



INTERIOR BOARD OF INDIAN APPEALS

Jennie Honanie v. Northwest Regional Director, Bureau of Indian Affairs

53 IBIA 140 (04/22/2011)



United States Department of the Interior

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

JENNIE HONANIE,)	Order Affirming in Part, Vacating in Part,
Appellant,)	and Remanding for Further
)	Consideration
v.)	
)	
NORTHWEST REGIONAL)	Docket No. IBIA 09-49-A
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	April 22, 2011

We affirm in part and vacate in part the December 30, 2008, decision of the Northwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA), in which he upheld the decision of the Superintendent of BIA’s Yakama Agency (Superintendent) to restrict, through an encumbrance, the Individual Indian Money (IIM) account belonging to Appellant Jennie Honanie. BIA authorized the restriction after it was provided a copy of a judgment entered against Appellant by the Yakama Nation Tribal Court (Tribal court) in favor of the Yakama Nation Credit Enterprise (YNCE), which had initiated the suit to recoup funds loaned to Appellant and on which she had defaulted. We find no basis to set aside BIA’s initial action to restrict Appellant’s account. However, we vacate the Regional Director’s final decision to encumber the account because he erred in not holding the decision in abeyance pending the exhaustion of tribal remedies. On remand, the Regional Director shall determine whether tribal remedies have now been exhausted, and, if so and if he determines that there are grounds to continue the restriction on Appellant’s IIM account, he shall afford Appellant an opportunity for a supplemental hearing before issuing a final decision on the requested encumbrance.

Statutory and Regulatory Framework

BIA maintains accounts for trust funds owned by individual Indians. *See generally*, 25 C.F.R. pt. 115, subpt. F. The Government’s trust responsibilities for administering IIM accounts include “[p]roviding adequate controls over . . . disbursements [from IIM accounts],” 25 U.S.C. § 162a(d)(2); funds earned from the lease or sale of Indian trust lands may not be used to pay the debts of or claims against an Indian without the approval and consent of the Secretary of the Interior, *id.* § 410.

Unless an IIM account is restricted in some way, an Indian account holder may freely withdraw funds from her account. 25 C.F.R. § 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. *See* 25 C.F.R. pt. 115, subpt. E.

One type of restriction on an IIM account is an encumbrance. 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); *see also id.* § 115.002 (definition of “encumber or encumbrance”). Relevant to this appeal, one circumstance in which BIA may encumber an IIM account occurs when BIA receives documentation showing that a money judgment has been entered against the account holder under any tribal law and order code. *See id.* §§ 115.104, 115.601(b)(3).

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 5 days after BIA mails 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). Thus, while the restriction becomes effective after proper notice in accordance with § 115.602, it remains subject to the account holder’s right to a hearing.

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, 115.615.¹ 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. If the restriction is the result of an order or judgment of a court of competent jurisdiction,² and if evidence is presented that the account holder has

¹ The hearing may, of course, be postponed at the request of the account holder.

² For purposes of 25 C.F.R. pt. 115, “court of competent jurisdiction” is defined as “a [F]ederal or tribal court with jurisdiction.” 25 C.F.R. § 115.002. A state court is deemed to be a court of competent jurisdiction if there is no tribal court with jurisdiction. *Id.*

“appealed” from the order or judgment, “the BIA hearing [on a proposed encumbrance] *will be postponed* until there is a final order from the court.” *Id.* (emphasis added). In that event, “[t]he restriction on [the] IIM account will remain in place until after the hearing is concluded.” *Id.* 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 decision may also include “[a]ny 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.* §§ 115.107, 115.619. The restriction, however, remains in effect during the appeal. *Id.* § 115.620.

Factual Background

Appellant obtained three loans with YNCE, “a Yakama Tribal entity,” on which she failed to make adequate payments. Order (March 20 Order), *Yakama Nation Credit Enterprise v. Honanie*, No. C-06-44 (Yakama Tr. Ct. Mar. 20, 2007) (*Honanie*). Appellant’s delinquency led YNCE to file an action in the Yakama Tribal Court for a civil judgment in the amount of \$114,546.23, *see* Complaint, *Honanie* (attached to Appellant’s Response to [Board’s] Order for Supplemental Briefing), at 2. According to the complaint, YNCE sought judgment against Appellant for defaulting on 3 loans: (1) S016/C29305 (home equity loan), (2) S005/205129 (car loan – 1999 Altima), and (3) S023/227973 (car loan – 2000 Ford Windstar). The Tribal court set the matter for hearing on February 8, 2007. YNCE appeared; Appellant failed to appear. On February 14, 2007, Appellant wrote a letter to the Tribal court to explain her failure to appear.

On March 20, 2007, the Tribal court issued a default judgment in *Honanie* against Appellant for \$119,224.28 plus \$20 for the filing fee. Order, Mar. 20, 2007, *Honanie* (March 20 Order).³ According to the March 20 Order, Appellant was notified of the date and time of the hearing but did not appear. Although Appellant was not present, the Tribal

³ We note that the court’s order was signed on March 20, 2007, but bears a “received” date of February 22, 2007. YNCE explained that it drafted the order for the court’s signature, lodged it with the court as a proposed order on February 22, and the Tribal court judge subsequently signed the order on March 20. It is not uncommon for courts to require or request the parties to submit proposed orders for the court’s consideration and signature.

court proceeded with the hearing. The March 20 Order granted a default judgment against Appellant, stating,

2. [Appellant] did not appear at the hearing, or otherwise contact the Court or file any answer, request for continuance, or other document with the Court.

4.^[4] Pursuant to RYC Section 7.10.05,^[5] [YNCE] . . . offer[ed] evidence that [Appellant] had entered into valid loan agreements with [YNCE] to pay three loans, that [Appellant] had breached those agreements by failing to make the payments as agreed, and that the current balances due and payable on the loans, including unpaid interest, were: (a) Loan No. S005 – \$3,771.90[;] (b) Loan No. S016 – \$94,892.63; and (c) Loan No. S023 – \$20,540.22. These amounts total \$119,224.28.^[6]

5. This Court finds that [YNCE] presented sufficient evidence that [Appellant] signed valid contracts for loans and that [Appellant] breached those contracts, entitling [YNCE] to a judgment in the amount of \$119,224.28.

....

[Appellant] shall have ten (10) days from the entry of this Order to apply to the Court in writing for consideration for a new trial, based on a showing of good cause for her failure to appear and answer the summons.

Id. at 2.⁷ The March 20 Order further “directs” that Appellant’s IIM account be restricted and the funds in the account be used to pay the judgment. *Id.* Finally, the March 20 Order

⁴ The March 20 Order does not contain a paragraph numbered “3;” the paragraph following ¶ 2 is numbered “4.”

⁵ “RYC” refers to Revised Yakama Code. *See, e.g., Estate of Phillip Quaempts*, 41 IBIA 252, 253 (2005). None of the parties have provided the Board with copies of relevant provisions of the Revised Yakama Code or of relevant precedential Tribal court decisions.

⁶ The 3 loan amounts total \$119,204.75, not \$119,224.28.

⁷ Apparently one of the loans, S005, has been satisfied or forgiven. *See* Exh. E (YNCE’s Response to Appellant’s Submissions, Nov. 30, 2010, *Honanie* (seeking judgment against Appellant on 2 loans, nos. S023 and S016)) to Declaration of Karin L. Foster (Foster Declaration), Feb. 11, 2011, at 2 (attached to YNCE’s Supp. Brf., Feb. 11, 2011).

entered a default judgment in favor of YNCE pursuant to RYC § 7.01.05. The March 20 Order does not explain why the amount of the judgment is greater than the amount prayed for in YNCE's complaint. The Tribal court did not address or acknowledge Appellant's February 14 letter.

According to both BIA and YNCE, YNCE did not present a written request to BIA for an encumbrance to be placed on Appellant's IIM account. Rather, YNCE asserts that it drafted a *Kennerly* letter⁸ for BIA's signature, which it apparently presented to BIA together with (1) a copy of 2 loan documents for loan nos. C29305 and 227973, (2) 2 executed and approved Assignments of Trust Property for loan nos. C29305 and 227973 (Assignments), (3) "Loan Information" forms for loan nos. C29305 and 227973, (4) a copy of YNCE's March 6, 2007, brief opposing new trial filed in *Honanie*, and (5) a copy of the March 20 Order. *See* Declaration of Kim Smartlowit (Smartlowit Declaration), Feb. 11, 2011, at ¶ 4 and Exh. A (attached to YNCE's Supp. Brf., Feb. 11, 2011).⁹ No loan documents for loan no. S005/205129 appear in BIA's administrative record nor do any Assignments.¹⁰

Thereafter, on July 9, 2008, the Superintendent issued the *Kennerly* letter to Appellant, informing her that BIA had received a copy of the Tribal court's March 20 Order "in the amount of \$119[,]244.28 and [YNCE] is seeking to recover from you the remaining amount of \$113,480.17 [through an encumbrance on your IIM account]." Letter to Appellant from Superintendent, July 9, 2008, at 1 (Administrative Record (AR), Tab 10). The letter further advised Appellant that her IIM account would be restricted

⁸ So called after *Kennerly v. United States*, 721 F.2d 1252 (9th Cir. 1983).

⁹ Attached to Smartlowit's declaration is the actual *Kennerly* letter, dated July 9, 2008, that BIA sent to Appellant, not a draft letter. Because Smartlowit asserts that this letter "is a true and complete copy of the *Kennerly* letter . . . submitted [by YNCE] to BIA," Smartlowit Declaration at ¶ 4, we assume then that the actual letter is identical to the draft letter submitted by YNCE.

¹⁰ According to the Assignments provided by YNCE, Appellant assigned *inter alia* "[a]ll property, except land, which is now or may in the future be held in trust for me by the United States [and] any income from any source and any funds [from] any source accruing to my [IIM] account." The forms were each signed by Appellant and by the Superintendent. Neither the Regional Director nor the Superintendent made any reference to the assignments in their respective decisions. Therefore, we conclude that BIA did not rely on the assignments in approving the restriction of Appellant's IIM account, and we do not give further consideration to them in our decision. *See* 25 C.F.R. § 115.601(b)(2).

effective 5 days after mailing, and that all moneys currently in her IIM account as well as future deposits to the account would be distributed to YNCE during the time her account was restricted until the entire amount of the judgment was paid from the account and any other sources. The letter also informed Appellant of her right to request a hearing, the process for doing so, and her right to present testimony and other evidence at the hearing. Enclosed with the letter was a copy of 25 C.F.R. §§ 115.609-115.612.

Appellant requested a hearing before BIA, which apparently was scheduled for August 11, 2008.¹¹ The designated BIA hearing officer was Linda Oberle. Appellant appeared for the hearing on August 11, gave Oberle a written brief (AR, Tab 15), and requested a continuance that Oberle granted.¹² In her brief, Appellant stated that on February 14, 2007,¹³ and again on April 20, 2007, she wrote to the Tribal court to explain why she was not in court for her trial date and that she requested a new trial;¹⁴ she further stated that she was still waiting for a response from the Tribal court and argued that BIA should not take any action until Appellant exhausted her tribal remedies.

The hearing was continued to August 26, 2008, “to ensure [Appellant has] sufficient time to submit requested documentation of proof [of a] pending appeal [in the tribal court action].” Letter to Appellant from Oberle, undated (AR, Tab 14). Appellant appeared at the August 26 hearing, and she and her representative, Ray Olney, spoke against the

¹¹ The letter setting the hearing sets the date as July 11, 2008, which would appear to be a typographical error. *See* AR, Tab 12.

¹² It is unclear what, if any, proceedings took place on August 11 before the matter was continued or postponed to August 26 although some colloquy occurred concerning the issue of whether Appellant may have appealed from the March 20 Order. *See* Letter to Appellant from Oberle, undated (AR, Tab 14). In any event, the record contains no transcript for proceedings on August 11.

¹³ Appellant’s brief says that the request was dated February 14, 2008, which appears to be a typographical error: A copy of the request appears in the record, *see* AR, Tab 6, and is dated February 14, 2007.

¹⁴ According to the brief that Appellant gave to Oberle, there were three documents attached, including Appellant’s April 20, 2007, communication to the Tribal court. The copy of the brief that appears in the administrative record has no documents attached to it. We cannot determine whether Appellant omitted the attachments when she delivered her brief to BIA or whether BIA omitted the attachments when it prepared the record for the Board.

restriction; YNCE was represented at the hearing by its attorney, who argued for the imposition of the encumbrance. Appellant explained again that she was still waiting for a response to her February 14, 2007, letter to the Tribal court. She added that she wrote to the Tribal court a second time, and had not received a response. She admitted that she had not filed an appeal with the Tribal appellate court but explained that she had not done so because she was waiting for a response to her letters to the lower court. She also explained that she went to the Tribal Law and Order Committee as well as to the Tribal court secretary in her efforts to obtain a response to her February 2007 letters. Appellant argued that she had not received due process in the Tribal court, that she had already paid \$45,000 towards her indebtedness, and that treaty rights prohibited encumbrances on her IIM account.¹⁵

On September 2, 2008, the hearing officer recommended to the Superintendent that Appellant's IIM account remain restricted. The recommendation stated that Appellant "did submit letters written by her to the Tribal [c]ourt" concerning her failure to appear, but that the Tribal court found that Appellant "did not show good cause for not appearing." Recommended Decision, Sept. 2, 2008 (AR, Tab 17). The hearing officer also recommended that if "circumstances change" in the Tribal court and "an appeal is granted," the restriction on Appellant's IIM account could be revisited at that time. *Id.*

The Superintendent accepted the hearing officer's recommendation, and notified Appellant by letter dated September 4, 2008, that the encumbrance would remain in place. He observed that Oberle's recommendation "was based on the fact[] that there is no current appeal pending in . . . Tribal [c]ourt." Superintendent's Decision, Sept. 4, 2008 (AR, Tab 18). He stated that Appellant could seek reconsideration of the encumbrance if she were later "granted an appeal." *Id.* Finally, he explained that the encumbrance would be for "\$119,224.28 less any amounts that have since been applied to [Appellant's debt];" that payments would be made to YNCE; "an encumberment distribution plan" would be developed for distribution of payments; and that the encumbrance would remain in place until the judgment was satisfied. *Id.* Neither the hearing officer nor the Superintendent addressed the remaining arguments raised by Appellant at the hearing, e.g., that she had paid \$45,000 towards her debt to YNCE, that she did not receive due process in the Tribal court, and that her IIM money could not be encumbered.

¹⁵ The transcript does not reflect any questions from the hearing officer concerning Appellant's representation that she had paid her debt down by \$45,000, nor did YNCE challenge or explain this assertion.

Appellant appealed the Superintendent's decision to the Regional Director. She argued that she was denied due process in the Tribal court and enclosed a copy of her September 16, 2008, notice of appeal that she filed in the Tribal appellate court seeking review of the lower court's March 20 Order. She also claimed that she had not received any plan or recommendation for the distribution of her IIM funds to YNCE, claimed that she should have been given another hearing by BIA, claimed that she did not receive certain rights under 25 C.F.R. pt. 2, and asserted that the decision would adversely affect herself and her family, and would cause her "substantial and measurable financial loss." Notice of Appeal, Sept. 22, 2008 (AR, Tab 19). She did not detail how she and her family would be impacted by the encumbrance. YNCE filed a brief in opposition to Appellant's appeal from the Superintendent's decision.

On December 30, 2008, the Regional Director affirmed the Superintendent's decision. The Regional Director found that at the hearing Appellant did not provide proof of a pending appeal, and that there was no appeal pending in Tribal court at the time of the Superintendent's decision. The Regional Director observed that Appellant had borrowed from YNCE and had failed to pay the resulting debts, thus prompting YNCE to seek redress against her in Tribal court. In response to Appellant's arguments, the Regional Director explained that, because he lacked authority over the Tribal court, he is "not able to state whether or not [Appellant was] provided due process under this jurisdiction," Decision at 5, he explained that a plan for the distribution of payments from Appellant's IIM account would be forthcoming, and he explained that the appeal procedures at 25 C.F.R. pt. 2 were not applicable to the decision making process that occurred while the matter was before the Superintendent.

This appeal followed. During the pendency of this appeal, the Tribal appellate court issued an order dismissing Appellant's appeal as untimely but nevertheless remanding the matter to the lower court to hold a new trial. *See* Order Stay Denied, *Yakama Nation Credit Union v. Honanie*, No. A-08-10 (Yakama Tr. App. Ct. Feb. 17, 2009 (JJ. Gonzalez, Jackson)); Emergency, Hearing, & Stay Order, *Yakama Nation Credit Union v. Honanie*, No. A-08-10 (Yakama Tr. App. Ct. Feb. 18, 2009 (J. Pinkham) (filed with Appellant's Opening Brief). Two of the appellate justices held that Appellant had been denied due process by the lower court when that court failed to respond to her February 14 letter. *See* Order Stay Denied at 3.

A subsequent hearing was held in the Tribal court on December 2, 2010, and an order issued that same day that held that "due process has been met," observed that the restriction of Appellant's IIM account is not part of the Tribal court proceedings but within the purview of the BIA, and noted that the parties were amenable to restructuring

Appellant's home loan. Order, *Honanie*, entered Dec. 2, 2010 (December 2 Order).¹⁶ The December 2 Order, by its terms, neither purports to affirm the March 20 Order nor award judgment in favor of either party. In February 2011, YNCE wrote to the Tribal court "to inform the Court of the status of settlement discussions between the parties." See Exh. H (Letter to Hon. Lorintha Warwick from YNCE, Feb. 10, 2011, *Honanie*) to Foster Declaration (attached to YNCE's Supp. Brf., Feb. 11, 2011). YNCE advised the Tribal court that Appellant had failed to execute and return the loan application that would permit the loan restructure process to go forward.

In response to the Board's order for supplemental briefing, YNCE represents that it is unaware of any appeal filed by Appellant from the Tribal court's December 2 Order, and further asserts that because the time for filing an appeal has passed, the Tribal court proceedings have now "ended." YNCE's Supp. Brf. at 6. Appellant argues that she received a copy of a proposed order lodged by YNCE with the Tribal court, but has not received an order signed by the Tribal court on December 2, 2010. Therefore, she argues that her time to appeal has not begun to run.

Discussion

We conclude that the Tribal court's default judgment provided a sufficient basis for BIA to restrict Appellant's IIM account, but that BIA erred in not holding in abeyance a final decision to encumber the account pending exhaustion of tribal court remedies. We also conclude that the Regional Director erroneously accepted the Superintendent's decision to encumber Appellant's account in the amount of the Tribal court judgment notwithstanding YNCE's request to encumber the account for a lesser amount. On remand, after determining whether tribal court remedies have been exhausted, the Regional Director must afford Appellant an opportunity for a supplemental hearing before making a final decision to encumber her IIM account.

1. Standard of Review

The decision to allow or disallow an encumbrance is a discretionary decision that rests with BIA. *Quaempts v. Acting Northwest Regional Director*, 42 IBIA 272, 280 (2006). Thus, the Board's role, in reviewing appeals from discretionary decisions, is a limited one: We determine whether the administrative record supports the Regional Director's decision,

¹⁶ No certificate of service is appended to the Dec. 2 Order provided to the Board by YNCE.

whether the decision comports with the law and applicable regulations, and whether BIA has provided an explanation for its decision that is neither arbitrary nor capricious. *See id.* Although, we will review *de novo* BIA's interpretation of regulations, we will not substitute our judgment for BIA's exercise of its discretionary authority. *Id.* The burden remains with the appellant to show error in the decision. *Id.*

2. Merits

Appellant's persistent argument, beginning at BIA's Yakama Agency and renewed before the Regional Director and the Board, has been that BIA action to encumber her IIM account is premature. We agree in part with Appellant. BIA is vested with the discretion to restrict Appellant's IIM account when, *inter alia*, BIA is presented with a tribal court order awarding a monetary judgment against an IIM account holder and is requested to disburse income to a third party pursuant to that order. However, while BIA may restrict an account based upon a court judgment or order, we construe the regulations to preclude BIA from issuing a final decision to encumber an account until tribal court remedies have been exhausted. In the present case, it was clear at the hearing that Appellant was in the process of seeking relief from the March 20 Order. And when the Regional Director issued his decision, he knew that Appellant had filed an appeal with the Tribal appellate court. Whether that appeal was timely or meritorious was for the Tribal court — not the Regional Director — to decide.

a. Tribal Court Proceedings

The parties do not dispute that the March 20 Order determined that Appellant is delinquent in her loan payments to YNCE and awarded judgment to YNCE. The March 20 Order recites that it was issued pursuant to tribal law, specifically RYC § 7.01.05. Therefore and pursuant to 25 C.F.R. § 115.601(b)(3), the Regional Director properly relied on the Tribal court order to affirm the Superintendent's decision to restrict Appellant's IIM account. To the extent that Appellant argues that the March 20 Order should be disregarded in its entirety and the encumbrance removed, we disagree and conclude that Appellant has not met her burden of showing error. Appellant maintains that the Tribal court is untrained and unbiased, that YNCE's attorney has a conflict of interest because she is paid from the interest paid by Appellant on her YNCE loans, and that YNCE's attorney breached confidentiality. These arguments attack the court's order and are barred in these proceedings. *See* 25 C.F.R. § 115.609 ("You may not challenge a court order or judgment in . . . proceeding[s] before BIA."). Moreover, these arguments are raised for the first time in Appellant's supplemental brief to the Board and we decline to consider them in the first instance. *See Bunney v. Pacific Regional Director*, 49 IBIA 26, 32-

33 (2009) (Board need not consider arguments raised for the first time in supplemental briefing to the Board).¹⁷ Apart from her due process challenge, which Appellant is pursuing in the Tribal court, Appellant raises no other challenges to the March 20 Order or any basis for us to lift the restriction. And, because the March 20 Order has not been set aside by the Tribal court, we affirm the Regional Director's decision to restrict Appellant's account pending the exhaustion of tribal court proceedings.

We turn now to the issue of whether, at the time of the Regional Director's decision, tribal court proceedings had concluded for purposes of entering a final agency decision to encumber Appellant's account pursuant to 25 C.F.R. §§ 115.615-115.616. We conclude that they had not.

We hold that "appeal", as used in § 115.609, not only includes formal appeals to a higher court within the tribal judicial system, but also includes pleadings seeking reconsideration of or relief from judgment, such as Appellant's February 14 letter to the Tribal court. In other words, we construe § 115.609 to allow for the exhaustion of court remedies where a restriction is predicated upon a tribal court order or judgment. In such circumstances, the Department's role is analogous to that of a bank in an interpleader action albeit with the additional layer of trust responsibilities, which are owed to the account holder. Thus, where the restriction is for the benefit of a third party and results from a facially valid court order or judgment, BIA's initial role is that of a neutral party holding funds to which two or more parties assert rights. BIA retains the discretion to determine whether to permit an encumbrance on the IIM account, which need not and should not include determining whether a particular appeal from the court order is timely or meritorious. However, once BIA exercises its discretion to accept a tribal court order as the basis for restricting an IIM account, BIA then assumes the role of a neutral party while tribal court remedies are pursued. Once court proceedings have concluded and assuming grounds remain for continuing the restriction, BIA then schedules a hearing, followed by a final, discretionary decision in accordance with 25 C.F.R. § 115.616.

Here, it is evident that Appellant had not exhausted her tribal court remedies at the time of the Regional Director's decision: Appellant still had not received a response to her

¹⁷ The scope of the Board's review of the Regional Director's decision is limited to those issues that were before him or decided by him, unless manifest error or injustice is evident. 43 C.F.R. § 4.318. Appellant's asserted arguments do not raise an issue of manifest error or injustice.

February 14 letter to the lower tribal court *and* she had an appeal pending in the Tribal appellate court. Thus, we hold that the Regional Director erred in concluding that the March 20 Order was a final order in the face of evidence of Appellant's active pursuit of tribal court remedies. Moreover, the Regional Director's duty under § 115.609 was to determine whether or not an appeal was pending, not whether the appeal was timely or meritorious or whether an appeal was pending at the time the request for an encumbrance was before the Superintendent.¹⁸

Therefore, we conclude that the Regional Director erred in failing to recognize either Appellant's February 14 letter or her appeal to the Tribal appellate court as "appeals" within the meaning of § 115.609. We vacate that portion of the Regional Director's decision that purports to be a final decision to encumber Appellant's IIM account. On remand, the Regional Director should determine whether the December 2 Order has been appealed. If it has not, the Regional Director should determine whether the December 2 Order is an interlocutory or final decision.¹⁹ At such time as there is a final, unappealed Tribal court order in *Honanie* (or the parties settle *Honanie*) and the Regional Director determines that grounds for the imposition of an encumbrance remain, the Regional Director shall afford Appellant an opportunity for a supplemental hearing on the record at which Appellant is entitled to show (1) that it will be an undue financial hardship to encumber her IIM account, (2) that the amount of any judgment should be offset by payments made by Appellant to YNCE, and (3) any additional arguments that Appellant chooses to raise in opposition to the encumbrance, including any arguments that she was

¹⁸ Both parties — Appellant and YNCE — have an incentive to ensure that the Tribal court responds to Appellant's filings because the funds in the IIM account otherwise remain restricted and not subject to disbursement, except to Appellant and only if she is able to demonstrate undue financial hardship.

¹⁹ The December 2 Order does not reaffirm or address the status of the March 20 Order nor does the December 2 Order purport to award judgment in favor of either party, much less award a sum certain to YNCE. It is possible that the Tribal court is holding its final order in abeyance pending settlement negotiations between the parties. *See* letter to Hon. Lorintha Warwick from YNCE, Feb. 10, 2011 ("This letter is filed . . . to inform the Court of the *status of settlement discussions* between the parties." *Emphasis added.*) (Exh H to declaration of Karin L. Foster, Feb. 11, 2011, attached to YNCE's Supp. Brf.). It is unclear why YNCE would be reporting the status of settlement discussions to the Tribal court if the matter is closed and no longer on the court's docket.

denied due process.²⁰ Following the hearing, a final decision shall then be issued pursuant to 25 C.F.R. § 115.615-115.616.

b. Amount of Encumbrance Pending Exhaustion of Tribal Court Remedies

The Regional Director affirmed the Superintendent's decision to encumber Appellant's IIM account for "[t]he amount to be paid per the court order, dated March 20, 2007, [of] \$119,224.28 less any amounts that have since been applied to the account." Superintendent's Decision, Sept. 4, 2008 (AR, Tab 18). YNCE, however, submitted a request to BIA to encumber Appellant's account in "the remaining amount of \$113,480.17." See *Kennerly* letter, July 10, 2008, at 1 (AR, Tab 10).²¹ Therefore, while judgment originally was awarded in the amount of \$119,224.48 plus \$20 filing fee, *but see* n.6 *supra*, YNCE represented to BIA that an encumbrance of \$113,480.17 would satisfy Appellant's debt. BIA had no basis for encumbering Appellant's IIM account in an amount greater than requested by YNCE.

We therefore reduce the amount of the funds to be restricted for the benefit of YNCE to \$113,480.17. Pursuant to 25 C.F.R. § 115.620(b), Appellant shall be entitled to request any funds in her account that exceed this amount. At the conclusion of tribal court proceedings and a supplemental hearing (if requested by Appellant), BIA shall determine the appropriate amount of encumbrance, if Appellant's IIM account is restricted, and enter a final decision in accordance with 25 C.F.R. § 115.616.²²

²⁰ While BIA has no authority to reverse or modify a tribal court judgment, *see* 25 C.F.R. § 115.609, BIA is *not* precluded from considering — in the context of determining whether to encumber an Indian's IIM account — whether Appellant's rights under the Indian Civil Rights Act (ICRA), 25 U.S.C. § 1302, were violated. In this regard, the Regional Director's statement — "[t]he Tribal Court is not under my jurisdiction, and thus I am not able to state whether or not [Appellant was] provided due process [in the Tribal court]," Regional Director's Decision at 5 — is overbroad. *See Jenkins v. Western Regional Director*, 42 IBIA 106, 113 (2006) (BIA properly considers whether an ICRA violation has occurred in the context of matters over which BIA has decisional authority, e.g., whether to approve a constitutional amendment, or where BIA is otherwise required to make a decision).

²¹ YNCE states that it drafted the *Kennerly* letter that the Superintendent sent to Appellant in which he states that YNCE requested an encumbrance of \$113,480.17.

²² Appellant is entitled to the use of any funds in her IIM account that exceed this amount, *see* 25 C.F.R. § 115.620(b), unless there are additional encumbrances on her account, *see*,

(continued...)

Conclusion

We affirm the Regional Director's decision to restrict Appellant's IIM account. We vacate that part of his decision in which he affirms the Superintendent's decision to encumber the account for "119,224.48 less any amounts that have since been applied," and order that Appellant's IIM account be restricted for up to \$113,480.17 pending a final order from the Tribal court or a settlement executed by the parties.

We remand this matter to the Regional Director to determine whether the Tribal court has rendered a final decision in *Honanie* or, alternatively, whether the parties have settled their dispute. Once the Regional Director determines that tribal court proceedings have concluded and assuming that the Regional Director determines that grounds exist for continuing the restriction on Appellant's account, a supplemental administrative hearing shall be offered to Appellant at which Appellant may contest the encumbrance itself, the amount of the encumbrance, or show that an encumbrance would result in undue financial hardship. Thereafter, a decision should be rendered in accordance with 25 C.F.R. § 115.616.²³

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, affirms in part and vacates in part the Regional Director's December 30 2008, decision, and remands for further proceedings consistent with this order.

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

²²(...continued)

e.g., U.S. Department of the Treasury, Notice of Levy, Sept. 28, 2009 (attached to Appellant's Second Request for Release of IIM Funds, Feb. 2, 2010). We express no opinion on the priority of encumbrances in the event there is more than one encumbrance.

²³ We leave it to the Regional Director to determine whether to remand this matter to the Superintendent to decide in the first instance or whether the matter should be decided at the regional level.