INTERIOR BOARD OF INDIAN APPEALS

Shaahook Group of Capitan Grande Band of Diegueno Mission Indians
v. Director, Office of Tribal Services, Bureau of Indian Affairs

27 IBIA 43 (11/29/1994)

On reconsideration:
27 IBIA 90

United States Department of the Interior

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

SHAAHOOK GROUP OF CAPITAN GRANDE BAND
OF DIEGUENO MISSION INDIANS
v.
DIRECTOR, OFFICE OF TRIBAL SERVICES, BUREAU OF INDIAN AFFAIRS

IBIA 95-42-A Decided November 29, 1994

Appeal from the failure of the Director, Office of Tribal Services, to respond to a request for action concerning the calling of a Secretarial election.

Docketed, dismissed.

1. Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals: Generally

   The Assistant Secretary - Indian Affairs lacks authority to assume jurisdiction over an appeal filed with the Board of Indian Appeals when the timeframes established in 25 CFR 2.20(c) and 43 CFR 4.332(b) have passed.

2. Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs: Administrative Appeals: Generally

   When the Bureau of Indian Affairs shows that it is working on a response to a request for action under 25 CFR 2.8, the Board of Indian Appeals will dismiss without prejudice an appeal based on the failure to respond to the request.

APPEARANCES: Nancy S. Rank, Esq., Escondido, California, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Shaahook Group of Capitan Grande Band of Diegueno Mission Indians seeks review of the failure of the Director, Office of Tribal Services, Bureau of Indian Affairs (Director; BIA), to respond to a September 22, 1994, request for action under 25 CFR 2.8. 1/ For the

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1/ Section 2.8 provides:

"(a) A person whose interests are adversely affected, or whose ability to protect such interests is impeded by the failure of [a BIA] official to act on a request to the official, can make the official Is inaction the subject of appeal, as follows:

reasons discussed below, the Board of Indian Appeals dismisses this appeal.

Appellant's September 22, 1994, letter included

> (1) A request that the Secretary [of the Interior] call and conduct an IRA [Indian Reorganization Act, 25 U.S.C. § 476 (1988)] election on [appellant's] proposed constitution. * * * [and]
>
> (2) Additionally, and in the alternative, a request for confirmation of federal recognition of [appellant] as a Part 83 tribe, on a par with the Viejas and Barona Groups of the Capitan Grande Band, under the authority of the Act of May 4, 1932, 47 Stat. 146, and as such, confirmation of the right of [appellant] to organize under its proposed constitution without an IRA election.

When appellant did not receive a response to its letter within the timeframes established in 25 CFR 2.8, it filed a notice of appeal with the Board. By order dated October 25, 1994, the Board made a preliminary determination that it had jurisdiction over this appeal, but asked for information from the Director as to whether appellant's request for action was filed with an appropriate official. The Director's response was due on or before November 18, 1994.

Appellant responded to the Board's October 25, 1994, order on November 2, 1994, stating that it had received a letter dated October 18, 1994, from the Acting Deputy Commissioner of Indian Affairs acknowledging

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fn. 1 (continued)

"(1) Request in writing that that official take the action originally asked of him/her;

* * * * * * *

"(3) State that, unless the official involved either takes action on the merits of the written request within 10 days of receipt of such request by the official, or establishes a date by which action will be taken, an appeal shall be filed in accordance with this part.

"(b) The official receiving a request as specified in paragraph (a) of this section must either make a decision on the merits of the initial request within 10 days from receipt of the request for a decision or establish a reasonable later date by which the decision shall be made, not to exceed 60 days from the date of request. If an official establishes a date by which a requested decision shall be made, this date shall be the date by which failure to make a decision shall be appealable under this part. If the official, within the 10-day period specified in paragraph (a) of this section, neither makes a decision on the merits of the initial request nor establishes a later date by which a decision shall be made, the official's inaction shall be appealable to the next official in the process established in this part."

receipt of the September 22, 1994, request for action. Appellant argued that the Deputy Commissioner's letter showed that the proper officials had received appellant's September 22, 1994, request for action but that because the timeframes in 25 CFR 2.8 had not been met, jurisdiction was properly with the Board.

On November 23, 1994, the Board of Indian Appeals (Board) received a memorandum from the Assistant Secretary - Indian Affairs (Assistant Secretary) stating her intention to assume jurisdiction over the above case. The memorandum was dated November 10, 1994, but was not postmarked until November 21, 1994.

25 CFR 2.20(c) states in pertinent part: "If the Assistant Secretary decides to issue a decision in the appeal * * *, [she] shall notify the Board * * *, the deciding official, the appellant, and interested parties within 15 days of [her] receipt of a copy of the notice of appeal." 43 CFR 4.332(b) provides: "In accordance with 25 CFR 2.20(c) a notice of appeal shall not be effective for 20 days from receipt by the Board, during which time the Assistant Secretary may decide to review the appeal."

These sections provide that the Assistant Secretary may assume jurisdiction over an appeal within 15 days of her receipt of the notice of appeal, and that the Board will not docket an appeal for 20 days in order to allow time for the transmittal of the Assistant Secretary's memorandum assuming jurisdiction.

[1] The Assistant Secretary lacks authority to assume jurisdiction over an appeal filed with the Board when the timeframes established in 25 CPR 2.20(c) and 43 CFR 4.332(b) have passed. Here, the Assistant Secretary's memorandum was dated within the proper timeframes, but was not postmarked until well after the time for assuming jurisdiction had passed. A memorandum assuming jurisdiction over an appeal filed with the Board, like other filings before the Board, is filed as of the postmark date. See 43 CFR 4.310(a). Accordingly, the Assistant Secretary's memorandum assuming jurisdiction over this appeal has no legal effect.

[2] However, the information before the Board is that the Director is working on appellant's request, although her October 18, 1994, letter did not precisely meet the requirements of 25 CFR 2.8. Section 2.8 is an action-forcing mechanism. It has been the Board's experience that when BIA is working on a response to a request for action under section 2.8, even though BIA has not technically met all of the requirements of that section, it is more beneficial to the parties to allow BIA to complete its review and issue a decision. It sees no reason to believe that this case is different. Therefore, the Board dismisses this appeal in order that the Director may continue to address appellant's request for action.

Should the Director not provide appellant with a response within the timeframes established in her October 18, 1994, letter, appellant may again seek Board review under 25 CFR 2.8.

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 inaction of the Director, Office of Tribal Services, is docketed and dismissed without prejudice so that the Director may continue to consider appellant's request.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge