



INTERIOR BOARD OF INDIAN APPEALS

Joint Board of Control for the Flathead, Mission & Jocko Irrigation Districts
v. Portland Area Director, Bureau of Indian Affairs

20 IBIA 223 (08/27/1991)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

JOINT BOARD OF CONTROL FOR THE	:	Order Docketing and Dismissing
FLATHEAD, MISSION, AND JOCKO	:	Appeal
VALLEY IRRIGATION DISTRICTS,	:	
Appellant	:	
	:	
v.	:	Docket No. IBIA 91-127-A
	:	
PORTLAND AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	August 27, 1991

The Portland Area Director, Bureau of Indian Affairs (Area Director), filed with the Board of Indian Appeals (Board) a motion to dismiss an appeal allegedly filed by the Joint Board of Control for the Flathead, Mission, and Jocko Valley Irrigation Districts (appellant). The Area Director's motion, which the Board received on August 26, 1991, indicated that appellant had filed a notice of appeal dated August 12, 1991, challenging the final notice of operation and maintenance rates for the Flathead Indian Irrigation Project for 1992. The final notice was published in the Federal Register at 56 FR 31960 (July 12, 1991). Because the Board had not received a notice of appeal concerning this matter, it requested a copy of the notice from counsel for the Area Director. A copy of the notice was received by facsimile transmission on August 26, 1991.

The appeal is docketed under the above case name and number which should be cited in all future correspondence or inquiries regarding the matter. The Board finds, however, that the circumstances of this case require that the appeal be dismissed.

Initially, appellant has failed to file a timely notice of appeal. Appellant has been before the Board on numerous occasions, including in the case presently pending before the Board as Joint Board of Control for the Flathead, Mission, and Jocko Valley Irrigation Districts v. Portland Area Director, Docket No. IBIA 91-34-A. Appellant is well aware of the Board's address. The notice of appeal, however, shows that it was addressed to the Board at an incorrect address. Furthermore, the certificate of service of interested parties shows service of a copy of the notice of appeal on the Board at a second incorrect address. The Board has not received a copy of the notice of appeal from appellant. It received only the copy requested from counsel for the Area Director.

Notice of final rulemaking for the 1992 operation and maintenance rates was published in the Federal Register on July 12, 1991. Appellant alleges that it received notice of that publication on July 19, 1991. Using either

date results in this notice of appeal being untimely. Although the Federal Register publication did not set forth appeal rights, because there were none, appellant's notice of appeal states that it is an appeal to the Board under 43 CFR 4.332. Section 4.332 provides that a notice of appeal must be filed with the Board within 30 days from receipt of the decision from which the appeal is being taken. The section also sets forth the Board's correct address.

Appellant knew the procedures for filing an appeal of the type it intended. The notice of appeal, however, shows that it was sent to the Board at two incorrect addresses. This case is analogous to the Board's cases in which it has held that a notice of appeal is not timely when an appellant is given the correct appeal information, but files the notice in a way that results in receipt of the notice from another office outside the time period specified in the regulations. See, e.g., Baker v. Acting Muskogee Area Director , 20 IBIA 164 (1991), and cases cited therein. The Board finds that appellant failed to file a timely notice of appeal.

In addition, this appeal must be dismissed for lack of jurisdiction. In Joint Board of Control for the Flathead, Mission, and Jocko Irrigation Districts v. Portland Area Director, 17 IBIA 65 (1989), the Board held that the setting of operation and maintenance rates under 25 CFR 171.1(e) was rulemaking within the meaning of 5 U.S.C. § 551(4) (1988). The Area Director followed rulemaking procedures in establishing the 1992 operation and maintenance rates. A proposed rule published at 56 FR 23000 (May 17 1991) set forth a 30-day period for filing comments on the proposed rates. The final rates were published at 56 FR 31960 (July 12, 1991). The preamble to the final rule responds to comments filed by appellant during the comment period.

The Board does not have authority to change or declare invalid duly promulgated Departmental regulations. Joint Board of Control, 17 IBIA at 70; Northern Natural Gas v. Minneapolis Area Director, 15 IBIA 124, 126 (1987); Tarabochia v. Deputy Assistant Secretary - Indian Affairs (Operations), 12 IBIA 269, 275, 91 I.D. 243, 246 (1984); Zarr v. Acting Deputy Director, Office of Indian Education Programs, 11 IBIA 174, 177, 90 I.D. 172, 174 (1983). Because appellant seeks the change or invalidation of a Departmental regulation, the Board lacks jurisdiction to grant the relief requested.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal from the July 12, 1991, Federal Register publication of the Portland Area Director's 1992 operation and maintenance rates for the Flathead Indian Irrigation Project is dismissed for the two reasons set forth above.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge