In contrast to the Board's limited review of BIA discretionary decisions, the Board has full authority to review any legal issues raised in a trust acquisition case. Id. at 247; Shawano County, 40 IBIA at 245. Appellant, however, bears the burden of proving that BIA's decision was in error or not supported by substantial evidence. Id.

Factual and Procedural Background

The Nation's current reservation consists of 652 acres in five non-contiguous tracts of land, all located in Yavapai County, Arizona. The "Middle Verde Reservation" consists of approximately 460 acres; the "Lower Verde Reservation" consists of 55 acres; the "Camp Verde Reservation" consists of 74.84 acres; the "Rimrock Reservation" consists of 4 acres; and the "Clarkdale Reservation" consists of 58.5 acres. By Tribal Resolution No. 08-2001, adopted on February 8, 2001, and Tribal Resolution No. 16-2001, adopted on March 8, 2001, the Nation requested that BIA take 1,211.16 acres, comprising 25 tax parcels, into trust on its behalf. Eighteen of the parcels are located within the Town of Camp Verde and seven of the parcels are located within the Town of Clarkdale. After being advised by the Field Solicitor that one of the parcels within the Town of Clarkdale was not contiguous to any existing reservation lands, the Nation removed this parcel from its request. The proposed trust acquisition, therefore, is for 24 tax parcels comprising 1,168.9 acres.

On February 20, 2001, the Regional Director received a February 14, 2001 application from the Nation to have the land transferred into trust status on its behalf. As explained in its application materials, many of the Nation's more than 1700 members live in inadequate housing, many on non-tribal lands. A portion of the trust lands will therefore be used to build affordable housing. The remaining trust lands will be used for commercial purposes (shopping center and retail businesses) and agricultural purposes (hay, pecan trees

and other crops) in order to diversify the Nation's economic base, create jobs, and ensure the Nation's financial independence.

The Regional Director found deficiencies in the Nation's application and returned the application to the Superintendent, Truxton Canon Field Office (Superintendent), by memorandum dated February 26, 2001. By letters issued in mid-February and March, 2001, the Superintendent solicited comments on the proposed acquisition from the State of Arizona, Yavapai County, and the Towns of Camp Verde and Clarkdale and the City of Cottonwood. BIA received comments from the ADWR (by letter dated April 11, 2001); Yavapai County (by letter dated April 11, 2001); City of Cottonwood (by letter dated April 5, 2001); Town of Clarkdale (by letter dated April 10, 2001); Town of Camp Verde (by letter dated April 10, 2001); SRP ^{3/} (through counsel by letter dated April 11, 2001); and 14 private citizens. ASLD did not submit comments.

In order to comply with applicable environmental statutes and Departmental requirements, BIA hired a contractor to conduct various analyses. BIA had an environmental assessment (EA) prepared in accordance with the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.* The EA was presented to BIA in April 2001, and on April 12, 2001, the Superintendent issued a Finding of No Significant Impact (FONSI). In the FONSI, the Superintendent concluded that taking the parcels into trust "will not have a significant impact upon the quality of the natural and human environment and, therefore, an Environmental Impact Statement is not required." BIA also had a number of studies conducted in accordance with Departmental requirements to evaluate whether hazardous substances or contaminants were present. In addition, BIA had a biological assessment (BA) prepared in accordance with Section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536(a)(2). The BA found that the proposed acquisition area encompassed designated critical habitat for four listed species and potentially suitable habitat for two listed species, but that the proposed trust acquisition would have "no effect" on these six species. Finally, BIA consulted with the Arizona State Historic Preservation Office (SHPO) under Section 106 of the National Historic Preservation Act, 16 U.S.C. §§ 470 *et seq.* In a letter dated March 30, 2001, the SHPO concurred with BIA's determination that the proposed trust acquisition would have no adverse effect on any historic properties.

^{3/} SRP consists of the Salt River Valley Water Users' Association, a not-for-profit Arizona corporation, and the Salt River Project Agricultural Improvement and Power District. These two entities provide water and electricity to the Phoenix metropolitan area. *See* SRP Opening Brief at 3-4.

By memorandum dated April 13, 2001, the Superintendent submitted the Nation's revised application, including documentation of the above-described environmental analyses and determinations, to the Regional Director. The Regional Director, however, declined to consider the Nation's application at that time, in part because of then-pending litigation in state court brought by the Town of Camp Verde against the Nation related to the Nation's use of several parcels included in the proposed acquisition for a sand and gravel mining operation. ^{4/} The litigation was subsequently resolved through a settlement agreement entered into by the parties in 2003. Following resolution of the litigation, the Regional Director began to process the Nation's trust application.

In December 2003, BIA circulated a draft supplemental EA for review and comment. The final supplemental EA was issued in May 2004, and on May 24, 2004, the Superintendent issued a second FONSI. The FONSI concluded, among other things, that taking the land into trust "will not have a significant effect on the human environment;" "has no potential to affect any historic properties or districts listed in the National Register of Historic Places;" "would not impact threatened or endangered species;" and "would improve the economic and social conditions of the Nation." May 24, 2004 FONSI at 3-4.

On June 28, 2004, the Regional Director issued the decision that is the subject of the present appeal, approving the Nation's trust application. In his decision, the Regional Director considered each of the factors set forth in 25 C.F.R. § 151.10 and concluded that taking the 24 parcels into trust would "promote housing, economic development, and self-sufficiency, and that the acquisition would thus satisfy 25 CFR 151.3(a)" and "be in the best interest of the * * * Nation." Regional Director's Decision at 9, 30. ^{5/} Timely notices of appeal were received by the Board from each of the appellants. In an order issued on August 2, 2004, the Board consolidated the appeals. Each of the appellants, the Nation, and BIA filed briefs.

Discussion

Before the Board can reach the merits of these appeals we must first determine whether the appellants have standing to bring their appeals.

^{4/} The Nation has been operating the mine, Yavapai-Apache Sand and Rock, since 1998.

^{5/} The Regional Director's decision did not consider subsection 151.10(d), which applies only if land is to be acquired in trust for an individual Indian.

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. Santa Ynez Valley Concerned Citizens v. Pacific Regional Director, 42 IBIA 189, 192 (2006) (citing Citizens for Safety and Environment v. Acting Northwest Regional Director, 40 IBIA 87, 92 (2004)). In determining whether an appellant has standing, the Board relies on the analysis provided in Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992). Id. Under Lujan, 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. Santa Ynez, 42 IBIA at 192; Citizens for Safety and Environment, 40 IBIA at 93 (citing Lujan, 504 U.S. at 560-61). If an appellant can establish Constitutional standing under Lujan, it must next establish prudential standing by showing that “the interest sought to be protected * * * is arguably within the zone of interests to be protected or regulated by the statute * * * in question.” Ass’n of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150, 153 (1970).

As explained in more detail below, we conclude that it is unnecessary to determine whether ASLD has standing because even assuming it does, the State failed to present any of ASLD’s arguments or concerns to the Regional Director for consideration, and we therefore decline to consider them. We next conclude that SRP does not have standing because it cannot establish a concrete and particularized injury to a legally protected interest that is sufficient to form a basis for standing. Although we conclude that Strathmere meets the first element of standing with respect to one type of alleged injury, he fails to satisfy the second element of standing because he cannot demonstrate that the alleged injury is caused by or fairly traceable to BIA’s action of approving the Nation’s trust application. With respect to Strathmere’s other alleged injury, we conclude that because the injury is not to a legally protected interest, Strathmere fails to meet the first element of standing. Finally, we conclude that ADWR has standing, but we uphold the Regional Director’s decision on the merits.

We address each of the appellants below.

(1) Arizona State Land Department

ASLD first notes that the Verde River flows through six of the parcels at issue and that, under the “Equal Footing Doctrine,” the State of Arizona may own the riverbed in

these parcels. 6/ ASLD then alleges that the Regional Director’s decision was an abuse of discretion because it failed to consider the State’s potential ownership of the riverbed in deciding whether to approve the trust acquisition. Specifically, ASLD alleges that the Regional Director’s decision does not comply with 25 C.F.R. § 151.10(f), which requires BIA to consider potential jurisdictional problems and conflicts in land use that could arise if BIA takes the lands at issue into trust. ASLD contends that if the State owns the riverbed, the trust acquisition “would be tantamount to exercise of the power of eminent domain” and would “significantly intrude on the State’s sovereignty.” ASLD Opening Brief at 9-10. 7/ Further, ASLD claims that “once the Parcels are taken into trust * * * the State of Arizona will no longer have a forum in which to quiet title to its sovereign land,” id. at 11, which “could lead to a direct and significant conflict over the right to use and manage the bedlands,” id. 8/ Thus, ASLD argues that unless and until it is determined that the State of Arizona does not own the riverbed underlying the six parcels through which the Verde River flows, BIA should not be permitted to take the lands into trust.

6/ Under the “Equal Footing Doctrine,” states admitted to the Union after the original thirteen colonies acquired title to the beds and banks of navigable rivers within their borders, if title was not previously reserved. See Alaska v. United States, 545 U.S. 75, 91 (2005). The presumption of state title to lands beneath navigable waters was “confirmed” and “established” by the Submerged Lands Act, 43 U.S.C. § 1311(a). Id.

7/ We note that even if BIA takes the parcels into trust prior to a final determination about the State’s ownership of the riverbed, the United States would acquire title no greater than what the Nation currently owns in fee. Therefore, if it is determined that the State, and not the Nation, owns the riverbed, the United States could not acquire (or purport to acquire) the riverbed through the trust acquisition.

8/ The Quiet Title Act provides:

The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. This section does not apply to trust or restricted Indian lands.

28 U.S.C. § 2409a(a) (emphasis added). The United States Supreme Court has confirmed that the statute does not waive the government’s immunity when the lands at issue are trust or restricted Indian lands. See Big Lagoon Park Co., Inc. v. Acting Sacramento Area Director, 32 IBIA 309, 313-14 (1998) (citing Block v. North Dakota, 461 U.S. 273, 283 (1983) and United States v. Mottaz, 476 U.S. 834, 843 (1986)).

In response, BIA notes that ASLD “first raised the issue on appeal, and the Appellee first became aware of ASLD’s concerns as they were presented in the form of its Opening Brief.” Appellee Combined Response Brief at 6. BIA states that the Regional Director was therefore unaware of ASLD’s concerns. Similarly, the Nation points out that ASLD did not participate in the comment process for the proposed trust acquisition and raises the issue of a potential conflict in the ownership of the Verde River riverbed for the first time on appeal. Thus, the Nation states that ASLD provided no opportunity for either the Nation or BIA to respond to its concerns.

We agree that ASLD’s failure to provide any comments on the proposed trust acquisition means that neither BIA nor the Nation was aware of ASLD’s concerns about potential land use conflicts with respect to the riverbed. ASLD had the opportunity to comment on the proposed trust acquisition, but did not do so. ^{9/} BIA’s decision to take the parcels into trust is a discretionary decision; BIA’s duty is to consider the section 151.10 factors, but BIA is not obligated to do so in any particular way or reach any particular conclusion. ASLD cannot reasonably expect BIA, in its trust acquisition decision, to address a concern that it did not know about. As a general rule, the Board will not consider issues raised for the first time on appeal, and we see no reason to depart from that rule here. See South Dakota v. Acting Great Plains Regional Director, 39 IBIA 301, 305 (2004); County of Mille Lacs v. Midwest Regional Director, 37 IBIA 169, 174 (2002). Accordingly, the Board declines to consider ASLD’s claims.

^{9/} ASLD claims that it did not raise its concerns earlier because it “did not receive notice of the Director’s proposed action until the June 28, 2004 decision was issued.” ASLD Reply Brief at 3, 4. Under the trust acquisition regulations, upon receipt of a written request for a trust acquisition, BIA is required to provide notice to the state and local governments having regulatory jurisdiction over the lands to be acquired. 25 C.F.R. § 151.10. Here, BIA provided individual notice of its proposed decision to the State, County, and Towns of Camp Verde and Clarkdale and the City of Cottonwood, consistent with section 151.10. In addition, the Nation held public hearings on the proposed trust acquisition, and the supplemental EA indicates that ASLD was consulted during preparation of the NEPA analysis, and that it received notice and a copy of the EA. See 2004 Supp. EA at 38.

(2) Salt River Project

SRP raises numerous legal issues in its appeal. 10/ The legally protected interests that SRP alleges will be injured by the Regional Director's decision to confer trust status upon the 24 parcels are its interests in protecting its water rights and the riparian habitat that it owns near the proposed trust lands. SRP argues that because it is a public entity, it automatically has standing to protect its "proprietary interests in natural resources." SRP Reply Brief at 15 (citing Fireman's Fund Ins. Co. v. City of Lodi, 302 F.3d 928, 944 (9th Cir. 2002) and City of Sausalito v. O'Neill, 386 F.3d 1186, 1198-99 (9th Cir. 2004)). We assume, without deciding, that SRP has such "proprietary interests" in its water rights and riparian lands. We conclude, however, that any alleged injury to these interests resulting from BIA's trust acquisition decision is far too speculative to provide a sufficient basis for establishing standing. 11/

SRP asserts that it will suffer injuries from BIA's approval of the proposed trust acquisition because there is insufficient water for the Nation's development plans for the

10/ SRP alleges that the Regional Director's decision violated subsections 151.10(b), (c), (f), and (g) of the trust acquisition regulations; failed to recognize that the parcels are noncontiguous to the Nation's existing reservation and thus failed to properly analyze the proposed trust acquisition under 25 C.F.R. § 151.11; violated numerous requirements of NEPA; and violated the ESA's consultation requirements. SRP also makes two statutory arguments, alleging that 25 U.S.C. § 465 is an unconstitutional delegation of authority to the Secretary, and that 25 U.S.C. § 211 prohibits the creation of new Indian reservations in Arizona, except by act of Congress. Finally, SRP argues that the Regional Director's decision violated the Enclave Clause of the United States Constitution. Because we dismiss SRP's appeal based on Article III constitutional standing, we need not address whether SRP would have prudential standing under the zone-of-interest test with respect to any of these claims.

11/ We note that SRP's first argument with respect to standing is that the Article III requirements for standing are inapplicable to this case because it is an administrative proceeding, outside the federal courts. As discussed above, it is well established that, as a matter of prudence, the Board generally limits its jurisdiction to cases where an appellant can show standing, even though the Board is not bound by the case or controversy restriction imposed on federal courts by Article III of the United States Constitution. See Citizens for Safety and Environment, 40 IBIA at 92; Evitt v. Acting Pacific Regional Director, 38 IBIA 77, 79 (2002). We therefore reject SRP's argument.

24 parcels. SRP explains that the Verde River and its tributaries are already over-appropriated — i.e., there is insufficient water to meet even current needs — and that the Nation’s plans for the lands to be taken into trust will require “a substantial quantity of water.” SRP Opening Brief at 9. SRP then alleges that its interests will be injured because “[a]ny water the Nation uses * * * likely will be water that the Nation is taking directly from existing water users such as SRP, local communities and farmers, and other tribes downstream.” *Id.* at 19. SRP also alleges that its interests in its riparian land will be injured because “the Nation’s water use could have significant impacts on the continuing viability of this habitat for the flycatcher.” SRP Reply Brief at 25.

SRP devotes a considerable number of pages in its briefs to explaining why it believes there is insufficient water available to the Nation to support its plans to develop the parcels. The injuries to water rights and riparian habitat alleged by SRP are based solely on SRP’s assumptions about the availability of water and about the assumed nature of the Nation’s future attempts to obtain water. SRP contends that because water in the Verde River system is so limited, the Nation would necessarily and improperly usurp or interfere with SRP’s existing water rights in order to obtain the water necessary for its development plans. 12/

For example, SRP asserts that any federal reserved water rights created by the trust acquisition would be junior in priority compared to existing water rights, and therefore the Nation “could not pump subflow without impinging on the rights of others.” SRP Opening Brief at 16. SRP then concludes that in order to develop the parcels, the Nation would have to “tak[e] water directly from existing water users such as SRP,” *id.* at 19, and that the Nation’s actions would generate water use conflicts and result in “injuries to other water users, including SRP,” SRP Reply Brief at 18.

This is pure speculation. There is no evidence in the record that the Nation would take water to which it is not legally entitled. To the contrary, the Nation immediately asserted in response to comments on the proposed acquisition that it is committed to “us[ing] the water lawfully available to it.” April 13, 2001 Letter from the Tribal Chairman to Counsel for SRP at 3.

We note here that not only does SRP ignore the Nation’s commitment to use or acquire water legally, SRP also ignores various water resources that may be available to the Nation. SRP’s assertion that the Nation will not have sufficient water for its needs appears

12/ Although SRP does not expressly accuse the Nation of intending to steal water, that would not be an unreasonable reading of SRP’s allegations.

to be based on its assessment of the Nation's existing decreed water rights for the parcels, plus any new (and junior) federal reserved water rights arising from the trust acquisition. SRP fails to acknowledge that the Nation may have water available to it through its currently-held federal reserved water rights (as claimed by the United States in the ongoing Gila River General Stream Adjudication), its existing Central Arizona Project allocation (available through the use of exchange agreements), and the potential use of private water delivery contracts (once negotiated and executed). SRP makes no mention of these water rights and sources in alleging that there necessarily will be insufficient water to support the Nation's development plans for these parcels.

Equally, if not more important, SRP appears to presume that the Nation intends to fully develop the parcels as soon as trust status is granted, at the expense of third party rights. The Nation's declared intent to comply with the law, however, indicates that the Nation would scale-back or delay its development plans, if necessary, until it can properly obtain the water needed for development. In addition, there is evidence in the record that the Nation acknowledges the possibility of developing the parcels in phases. In letters to the Superintendent dated March 12, 2001, the Tribal Chairman states that the Nation's most important need in developing the parcels is to create housing. The letters go on to state that the planned agricultural projects are "secondary," and that the planned commercial development is "[o]f lesser importance." These statements suggest that even if the Nation's long-term plan is for full development of the parcels, the Nation's priorities would be amenable to phased development. SRP has provided no evidence to the contrary.

SRP further alleges that injuries to its interests will occur because BIA's decision to approve the Nation's trust application will remove the parcels from state and local regulation. See SRP Opening Brief at 29 (trust status would "strip[] state and local governments of their regulatory authority and jurisdiction over those lands"). For example, SRP states that as a result of BIA's decision, "State groundwater regulations will no longer apply and no longer protect SRP and other water users in the area." SRP Reply Brief at 13. Similarly, SRP states that BIA's decision "will affect regulatory protections" now enjoyed by riparian habitat owned by SRP and inhabited by the endangered southwestern willow flycatcher and western yellow-billed cuckoo. Id. at 25.

SRP, however, does not explain what injuries will occur to its interests as a result of the removal of state and local regulatory jurisdiction over the parcels. For example, with respect to its allegation that there will be adverse impacts to the viability of riparian habitat used by the endangered flycatcher, SRP offers nothing more than its generalized allegation of injury. SRP presents no information about any specific injury that would occur or how such injury would impact habitat viability. These allegations of injury, therefore, are too

generalized to satisfy the requirement under Lujan that an injury be “concrete and particularized.” 13/

We conclude, therefore, that the injuries alleged by SRP are either too speculative or too generalized to establish a basis for standing. The Board therefore dismisses SRP’s claims for lack of jurisdiction. 14/

(3) Strathmere

Strathmere, who is a private citizen living near or adjacent to three of the parcels, alleges two injuries resulting from BIA’s decision to approve the proposed trust acquisition. First, Strathmere alleges that the Nation’s operation of Yavapai-Apache Sand and Rock constitutes a “trespass and nuisance” that is harming his health and decreasing property values. Strathmere Opening Brief at 5. Second, Strathmere alleges that the Nation’s operation of the mine is unlawful under the Town of Camp Verde’s zoning laws. Strathmere notes that there is a pending lawsuit brought by himself and others against the Town and the Nation, challenging the permit issued by the Town to the Nation that allows

13/ It is also doubtful that SRP would have a legally protected interest in state and local regulatory jurisdiction.

14/ We note that SRP argues that because the injuries it alleges are “procedural” in nature, “less stringent standing criteria” should be applied. SRP Reply Brief at 10. SRP argues that it need not demonstrate that an injury to a legally protected interest is actual or imminent, but only that such injury will occur with “reasonable probability,” id. at 12 (citing Hall v. Norton, 266 F.3d 969, 977 (9th Cir. 2001)), or is threatened, id. at 15 (citing Idaho Conservation League v. Mumma, 956 F.2d 1508, 1515 (9th Cir. 1992)). The Board agrees that in Lujan, the Supreme Court recognized that under NEPA there are less stringent requirements for standing. The Supreme Court stated: “The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.” 504 U.S. at 573 n.7 (emphasis added). The Supreme Court went on to explain that standing can be established when a concrete interest protected by the procedures in question is threatened. Id. at 572 n.8. See also Ashley Creek Phosphate Co. v. Norton, 420 F.3d 934, 938 n.2 (9th Cir. 2005), and cases cited therein. But regardless of whether we apply a “strict” Lujan test for standing or this less stringent standard, SRP’s alleged injuries remain too speculative and generalized to establish standing to pursue any of its claims. Because SRP’s alleged injuries are speculative and generalized, we do not reach the question of whether these injuries are “actual or imminent” or will occur with “reasonable probability.”

the Nation to operate the mine. Because taking the parcels into trust removes the Town's regulatory authority over the land, Strathmere argues that BIA's decision "totally eviscerates [his] efforts to confront in court the validity of the Town's permit and the Tribe's current operation" and "renders moot [his] effort to seek redress in court through injunction or damages against the Town and the Tribe." Strathmere Reply Brief at 3.

We conclude that the first injury alleged by Strathmere satisfies the injury element of standing. His allegation that the dust, noise and fumes from the Nation's operation of its sand and gravel mine "are a common law trespass and nuisance," adversely affect his physical health, and have "caused a depreciation in * * * property values," Strathmere Opening Brief at 5, states a concrete and particularized injury to a legally protected interest. Because Strathmere lives near or adjacent to the sand and gravel mine, we assume for our analysis here that his injuries exist and are sufficient for satisfying the first prong of the Lujan standing test. Cf. Evitt, 38 IBIA at 80; Ashley Creek Phosphate Co., 420 F.3d at 938 (for NEPA claims, Article III standing requires a "geographic nexus" between the individual asserting the claim and the location where the environmental impact is occurring). Nevertheless, we conclude that Strathmere does not have standing to appeal the Regional Director's approval of the Nation's trust application based on these injuries because there is no causal link between the injuries and the action being appealed.

In order for Strathmere to satisfy the causation element of standing, he must show that the Nation's use of the property for the sand and gravel mine is "dependent upon" the land being in trust, rather than in fee, status. Evitt, 38 IBIA at 81; see also Citizens for Safety and Environment, 40 IBIA at 93 (no causation where use of property was "not dependent on the land's trust status"); TOMAC v. Norton, 193 F. Supp.2d 182, 188 (D.D.C. 2002), aff'd, TOMAC v. Norton, 433 F.3d 852 (D.C. Cir. 2006) (causation element satisfied because trust status was a "necessary prerequisite" for the tribe's intended use of the property for a casino). Here, the Nation's operation of Yavapai-Apache Sand and Rock — the source of Strathmere's alleged injuries — is obviously not dependent on having the parcels on which the mine is located taken into trust. The Nation, which owns all 24 parcels in fee, has been operating the sand and gravel mine since 1998. Strathmere's alleged injuries, therefore, are injuries that have occurred in the past, are presently occurring, and presumably will continue to occur in the future, so long as the mine is in operation. Because Strathmere's injuries are already in existence, they cannot arise out of the Regional Director's decision to take the lands into trust. Instead, any injuries are caused by the independent action of the Nation (i.e., operation of the mine), and this cannot form the basis for establishing standing to appeal the decision at issue here. See Santa Ynez, 42 IBIA at 199; Citizens for Safety and Environment, 40 IBIA at 93-94; Evitt, 38 IBIA at 80-82.

The Board reached a similar conclusion in Citizens for Safety and Environment. In that case, an environmental group appealed BIA's decision to take certain lands into trust on behalf of the Muckleshoot Indian Tribe. Of particular concern to the appellant was the Tribe's use of a portion of the land as an outdoor amphitheater. The Tribe, which owned the land at issue in fee, had constructed and was using the amphitheater prior to BIA's decision approving the trust acquisition. The Board concluded that the appellant lacked standing to pursue its appeal because any injuries from the operation of the amphitheater could not be causally linked to BIA's decision to take that land into trust. The Board stated: "The fact remains that this proposed trust acquisition of 330 acres of land encompassing the amphitheater is independent and separate from the decision of the Tribe to use the property as an amphitheater, a use which has been already in effect for over a year." 42 IBIA at 93-94.

Just as in Citizens for Safety and Environment, because Strathmere's injuries are already in existence, they could not be the result of the Regional Director's decision to take the lands at issue in this case into trust. Accordingly, Strathmere cannot establish standing to pursue his appeal based on these injuries.

We also conclude that Strathmere fails to establish standing with respect to his second alleged injury — that BIA's approval of the proposed trust acquisition will remove the Town's regulatory authority over the land, and thus will eliminate his ability to pursue his lawsuit against the Nation and the Town challenging the lawfulness of the mining operation. Although Strathmere has a legally protected interest in his health and property values, he does not have a legally protected interest in the choice of governmental regulatory authority over the Nation's property, and he has no legal right to have his health and property protected by state regulation of the Nation's activities. Thus, Strathmere's inability to continue his lawsuit once the lands are granted trust status does not constitute an injury to any legally protected interest. As such, the Board concludes that Strathmere cannot establish standing to pursue his appeal based on the fact that trust status will remove the parcels from the Town's regulatory authority.

Accordingly, we dismiss Strathmere's claims for lack of jurisdiction.

(4) Arizona Department of Water Resources

ADWR argues that it has standing to pursue its claims that the Regional Director's decision to take the 24 parcels into trust failed to adequately consider the potential conflicts

related to water resources, as required by 25 C.F.R. § 151.10(f). ^{15/} ADWR argues that it has a legally protected interest in carrying out its statutory duties to regulate and enforce the laws related to groundwater and surface water throughout the State, and that this interest will be injured by BIA's decision because trust status will remove the parcels from ADWR's regulatory jurisdiction. ADWR argues that its status as a public agency requires only that it demonstrate that the challenged action "affects the performance of [its] duties." ADWR Reply Brief at 4. ADWR more specifically alleges that because taking the parcels into trust may give rise to a federal reserved water right, ADWR's "statutory obligations to regulate and enforce on the Parcels would be preempted by federal law." *Id.* at 7. ADWR further states that taking the parcels into trust would cause injury because ADWR would be barred from suing the Nation to enforce State water law on these lands.

ADWR's interest in regulating water satisfies the requirement that an appellant have a legally protected interest. See *City of Sausalito*, 386 F.3d at 1198-99 (to satisfy injury element of standing, municipality must seek to protect its own "proprietary interests"). In addition, BIA's decision to take the parcels into trust would injure ADWR's interest because it would remove the parcels from ADWR's regulatory authority, thus satisfying the causation element of standing. Finally, reversal of BIA's decision would leave the Nation's fee parcels, which are outside its reservation boundaries, subject to ADWR's regulatory authority, thus satisfying the redressability element of standing. We therefore conclude that ADWR has satisfied all three elements of standing. As explained below, however, we reject ADWR's arguments on the merits.

ADWR alleges that the Regional Director's decision improperly "assumed" that the Nation's existing water rights would be sufficient to meet the needs of its proposed development of the trust lands. ADWR Opening Brief at 6-7. Echoing SRP's arguments, ADWR argues that because the Nation lacks adequate water, conflicts related to water resources will arise as a result of granting trust status to the parcels because the Nation will necessarily seek to usurp or interfere with the legitimate water rights of others. ADWR argues that the Regional Director's decision failed to consider such conflicts as required by 25 C.F.R. § 151.10(f).

For example, ADWR argues that the Regional Director's decision failed to consider that any federal reserved water right created by the trust acquisition would be junior to existing water rights held by others, and thus would "result in little, if any, water to the

^{15/} We note that ADWR, like SRP, argues initially that the Article III requirements of standing do not apply to this proceeding because the Board is not a federal court. ADWR Reply Brief at 2-3.

Nation.” ADWR Opening Brief at 7-8. ADWR therefore argues that the Regional Director’s decision failed to consider that “[a] conflict will necessarily arise between the Nation and senior water users if the Nation attempts to use the appropriated water [of users with senior rights].” *Id.* at 8. ADWR also complains that the Regional Director’s decision failed to consider potential conflicts between surface water and groundwater claims, stating that if the Nation pumped underground subflow 16/ to meet its needs, this “most likely will interfere with senior water users’ rights” and “lead to conflict between the Nation and other water users.” *Id.* at 10.

We conclude that ADWR has not satisfied its burden to show that the Regional Director did not adequately consider potential conflicts related to water resources in his analysis under subsection 151.10(f). The Regional Director’s decision specifically acknowledges that water availability is the most significant resource issue related to the proposed trust acquisition, and discusses water availability at length. The Regional Director’s decision describes comments on the proposed trust acquisition made by ADWR, among others, and describes the Nation’s responses to these comments. In particular, the Regional Director’s decision notes that the Nation responded to comments about water supply by agreeing that its development plans will require a substantial amount of water, but that it believes that there is sufficient surface and groundwater available to it for its development plans (e.g., through existing state-based water rights, available groundwater, Central Arizona Project water, reclaimed effluent water, and private water delivery contracts). *See* Regional Director’s decision at 23-24. The decision also describes how the supplemental NEPA analysis shows that water claims made by the United States on behalf of the Nation in the ongoing Gila River general stream adjudication, and other existing water rights held by the Nation, would be sufficient for meeting the requirements of the Nation’s development of the 24 parcels.

Apart from disagreeing with the Regional Director’s conclusions about the availability of water, ADWR offers no evidence to demonstrate that the Regional Director failed to give proper consideration to any potential conflicts related to water resources that could occur as a result of taking the 24 parcels into trust. Subsection 151.10(f) requires BIA to consider potential land use and jurisdictional conflicts before deciding whether to acquire land in trust, but does not require BIA to resolve all such potential conflicts. In addition, ADWR, like SRP, appears to ignore the Nation’s stated commitment to using only water lawfully available to it, and offers no evidence to the contrary. Accordingly, the Board affirms the Regional Director’s decision.

16/ According to ADWR, “subflow” refers to water that is part of a surface stream, but flows underground.

Finally, we turn to ADWR's statutory argument — that 25 U.S.C. § 211 prohibits the trust acquisition at issue. Section 211 states: “No Indian reservation shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of New Mexico and Arizona, except by Act of Congress.” ADWR argues that the proposed trust acquisition will add land to the Nation's existing reservation, and that the Federal District Court in Arizona “has consistently applied 25 U.S.C. § 211 to prohibit the creation of new reservations and/or additions to existing reservations in Arizona.” ADWR Opening Brief at 11. ADWR additionally argues that the Indian Reorganization Act, 25 U.S.C. § 465, did not “supersede,” “amend,” or “repeal” section 211, and therefore section 211's prohibition applies in this case. ADWR Reply Brief at 20-21.

The Board concludes that ADWR's arguments are without merit. We have previously held that section 211 does not prohibit trust acquisitions under the Indian Reorganization Act. See Village of Ruidoso v. Albuquerque Area Director, 32 IBIA 130, 134 (1998). Moreover, neither of the two Federal District Court decisions ADWR cites in support of its position is on point. In neither decision — Healing v. Jones, 210 F. Supp. 125 (D. Ariz. 1962) and Masayesva v. Zah, 792 F. Supp. 1165 (D. Ariz. 1992) — did the court address or decide the relationship between section 211 and the authority granted to the Secretary in section 465. Further, we reject ADWR's argument that the New Mexico District Court's decision in Jicarilla Apache Tribe v. New Mexico, 742 F. Supp. 1487 (D. N.M. 1990), was erroneous. In Jicarilla, the court unambiguously held that Congress, in enacting the Indian Reorganization Act, made clear that the Indian Reorganization Act superseded section 211's strict prohibition and made all Indian tribes eligible for acquisition of trust lands, including Indian tribes in New Mexico and Arizona. 742 F. Supp. at 1489-90.

The Regional Director therefore correctly concluded in his decision that “the authority of the Secretary to accept land in trust pursuant to 25 U.S.C. [§] 465 is not limited by the 1918 statute codified at 25 U.S.C. [§] 211.” Regional Director's Decision at 30.

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 the appeals of ASLD, SRP, and Strathmere, and in ADWR's appeal, the Board affirms the Regional Director's decision.

I concur:

// original signed
Amy B. Sosin
Acting Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge