



INTERIOR BOARD OF INDIAN APPEALS

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

54 IBIA 36 (09/09/2011)

Dismissing Motion for Reconsideration of:

53 IBIA 155



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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VALLEY CENTER - PAUMA)	Order Dismissing Motion
UNIFIED SCHOOL DISTRICT,)	For Reconsideration
Appellant,)	
)	
v.)	Docket No. IBIA 11-080-1
)	
PACIFIC REGIONAL DIRECTOR,)	
BUREAU OF INDIAN AFFAIRS,)	
Appellee.)	September 9, 2011

On April 29, 2011, the Board of Indian Appeals (Board) dismissed as untimely this appeal by Valley Center - Pauma Unified School District (Appellant). 53 IBIA 155.¹ In finding the appeal untimely, the Board analyzed and applied BIA's current appeal regulations and concluded that Appellant had 30 days from its receipt of the Decision, which contained accurate appeal instructions in accordance with 25 C.F.R. § 2.7(c), to file an appeal with the Board.

It was undisputed that Appellant received a copy of the Decision, albeit not directly from BIA; that the Decision contained accurate appeal instructions; and that Appellant failed to file an appeal with the Board within 30 days after that receipt. No argument was made by Appellant that it was in any way confused by receiving the Decision indirectly or that it was lulled into complacency because it did not receive the Decision directly from BIA. Cf. 53 IBIA at 155 & 159 n.4 (appeal was filed on February 24, 2011; Appellant had informed BIA on January 20, 2011, that it would be filing an appeal). Instead, Appellant argued that unless and until BIA directly sent it a copy of the Decision, no time period for filing an appeal could be triggered, and that dismissal of its appeal would violate Appellant's constitutional due process rights. The Board rejected Appellant's interpretation of the regulations and its due process argument.

¹ The appeal sought 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).

On August 30, 2011, the Board received from the Regional Director, through the Solicitor's Office, a Motion for Reconsideration. In the motion, the Regional Director suggests that two court decisions applying a previous version of BIA's regulations had rejected an interpretation of those previous regulations that was "similar" to the Board's interpretation of the current regulations. See Motion for Reconsideration at 2-3 (citing *Cheyenne-Arapaho Tribes of Oklahoma v. United States*, 966 F.2d 583 (10th Cir. 1992), and *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908 (9th Cir. 1995)). The Regional Director also represents that BIA took a position in *Nkibtaqmikon v. Impson*, 573 F. Supp. 2d 311, 321-22 (D. Me. 2008), that was "contrary" to the position taken by the Board in its decision in the present case.

We summarily dismiss the Motion for Reconsideration because, as the Board's regulations plainly state, a motion for reconsideration "must be filed with the Board within 30 days from the date of the decision." 43 C.F.R. § 4.315. The Regional Director filed the motion more than four months after this appeal was decided.

Although dismissal of the Regional Director's motion is required, the extraordinary effort by the Regional Director to undermine the Board's interpretation and application of BIA's current regulations, requires a response. Even if the Regional Director's motion were not untimely, we would deny reconsideration.

As the Regional Director notes, both *Cheyenne-Arapaho Tribes* and *Hopi Tribe* were decided under a *previous* version of BIA's appeal regulations. After those cases were decided, BIA revised the regulations to include the specific subsections and specific language that the Board analyzed in dismissing Appellant's appeal. See 54 Fed. Reg. 6478 (Feb. 10, 1989); see also *Hopi Tribe*, 46 F.3d at 919 (applying due process analysis to prior regulations because they were "silent as to the required content" of the notice of an agency decision). Unlike the prior version of BIA's regulations, see 25 C.F.R. § 2.4 (1980), the current version of that provision, now codified at 25 C.F.R. § 2.7, includes three subsections, and the current regulation both modifies and clarifies the previous version. Among other things, the current regulation includes the "required content" of the notice of BIA's decision. See *id.* § 2.7(c). The revisions to BIA's appeal regulations in 1989 were not, as the Regional Director apparently assumes, insignificant. In our decision, we analyzed both the structure and content of the *current* regulations, and we disagree with the Regional Director's suggestion that *Cheyenne-Arapaho Tribes* and *Hopi Tribe* may require a different analysis or decision.

And with respect to *Nkibtaqmikon*, a reading of that decision indicates that if anything, it supports the Board's decision. First, in representing that BIA took a "contrary"

position in that case, the Regional Director fails to acknowledge that in *Nkihtaqmikon*, the appellants had never received *any* decision from BIA containing appeal rights — directly or indirectly, and even after inquiring with BIA about a lease approval decision. *See* 573 F. Supp. 2d at 329 & n.15 (BIA failed to notify the dissident members “of their right to administratively appeal;” BIA responded to a letter “without any reference to the lease approval or appeal rights”). Thus, to treat *Nkihtaqmikon* as factually similar to the present case is puzzling at best. Moreover, as the court noted in *Nkihtaqmikon*, BIA’s failure to include appeal rights in a decision “would be self-sanctioning — extending the time period within which the interested parties can exercise their appellate rights.” *Id.* at 330. That, of course, is precisely the analysis adopted by the Board in our interpretation of the current regulations, concluding that the 30-day time period for Appellant in this case was not triggered until Appellant received the Decision containing appeal rights. Unlike *Nkihtaqmikon*, this case is not a situation in which Appellant was unable to protect its interest because it had no notice of its appeal rights.

To summarize, had the Motion for Reconsideration been timely (and assuming the Regional Director would have had standing to seek reconsideration), the Board would deny the motion. None of the cases cited by the Regional Director are inconsistent with the Board’s analysis and application of BIA’s current appeal regulations.² BIA revised its appeal regulations in the interest of clarifying the notice requirements and, by implication, in the interest of promoting certainty and finality. To grant the Regional Director’s motion would undermine both of those interests by giving open-ended appeal rights to parties who receive a copy of a BIA decision containing accurate appeal instructions, but who did not receive the decision directly from BIA. We do not believe that to be the intent of the regulations.³

² We note that the Regional Director did not file a brief when the Board was considering whether Appellant’s appeal was timely. We also note that in arguing that its appeal was timely, Appellant undoubtedly could have, but did not, rely on (or even refer to) the court decisions now cited by the Regional Director as grounds for reconsideration. We think that Appellant’s exercise of judgment in not attempting to rely on these cases before the Board was sound.

³ Nor do we give any deference to the Regional Director in this matter. The Board exercises the authority of the Secretary, *see* 43 C.F.R. § 4.1, and reviews questions of law *de novo*, *see Seminole Tribe of Florida v. Eastern Regional Director*, 53 IBIA 195, 210 (2011).

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 the Motion for Reconsideration as untimely.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge