



INTERIOR BOARD OF INDIAN APPEALS

Valley Center - Pauma Unified School District v. Pacific Regional Director,
Bureau of Indian Affairs

53 IBIA 155 (04/29/2011)

Motion for Reconsideration Dismissed:

54 IBIA 36

Judicial review of this case:

Case settled and dismissed, *Valley Center-Pauma Unified School District v. IBIA, U.S. Dept. of the Interior*, No. 3:11-CV-01260-AJB-BGS (S.D. Cal. Mar. 28, 2011)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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VALLEY CENTER - PAUMA)	Order Docketing and Dismissing
UNIFIED SCHOOL DISTRICT,)	Appeal
Appellant,)	
)	
v.)	Docket No. IBIA 11-080
)	
PACIFIC REGIONAL DIRECTOR,)	
BUREAU OF INDIAN AFFAIRS,)	
Appellee.)	April 29, 2011

On February 24, 2011, the Board of Indian Appeals (Board) received, by FedEx delivery, an original of a notice of appeal by Valley Center - Pauma Unified School District (Appellant). The appeal seeks review of a January 4, 2011, decision (Decision) of the Pacific Regional Director (Regional Director), Bureau of Indian Affairs (BIA), to approve the acceptance into trust of 9.08 acres, more or less, of land located in San Diego County, California, by the United States for the San Pasqual Band of Diegueno Mission Indians of California (Tribe).¹ Appellant sent the appeal to the Regional Director, who transmitted it to the Board.

A notice of appeal from a decision of a BIA regional director must be filed with the Board “within 30 days after receipt by the appellant of the decision from which the appeal is taken.” 43 C.F.R. § 4.332(a). Appellant does not contend that its appeal was filed with the Board within 30 days after Appellant received a copy of the Decision, but argues instead that the 30-day deadline does not apply to Appellant because the Regional Director did not send a copy of her Decision to Appellant. We disagree with Appellant that the 30-day deadline is inapplicable, and therefore we dismiss this appeal for lack of jurisdiction.

Background

The Regional Director’s Decision advised interested parties of their appeal rights, stating that any appeal must be filed “within (30) days of receipt of this notice with the [Board],” and that the notice of appeal to the Board must be mailed “within thirty (30)

¹ The land is identified as Assessor’s Parcel Number 189-051-02.

days of the date of receipt of this notice.” Decision at 6. The Decision provided the Board’s current address. The Regional Director sent the Decision to, among other interested parties, the California State Clearinghouse, the Office of the Governor of California and the Deputy Attorney General, and various officials of San Diego County.

It is undisputed, however, that the Regional Director did not send a copy of the Decision directly to Appellant, and for purposes of deciding this appeal, we accept Appellant’s allegation that the Regional Director was on notice that Appellant had expressly asked to be added to the service list. Appellant asserts that it received a copy of the Decision “second-hand” through the office of a state agency. *See* Appellant’s Statement of Good Cause at 2 (stating that Appellant “received the Decision second-hand” from a “fellow California public agency”). Appellant does not identify the date on which it received a copy of the Decision, but Appellant also does not contend that it filed its appeal with the Board within 30 days of its receipt of the Decision from the state agency. Instead, Appellant argues that because it was not served directly with the Decision, BIA violated its “constitutional due process” rights, thus precluding application of the 30-days-from-receipt deadline. *Id.*

The burden is on an appellant to show that its notice of appeal was timely filed with the Board. *See Saguario Chevrolet, Inc. v. Western Regional Director*, 43 IBIA 85, 85 (2006). As noted earlier, 43 C.F.R. § 4.332(a) provides the general rule that a notice of appeal from a BIA administrative decision must be filed with the Board “within 30 days after receipt by the appellant of the decision from which the appeal is taken,” and the 30-day deadline is jurisdictional. 43 C.F.R. § 4.332(a); *Ducheneaux v. Acting Great Plains Regional Director*, 52 IBIA 213, 217 (2010); *Wick v. Midwest Regional Director*, 44 IBIA 20, 20 (2006).

There is, however, an exception to the 30-day deadline, which is found in 25 C.F.R. § 2.7. Section 2.7 requires that a BIA official give written notice of a decision and advise interested parties of appeal rights, and it contains a tolling provision that applies under certain circumstances. Section 2.7 provides in relevant part as follows:

(a) The official making a decision shall give all interested parties known to the decisionmaker written notice of the decision by personal delivery or mail.

(b) Failure to give such notice shall not affect the validity of the decision or action *but the time to file a notice of appeal regarding such a decision shall not begin to run until notice has been given in accordance with paragraph (c) of this section.*

(c) All written decisions . . . shall include a statement that the decision may be appealed pursuant to this part, identify the official to whom it may be

appealed and indicate the appeal procedures, including the 30-day time limit for filing a notice of appeal.

25 C.F.R. § 2.7 (emphasis added). Thus, if written notice is not given under § 2.7(a), the time period for filing an appeal is tolled until a party has been provided a statement of appeal rights under § 2.7(c), which requires that a BIA decision contain instructions on where and when an appeal must be filed.

In the present case, the Decision included accurate instructions for filing an appeal, and thus it complied with § 2.7(c). But the Decision was not, as noted, sent to Appellant pursuant to § 2.7(a); instead, Appellant received it through another agency.² On these facts, Appellant argues that the filing deadline contained in the regulations does not apply because it “was never served with the Decision, as required by due process and 25 C.F.R. [§] 2.7.” Appellant’s Statement of Good Cause at 2; *see also* Appellant’s Reply to Tribe’s Opposition to Appellant’s Statement of Good Cause at 5 (arguing that Appellant “simply was not subject to a 30-day deadline”).

We disagree. By its express language, the tolling provision in § 2.7(b) is tied to compliance with § 2.7(c) — i.e., a decision must contain correct appeal instructions. Appellant emphasizes the tolling language in § 2.7(b), but fails to address its express reference to § 2.7(c). *See id.* at 3. If a decision fails to contain correct appeal instructions, as required by § 2.7(c), then § 2.7(b) provides the consequence: the 30-day deadline is tolled as a matter of law until notice of appeal rights has been given. On the other hand, if BIA fails to comply with § 2.7(a) by failing to send a decision to an interested party, the consequence is that a party entitled to notice of the decision will not receive the decision, thus preventing the 30-day deadline from being *triggered*, unless and until the party does receive notice of the decision. BIA’s failure to send a decision directly to an interested party does not mean, as Appellant argues, that the 30-day deadline will never apply.³ Appellant’s argument, if accepted, would mean that even if a BIA decision contains correct appeal

² The Tribe contends that Appellant is not an interested party and was not entitled to direct notice. We assume, solely for purposes of deciding this appeal, that Appellant qualifies as an interested party entitled to notice of the Decision under § 2.7(a).

³ Appellant argues that notice to the State Clearinghouse did not constitute notice to Appellant. We need not decide whether sending the Decision to the State Clearinghouse constituted constructive notice to Appellant sufficient to trigger the 30-day deadline because Appellant does not contend that it received actual notice less than 30 days before the appeal was filed with the Board.

instructions, and even if an interested party receives the decision by other means, BIA's failure to serve that party directly would toll indefinitely the time for filing an appeal. We do not think that was the intent of § 2.7(b), nor do we think that due process requires such a reading.

Appellant argues that after it received the Decision, second-hand, in January 2011, it "acted diligently to preserve its rights," Appellant's Statement of Good Cause at 3, but the fact remains that Appellant failed to follow the appeal instructions provided in the Decision, and it had 30 days from receipt to do so. The Board has consistently held that "[a] notice of appeal is not timely when the appellant has been given correct appeal information but files a notice of appeal with an official other than the Board, resulting in receipt of the notice of appeal by the Board outside the time period specified in the regulations." *Wick*, 44 IBIA at 21. *See also LeCompte v. Acting Great Plains Regional Director*, 46 IBIA 242, 243 (2008) (appellant's assertion that she served BIA and the Assistant Secretary - Indian Affairs "does not satisfy the regulatory requirement that she timely file her notice of appeal with the Board"); *see generally Saguario Chevrolet, Inc.*, 43 IBIA 85 (copy of appeal sent to BIA within appeal period *but not to the Board* does not render appeal timely within the meaning of § 4.332(a)). Further, an appellant who ignores appeal instructions and files its notice of appeal in the wrong office bears the risks of delays in transmitting its notice of appeal to the Board. *See Siemion v. Rocky Mountain Regional Director*, 48 IBIA 249, 256 (2009).

Appellant also argues that the Board "must avoid procedural dismissals if there has been no showing that a procedural deficiency has prejudiced an adverse party." Appellant's Statement of Good Cause at 4. In support of its argument, Appellant cites the decision of the Interior Board of Land Appeals (IBLA) in *Lewis v. Bureau of Land Management*, 144 IBLA 235 (1998). That decision is inapplicable. In *Lewis*, there was no question that the appellant had filed a timely notice of appeal. At issue was the appellants' failure to file a statement of reasons within the same time period. The IBLA concluded that filing statement of reasons within the deadline for filing an appeal was not a jurisdictional requirement. *Id.* at 238-39. This Board's precedent is the same. *See Native One Deposit & Trust v. Deputy Director, Office of Tribal Services*, 42 IBIA 42, 44 (2005) (statement of reasons not a jurisdictional requirement). But neither this Board nor IBLA has treated the time period for filing of a notice of appeal as non-jurisdictional. In *Lewis*, the IBLA specifically distinguished between the jurisdictional requirement to file a timely notice of appeal, and the non-jurisdictional requirement to file a statement of reasons. *See Lewis*, 144 IBLA at 238 & n.2. Thus, *Lewis* is of no assistance to Appellant.

Here, Appellant received a copy of the Decision, was advised of where and when to file an appeal. Instead of sending its appeal to the Board, Appellant mailed the notice of

appeal to the Regional Director, who forwarded the appeal to the Board. The filing date for the appeal was February 24, 2011, the date that the Board received the notice of appeal from the Regional Director by FedEx delivery. *See* 43 C.F.R. § 4.310(a). Although Appellant has not informed the Board of the date that it received a copy of the Decision, Appellant does not contend that it was less than 30 days before the February 24 date of filing.⁴

When Appellant received a copy of the Decision, the appeal period began to run and Appellant had 30 days — just like any other potentially interested party — to file an appeal with the Board. BIA’s failure to send the Decision directly to Appellant may have delayed its receipt of the Decision, and thus delayed triggering the 30-day deadline, but it did not eliminate the requirement that Appellant file an appeal with the Board within 30 days of receipt. Appellant failed to do so, and therefore the appeal must be dismissed as untimely.

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 docketed but dismisses this appeal for lack of jurisdiction.

I concur:

 // original signed
Steven K. Linscheid
Chief Administrative Judge

 // original signed
Debora G. Luther
Administrative Judge

⁴ It appears that Appellant had notice of the Decision by, at the latest, January 20, 2011. *See* Tribe’s Opposition to Appellant’s Statement of Good Cause, Ex. A (January 20, 2011, letter from the Superintendent, Valley Center - Pauma Unified School District to Tribe’s Chairman, stating that Appellant intended to appeal the Regional Director’s decision). Even assuming that January 20 was also the first time that Appellant received a copy of the Decision, the deadline for filing the appeal would have expired on February 22, 2011. *See* 43 C.F.R. § 4.310(c) (where filing date falls on a nonbusiness day, the date is extended to the next business day).