



## INTERIOR BOARD OF INDIAN APPEALS

Thomas E. Edwards v. Northwest Regional Director, Bureau of Indian Affairs

37 IBIA 227 (04/18/2002)

Related Board case:  
39 IBIA 18



# 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

THOMAS E. EDWARDS,	:	Order Docketing and Dismissing
Appellant	:	Appeal as Premature and Denying
	:	Request for Bond
v.	:	
	:	
NORTHWEST REGIONAL DIRECTOR,	:	Docket No. IBIA 02-90-A
BUREAU OF INDIAN AFFAIRS,	:	
Appellee	:	April 18, 2002

On April 15, 2002, the Board of Indian Appeals (Board) received a notice of appeal from Thomas E. Edwards (Appellant), pro se. Although he states that he is appealing from a March 18, 2002, decision issued by the Northwest Regional Director, Bureau of Indian Affairs (Regional Director; BIA), it appears that Appellant is ultimately seeking relief from the alleged inaction of a BIA official under 25 C.F.R. § 2.8. Section 2.8 establishes procedures under which a person who is aggrieved by the failure of a BIA official to act on a request for action or for a decision can make that inaction the subject of an appeal to the next higher official in the appeal process. For the reasons discussed below, the Board finds that this appeal must be dismissed as premature.

Appellant and his family members own an allotment on the Yakama Indian Reservation that is within the boundaries of the Wapato Irrigation Project. On November 23, 2001, Appellant wrote to the Superintendent, Yakama Agency, BIA (Superintendent), asking him to “determine and quantify our annual acre-feet of water entitlement for allotment No. 2850 on the Yakima [sic] Indian Reservation.” Nov. 23, 2001, Letter at 3. Appellant continued:

Since, to the best of my knowledge, no irrigation water has been put to use on our allotment No. 2850, I request for myself and my brothers and sisters that you, “EACH YEAR”, place our annual entitlement to water on the market for sale to the highest bidder. Once you determine who the highest bidder is, you will be able to issue a certificate of entitlement to draw a “X” amount of water anywhere in the Yakima Drainage Basin so long as it does not interfere with any other person’s surface rights. It is our desire that someone or some water user be given the opportunity to purchase a year’s worth of these water entitlements so that they will have the authority to draw and/or divert this

water from the Yakima drainage basin. I request that you advertise the opening of bidding to all water users including farmers and water bottling corporations. Water bottling corporations may be interested in drawing water at its source in the mountains.

Id. at 4-5.

Appellant states that he did not receive a response from the Superintendent. By letter dated December 31, 2001, Appellant began the process established in 25 C.F.R. § 2.8 in regard to the Superintendent's failure to respond.

On January 7, 2002, the Superintendent responded to Appellant's November 23, 2001, letter. The Superintendent did not mention Appellant's December 31, 2001, letter, and it is possible that he had not yet received that letter. The Superintendent noted that Allotment 2850 had been advertised for lease in November 2001. He continued:

In respect to your first and second request for a decision, the Wapato Irrigation Project (WIP) is under separate management from the Yakama Agency and the management, distribution and handling of water within the WIP is the responsibility of the Wapato Irrigation Project Manager \* \* \* not the Superintendent of the Yakama Agency. Any questions which deal with the disposition or allocation of the water pertaining to Allotment 2850 should be addressed to [the WIP manager]. The address of the Wapato Irrigation Project is:

\* \* \* \* \*

In respect to your third request, there is no provision or process in place whereby your trust asset can be transferred to the Office of Special Trustee. At present the only trust assets that office deals with are trust funds. Any decision to transfer management authority would not be made at the agency level.

On January 16, 2002, Appellant wrote to the Regional Director, titling his filing "Notice of Appeal from Inaction of Official." Appellant mentioned 25 C.F.R. § 2.8, but included a copy of the Superintendent's January 7, 2002, letter which Appellant described as "contain[ing] not even one decision." Jan. 16, 2002, Notice of Appeal at 2.

Appellant wrote to the Regional Director again on February 19, 2002, specifically "invok[ing] the provisions of 25 C.F.R. § 2.8 Appeal from inaction of official." Feb. 19, 2002, Notice of Appeal at 1.

The Regional Director responded by letter dated February 28, 2002. As appears to have also been the case with the Superintendent, it is possible that the Regional Director had not received Appellant's February 19, 2002, second notice of appeal when he signed the February 28,

2002, letter. The Regional Director stated that a decision would be issued within 30 days from the date of his letter.

The Regional Director again wrote to Appellant on March 18, 2002. He stated that, upon further review, he had determined that his February 28, 2002, letter had been issued in error. Although the Board finds that the Regional Director's March 18, 2002, letter is not a model of clarity, it appears that the Regional Director determined that Appellant had filed both a notice of appeal from the inaction of a BIA official and a notice of appeal concerning the Superintendent's January 7, 2002, letter. Apparently because he concluded that the Superintendent had issued a decision and that Appellant had appealed from that decision, the Regional Director informed Appellant that his appeal would be handled under the general appeal regulations in 25 C.F.R. Part 2, rather than under the special provisions of 25 C.F.R. § 2.8. He stated that a decision would be issued within 60 days after all pleadings had been filed in the appeal. See 25 C.F.R. § 2.19(a).

In his notice of appeal to the Board, Appellant objects to what he terms the Regional Director's "retroactive" change to his February 28, 2002, letter.

The Board can sympathize with the Regional Director's initial confusion over Appellant's intent in his January 16 notice of appeal, since Appellant mentioned both an appeal from the Superintendent's inaction and the Superintendent's January 7, 2002, decision. The Regional Director's February 28, 2002, letter was obviously intended to fulfill the requirements of section 2.8. However, it appears that, upon further review of Appellant's January 16 filing, perhaps in conjunction with review of Appellant's February 19 filing, the Regional Director concluded that the Superintendent had in fact issued a decision, and therefore attempted to ensure that Appellant's appeal was in the proper appeal process.

After reviewing the documents which Appellant provided with his notice of appeal to it, the Board concludes that the Superintendent responded to Appellant's November 23 and December 31, 2001, letters. His response was that he did not have the authority to take the action which Appellant was requesting concerning the use of irrigation water and that the official who did have that authority was the WIP manager. He also informed Appellant that he did not have authority to transfer management responsibilities for Appellant's trust assets to the Office of Special Trustee. Obviously, Appellant was, and is, not happy with this response. However, the question of whether the Superintendent's decision was correct is presently pending before the Regional Director in response to Appellant's January 16 and February 19, 2002, notices of appeal. The Board therefore concludes that this appeal is premature.

Appellant has requested that the Board order BIA to post a bond to cover his and his family's alleged loss of income from the sale of irrigation water. Appellant alleges that this loss is approximately \$540,000 per year. The Board does not have authority to order BIA to post

a bond. Furthermore, because, despite what Appellant may believe, BIA has expeditiously addressed Appellant's request, the Board would not order BIA to post a bond even if it had that authority.

While this matter remains pending before BIA and in order to prevent any further loss of time should the Superintendent's decision be upheld on appeal, Appellant would be well advised to raise his request to sell irrigation water with the WIP manager, to whom he was referred.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, this appeal is docketed but dismissed without prejudice as premature.

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// original signed

Kathryn A. Lynn  
Chief Administrative Judge

\_\_\_\_\_  
// original signed

Anita Vogt  
Administrative Judge