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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No. CV 06-1502 AHM Date May 13, 2008

Title Preservation of Los Olivos, *et al.* v. United States Department of the Interior, *et al.*

Present: The Honorable A. HOWARD MATZ, U.S. DISTRICT JUDGE

Stephen Montes	Not Reported	
Deputy Clerk	Court Reporter / Recorder	Tape No.

Attorneys **NOT** Present for Plaintiffs: Attorneys **NOT** Present for Defendants:

Proceedings: IN CHAMBERS (No Proceedings Held)

Before the Court is Plaintiffs' Motion for Summary Judgment on their action seeking review of the order of defendant Department of the Interior, Interior Board of Indian Appeals (IBIA) dated February 3, 2006 and the IBIA Order dated June 29, 2007 (collectively, "the IBIA Order"). Plaintiffs seek a declaratory judgment that the IBIA erred in dismissing their administrative appeal on the grounds that they lack standing. They also seek injunctive relief precluding defendants from enforcing the January 14, 2005 BIA Order until the IBIA has reviewed the merits of that appeal. Defendants seek affirmance of the IBIA Order; they do not challenge this Court's jurisdiction.

Paragraphs 25 and 35 of the First Amended Complaint ("FAC") allege that Plaintiffs have both Article III standing and "prudential standing." *See also* FAC ¶ 37 (associational standing). The gist of Plaintiffs' argument is that they suffered an injury in fact because of defendants' violations of the National Environmental Protection Act ("NEPA") and 25 C.F.R. § 151.10, the regulation that implements 25 U.S.C. § 465, the statute governing the acquisition of land in trust.

The IBIA Order dismissed Plaintiffs' appeal of the BIA Order on the basis that Plaintiffs lacked standing under principles of judicial standing. The parties in their briefs before this Court also addressed the issue of standing with reference to only those principles.[1] It appears that this approach was unsound and perhaps unwarranted. *See Hi-*

[1] To be sure, the IBIA did not state that it was legally required to follow that approach: "Although the Board is not bound by the case or controversy requirement of

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Ridge Lumber Co. v. United States, 443 F.2d 452, 456 (9th Cir. 1971) (characterizing as "mistaken" the notion that one can simply "assimilate the standards relating to standing to sue in obtaining judicial review of an administrative decision with those relating to internal administrative appeals."). Indeed, the requirements for administrative standing and judicial standing should not be the same. *Koniag, Inc., Village of Uyak v. Andrus*, 580 F.2d 601, 606 (D.C. Cir. 1978) (affirming district court's finding that certain federal agencies had standing to appeal a ruling of the Bureau of Indian Affairs), *cert. denied*, *Koniag, Inc. v. Andrus*, 439 U.S. 1052 (1978). As the main opinion in *Koniag* put it : "[I]t does not follow from . . . [precedents] that a party must be excluded from participation before the agency if it does not have a sufficient interest to meet Article III requirements for judicial review. Indeed . . . 'standing to sue depends on more restrictive criteria than standing to appear before administrative agencies.'" *Id.* (citations omitted). *See also Envirocare of Utah, Inc. v. Nuclear Regulatory Comm'n,* 194 F.3d 72, 75-76 (D.C. Cir. 1999) ("Whether the [Nuclear Regulatory] Commission erred in excluding Envirocare from participating in International Uranium's licensing proceeding. . . turns not on judicial decisions dealing with standing to sue, but on familiar principles of administrative law regarding an agency's interpretation of the statutes it alone administers.")

Judge Bazelon's concurring opinion in *Koniag* helpfully explained the conceptual and practical distinctions between judicial standing - - Article III and prudential limitations on federal court jurisdiction - - and standing requirements in Article I administrative tribunals. *See Koniag*, 580 F.2d at 611-17. First, Judge Bazelon noted that there is no reason to limit administrative tribunals to the strictures of Article III, because they do not share the attributes of Article III courts. "Congress, in its discretion, can require that any person be admitted to administrative proceedings, whether or not that person has alleged 'injury in fact' or has satisfied the other constitutional standing requirements recognized by the Supreme Court." *Id.* at 612. Similarly, Judge Bazelon explained, prudential limitations on the exercise of federal court authority are not applicable to administrative tribunals, because those limitations are "founded in concern about the proper and properly limited role of courts in a democratic society." *Id.* (quoting

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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." 42 IBIA 192.

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Warth v. Seldin, 422 U.S. 490, 498 (1978)). *Id.* Administrative agencies, in contrast, derive their powers from Congress. "As such, prudential limitations are no more applicable to administrative agencies than Article III limitations." *Id.* Furthermore, administrative agencies have broad discretion in formulating both substantive policies and procedural rules. *Id.* at 613. For all of these reasons, "administrative standing would [not] necessarily be improper if a party would not have standing to obtain judicial review." *Id. Accord, Brazoria County, Texas v. Equal Employment Opportunity Comm'n,* 391 F.3d 685, 691 (5th Cir. 2004); *Ritchie v. Simpson*, 170 F.3d 1092, 1095 (Fed. Cir. 1999).

That is not to say case law on judicial standing is never relevant in assessing administrative standing. As Judge Bazelon wrote:

> The fact that judicial and administrative standing are conceptually distinct does not, of course, mean that Congress could not require an administrative agency to apply judicial standing concepts in determining administrative standing. Nor does it mean that courts and agencies should never refer to judicial standing decisions, where helpful, by way of analogy. But absent a specific justification for invoking judicial standing decisions, I see no basis for interjecting the complex and restrictive law of judicial standing into the administrative process.

Koniag, at 614-15 (emphasis added).

Judge Bazelon went on to suggest "some principles that may be broadly applicable in setting standards for determining standing to appear before an agency." *Id.* at 614. The first consideration is "the language of the statutes and regulations that provide for an administrative hearing, appeal or intervention." In *Koniag*, the regulation governing who had a right to appeal was 43 C.F.R. § 4.700 (1973), which gave standing to "any party aggrieved by an adjudicatory action or decision of a Departmental official . . . ." *Id.* at 614-15. Judge Bazelon pointed out that

> "Such a general and indefinite provision suggests no concrete standards for determining who should have standing to appeal. In these circumstances . . . a functional analysis of administrative standing is appropriate. Such an

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> analysis would examine the nature of the asserted interest, the relationship of [the proponent of standing's] interest to the functions of the agency, and whether an award of standing would contribute to the attainment of these functions."

Id. at 614-15. He then went on to specify five factors that would go into a functional analysis:

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

Koniag at 616.

In the Order at issue here, the IBIA ignored and did not even cite 43 C.F.R. § 4.331, the current regulation governing appeals of BIA decisions. In *Koniag* and other decisions involving the BIA, by contrast, the BIA determined standing with reference to the applicable regulation. *See, e.g., Koniag*, 580 F.2d at 607 (affirming agency's ruling that parties were "aggrieved" within the meaning of 43 C.F.R. § 4.700 (1973)). *See also Redfield v. Acting Deputy Assistant Secretary-Indian Affairs*, 9 IBIA 175 (finding that appellant had standing under 43 C.F.R. § 4.331 (1981)).

43 C.F.R. § 4.331 provides, in pertinent part: "Any interested party affected by a final administrative action or decision of an official of the Bureau of Indian Affairs issued under regulations in Title 25 of the Code of Federal Regulations may appeal to the Board of Indian Appeals." 43 C.F.R. § 4.331 (1989). "Interested party" is defined as "any person whose interests could be adversely affected by a decision in an appeal." 25 C.F.R. § 2.2 (1989). The standard under 43 C.F.R. § 4.331 thus is as "general and indefinite" as

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was its predecessor in *Koniag*. 580 F.2d at 614. If the IBIA had applied the kind of "functional analysis" of 43 C.F.R. 4.331 that Judge Bazelon advocated, would it have still ruled that not even one individual member of Plaintiff organizations "could be" adversely affected by the BIA's decision? Doubtful. After all, the IBIA found that although Hinnrichs and Bowen had constitutional standing, they lacked prudential standing because they were alleging economic injuries outside the zone of interests of 25 C.F.R. § 151.10 and NEPA. On remand, the IBIA refused to even consider certain of Plaintiffs' arguments about Bowen's interests and NEPA's zone of interests, such as whether the Tribe's tax advantage would harm the overall health of the community or whether the acquisition had to be assessed in light of the Indian Reorganization Act as a whole. Its refusal was based on Plaintiffs' failure to make those arguments during the initial appeal. *See* 45 IBIA 112-113. Under a functional analysis, those arguments might be relevant considerations. Moreover, in its initial ruling, the IBIA rejected standing for the DeWitts, who claimed the same environmental harms as did Plaintiffs' members, because "the marginal impacts . . . [they] claim . . . are speculative and do not constitute concrete and actual or imminent injuries under the *Lujan* [constitutional] standing analysis." 42 IBIA 200. Since the combined effect of 43 C.F.R. § 4.331 and 25 C.F.R. § 22 is that someone "whose interests [merely] *could be* adversely affected by a decision in an appeal" is entitled to appeal to the IBIA, the IBIA may not have reached that conclusion had it applied principles of administrative standing.

Accordingly, the Court ORDERS the parties to meet and confer to exchange their views as to whether this matter should be remanded to the IBIA for further consideration of standing in light of 43 C.F.R. § 4.331 and based on a functional analysis.

If the parties agree to a remand, they shall so stipulate in writing by not later than May 21, 2008. If they do not agree, each side may set forth its position as to whether this Court should nevertheless remand this matter again. They shall do so in a supplemental brief not to exceed eight (8) pages. Each such supplemental brief should set forth not only why the case should (or should not, as the case may be) be remanded, but also - - if the Court does not remand the case, - - whether (and if so, in what manner) this Court's ruling on the validity of the IBIA's decision should be affected by a functional analysis. The supplemental briefs shall be filed simultaneously on May 30, 2008. (No side may file responses to the other side's brief.)

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