INTERIOR BOARD OF INDIAN APPEALS

Cynthia Hamilton Midthun v. Rocky Mountain Regional Director, Bureau of Indian Affairs

43 IBIA 258 (08/25/2006)

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

CYNTHIA HAMILTON MIDTHUN, Appellant,	:	Order Remanding Matter to Regional Director With Instructions to Issue a Decision on the Merits
v.	:	
ROCKY MOUNTAIN REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	:	Docket No. IBIA 05-66-A
	:	August 25, 2006

Appellant Cynthia Hamilton Midthun appeals, pursuant to 25 C.F.R. § 2.8 (Appeal from inaction of official), from a March 1, 2005 letter of the Rocky Mountain Regional Director, Bureau of Indian Affairs (Regional Director; BIA). 1/ The Regional Director's letter was sent in response to Appellant's appeal from a December 14, 2004 letter from the Superintendent of the Fort Peck Agency (Superintendent; Agency) concerning certain rental payments deposited in the "Missouri River Accretion Account" (Accretion Account). Appellant contends that she is entitled to immediate payment of her share of the escrowed funds. In appealing to the Board, Appellant acknowledges that the Regional Director responded to her in his March 1, 2005 letter, but contends that the letter did not satisfy the requirements of section 2.8. For the reasons discussed below, the Board remands this matter to the Regional Director with instructions for BIA to issue a decision on the merits of Appellant's request for payment, either granting or denying that request.

Background

Appellant owns a fractional interest in Lot 6, sec. 1, T. 26 N., R. 46 E., Roosevelt County, Montana, Fort Peck Allotment No. 1388 (Allotment 1388), which is located on the Fort Peck Reservation along the Missouri River. As an owner, Appellant is entitled to her respective share of rental payments made from leases on the allotment. Appellant's notice of appeal includes copies of two leases for Allotment 1388, one for the period from

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1/ 25 C.F.R. § 2.8 is an action-prompting provision, which allows a party to appeal from the "inaction" of a BIA official if the party has submitted a demand for action pursuant to section 2.8 and the BIA official has failed to respond in accordance with that section.

January 1, 1981 to December 31, 1985, and a second for the period from January 1, 1987 to December 31, 1991. Each lease identifies the total acreage for Allotment 1388 as "37.54 acres, more or less," and also breaks down the total acreage into 19.54 acres of "pastureland" and 18.00 acres of "accreted pastureland." Both leases have an attached "Ownership and Payment Schedule," which appears to indicate that the lease payments for the pastureland acreage will be distributed upon receipt to the various landowners according to their fractional ownership interest, and the lease payments for the accreted pastureland acreage will be credited to an account identified as the Accretion Account.

The record before the Board indicates that Appellant may have first inquired about the purpose of the Accretion Account in a 1989 letter to the Fort Peck Agency. On April 10, 1990, the Superintendent responded that a survey was required "to properly provide a legal description and to identify ownership of the accreted lands." April 10, 1990 Letter from Superintendent to Appellant. The Superintendent indicated that the Bureau of Land Management (BLM) would conduct the survey as BIA funding became available, and that until this was accomplished "any lease rentals collected for accreted lands are maintained in an escrow account." Id.

There was additional correspondence between Appellant and the Superintendent in 1999 after Appellant requested further clarification concerning the Accretion Account. In 2004, Appellant wrote to both the Superintendent and the Billings Field Solicitor requesting further information and clarification concerning the basis for holding rental payments in the Accretion Account. On August 26, 2004, the Superintendent informed Appellant that BIA had received a plat map from BLM for Allotment 1388, that BIA would need to submit a request to the Office of Trust Records (OTR) for the expired lease files, and that BIA Realty staff would begin immediate research and would transfer the accretion rentals applicable to Allotment 1388 to the extent amounts were readily determinable from the statements of account. In a letter dated December 14, 2004, in response to further correspondence from Appellant, the Superintendent stated that BIA was "close to completing [its] research and determining what funds, if any, [Appellant] may be entitled to receive." Dec. 14, 2004 Letter from Superintendent to Appellant. The letter also stated that BIA was waiting for a historical report on the 1980-1985 lease from the Office of the Special Trustee (OST). The Superintendent "apologize[d] again for the time it has taken to resolve this matter." Id.

The matter was not resolved, however, and on January 20, January 30, and February 11, 2005, Appellant or her husband, at her request, wrote to the Superintendent or the Regional Director. Appellant took issue with the Superintendent's December 14, 2004 letter, asserted that the Accretion Account had been erroneously established, and

argued that BIA had no basis for withholding payments from the Account. 2/ In her January 30, 2005 letter, Appellant appealed to the Regional Director from the Superintendent's December 14, 2004 response, arguing that the response "either directly or indirectly by implication denied my requests and my assertions." Jan. 30, 2005 Letter from Appellant to Regional Director.

On February 17, 2005, Appellant wrote to the Regional Director, pursuant to 25 C.F.R. § 2.8, requesting that he take action on her January 30, 2005 appeal within 10 days or establish a date by when such action would be taken. 3/

On March 1, 2005, the Regional Director responded. He stated that the Superintendent had neither denied nor ignored Appellant's request, but that the Superintendent's letter was intended to provide Appellant with an update of BIA's actions to resolve the underlying issue regarding rental payments for Allotment 1388. The Regional Director also stated that upon receipt of the accounting report from OST, the Superintendent would be able to respond to Appellant's concerns.

Appellant then appealed to the Board. Appellant acknowledged that the Regional Director had replied to her January 30, 2005 letter, but contended that the reply did not comply with the requirements of section 2.8 to take action on the merits of the issue.

By orders dated June 21, 2005 and February 16, 2006, the Board requested status reports from the Regional Director, which the Board received on August 8, 2005 and

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2/ In a letter to the Superintendent from Appellant's husband, on her behalf, Appellant had argued that the landowners "were, AND ARE, entitled to receive their full rents WHEN collected, not decades later." Dec. 9, 2004 Letter from Elmer Midthun to Superintendent.

3/ 25 C.F.R. § 2.8(b) provides in relevant part:

> The [BIA] official receiving a request [for action] as specified in [25 C.F.R. § 2.8(a)] 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 the official, within the 10-day period specified in [subsection 2.8(a)] 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.

April 5, 2006. Appellant filed responses to each status report filed by the Regional Director.

Discussion

This appeal comes to the Board in the form of a section 2.8 appeal, which governs appeals from inaction or alleged inaction by BIA officials. As further discussed below, in a section 2.8 appeal the Board's review typically is limited to reviewing whether BIA's alleged failure to take action or issue a decision within the prescribed time frame was excusable — not to review the underlying merits of the matter on which action was requested.

In her correspondence with BIA over the years, Appellant has asserted that the Accretion Account is wholly unnecessary, and is based on an incorrect legal interpretation of the leases. In her December 9, 2004 letter to the Superintendent, see supra note 2, Appellant contended that there was no reason why BIA should withhold any rental payments from the landowners.

As noted above, in his March 1, 2005 letter to Appellant, the Regional Director interpreted the Superintendent's December 14, 2004 response as neither denying or granting Appellant's request, but as providing updated information and an explanation to Appellant for why funds could not yet be distributed from the Accretion Account. Thus, the Regional Director did not directly address or decide the merits of the issue presented by Appellant — whether she is entitled to immediate payment of her share of any rent held in escrow for leases for Allotment 1388. Appellant therefore contends that the Regional Director's March 1, 2005 letter did not comply with the requirements of section 2.8 to issue a decision on the merits.

In some cases, the Board has recognized that it may be appropriate to dismiss a section 2.8 appeal, even if BIA has not technically met the regulation's requirements, when BIA is taking some action on the matter. See, e.g., Doney v. Rocky Mountain Regional Director, 40 IBIA 279, 280 (2005) (BIA had taken several specific actions to address the appellant's request and was acting in good faith in seeking to be responsive to appellant); Hackford v. Phoenix Area Director, 30 IBIA 270 (1997) (it was apparent that the Area Director was addressing the matter); Shaahook Group of Capitan Grande Band of Diegueno Mission Indians v. Director, Office of Tribal Services, 27 IBIA 43, 45 (1994) (information showed that the Director was working on the appellant's request).

In addition, the Board has dismissed section 2.8 appeals when it appears that the matter is not yet ripe for final action by a Regional Director because he or she is awaiting further information that is clearly necessary for making a decision. See, e.g., Paiute Indian Tribe of Utah v. Acting Western Regional Director, 40 IBIA 208, 209 (2005) (Regional

Director was awaiting required review by the Assistant Secretary - Indian Affairs before issuing a land-into-trust decision); Paiute Tribe of Utah v. Western Regional Director, 39 IBIA 261, 262 (2004) (Regional Director may need additional action or documents from the appellant and advice from the Solicitor's Office).

Thus, the Board does not construe section 2.8's directive to "make a decision on the merits" as allowing a party to use section 2.8 to force BIA to issue a merits decision when such a decision would be based on admittedly incomplete information or is contingent on third party action or, depending on how the request for action was framed, when BIA is acting in good faith to address the request.

The present case is similar in some respects to the cases in which the Board has dismissed section 2.8 appeals because BIA is taking action to gather additional information and it appears that the Regional Director sought in good faith to be responsive to Appellant. However, this case also differs from those cases in several respects, and we conclude that this difference warrants a remand with instructions rather than simply a dismissal. First, Appellant contends, as a matter of law, that she is entitled to immediate payment of her share of escrowed funds based on what she contends is the correct interpretation of her leases. Appellant argues that her leases provide for lump-sum annual rental payments, and that acreage information is irrelevant in calculating the proper amount due to her. 4/ Second, Appellant argues that even if her leases are properly interpreted as

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4/ During these proceedings, the Board characterized its understanding of the parties' respective interpretations of Appellant's leases as follows:

> The Board understands Appellant to interpret the leases as setting a single lump-sum annual rental amount for Allotment 1388, regardless of whether the riparian lands subject to accretion or other natural forces increase or decrease in acreage. As such, Appellant contends that the varying acreage of riparian lands is not relevant to a determination of the amount of rent to which she is entitled. The Board understands BIA to interpret the rental rate provisions in the leases for Allotment 1388 as establishing a per-acre rental rate. Because the amount of acreage of the accreted lands subject to a lease may vary over time, BIA has undertaken an effort to determine the specific acreage of the accreted lands within Allotment 1388 during the relevant time periods, in order to calculate the allocation of the escrowed funds to the owners, on a per-acre-rental-rate basis.

Feb. 16, 2006 Order at 3 n.1. Appellant subsequently confirmed that the Board had accurately stated her position. The Regional Director neither agreed nor disagreed with the Board's characterization of BIA's apparent position.

providing for rent on a per-acre basis, the surveys being conducted for BIA will be incapable of determining the actual acreage of Allotment 1388 during the relevant time periods — the terms of each lease. In effect, Appellant contends that this matter is ripe for action because there is no legal reason for BIA to deny immediate payment and the present-day surveys on which BIA apparently relies as grounds for withholding payment will not yield any information that would be relevant for a payment decision. 5/

Under the circumstances, we conclude that Appellant's requests to the Superintendent and the Regional Director, fairly construed, were requests for immediate payment of her share from the Accretion Account, based on legal and factual arguments that the matter was ripe for a decision. We do not question that BIA has been acting in good faith in attempting to address Appellant's inquiries, or that BIA believes in good faith that further information is necessary before it can distribute payments to Appellant for Allotment 1388 from the Accretion Account. However, unlike other section 2.8 cases that the Board has dismissed, it appears that this matter is at least "ripe" in the sense that BIA appropriately can issue a decision addressing the specific legal and factual arguments raised by Appellant in the context of her request for immediate payment.

The fact that BIA may still be waiting for historical lease records from OTR or OST would likely, in other circumstances, warrant dismissal of this appeal. However, given the nature of Appellant's legal arguments and the significant question of the relevance of the present-day surveys — which BIA expects may not be completed for another five or six years — the Board concludes that the appropriate course of action in this case is to remand the matter to the Regional Director with instructions for BIA to issue a decision in accordance with 25 C.F.R. § 2.7 and within 90 days, specifically granting or denying Appellant's request for immediate payment of her share of escrowed payments for Allotment 1388 from the Accretion Account. 6/ We leave it to the Regional Director to determine whether he will issue a decision directly, or whether he will direct the Superintendent to issue the initial merits decision responding to Appellant. We are fully aware, as Appellant must also be, that BIA may issue a decision denying payment. If that is

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5/ Appellant does not address the statements in the Regional Director's March 1, 2005 letter and his status reports to the Board that BIA also requires certain historical records or a report from OTR or OST in order to determine the payment amounts due to her.

6/ The 90-day timetable for issuing a decision should allow OTR or OST to produce the requested historical records or at least explain to BIA why they cannot be produced. Of course, if BIA denies Appellant's request for immediate payment based on BIA's inability to obtain records from another office or agency, BIA should explain that in its decision.

the case, however, and if Appellant again appeals to the Board, the Board will have an actual BIA decision on the merits and an administrative record to review. 7/

At a minimum, BIA's decision should explain the legal and factual basis for BIA's interpretation of the lease payment provisions relevant to the Accretion Account, the necessity of the Account, and the relevance of present-day surveys for determining amounts due to Appellant from the Account. The decision should also respond to the arguments raised and requests for information submitted by Appellant during the course of this appeal, to the extent they are relevant to deciding her request for payment. 8/

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 remands this matter to the Regional Director with instructions to issue a decision, in accordance with this order.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Amy B. Sosin
Acting Administrative Judge

7/ The Board is also aware that Appellant would likely prefer to have the Board address her arguments on the merits in deciding this appeal. As we have noted, however, the Board's scope of review over section 2.8 appeals is limited to deciding whether BIA must take action or issue a decision, and does not extend to directing BIA how to act or decide a matter in the first instance.

8/ During the course of this appeal, Appellant submitted separate requests for information, apparently under the Freedom of Information Act (FOIA), to the Superintendent. Specifically, Appellant asked BIA to inform her of the total balance in the Accretion Account and whether it is an interest-bearing account. The Superintendent apparently declined to provide that information, asserting that it is protected by the Privacy Act. Appellant's request is not within the scope of this appeal to the Board, which in any event does not have jurisdiction to consider appeals from denials under FOIA. Simpson v. Southern Plains Regional Director, 38 IBIA 127 (2002). Departmental regulations provide a separate process for FOIA appeals. See 43 C.F.R. §§ 2.28 - 2.33.