



INTERIOR BOARD OF INDIAN APPEALS

Mae and Jim Bekis, et al. v. Acting Navajo Area Director, Bureau of Indian Affairs

22 IBIA 47 (05/04/1992)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

MAE and JIM BEKIS, ASON CHILLIE	:	Order Docketing and Dismissing
BEGAYE, JANET BEGAYE, and	:	Appeal
LERROY JACKSON,	:	
Appellants	:	
	:	
v.	:	Docket No. IBIA 92-139-A
	:	
ACTING NAVAJO AREA DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	May 4, 1992

On March 20, 1992, the Board of Indian Appeals (Board) received a notice of appeal from Mae and Jim Bekis, Ason Chillie Begaye, Janet Begaye, and Leroy Jackson (appellants). From the document filed with appellants' notice of appeal, it appeared that they sought review of a February 19, 1992, letter from the Acting Navajo Area Director, Bureau of Indian Affairs (Area Director; BIA), providing Leroy Jackson with a copy of a February 4, 1992, Finding of No Significant Impact (FONSI) under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4335 (1988), for the Ugly Valley/Whiskey Creek Timber Sales. The Board issued a pre-docketing notice on March 24, 1992.

On April 27, 1992, the Board received a motion to dismiss this appeal from the Area Director. The Area Director first argues that the FONSI, which was signed by the Area Environmental Quality Officer, is still subject to review by the Area Director under section 5.4(D) of BIA's NEPA Handbook, 30 BIAM (Bureau of Indian Affairs Manual) Supplement 1.

The Board has previously considered the status of the BIAM, and has held that the Administrative Procedure Act, 5 U.S.C. § 552 (1988), prohibits the application of policies set forth only in the BIAM against a person dealing with BIA. See, e.g., Carter v. Acting Billings Area Director, 20 IBIA 195, 203-04 (1991); Stone Trucking v. Portland Area Director, 19 IBIA 312, 315-16 n.3 (1991). The Area Director cites the BIA NEPA Manual, part of the BIAM, for the procedures it establishes for administrative review of decisions made under NEPA. 5 U.S.C. § 552 (1988) states:

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public

* * * * *

(c) rules of procedure * * *

* * * * *

(2) Each agency, in accordance with published rules, shall make available for public inspection and copying--

* * * * *

(c) administrative staff manuals and instructions to staff that affect a member of the public;

unless the materials are promptly published and copies offered for sale. * * *

A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if--

(i) it has been indexed and either made available or published as provided in this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

Whether the BIA NEPA Manual is considered as establishing rules of procedure or as being a staff manual or instructions to staff, its contents are not binding upon parties before the Department unless the manual is published or made available to the public. The Area Director has not shown that the manual has been published in the Federal Register or offered for sale to the public, or that appellants otherwise had actual and timely notice of its terms. For this reason, the Board will not apply the BIA NEPA Manual review procedures against appellants.

The Area Director also argues that the Board lacks jurisdiction under 25 CFR 2.4(a) and 43 CFR 4.331(a) because the FONSI determination has not been appealed to the Area Director. Section 2.4(a) states that an Area Director shall decide appeals if the decision is that of a person under the Area Director's authority. Section 4.331(a) provides that an appeal may be taken to the Board "[t]o the extent that decisions which are subject to appeal to a higher official within the Bureau of Indian Affairs must first be appealed to that official." Upon reviewing the information submitted with the Area Director's motion, the Board concludes that it lacks jurisdiction over this matter because no decision has been rendered by the Area Director.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal is docketed and dismissed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge