INTERIOR BOARD OF INDIAN APPEALS

Karen Rabbithead v. Great Plains Regional Director, Bureau of Indian Affairs

55 IBIA 44 (05/18/2012)

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

KAREN RABBITHEAD,	)	Order Affirming Decision
Appellant,	)	
	)	
v.	)	
	)	Docket No. IBIA 10-093
GREAT PLAINS REGIONAL	)	
DIRECTOR,	)	
Appellee.	)	May 18, 2012

Appellant Karen Rabbithead appeals to the Board of Indian Appeals (Board) from a January 21, 2010, decision of the Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA), in which he dismissed Appellant's appeal to him for failing to submit a statement of reasons or other document that explains why she believes the Superintendent of BIA's Fort Berthold Agency (Superintendent) erred in approving an assignment of an oil and gas lease on land in which Appellant owns an interest. On appeal to the Board, Appellant produced a document containing arguments in support of her appeal, and she asserted that she gave it to the Regional Director 3 weeks after she filed her notice of appeal.

We conclude that Appellant did not meet her burden. When an appellant is on notice that her appeal to a Regional Director is incomplete, the burden rests with the appellant to ensure that the Regional Director has a complete copy. Here, the Regional Director asked Appellant for her statement of reasons 4 months after she filed her notice of appeal. Appellant failed to submit a statement of reasons or a copy of the document that she previously submitted, and never told the Regional Director that she had already submitted it. Not only did she fail to produce a copy of the document that she said she had already given to him, she repeatedly requested extensions of time to submit her statement of reasons. Ultimately, she allowed the time for producing her statement of reasons to lapse without further contact with the Regional Director. Therefore, we affirm the Regional Director's decision.

Background

Proceedings Before the Regional Director

On or about July 14, 2008, BIA approved an oil and gas lease on Allotment No. M1004A, in which Appellant apparently owns an interest. Lease (Administrative Record (AR) Tab 1). The lessee was Zenergy Properties 6 Ft. Berthold Allottee, LLC (Zenergy). The lease has an initial term of 5 years and thereafter, for so long as oil and/or gas is produced in paying quantities from the land. In 2009, Zenergy assigned its rights in the lease to Dakota-3 E&P Company, LLC (Dakota-3). Assignment of Oil and Gas Lease Record Title (AR Tab 2).[1] The Superintendent approved the assignment on April 10, 2009. *Id*.

On the same date that the assignment was approved, the Superintendent sent a letter to the owners of Allotment No. M1004A to inform them of the assignment. The letter states that the assignee "is duly qualified to hold the Oil and Gas Lease under existing rules and regulations, and has posted the appropriate bond with [BIA]." Letter from Superintendent to Appellant, Apr. 10, 2009 (AR Tab 3).

Appellant appealed the Superintendent's letter to the Regional Director. In its entirety, the notice of appeal states,

> Pursuant to 25 CFR part 2, I am appealing your April 10, 2009 decision to approve the assignment of Zenergy Properties 6 Ft. Berthold Allottee, LLC to Dakota-3 E&P Company, LLC, on allotment M1004A.
>
> Also pursuant to 25 CFR Part 2, I am requesting that you help me write my appeal. Please inform me in writing of the time to meet with you and get this done.

Notice of Appeal, May 8, 2009 (AR Tab 4).[2] On September 17, 2009, the Regional Director acknowledged receipt of Appellant's appeal, and told her that her statement of

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[1] It appears that Dakota-3 may be a successor entity to or subsidiary of Zenergy or that there is some relationship between the two companies inasmuch as the same individual is the president of both companies.

[2] Although the Superintendent agreed to assist Appellant, Appellant apparently did not find it necessary to pursue his offer. In any event, the availability of the Superintendent's assistance is not an issue in this appeal.

reasons must be filed no later than October 2, 2009. AR Tab 6.[3] Thereafter, Appellant requested three extensions of time to submit her statement of reasons. In none of these three requests did Appellant inform the Regional Director that she had already submitted her statement of reasons. The Regional Director granted each of Appellant's requests for additional time. In response to Appellant's third request, the Regional Director gave Appellant until December 31, 2009, to submit her statement of reasons. Letter from Regional Director to Appellant, Dec. 11, 2009 (AR Tab 12). The Regional Director informed Appellant that "[t]his will be the final extension granted. If your statement of reasons is not received by December 31, 2009, your appeal will be summarily dismissed." *Id.* Appellant submitted no response.

On January 21, 2010, the Regional Director dismissed Appellant's appeal for failing to show how the Superintendent erred in granting the assignment from Zenergy to Dakota-3. The Regional Director's decision did not provide appeal rights to Appellant.

By letter dated January 28, 2010, Appellant sent an appeal to the Assistant Secretary-Indian Affairs through the Superintendent and Regional Director. The Regional Director forwarded the appeal to the Board.

Proceedings Before the Board

Upon receipt of Appellant's appeal, the Board first determined that the appeal was timely because the appeal period was tolled when the Regional Director failed to include appeal rights in his decision. *See* 25 C.F.R. § 2.7(c) (decisions of BIA officials must contain appropriate appeal instructions). The Board then ordered Appellant to show cause (OSC) why the Regional Director's decision should not be summarily affirmed on the grounds that she had failed to file a statement of reasons.

In response to the Board's OSC, Appellant produced a two-page, typed document that she asserts she gave to the Regional Director at a meeting attended by several people on May 28, 2009. Appellant's Response to OSC, May 28, 2010, Attach. 1 (May 28 Document). At the top of this document, "To Mike Black"[4] is handwritten; below that, the following typed heading appears:

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[3] The Regional Director told Appellant that "[t]he statement of reasons must explain why the decision being appealed is in error." Letter from Regional Director to Appellant, Sept. 17, 2009, at 1 (AR Tab 6).

[4] At the time of the May 28, 2009, meeting, Black held the position of Regional Director for BIA's Great Plains Region. Declaration of Michael S. Black (Regional Director's Answer Brief, Ex. 2). He became the Director of BIA in April 2010. *Id.*

Awa Nux-Baaga Association
May 28, 2009
Dickinson, ND

Id. at 1. The May 28 Document does not itself state that it is a "Statement of Reasons" in support of Appellant's appeal, although it does note that Appellant had filed a Notice of Appeal from the Superintendent's decision to approve the assignment of the oil and gas lease from Zenergy to Dakota-3, and it contains arguments intended to show that that approval decision was arbitrary, capricious, and not in accordance with the law.

Thereafter, the Board ordered BIA to provide the record and, upon its receipt, issued an order scheduling briefing in this appeal. In particular, the Board ordered Appellant "*to specifically address why she apparently did not advise the Regional Director, while the matter was still pending before him, that she had already filed a statement of reasons*." Order Setting Briefing Schedule, July 30, 2010, at 2.[5]

Appellant submitted an opening brief, the Regional Director submitted an answer brief, and Appellant responded to the Regional Director's answer brief. Neither of Appellant's briefs addressed the issue of why she did not inform the Regional Director that she had already submitted her statement of reasons to him. The Regional Director produced two sworn affidavits, one from Black and one from the Realty Officer of BIA's Great Plains Regional Office. Black attested that he recalls meeting with Appellant on May 28, 2009, but does not recall receiving any documents from her at the meeting. He further asserted that if he had received any documents from Appellant, he would have sent them to the Regional Office's Division of Real Estate Services. The Realty Officer attested that he caused a search to be made of the case file and the incoming mail log to determine whether Appellant's document had been received, and no evidence of its receipt was found. In response to the Regional Director's brief and affidavits, Appellant produced unsworn affidavits from herself and three individuals, stating that she presented her statement of reasons to the Regional Director at the May 28, 2009, meeting.

Discussion

We affirm the Regional Director's decision for the simple reason that it is Appellant's burden to show error in the Superintendent's decision when she appeals such a decision to the Regional Director. If her notice of appeal fails to contain her arguments,

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[5] The Board also requested the Regional Director to explain why, if he received the May 28 Document, "it was not included in the administrative record and was not considered sufficient to constitute a statement of reasons." Order Setting Briefing Schedule, July 30, 2010, at 2.

and if the circumstance would lead a reasonable person to believe that a previously submitted statement of reasons may have been lost or misplaced, it is Appellant's burden to determine whether, in fact, the Regional Director has appellant's statement of reasons and, if not, provide him with a duplicate copy within the established time frame for doing so. Here, Appellant did not meet her burden, and we affirm the Regional Director's decision.

It is well established that appellants bear the burden of showing why a decision by a BIA superintendent is erroneous. *See* 25 C.F.R. §§ 2.2 (a statement of reasons is a written explanation showing "why the decision being appealed is in error"), 2.10(a) ("A statement of reasons shall be filed by the appellant in every appeal"); *Jerome v. Acting Aberdeen Area Director*, 23 IBIA 137, 140 (1993). The statement of reasons should "[b]e clearly labeled 'STATEMENT OF REASONS.'" 25 C.F.R. § 2.10(d)(1).[6] If an appellant is given an opportunity to state why the decision being appealed is in error and fails to do so, the appeal may be summarily dismissed. *Id*. § 2.17(b)(1).

For purposes of our decision, we assume that Appellant delivered the May 28 Document to the Regional Director and that it was lost or misplaced.[7] First, we observe that nothing in the May 28 Document specifically identifies it as a Statement of Reasons in support of Appellant's appeal. Although the document does reference Appellant's appeal, it bears the heading of the Awa Nux-Baaga Association and, as such, it reasonably could be construed as a letter *from the Association* in support of Appellant's appeal or as expressing the separate concerns of the Association. Thus, standing alone, it is not reasonably apparent that this document should be assumed or construed to be Appellant's personal statement of reasons in support of her appeal.

And Appellant only reinforced this point with her repeated requests for extensions of time in the wake of the Regional Director's September 17 letter to her in which he first advised her that she needed to file a statement of reasons. The Regional Director's letter (and his subsequent letters granting her requests for additional time) put Appellant on notice that he either lost or misplaced the May 28 Document *or* that he did not understand that that document was Appellant's statement of reasons in support of her appeal. Armed with this information, Appellant should have either confirmed whether the Regional Director had the May 28 Document and understood that it was her statement of reasons *or* she should have sent him another copy of the May 28 Document clearly marked as her

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[6] If the statement of reasons is delivered in an envelope, the face of the envelope should also be marked, "STATEMENT OF REASONS." 25 C.F.R. § 2.10(d)(2).

[7] For this reason, we need not address Appellant's assertion that BIA's Realty Officer relied on hearsay in asserting that a search of Realty Office files did not turn up a copy of the May 28 Document.

statement of reasons. Appellant did neither. Even after Appellant was given a third *and final* extension of time in response to her request for additional time to submit her statement of reasons, she still did not inform the Regional Director that she had already submitted the document to him nor did she provide him with a copy. She simply let the time lapse with no response. Given this chain of events, we affirm the Regional Director's decision to dismiss Appellant's appeal. *Cf. Siletz Tribe v. Acting Portland Area Director*, 26IBIA 256, 257 (1994) (tribe asserted that BIA lost a critical page of its grant application; Board held that grantee bears the responsibility of ensuring that its application is complete).

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 affirms the January 21, 2010, decision of the Regional Director.

I concur:

// original signed	//original signed
Debora G. Luther	Steven K. Linscheid
Administrative Judge	Chief Administrative Judge