



INTERIOR BOARD OF INDIAN APPEALS

Forest County Potawatomi Community v. Deputy Assistant Secretary - Indian Affairs and
Forest County Potawatomi Community v. Director, Bureau of Indian Affairs

48 IBIA 259 (02/10/2009)



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

FOREST COUNTY POTAWATOMI)	Order Dismissing Appeals
COMMUNITY,)	
Appellant,)	
v.)	
DEPUTY ASSISTANT SECRETARY -)	
INDIAN AFFAIRS,)	Docket Nos. IBIA 06-54-A
Appellee.)	06-58-A
FOREST COUNTY POTAWATOMI)	
COMMUNITY,)	
Appellant,)	
v.)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	February 10, 2009

These appeals arise from a request by the Forest County Potawatomi Community (Tribe) to the Department of the Interior (Department), asking the Department to submit an application, on behalf of the Tribe, to the U.S. Department of the Air Force (Air Force), to acquire the General Mitchell Air Reserve Station (GMS), a military base closure property located in Milwaukee, Wisconsin. When the Department failed to issue a decision or otherwise act on the Tribe's request, the Tribe filed an appeal with the Board of Indian Appeals (Board) against the Deputy Assistant Secretary - Indian Affairs (Deputy Assistant Secretary), pursuant to 25 C.F.R. § 2.8, which allows a party to appeal from inaction by an official, after the party has made a proper demand for action or decision.

The same day that the Tribe filed its section 2.8 appeal, which named the Deputy Assistant Secretary as the appellee from whom action was sought, the Director of the Bureau of Indian Affairs (Director; BIA) decided the merits of the Tribe's request by declining to submit the Tribe's application for GMS to the Air Force. *See* Letter from Director to Tribe's Chairman, Mar. 3, 2006 (Director's Decision). Seven days later, the

Associate Deputy Secretary of the Interior (Associate Deputy Secretary),¹ to whom the authority of the Assistant Secretary had been temporarily redelegated, separately responded to the Tribe's request, and also announced that the Department would not submit the Tribe's application to the Air Force. *See* Letter from Associate Deputy Secretary to Douglas B. L. Endreson, Mar. 10, 2006 (ADS Letter). Shortly thereafter (and before the Tribe received the ADS Letter), the Tribe appealed the Director's decision to the Board.²

We conclude that both of the Tribe's appeals to the Board must be dismissed. The Tribe's first appeal necessarily was limited, under 25 C.F.R. § 2.8, to challenging the failure by an official to take action or issue a decision on the merits of the Tribe's request for GMS. That appeal from inaction was rendered moot on March 3, 2006, when the Director took action on the merits by issuing his decision, or at the latest on March 10, 2006, when the Associate Deputy Secretary issued his letter to the Tribe. The Tribe's second appeal, challenging the Director's decision on the merits, is also moot because the Associate Deputy Secretary's response to the Tribe constituted a separate decision or action that superseded the decision issued by the Director.³ We reject the Tribe's arguments that its pending

¹ In the Department's organization, the Deputy Secretary of the Interior is immediately subordinate to the Secretary. *See* 109 Departmental Manual 1.2(B). The position of Associate Deputy Secretary is not expressly described in the Manual, but the title denotes an official within the Deputy Secretary's office. Neither the position of Deputy Secretary nor Associate Deputy Secretary is specific to Indian Affairs.

The Secretary's authority and responsibility over Indian affairs is delegated to the Assistant Secretary - Indian Affairs (Assistant Secretary), and the Deputy Assistant Secretary reports to the Assistant Secretary. *See* 110 DM 8.1, 209 DM 8.1. The Director is the highest official within BIA, and reports to the Principal Deputy Assistant Secretary. *See* 130 DM 3.1.

² On March 23, 2008, the Board assigned Docket Number IBIA 06-54-A to the Tribe's first appeal, and on April 5, 2008, the Board assigned Docket Number IBIA 06-58-A to the Tribe's second appeal. *See* 43 C.F.R. § 4.336 (the Board assigns docket number to an appeal 20 days after receipt, unless the Assistant Secretary has assumed jurisdiction); *see also* 25 C.F.R. § 2.20 (Assistant Secretary's authority to assume jurisdiction over an appeal within 20 days after the Board's receipt of appeal).

³ The Tribe has not sought to appeal from the Associate Deputy Secretary's decision, and in any event it is undisputed that the Board lacks authority to review a decision by the Associate Deputy Secretary, and also lacks authority to review a decision by the Assistant Secretary unless expressly authorized to do so.

section 2.8 appeal, or limitations on the delegation of authority to the Associate Deputy Secretary, precluded the Associate Deputy Secretary from issuing a final Departmental decision on the Tribe's request.

Background

In November of 2005, Congress approved a list of military bases slated for closure under the Defense Base Realignment and Closure Act of 1990 (BRAC), *as amended*, 10 U.S.C. § 2687 & note. The list includes GMS. GMS consists of approximately 102 acres of real estate, on which are located approximately 85 buildings. On December 7, 2005, the Air Force notified the Secretary of the Interior that GMS had become available for transfer to other Federal agencies.⁴ The notice stated that an agency with an interest in acquiring Air Force BRAC property was required to submit an expression of interest to the Air Force within 30 days of the notice of availability, and then to submit an application for transfer within 60 days of the notice.

The Indian Self-Determination and Education Assistance Act (ISDA), Pub. L. No. 93-638, authorizes the Secretary of the Interior to request excess or surplus government property from other agencies, on behalf of tribes, if the Secretary determines that the property is appropriate for use by the tribe for a purpose for which a self-determination contract or grant agreement is authorized under ISDA. *See* 25 U.S.C. § 450j(f)(3); *see also* 25 C.F.R. §§ 900.102 - 900.106 (implementing regulations). The Tribe has a self-governance compact with the Department under ISDA and, in early January of 2006, the Tribe expressed its interest in GMS to BIA.⁵ BIA then submitted an expression of interest to the Air Force on behalf of the Tribe. On January 30, 2006, the Tribe submitted to the Deputy Assistant Secretary and the Realty Division of BIA a formal request and application for GMS, for the Department's approval and transmittal to the Air Force.

⁴ It was also possible that components of the Department of Defense could retain the property, but the prioritization process for disposing of military base realignment and closure property is not relevant for purposes of deciding this appeal.

⁵ The Tribe has reservation trust lands in northern Wisconsin consisting of approximately 10,600 acres, and historically the Tribe occupied lands that include the area that is now Milwaukee, Wisconsin. According to the Tribe, it presently has 17.31 acres of trust lands and 23.88 acres of fee lands in the Milwaukee area, and as of January of 2006, 112 tribal members (10% of the Tribe's membership) resided in the Milwaukee area.

By letter dated February 3, 2006, the Tribe also wrote to the Associate Deputy Secretary regarding its request and application for GMS. At the time, the Associate Deputy Secretary had been temporarily redelegated, by the Secretary, “all functions, duties, and responsibilities of the Assistant Secretary - Indian Affairs that are not required by statute or regulation to be performed only by the Assistant Secretary - Indian Affairs.” See Secretarial Order No. 3259, Amendment No. 1, Aug. 11, 2005. The Tribe’s letter to the Associate Deputy Secretary set forth its position on its eligibility to acquire GMS under ISDA, asserted that it had the right to have its application submitted to the Air Force, and “request[ed] the Department to do so.” Letter from Tribe to Associate Deputy Secretary, at 5, Feb. 3, 2006. The Tribe’s letter emphasized that because the Air Force would make the final decision, the Department should submit the application and let the Air Force evaluate it. *Id.*

On March 3, 2006, when the Department had failed to submit the Tribe’s application to the Air Force, and also had failed to give any written notice to the Tribe of a decision, the Tribe filed an appeal with the Board, seeking to force action and a written decision. The notice of appeal identified the Deputy Assistant Secretary as the official against whom the appeal was filed and from whom action was sought.⁶ The Tribe’s notice of appeal stated that the Tribe was filing the appeal to protect its rights and interests, but that

the Tribe would not pursue this appeal if the Tribe receives from the Department: (1) a formal written decision on the Tribe’s Request from which an appeal may be pursued; and (2) the assurances . . . that the Tribe’s right to pursue an appeal does not commence to run until receipt of that written decision.

Notice of Appeal at 2-3 (Docket No. IBIA 06-54-A).

Also on March 3, 2006, (1) the Tribe submitted to the Deputy Assistant Secretary a formal demand under section 2.8 for a written decision on its GMS request, and (2) the Director issued a decision that rejected the Tribe’s request and declined to transmit its

⁶ During the course of this appeal, the Tribe explained that it named the Deputy Assistant Secretary because it understood that the matter had been assigned to him for action. As noted above, the Tribe submitted a formal request on its application for GMS jointly to the Deputy Assistant Secretary and BIA Realty on January 30, 2006, and then sent a separate letter to the Associate Deputy Secretary on February 3, 2006, requesting that the Department submit the application to the Air Force.

application for GMS to the Air Force. The decision stated that GMS did not meet Departmental criteria for tribal requests for the acquisition of BRAC property.

On March 7, 2006, in response to the Tribe's appeal from the Deputy Assistant Secretary's failure to take action, the Board ordered a status report from the Deputy Assistant Secretary, which was to include a timetable for taking action or reaching a decision on the Tribe's request. At the time, the Board had not received notice of the Director's decision. The Board's order stated that "[t]o the extent that [the Tribe's section 2.8] appeal would otherwise divest the Deputy Assistant Secretary of jurisdiction over the matter, . . . the Board authorizes the Deputy Assistant Secretary to continue to consider the Tribe's request and to take action or make a decision on that request." Pre-Docketing Notice and Order for Status Report from Deputy Assistant Secretary, at 1, Mar. 7, 2006.

Three days later, on March 10, 2006, the Associate Deputy Secretary responded to the Tribe's letter of February 3, 2006. The Associate Deputy Secretary's letter briefly described the Secretary's discretionary authority for the acquisition of base closure properties, stated that the Tribe's ISDA annual funding agreements do not support the acquisition of the entire GMS, and asserted that the Tribe had been offered an option to amend its application to decrease the acreage requested, but had declined to do so. The Associate Deputy Secretary's letter did not reference the Director's decision, at least not directly, concluding that "[w]e have determined that the [Tribe's] application does not meet the requirements for this acquisition." ADS Letter. On March 16, 2006, and before the Tribe had received the Associate Deputy Secretary's letter, the Tribe filed an appeal with the Board from the Director's Decision.⁷

At the request of the Board, the parties briefed whether the Director's Decision rendered moot the Tribe's section 2.8 appeal, in addition to briefing the merits of that Decision. Subsequently, the Board requested briefing, and the parties filed supplemental briefs, on the issue of whether the Associate Deputy Secretary's March 10, 2006, letter

⁷ The Tribe's appeal was styled as a Motion for Leave to File Amended Notice of Appeal, seeking to add its appeal from the Director's decision to its appeal from BIA's inaction. The Board accepted it as a separate appeal, explaining that an appeal from BIA inaction under section 2.8 is distinct from an appeal from a BIA decision on the merits. *See* Pre-Docketing Notice and Order Concerning "Motion for Leave to File Amended Notice of Appeal," Mar. 17, 2006.

constituted a decision that either superseded or otherwise rendered moot the Board's review of the Director's Decision.⁸

Discussion

The doctrine of mootness, to which the Board adheres, is based on the principle that an active case or controversy must be present at all stages of litigation. *Harris-Noble v. Acting Southern Plains Regional Director*, 45 IBIA 224, 229 (2007); *Pueblo of Tesuque v. Acting Southwest Regional Director*, 40 IBIA 273, 274 (2005). When nothing turns on the outcome of an appeal, e.g., because the requested relief can no longer be granted by the Board, an appeal is deemed to be moot. A related principle is that the Board does not issue advisory opinions. *United Keetoowah Band of Cherokee Indians of Oklahoma v. Eastern Oklahoma Regional Director*, 47 IBIA 87, 89 (2008); *Harris-Noble*, 45 IBIA at 230.

We first address the Tribe's appeal from the Department's failure to act on its GMS request — its section 2.8 appeal — and conclude that the appeal became moot when a decision was issued on the merits of that request, regardless of whether we look to the March 3, 2006, Director's decision or the March 10, 2006, Associate Deputy Secretary's response to the Tribe. Although the Tribe attempts to salvage its first appeal by arguing that it encompassed both the failure to act *and* the failure to take the specific action requested (i.e., submit the Tribe's GMS application to the Air Force), the appeal necessarily was a section 2.8 appeal, and a section 2.8 appeal necessarily is limited to challenging a failure to take action by failing to decide the merits of a matter in writing; a section 2.8 appeal does not give rise to review of the underlying merits of the matter on which action or a decision is sought.

We then address the Tribe's second appeal and conclude that the Associate Deputy Secretary's response to the Tribe constituted a separate and superseding decision that renders moot the appeal from the Director's decision. We reject the Tribe's arguments that its pending section 2.8 appeal, or limitations on the delegation of authority to the Associate Deputy Secretary, provide a basis for us to decide that he was precluded from issuing a final Departmental decision on the GMS request.

⁸ The Board also requested briefing on whether the Tribe's request for GMS might itself be moot, e.g., because the Air Force had conveyed it to another entity. The parties indicated that the Air Force has made no final disposition of GMS, and the Tribe contends that the Air Force would still have some discretion to consider untimely requests.

I. Is the Tribe's Appeal from Departmental Inaction Moot?

The Tribe's first appeal to the Board was based on the Department's failure to take action on its request that the Department transmit the Tribe's application for GMS to the Air Force. On the same day that the Tribe filed its notice of appeal with the Board, seeking to force the issuance of a written decision by the Deputy Assistant Secretary on the merits, the Director issued his decision rejecting the Tribe's request.

Ordinarily, when a party files a section 2.8 appeal to the Board from the alleged improper failure of a BIA official to take action, the Board will summarily dismiss the section 2.8 appeal when BIA issues a decision on the merits. *See, e.g., Tuttle v. Western Regional Director*, 41 IBIA 74 (2005); *El Paso Field Services Co. v. Navajo Regional Director*, 40 IBIA 165 (2004); *Hall-Houston Oil Co. v. Western Regional Director*, 40 IBIA 33 (2004); *Ute Indian Tribe v. Western Regional Director*, 38 IBIA 288 (2003). If BIA's decision on the merits is adverse to the party who filed the section 2.8 appeal, that party may, of course, appeal on the merits either directly or eventually to the Board, *see, e.g., Tuttle v. Western Regional Director*, 46 IBIA 216, 217 n.2 (2008), unless the Board otherwise lacks subject matter jurisdiction, *see* 43 C.F.R. § 4.330(b).

The Tribe concedes that the Director's decision "moots that portion of the Tribe's first appeal regarding the Department's failure to issue a written decision on the Tribe's GMS request." Opening Brief at 16. The Tribe argues in this case, however, that its section 2.8 appeal is not moot because although the Director issued a decision, he failed to take the specific underlying action that the Tribe requested, i.e., he failed to submit the application for GMS to the Air Force. But the Tribe misunderstands the limited scope of a section 2.8 appeal from inaction, and improperly equates (1) BIA's failure to take action within the meaning of section 2.8 — i.e., failure to issue any decision or to take any action on the *merits* of a request — with (2) BIA's "failure" to grant the specific relief sought in the underlying request — i.e., that the Department submit the Tribe's application for GMS to the Air Force.

Section 2.8 is limited to seeking action "*on* a request," 25 C.F.R. § 2.8(a) (emphasis added), and demanding "action on the merits" or a "decision on the merits," *id.* § 2.8(a)(3), (b). It is the failure to take action on the merits or to issue a decision on the merits, after a proper section 2.8 demand has been filed, that becomes appealable. *Id.* § 2.8(b).⁹ The

⁹ During the final round of briefing on this case, the Tribe submitted to the Board a copy of its March 3, 2006, demand for action submitted to the Deputy Assistant Secretary,

(continued...)

section 2.8 appeal is separate and distinct from reviewing the underlying merits and, as the Board has previously held, “[t]he Board’s scope of review over section 2.8 appeals is limited to deciding *whether* BIA must take action or issue a decision, and does not extend to directing BIA *how* to act or decide a matter in the first instance.” *Midthun v. Rocky Mountain Regional Director*, 43 IBIA 258, 264 (2006) (emphasis added); *see Tuttle*, 41 IBIA at 74.

Because the Tribe concedes that the Director’s decision effectively rendered moot its appeal from the Department’s failure to issue a written decision, and because, under section 2.8, its first appeal necessarily was limited to that single issue, no further relief is available in that appeal and it is moot in its entirety.

II. Was the Tribe’s Second Appeal, for a Review of the Merits of the Director’s Decision, Rendered Moot by the Associate Deputy Secretary’s March 10, 2006, Letter?

We next address the effect of the Associate Deputy Secretary’s March 10, 2006, letter on the Tribe’s second appeal, which directly challenged the Director’s decision, on the merits, not to submit the Tribe’s application for GMS to the Air Force. The Tribe makes two arguments that the Associate Deputy Secretary’s action does not supersede the Director’s decision and does not render its appeal from that decision moot.

First, the Tribe argues that the Associate Deputy Secretary’s letter is a nullity and has no legal force or practical effect because it was issued after the Tribe filed its section 2.8 appeal. According to the Tribe, its section 2.8 appeal divested BIA of jurisdiction over the matter and thus precluded the Associate Deputy Secretary from acting without the Board’s authorization, the Board did not give such authorization, and the Associate Deputy

⁹(...continued)

pursuant to section 2.8. That letter makes it readily apparent that the appeal was suitable for summary dismissal on ripeness grounds from the outset, because the demand for action and the appeal are of the same date. Section 2.8 requires a party to first submit a specific demand for action to BIA, before the matter may become ripe for an appeal from alleged BIA inaction. *See* 25 C.F.R. § 2.8(b) (if a BIA official, within 10 days following a section 2.8 request, fails to take action or to establish a timetable for taking action, *then* the inaction is appealable to the next level); *Peak North Dakota v. Great Plains Regional Director*, 47 IBIA 166, 166 n.1 (2008) (section 2.8 has specific requirements that must be followed before alleged inaction is appealable to the Board); *Migisew-Asiniwiin Ojibwa Grant Council of Clans v. Director, Office of Self-Governance*, 41 IBIA 139, 139-40 & n.1 (same).

Secretary did not obtain such authorization to act by asserting jurisdiction over the Tribe's section 2.8 appeal.¹⁰

Second, the Tribe argues that the Associate Deputy Secretary had no legal authority to issue a final Departmental decision on the Tribe's request. The Tribe contends that the Secretary's redelegation of authority to the Associate Deputy Secretary excluded any functions or duties assigned by statute or regulation exclusively to the Assistant Secretary, and the Department's regulations specifically assign to the Assistant Secretary authority to issue decisions that are final and effective immediately, and to assume jurisdiction over a matter that has been appealed to the Board. Thus, according to the Tribe, the Associate Deputy Secretary lacked authority to issue a decision on its request to have the Department transmit the GMS request to the Air Force.

We reject both of the Tribe's arguments, and address each in turn.

- A. Did the Tribe's Section 2.8 Appeal Preclude the Associate Deputy Secretary from Deciding the Tribe's Request for the Department to Transmit its Application for GMS to the Air Force?

The Tribe argues that when it filed its first appeal to the Board, it had the effect of divesting BIA of jurisdiction or authority to take further action on the Tribe's request, except as expressly authorized by the Board, and the divestiture of jurisdiction extended to the Associate Deputy Secretary. Thus, according to the Tribe, the Associate Deputy Secretary's decision was of no effect. We disagree.

First, we conclude that, at least as a general rule, the filing of a section 2.8 appeal does not divest the official against whom the appeal has been filed of jurisdiction over the merits of the appellant's underlying request. The general rule that an appeal divests BIA of jurisdiction over a matter arose in the context of appeals from BIA *decisions*, and in that context the rule remains sound. Section 2.8, by contrast, is intended to force an official to *make* a decision. It would work an anomalous and perverse result to construe a section 2.8 appeal — a type of appeal that we have held does *not* encompass the underlying merits — as having the effect of *precluding* (without new and formal permission) such a decision on the

¹⁰ The Tribe's second appeal, from the Director's decision, was filed after the Associate Deputy Secretary sent his letter to the Tribe, and the Tribe does not contend that its second appeal has any relevance to the validity or invalidity of the Associate Deputy Secretary's letter as constituting a decision on its request.

merits, given that the very purpose of section 2.8 is to prompt the issuance of such a decision.

It is a well-established principle that “once an appeal is filed with [the Board] *from a decision* issued by a BIA official, BIA loses jurisdiction over the matter except to participate in the appeal as a party.” *Bullcreek v. Western Regional Director*, 39 IBIA 100, 101 (2003) (emphasis added) (internal citations omitted); *Five Sandoval Indian Pueblos, Inc. v. Deputy Commissioner of Indian Affairs*, 21 IBIA 17, 18 (1991) (same); *Raymond v. Acting Aberdeen Area Director*, 19 IBIA 41, 42 (1990) (same). In several cases, the Board summarized this principle by stating that BIA “loses jurisdiction over a *matter* once an appeal has been filed with the Board,” without referring to the logical context — an appeal “from a decision issued by a BIA official.” *Cherokee Nation of Oklahoma v. Muskogee Area Director*, 22 IBIA 240, 244 (1992) (emphasis added); see *Hammerberg v. Acting Portland Area Director*, 24 IBIA 78 (1993).

But because section 2.8 is an action-prompting mechanism, a party who appeals from inaction by BIA presumably does not intend, by virtue of filing its appeal, to preclude the very action sought: a written decision by BIA on the merits. Nor is the application of the general rule consistent with the purpose of section 2.8. To avoid uncertainty whether the filing of a section 2.8 appeal precludes BIA from acting on a request for action, the Board routinely includes language in section 2.8 appeal pre-docketing notices stating that “to the extent that” the appeal divests BIA of jurisdiction, BIA is nevertheless authorized to take action on the merits. See, e.g., Order, Mar. 7, 2006 (Docket No. IBIA 06-54-A). In only one case, which the Board did not cite in its March 7, 2006, order, has the Board ever concluded that a section 2.8 appeal divested BIA of jurisdiction to decide the underlying merits of a matter. See *United Auburn Indian Community v. Sacramento Area Director*, 24 IBIA 33, 38-39 (1993). We decline to follow that decision and conclude that, except perhaps in exceptional circumstances, the filing of a section 2.8 appeal does not itself divest the official against whom action is sought of authority to consider and respond to the merits of an underlying request.¹¹ The filing of an appeal to the Board should not create an

¹¹ The underlying issue in *United Auburn Indian Community* was whether the Department even had *authority* to grant relief to the appellant, and the Board concluded that the Department did not have such authority. Of course, the fact that a section 2.8 appeal does not work to *preclude* an official from issuing a decision on the merits does not mean that the official otherwise has the actual authority or is required to do so. See, e.g., *Castillo v. Pacific Regional Director*, 46 IBIA 209 (2008) (in section 2.8 appeal, the Board concluded that the Regional Director was not required to issue a new merits decision on a claim that was barred by *res judicata*).

additional hurdle between a party's request for action and BIA's ability to act on the request.

Thus, we conclude that the Tribe's first appeal did not have the effect of divesting the Director, Deputy Assistant Secretary, or the Associate Deputy Secretary, of authority to issue a written decision on the merits of the Tribe's GMS request.

But even if that were not the case, the Board's March 7, 2006, authorization, reasonably construed, applied to any appropriate decision maker, and that authorization, of course, pre-dated the Associate Deputy Secretary's March 10, 2006, letter.

The Tribe's first appeal specifically identified the Deputy Assistant Secretary as the official from whom a written decision was sought and expected, and the Board's pre-docketing notice thus identified the Deputy Assistant Secretary as the subject of the Board's authorization to continue to consider the Tribe's request and issue a decision on the merits. The order was not intended to limit the decision making authority, on the merits, to only one official — the Deputy Assistant Secretary — and to preclude any other Departmental official (whether the Director or the Associate Deputy Secretary) from deciding the Tribe's request. As the Tribe itself acknowledges, it "had no right to determine who would act for the Department on its GMS Request." Tribe's Additional Brief at 5 n.5, June 16, 2008. Neither did the Board have the right to make that determination, and its authorization for the Deputy Assistant Secretary to take action *was intended, in practical terms, simply to ensure that action could be taken on the Tribe's request*, and not to say who could or could not decide the matter.

Notably, the Tribe does not suggest that because the Board's authorization only named the Deputy Assistant Secretary, the Director was therefore precluded from deciding the merits of its request. Indeed, the Tribe concedes that the Director's decision effectively mooted its first appeal with respect to the request for a written decision. In challenging the Director's decision, the Tribe does not suggest that it should be vacated and the matter remanded on the grounds that the Director lacked authorization to act because of the Tribe's section 2.8 appeal. The purpose of section 2.8, and of the Board's order, was to facilitate a decision on the merits. We reject the Tribe's reading of the Board's order and authorization as effectively inhibiting a decision because the order only named an official that the Tribe identified, and failed to name officials whom the Tribe had not identified.¹²

¹² As noted earlier, when the Board issued its order authorizing a decision, it was unaware of the Tribe's February 3, 2006, letter to the Associate Deputy Secretary.

(continued...)

B. Was the Associate Deputy Secretary's Letter a Final Decision?

The Secretary's temporary redelegation to the Associate Deputy Secretary of "all functions, duties, and responsibilities of the Assistant Secretary" expressly excluded functions or duties which by statute or regulation are to be performed "only" or "exclusively" by the Assistant Secretary. *See* Secretarial Order No. 3259, Amendment No. 1, §§ 1, 3. The Tribe interprets this to mean that the Associate Deputy Secretary lacked authority to issue a final decision on the Tribe's GMS request because the regulations specifically assign to the Assistant Secretary authority to issue decisions that are final and effective immediately, and authorize only the Assistant Secretary to assume jurisdiction over a matter that has been appealed to the Board. We reject the Tribe's argument as providing any basis for the Board to find that the Deputy Associate Secretary's letter did not constitute a final decision for the Department.¹³

A specific delegation of authority is not the same as a delegation of *exclusive* authority. The regulations do not assign the authority to issue a final decision for the Department *exclusively* to the Assistant Secretary. For example, the Board also has authority to issue decisions that are final for the Department and effective immediately, *see* 43 C.F.R.

¹²(...continued)

Our conclusion that the Tribe's section 2.8 appeal did not preclude the Associate Deputy Secretary from deciding the merits of its GMS request also necessarily disposes of the Tribe's additional argument that before the Associate Deputy Secretary could gain such authority, he would have been required to assume jurisdiction over the Tribe's section 2.8 appeal, pursuant to 25 C.F.R. § 2.20 (something the Tribe also argues he lacked authority to do). No such assumption of jurisdiction was necessary, and thus we need not consider these arguments further.

¹³ As a preliminary matter, we recognize that the Board does not have authority to review, on the merits, a decision by the Associate Deputy Secretary. *County of Amador v. Associate Deputy Secretary of the Interior*, 44 IBIA 4 (2006) (the Board has no authority to review a decision of the Associate Deputy Secretary). In the present case, however, we are not reviewing the decision on the merits, but only determining, for the sole purpose of deciding the Board's own jurisdiction, whether the Associate Deputy Secretary's letter constituted a Departmental decision that rendered moot the Tribe's merits-based appeal to the Board from the same conclusion reached earlier by the Director.

§ 4.312, as do any number of other Departmental officials.¹⁴ *Cf. Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389, (D. Conn. 2008) (tribal acknowledgment determinations not assigned “exclusively” by statute or regulation to the Assistant Secretary).

The Associate Deputy Secretary’s letter was issued while the Associate Deputy Secretary had been redelegated the authority of the Assistant Secretary, who has authority to make final decisions for the Department. The Board has no authority to review a decision by the Assistant Secretary. *See Sandy Lake Band of Ojibwe Indians v. Midwest Regional Director*, 46 IBIA 310, 313 (2008) (Board has no general authority to review a decision by the Assistant Secretary);¹⁵ *Standing Rock Sioux Tribe v. Acting Assistant Secretary - Indian Affairs*, 41 IBIA 188 (2005), and cases cited therein (same). A decision by the Assistant Secretary, or in this case by the Associate Deputy Secretary acting pursuant to the redelegated authority of the Assistant Secretary, becomes final and effective immediately, *see* 25 C.F.R. § 2.6(c), unless the decision provides otherwise, which is not the case here.

The Tribe makes one final argument, contending that the Associate Deputy Secretary’s letter was not intended to be a decision at all, but simply to restate the position

¹⁴ The Tribe does not suggest that *only* the Assistant Secretary can issue a decision on a tribe’s request under ISDA for excess or surplus property, which clearly is not the case. *See* 25 C.F.R. § 900.104 (the “Secretary” shall act on a tribe’s request for excess or surplus property); *id.* § 900.6 (“Secretary” includes “delegates”).

Because we have already rejected the Tribe’s argument that its section 2.8 appeal precluded the Associate Deputy Secretary from issuing a decision unless (1) he was expressly authorized to do so by the Board, or (2) he assumed jurisdiction over the section 2.8 appeal, we need not address further the Tribe’s argument that the second option was not available to the Associate Deputy Secretary because authority to assume jurisdiction over appeals before the Board is assigned *exclusively* to the Assistant Secretary and thus fell outside the scope of the Secretary’s delegation.

¹⁵ The Tribe seeks to distinguish this case from *Sandy Lake* by arguing that in this case the Tribe made only one request to the Department, whereas in *Sandy Lake* the appellant had submitted separate but identical requests to a BIA regional director and to the Assistant Secretary. We think that is a distinction without a difference. In any event, although the Tribe submitted a single formal request to the Department, jointly addressed to the Assistant Deputy Secretary and the BIA realty office, it also submitted a separate letter to the Associate Deputy Secretary, in which it expressly asked the Department to submit its application for GMS to the Air Force.

taken in the Director's decision, after "describing an offer of compromise which it contends that the Tribe rejected, [and] leaving the position of the Department unchanged." Tribe's Additional Brief at 10, June 16, 2008. As noted earlier, the Associate Deputy Secretary's letter specifically responded to the Tribe's letter to the Associate Deputy Secretary, in which the Tribe expressly asked the Department to submit its application for GMS to the Air Force. The Tribe's letter to the Associate Deputy Secretary did not ask him to direct BIA to approve the application, and the Associate Deputy Secretary's letter did not refer to, or direct the Tribe to, the Director's decision. Instead, the Associate Deputy addressed the Tribe's request, raised issues that were not addressed in the Director's decision, and concluded that "[w]e have determined that the [Tribe's] application does not meet the requirements for this acquisition." ADS Letter. We decline the Tribe's invitation to speculate whether the Associate Deputy Secretary did or did not "intend" his letter to be a decision. We think the letter is sufficient on its face to conclude that it constituted a Departmental determination over which the Board lacks jurisdiction, and thus effectively precludes the Board from granting the Tribe the relief that it seeks in its appeal from the Director's decision, rendering the Tribe's second appeal administratively moot.

Conclusion

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 dismisses both of these appeals as moot.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge