



INTERIOR BOARD OF INDIAN APPEALS

Thelma Kuneki Quaempts v. Acting Northwest Regional Director, Bureau of Indian Affairs

42 IBIA 272 (03/31/2006)



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

THELMA KUNEKI QUAEMPTS,	:	Order Reversing in Part, Affirming in
Appellant,	:	Part, Vacating in Part, and
	:	Remanding
v.	:	
	:	
ACTING NORTHWEST REGIONAL	:	Docket No. IBIA 04-116-A
DIRECTOR, BUREAU OF INDIAN	:	
AFFAIRS,	:	
Appellee.	:	March 31, 2006

Appellant Thelma Kuneki Quaempts ^{1/} seeks review of a May 10, 2004 decision of the Acting Northwest Regional Director, Bureau of Indian Affairs (Regional Director; BIA), concerning an encumbrance that the Superintendent of the Yakama Agency (Superintendent) placed on Appellant’s Individual Indian Money (IIM) account after BIA erroneously deposited certain funds into her account. The matter came before the Regional Director as an appeal from alleged inaction by the Superintendent because Appellant contended that the Superintendent had failed to issue a “final decision” on the encumbrance as required by the regulations. The Regional Director dismissed Appellant’s appeal from the Superintendent’s alleged inaction as untimely, but also found that the Superintendent had issued a final decision that complied with the regulations.

For the reasons discussed below, we reverse the Regional Director’s determination that Appellant’s appeal to him was untimely. On the underlying merits, we affirm in part, vacate in part, and remand the vacated portions of the Regional Director’s decision for reconsideration and issuance of a new decision on how the funds will be repaid.

Regulatory Framework

An IIM account is an interest bearing account for funds belonging to an Indian individual that are held in trust for that individual by the Secretary of the Interior. See

^{1/} In the record, Appellant is also identified as “Thelma N. Murillo” and as “Thelma N. (Northover) Quaempts.”

25 C.F.R. §§ 115.002, 115.700. Unless an IIM account is restricted in some way, an Indian owner may freely withdraw funds from her account. Id. § 115.101, cf. id. § 115.002 (definition of “unrestricted account”). BIA may place a restriction on an IIM account in several circumstances, which limits the ability of the Indian account holder to make withdrawals and which may direct distributions to third parties.

One type of restriction on an IIM account is an “encumbrance.” ^{2/} An encumbered IIM account is one on which a restriction has been placed “by the BIA until money owed * * * is paid to a specified party.” Id. § 115.701 Table. If an IIM account is encumbered, “[t]he account holder may withdraw any money available in the account that is above the amount owed to specified parties.” Id. Relevant to this appeal, one circumstance in which BIA may encumber an IIM account is when BIA has documentation showing that BIA caused an administrative error which resulted in funds not owned by the account holder being deposited into her IIM account or distributed to the account holder. See id. §§ 115.601(b)(4), 115.618.

When BIA decides to restrict an IIM account and the address of the account holder is known, BIA must provide individual notice of its decision to the account holder (or guardian) by certified mail or personal delivery. Id. § 115.602. When an account holder is notified by certified mail, the restriction becomes effective five days after BIA mailed the notice. Id. § 115.604(a). Individual notice of the decision must, among other things, include the reason for the restriction and identify the amount to be encumbered, if applicable. Id. § 115.605(a)(2) & (3). It must also advise the account holder that she has 40 days from the date the notice was sent to request a hearing to challenge BIA’s decision to restrict the account. Id. § 115.605(a)(5).

If an account holder requests a hearing, BIA must conduct the hearing within 10 working days of receipt of the request, and must make a final decision regarding the restriction within 10 business days of the end of the hearing. Id. §§ 115.608, 115.615. At the hearing, an account holder may offer evidence and testimony challenging the restriction, including information showing how an encumbrance may create an undue financial hardship. Id. § 115.609. The final decision issued after the hearing must include BIA’s decision to remove or retain the restriction; it must also include, when “applicable,” a detailed justification for the encumbrance, the amount and time period for repayment, and “[a]ny provision to allow for distributions to the account holder because of an undue financial hardship created by the encumbrance.” Id. § 115.616(a)–(d). The final

^{2/} “Encumber” or “encumbrance” is defined as “to attach trust assets held by the Secretary with a claim, lien, or charge that has been approved by the Secretary.” Id. § 115.002.

decision may also include “any other information the hearing officer deems necessary.” Id. § 115.616(e).

If, after the hearing, BIA decides to continue the restriction on an IIM account, the account holder has the right to administratively appeal the decision. Id. § 115.619. The restriction, however, remains in effect during the appeal. Id. § 115.620.

When an account holder does not make a timely request for a hearing after receiving BIA’s notice of its decision to restrict her account, section 115.606 of the regulations provides that “BIA’s decision to restrict [the] IIM account will become final.” Section 115.606 also provides, however, that “BIA will follow the procedures outlined in § 115.616 through § 115.618, and § 115.620, as applicable.” 3/

Factual Background

Appellant is a member of the Yakama Nation (Nation). In November 1998, Appellant submitted an application to BIA to sell her fractional interests in Yakama Allotments No. 2998 (Allotment 2998) and No. 2720 (Allotment 2720). The record indicates that both the Nation and an individual tribal member were interested in Allotment 2998. It appears that in 1999, Appellant sold her interest in Allotment 2998, with BIA’s approval, to the individual tribal member. 4/

3/ As described above, section 115.616 describes information that may be required in a “final decision.” Section 115.617 requires BIA to provide the Office of Trust Funds Management (OTFM) with a distribution plan for payments from the account. Section 115.618 requires BIA to consult with the account holder to determine how the funds will be repaid when an encumbrance is based on funds having been improperly deposited in an IIM account or distributed to the account holder because of an administrative error. Section 115.620 provides that the encumbrance remains in effect during an appeal.

4/ The fact that this sale took place was never questioned in the proceedings before the Superintendent and the Regional Director, and Appellant does not dispute it on appeal. She does, however, raise questions about the accounting of the funds she was paid for the sale. The Regional Director’s Answer Brief states, without reference to the administrative record, that when this sale was completed, \$58,500 was deposited into Appellant’s IIM account. There is no documentation in the record before the Board showing a deposit for \$58,500. As discussed later in this decision, although issues concerning the amount and payment for the 1999 sale are outside the scope of this appeal, the Regional Director and OTFM should ensure that all proper documentation is in place concerning this sale.

After the sale, BIA's title records were not promptly updated. The Nation, unaware that the land had already been sold, proceeded to obtain consent from Appellant in 2001 to sell her interest in Allotment 2998 to the Nation. 5/ BIA again approved the sale of Appellant's interest in Allotment 2998, this time to the Nation, and on June 27, 2001, the amount of \$58,993.20 for the sale was credited to Appellant's IIM account. 6/

On August 13, 2001, the Superintendent sent a letter to Appellant stating that "[t]he Yakama Agency Realty Office has discovered an error in which you were paid \$58,993.20 on June 27, 2001, for an interest in Allotment 2998 that you do not own." It notified Appellant that a restriction would be placed on her IIM account five days after the date of mailing of the notice. The letter also advised Appellant that she had "the right to request a HEARING to challenge this decision," and that any such request for a hearing must be in writing and received within 40 days of the date of the notice. The letter further stated:

I also propose to distribute (pay) any and all funds currently on, and/or future income accumulating to, your account back to the rightful owner until the entire amount of \$58,993.20 that was erroneously paid to you is collected back from you. Should the amount currently on, or future amounts accumulating to, your account exceed the amount erroneously paid to you

5/ In August 2000, between the first and second sale, the Nation contracted realty functions from the Yakama Agency under the Indian Self-Determination and Education Assistance Act, P.L. 93-638.

Appellant contends on appeal that she "remembered selling Allotment 2998 a few years before," but "had to rely on the BIA and the Yakama Nation to handle all the paperwork for my land sales * * * and I had repeatedly been told that the paperwork was correct, so I signed the Consent to Sale [to the Nation]." Feb. 10, 2005 Declaration of Appellant ¶ 6.

The IIM records submitted to the Board by Appellant, and other documents in the record, indicate that about the same time of her sale of Allotment 2998 to the Nation, Appellant also sold her interest in Allotment 2720 to the Nation. The record shows that payment for that sale, \$39,447.17, was deposited in her IIM account 5 days after the \$58,993.20 deposit for Allotment 2998.

6/ This payment to Appellant is documented on an IIM account ledger provided to the Board by Appellant in a supplemental administrative record.

(\$58,993.20) any and all funds above what is owed will immediately be made available to you upon your request.

Aug. 13, 2001 Letter from Superintendent to Appellant.

Appellant did not request a hearing.

Fourteen months later, on October 4, 2002, the Superintendent sent a follow-up letter to Appellant and the Nation. The Superintendent referenced the August 13, 2001 letter and noted the restriction that had been placed on Appellant's IIM account. The Superintendent then stated: "As of this date the Yakama Agency has not received a request for hearing to challenge the hold. Therefore as per 25 CFR 115.606 a final decision on this matter will be rendered in accordance with 25 CFR 115.616." Oct. 4, 2002 Letter from Superintendent to Appellant and Nation at 1. The letter recounted that Appellant had actively been seeking to resolve the matter and had met with the Nation's Land Committee, and that a "tentative agreement" had been reached under which Appellant would provide equal value for the overpayment through a land conveyance.

In his October 4, 2002 decision, the Superintendent agreed to immediately release \$1000 to Appellant from her account, noting that she had expressed that she was having difficulty meeting immediate needs. The Superintendent found that Appellant was elderly, that the situation had caused her undue financial hardship, and that Nation's Land Committee (after evaluating the value of land offered by Appellant and the balance in the IIM account) had agreed to the disbursement.

The Superintendent noted in his decision that the process for finalizing the tentative agreement between Appellant and the Nation would take time, and that it was his decision that Appellant's IIM account "remain on hold until this process can be completed." Id. He concluded:

A final satisfaction of this obligation will be accomplished once the Tribe has been able to establish valuation through the appraisal process with [Appellant]. Given the timetable of reasonable appraisal process (sic) this should take approximately 60 days from the date of this final decision. Any further distribution from [Appellant's] account will be restricted pending final settlement through the above stated process.

This document will serve as the final decision on the disposition of this issue concerning the present restriction of the IIM account of [Appellant].

Id. at 2.

Apparently unaware of the Superintendent's October 4, 2002 decision, a year later an attorney representing Appellant wrote to the Superintendent, stating that Appellant "remains dissatisfied with the 2001 decision" to restrict her IIM account, and that the decision had "caused her great economic hardship." Oct. 14, 2003 Letter from M. Helen Spencer to Superintendent at 1. The letter stated that "[i]t appears certain that more was required of your office after issuance of notice of a hold on [Appellant's] IIM account on August 13, 2001," and contended that the regulations required a "final written decision" in addition to the August 13, 2001 notice. Id. The letter noted that Appellant had met with representatives of the Nation in 2002 "to discuss repayment of the second \$58,993.20 payment," id. at 2, but that Appellant did not agree with the proposal offered to her. Appellant's counsel also stated that she "remain[ed] confused about the entries in [Appellant's] IIM ledge in 1999," id., because only one payment for Allotment 2998 was reflected on the ledger. 7/

The Superintendent apparently met with Appellant and her counsel on December 4 and 5, 2003. On December 4, in anticipation of the meeting, Appellant's counsel wrote to the Superintendent requesting that the Superintendent issue a "final written decision" removing the restriction on Appellant's IIM account and releasing to her the entire balance then in her account — approximately \$22,500 — because of undue financial hardship. Dec. 4, 2003 Letter from M. Helen Spencer to Superintendent at 1. 8/ The letter contended that Appellant had "no more land to sell and no more equity in her home," summarized a variety of outstanding bills owed, and identified other claimed needs. Id. The letter notes that at the meeting the parties would discuss Appellant's plans to repay the Yakama Nation and that Appellant had "offered in the past, and hereby repeats her offer to transfer her interest in [other allotments] to the [Nation] up to the value of the \$58,993.20 duplicate payment." Id. at 2. At the meetings, Appellant submitted copies of delinquent bills to support her claim of financial hardship.

7/ The IIM account ledger that Appellant submitted to the Board shows a \$54,000 land sale payment credited to Appellant's IIM account in November 1999, but apparently in reference to a different allotment. As noted earlier, the Regional Director states that the payment to Appellant for the first sale of Allotment 2998 was for \$58,500.

8/ It appears that between June 27, 2001, when the \$58,993.20 was deposited in Appellant's IIM account, and August 13, 2001, when she was notified of the erroneous deposit, Appellant withdrew a substantial amount from her account. BIA's administrative record does not, however, include any ledger entries from Appellant's IIM account, and the ledger entries provided by Appellant do not reflect withdrawals during this time period.

Following the meetings, on December 22, 2003, 9/ counsel for Appellant again wrote to the Superintendent, requesting that he take action to release Appellant's IIM funds to her within 10 days, on the basis of undue financial hardship. The request for action was made pursuant to 25 C.F.R. § 2.8, which provides that BIA "inaction" becomes appealable if a BIA official does not make a timely decision after a demand is made under that section. The letter stated that even when a hearing is not requested in response to a notice of an encumbrance, BIA has an obligation to issue a "final decision." The letter further stated in relevant part:

Because this case does involve administrative error, in addition to the hardship determination you are also obligated to consult with [Appellant] concerning repayment of the erroneously paid fund[s]. [25 C.F.R.] § 115.618. We believe our meeting with you on December 4, and the meeting with you, the [Nation's] Land Committee and [the Nation's] attorney * * * on December 5 allowed [Appellant] to adequately explain and document her hardship, and to explain the confusion surrounding the duplicate payment.

On December 4 we provided you with copies of most of [Appellant's] delinquent bills and her explanation of why she needs to replace her current vehicle. In addition [Appellant] has explained [other needs], bringing her important household and medical bills to a total of * * * .

* * * * *

We have also discussed at length how [Appellant] will repay the duplicate payment. Again, [Appellant] promises [to] transfer all trust interests she has or may acquire to repay [the Nation] in part or in whole.

* * * * *

We believe the meetings on December 4 and 5 were an adequate consultation under § 116.618, and you now have ample information (concerning both [Appellant's] hardship and her ability to repay) on which to base a final decision under § 115.616. * * *

[Appellant's] immediate economic hardship is the major consideration, and not how much of the second payment she will be able to eventually repay from transfer of her interests in trust land. She agrees to repay with her trust interests, but it will take many months to straighten out exactly what [interests she owns]. She should not have to prove that she can repay the full

9/ The year on the letter is misdated as "2002," but a footer dates it as "12.22.03" and the context makes clear that the letter was written in 2003.

amount, or wait until the value of her remaining land is determined before her hardship request can be considered.

Dec. 22, 2003 Letter from M. Helen Spencer to Superintendent at 2-3.

On January 13, 2004, when the Superintendent had not responded to her December 22, 2003 letter, Appellant filed a notice of appeal from the Superintendent's inaction, pursuant to 25 C.F.R. § 2.8. Appellant filed the notice with the Superintendent, as required by 25 C.F.R. § 2.9(a), but failed at the time to send a copy to the Regional Director, which is also required by section 2.9(a). On March 15, 2004, Appellant sent a copy of the notice of appeal to the Regional Director, explaining in a cover letter that she had inadvertently failed to send it earlier. The cover letter reiterated that Appellant's IIM account was encumbered by BIA "to facilitate the recovery of an overpayment on the sale of trust realty," that "[t]he overpayment was entirely the result of administrative errors by the Nation and [BIA]," and that the funds should be released "because of the great hardship caused by withholding of those funds." Mar. 15, 2004 Letter from H. Helen Spencer to Regional Director at 1.

On May 10, 2004, the Regional Director issued the decision that is the subject of this appeal. The Regional Director first concluded that although Appellant had "appropriately filed [her appeal] in the Superintendent's office * * * within the mandatory 30 day time frame * * * it was not filed in this office until approximately two months later * * * [and] therefore was not timely filed in this office." Regional Director's Decision at 2. Based on this conclusion, the Regional Director stated that he was "dismissing the appeal as not timely." Id.

Notwithstanding his dismissal of the appeal as untimely, the Regional Director also addressed the substance of the issues raised by Appellant. The Regional Director concluded that because Appellant had not requested a hearing after receiving the Superintendent's August 13, 2001 decision, that decision had become final and another final decision was not required. The Regional Director also found, however, that the Superintendent had issued a "second Final Decision" on October 4, 2002, which had taken into consideration Appellant's economic circumstances and discussed repayment options. Id. at 4. The Regional Director concluded that there was no need for the Superintendent to issue yet another decision.

Appellant appealed to the Board. Appellant and the Regional Director filed briefs, and the Nation joined in the Regional Director's brief.

Standard of Review

The BIA's interpretation of regulations is a legal determination, which the Board reviews de novo. Navajo Nation v. Navajo Regional Director, 40 IBIA 108, 115 (2004), and cases cited therein. On the other hand, the decision whether to place an encumbrance on an IIM account is an exercise of discretion, which is vested in BIA. See Pretty Paint v. Rocky Mountain Regional Director, 38 IBIA 177, 179 (2002); Grellner v. Anadarko Area Director, 35 IBIA 192, 195 (2000). When reviewing decisions based on BIA's exercise of discretion, the Board's role is limited to deciding whether BIA gave proper consideration to all legal prerequisites, whether the administrative record is adequate to support the decision, and whether BIA provided an adequate explanation for its decision. Navajo Nation, 40 IBIA at 115. The Board does not substitute its judgment for that of BIA. An appellant bears the burden of proving that BIA did not properly exercise its discretion. Id.

Discussion

On appeal, Appellant contends: (1) the Regional Director improperly dismissed her appeal as untimely; (2) the Superintendent's October 4, 2002 letter was not a "final decision" that complies with the regulations because it failed to contain a detailed justification for the encumbrance, failed to authorize any distribution or the time period for repayment, and failed to reflect consultation with Appellant regarding alternative means of repayment; (3) BIA should have considered the possibility of recovering less than all of the overpayment, based on the burden and undue financial hardship such recovery would cause Appellant; and (4) there is no documentation or proof in the record of any administrative error or overpayment.

We begin with the Regional Director's conclusion that Appellant's appeal to him was untimely.

The parties agree that Appellant timely filed her notice of appeal with the Superintendent. The Regional Director contends, however, that Appellant's failure to send him a copy of her notice of appeal within 30 days of the demand letter made the appeal untimely under the regulations. We disagree.

First, the Board has previously held that "the regulations do not establish a time limit for filing an appeal under 25 CFR 2.8 when a BIA official neither renders a decision nor establishes a time by which he/she will render a decision." Toyon Wintu Center, Inc. v. Sacramento Area Director, 29 IBIA 290, 293 (1996). Because the Superintendent did not establish a time period for taking action after the December 2003 meetings, the 30-day time

period did not apply. ^{10/} Therefore, Appellant's failure to send the Regional Director a copy of her notice of appeal within 30 days did not render her appeal untimely.

Second, even if we were to apply the 30-day time period in this case, we would still reverse the Regional Director's finding that Appellant's appeal was untimely. Section 2.9 of 25 C.F.R. provides that an appellant "must file a written notice of appeal in the office of the official whose decision is being appealed" and "must also send a copy * * * to the official who will decide the appeal and to all known interested parties." (Emphasis added.) ^{11/} The regulations further provide that "[n]otices of appeal not filed in the specified time shall not be considered * * *. Id. No similar consequences are imposed for a failure to "send" the notice of appeal to the official who will decide the appeal, or to known interested parties, within the same time period. Failure to serve a Regional Director may delay an appeal from a Superintendent's decision, and failure to comply with an order to cure such a service defect may be appropriate grounds for dismissal. But we find no basis in the regulations to treat the requirement to "send" a copy of an appeal to the Regional Director as jurisdictional. Therefore, even if the 30-day time period applied in this case, Appellant's appeal was timely "filed" when it was filed with the Superintendent, and the delayed service on the Regional Director did not make the appeal untimely.

We therefore reverse the Regional Director's decision finding that Appellant's appeal was untimely.

Because the Regional Director also addressed the substantive issues raised by Appellant, and concluded that the Superintendent's August 13, 2001 and October 4, 2002 decisions fully satisfied BIA's obligations under the regulations, we now turn to Appellant's arguments on the merits.

^{10/} When a BIA official does commit to a time period for making a decision, an Appellant will not be strictly held to the 30-day time period, but must file an appeal within a reasonable time after it is clear the BIA official is not going to act. See Gillette v. Aberdeen Area Director, 14 IBIA 187, 191 (1986) (finding a section 2.8 appeal untimely).

^{11/} The procedures for appealing a decision within BIA differ from those applicable to appeals to the Board. Appeals to a BIA official from a subordinate BIA official's decision must be filed with the subordinate official. 25 C.F.R. § 2.9(a). Appeals to the Board from a Regional Director's decision must be filed with the Board. 43 C.F.R. § 4.332(a).

We begin with Appellant’s third and fourth arguments — that BIA erred in not considering less than full recovery of the overpayment, and that there is no documentation in the record of any administrative error or overpayment.

Neither argument was presented to the Superintendent or the Regional Director. In general, the Board will not consider arguments that are raised for the first time on appeal. See Van Gorden v. Acting Midwest Regional Director, 41 IBIA 195, 203 (2005). We see no reason to depart from that practice in this case. Appellant could have raised these arguments with BIA, but did not do so. ^{12/} Therefore, we decline to consider Appellant’s third and fourth arguments.

We turn next to Appellant’s second and only remaining argument on the merits, which implicates both BIA’s interpretation of the IIM regulations and its exercise of discretion pursuant to those regulations. Appellant contends that the Superintendent’s October 4, 2002 decision, although characterized as a “final decision,” did not constitute a final decision as required by the IIM regulations. Appellant argues that even when an account holder does not request a hearing after receiving BIA’s notice of its decision to restrict her IIM account — in this case the Superintendent’s August 13, 2001 letter — BIA is still required to issue a separate final decision in every case, which includes the “applicable” provisions of 25 C.F.R. §§ 115.616, 115.617, and 115.618. In the present case, according to Appellant, BIA was required to issue a final decision, after meaningful consultation with Appellant, see id. § 115.618, which included a “detailed justification” for the encumbrance, see 25 C.F.R. § 115.616(b); the amount to be repaid, the identity of the payee, and the time period for repayment, see id. § 115.616(c); and whether to allow interim distributions to Appellant because of undue financial hardship, see id. § 115.616(d). Appellant argues that the Superintendent’s October 4, 2002 letter was “not sufficient as a final decision” because it did not include these required elements. Opening Brief at 11. In her reply brief, Appellant characterizes as her “core” complaint in this case that BIA “froze her account and then left her hanging, without completing all of the steps in the encumbrance process.” Reply Brief at 3.

^{12/} With respect to Appellant’s argument that there is no documentation of any error or overpayment, we do note that Appellant conceded on numerous occasions that the second payment for Allotment 2998 was an overpayment or “duplicate payment” based on an administrative error, and the IIM ledger entries submitted by Appellant to the Board specifically document the \$58,993.20 deposit. See, e.g., Oct. 14, 2003 Letter from M. Helen Spencer to Superintendent; Dec. 4, 2003 Letter from M. Helen Spencer to Superintendent; Dec. 22, 2003 Letter from M. Helen Spencer to Superintendent.

Although Appellant frames the issue as whether BIA ever issued a “final decision” in this case as it was “required” to do by 25 C.F.R. § 115.616, it is clear that the Superintendent — whether or not required to do so — did issue a final decision pursuant to that section on October 4, 2002, and announced it as such. Properly characterized then, the issue for us to decide is whether the Superintendent’s decision can be sustained under whatever provisions of the IIM regulations may apply. 13/

Section 115.606 expressly provides that if an account holder does not request a hearing after receiving the section 115.605 notice of decision, “BIA’s decision to restrict [the] account will become final.” Appellant contends that “will become final” means the decision only becomes final after BIA issues a final decision under section 115.616, in every case. Appellant characterizes the notice issued under section 115.605 of BIA’s decision to encumber an account as a “proposed encumbrance.” Although we agree that under the facts of this case, a follow-up decision to the August 13, 2001 decision was required, even though Appellant did not request a hearing, we disagree that the section 115.605 notice is merely notice of a “proposed encumbrance” and that another decision was required to make the encumbrance itself final.

First, none of the regulatory language regarding BIA’s notice of its decision to encumber an account suggests that it is merely a proposed decision or a proposed encumbrance. On the contrary, the regulatory language refers to the decision as having already been made, see, e.g., 25 C.F.R. §§ 115.602 and 115.605 (“notice of its decision”) (emphasis added), and the encumbrance goes into effect shortly after the account holder receives notice, see id. § 115.604.

Second, in order to give meaning to both the language of finality in section 115.606 and to the 40-day deadline for requesting a hearing, we construe section 115.606 to mean that when an account holder does not request a hearing, BIA’s decision to restrict the account and the amount of the restriction, as described in the notice, become final for the Department. When an account holder has already been informed of the reason for the restriction and the amount, in accordance with sections 115.602 and 115.605, and declines to exercise her right to a hearing, it makes little sense to require BIA to issue another “final” decision under section 115.616 providing a “detailed justification” for and determining the amount of the encumbrance. We do not construe the regulations as requiring BIA to do again that which it has already done and which has gone unchallenged. Cf. Split Family Support Group v. Northwest Regional Director, 36 IBIA 5, 6 (2001) (language in

13/ For this reason, we need not address Appellant’s argument that the IIM regulations require a final decision under section 115.616 in every case.

25 C.F.R. Part 82 providing that BIA's decision "shall be final" means "final for the Department").

In the present case, the Superintendent's August 13, 2001 notice of decision provided Appellant with the reason for the restriction — payment for an interest in land she no longer owned — and the amount of the encumbrance — \$58,993.20. When Appellant failed to request a hearing, that decision to restrict the account became final for the Department. Therefore, to the extent the Regional Director declined to review or revisit the Superintendent's decision to restrict Appellant's IIM account, and to impose an encumbrance in the total amount of \$58,993.20, we affirm his decision on the grounds that the Superintendent's decision to restrict the account had become final for the Department and no further decision on these issues was required under the regulations.

We also reject Appellant's argument that section 115.616 independently required BIA to issue a separate "final decision" addressing whether to allow distributions based on Appellant's undue financial hardship, even though Appellant did not request a hearing. Once an account holder receives notice of BIA's decision, the regulations effectively shift the burden to the account holder to request a hearing and offer evidence of undue hardship. See 25 C.F.R. § 115.609 (evidence at hearing may include how an encumbrance may create undue financial hardship). In the absence of such evidence, BIA could not be expected to have a factual basis for making a hardship determination, or deciding an appropriate amount to release to address such a hardship. We do not construe the regulations as imposing a general duty on BIA to inquire about the possibility of undue financial hardship caused by an encumbrance when the account holder herself has not sought a hearing to introduce such evidence. Therefore, because Appellant did not request a hearing, we conclude that section 115.616 did not require the Superintendent to issue a decision to address the potential hardship on Appellant caused by the encumbrance.

On the other hand, the regulations include a special provision that applies when an encumbrance has been placed on an account because an administrative error resulted in funds having been improperly deposited into the account or distributed to the account holder. In such cases, section 115.618 imposes an affirmative duty on BIA to consult with the account holder "to determine how the funds will be re-paid." Thus, in cases of administrative error, section 115.618 provides an account holder who did not request a hearing an opportunity to present evidence or argument as to how the improperly-deposited funds will be repaid. In practical effect, this consultation requirement allows the account holder a second chance to raise undue hardship, albeit in a more limited context than is the case in a hearing challenging the restriction itself. BIA is not, of course, under an obligation to accept an account holder's proposal, but in order to make the consultation meaningful, BIA must at least consider the proposal as part of its exercise of discretion.

It is apparent from the Superintendent's October 4, 2002 decision that Appellant and the Nation's Land Committee had been discussing how she might repay the Nation for the overpayment through land conveyances and possibly some of the funds improperly credited to her IIM account. Regardless of whether those discussions could have served in whole or in part to satisfy BIA's duty to consult with Appellant under section 115.618, we conclude that the Regional Director erred in sustaining the Superintendent's decision because the Superintendent's decision was dependent upon an anticipated near-term settlement between Appellant and the Nation, which had failed to occur. 14/

The Superintendent released some funds to Appellant, based on a finding of undue financial hardship. He also decided to continue the restriction on the remainder of Appellant's account, but this decision apparently was premised on an assumption that "final satisfaction" of Appellant's obligations to the Tribe for the overpayment would be resolved in the relatively near future. While the Superintendent may not have been required to specifically address the possibility of failed settlement negotiations when he made his October 4, 2002 decision, when the assumed settlement did not occur as anticipated, he should have revisited his decision to determine whether the lack of a settlement warranted a different conclusion or further consultation.

Because the decision on how the funds will be repaid is left to the discretion of BIA, we vacate the portion of the Regional Director's decision finding that the Superintendent satisfied his obligations under the regulations, and remand the matter to BIA for further consideration. On remand, BIA shall consider the information that Appellant provided as part of the December 2003 consultation meetings. In addition, given the time that has passed since those meetings, BIA shall again consult with Appellant before issuing a new decision on how the funds shall be repaid and whether or not any additional distribution

14/ Appellant never explains why she declined to exercise her right to a hearing to challenge the restriction or to offer evidence that the encumbrance was causing undue financial hardship. The Superintendent's August 13, 2001 letter arguably went beyond the requirements of section 115.605 and specifically proposed how repayment would be made. Appellant did not challenge the encumbrance or the proposal for repayment. While we are not suggesting that the Superintendent's August 13, 2001 proposal for repayment satisfied BIA's consultation obligations under section 115.618, we do not find fault with BIA in deferring to Appellant and the Nation to attempt to resolve on a voluntary basis how repayment should be made.

from her IIM account should be made to Appellant on the basis of undue financial hardship during the period of repayment. 15/

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 reverses the Regional Director's May 10, 2004 decision to dismiss Appellant's appeal as untimely. The Board affirms that decision to the extent it declined to revisit the Superintendent's August 13, 2001 decision to encumber Appellant's IIM account for \$58,993.20, but vacates the decision to the extent it concluded that the Superintendent's October 4, 2002 decision satisfied BIA's obligations under the IIM regulations. The Board remands the matter to the Regional Director to consult with Appellant pursuant to section 115.618 and to issue a new decision on how the funds should be repaid. 16/

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Amy B. Sosin
Acting Administrative Judge

15/ The new decision should include appeal rights language in accordance with 25 C.F.R. Part 2. Even though a decision to restrict an IIM account may become final for the Department because no hearing was requested, when additional "applicable" provisions of the regulations require a follow-up decision, as is the case here under section 115.618, it appears that the general 25 C.F.R. Part 2 appeal provisions apply to the follow-up decision.

16/ Although the Board concludes that BIA's decision to restrict Appellant's IIM account for \$58,993.20 became final for the Department pursuant to section 115.606 when Appellant failed to request a hearing, and therefore the Board lacks jurisdiction to review that decision here, we strongly recommend that BIA and OTFM ensure that their records are fully in order regarding the transactions involving Allotment 2998 and involving Appellant's IIM account. In earlier correspondence with BIA, Appellant's counsel requested clarification concerning entries in Appellant's IIM account ledger, including clarification of why the 1999 entries do not appear to show payment for the first sale of Allotment 2998. It may be, of course, that the documentation possessed by Appellant and submitted to the Board is incomplete. Apart from the finality of the Superintendent's August 13, 2001 decision, it would be advisable for BIA to ensure that all of the records regarding this matter are in order, keeping in mind that BIA would still have authority to correct errors.