



INTERIOR BOARD OF INDIAN APPEALS

Wagoner County Board of Commissioners v. Acting Eastern Oklahoma Regional Director,
Bureau of Indian Affairs

55 IBIA 204 (07/25/2012)



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

WAGONER COUNTY BOARD OF)	Order Reversing and Remanding
COMMISSIONERS,)	Decision
Appellant,)	
)	
v.)	
)	Docket No. IBIA 10-123
ACTING EASTERN OKLAHOMA)	
REGIONAL DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	July 25, 2012

Appellant Wagoner County Board of Commissioners appealed to the Board of Indian Appeals (Board) from the June 28, 2010, decision of the Acting Eastern Oklahoma Regional Director (Regional Director), Bureau of Indian Affairs (BIA), in which he summarily dismissed Appellant’s appeal from a decision of BIA’s Okmulgee Agency Superintendent (Superintendent) to accept property into trust for and on behalf of the Muscogee (Creek) Nation (Nation). After expressly acknowledging receipt of Appellant’s notice of appeal, the Regional Director then dismissed the appeal, claiming that Appellant had only expressed an “intention” to file an appeal and did not follow up with an actual notice of appeal. We reverse the Regional Director’s decision and remand this matter to him for consideration of Appellant’s objection to the Nation’s proposed trust acquisition. Appellant submitted a timely notice of appeal that included a reason for its appeal, which entitled it to consideration on the merits by the Regional Director.

Background

On January 15, 2009, the Superintendent acknowledged receipt of an application submitted by the Nation to take into trust for the Nation 77.77 acres, more or less, located in the E½SE¼ of Section 17, Township 17 North, Range 16 East, Wagoner County, Oklahoma, and known as the “Koweta Property.” Administrative Record (AR) Tab 18.¹

¹ The record does not contain an application per se from the Nation, but does contain a copy of a resolution by the Nation’s National Council that authorizes the submission to

(continued...)

Thereafter, on May 1, 2009, BIA issued notices to state and local governments, including Appellant, inviting them to submit information and comments relevant to the proposed acquisition within 30 days. AR Tab 20. On April 5, 2010, the Superintendent issued his decision to take the Koweta Property into trust. The letter included appeal rights to the Regional Director. AR Tab 28. Two weeks later, on April 19, 2010, Appellant acknowledged receipt of the Superintendent's decision. Letter from Appellant to Regional Director, Apr. 19, 2010 (AR Tab 30) (April 19 letter). Appellant asserted that the trust acquisition will have an economic impact resulting from the loss of \$127,906 in ad valorem taxes, a loss that "will be sorely felt." *Id.* Appellant closed its letter by stating, "It is the intent of [Appellant] to appeal the decision to place this property in trust. We appreciate any consideration you may give to this request." *Id.* The letter is signed by the Chairman of Appellant's Board and two district commissioners, and is attested by the Wagoner County Clerk. According to its letterhead, Appellant consists of the three individuals who signed the letter.

In a letter dated May 1, 2010, the Regional Director "acknowledge[d] receipt of the Notice of Appeal" from Appellant and ordered the administrative record from the Superintendent. AR Tab 32. The Regional Director informed Appellant that it "must file a Statement of Reasons within 30 days after the Notice of Appeal is filed." *Id.* Appellant did not file a statement of reasons.

In an abrupt about face, the Regional Director informed Appellant on June 17, 2010, that he now construed Appellant's notice of appeal only as a statement "of its *intent* to appeal the [Superintendent's] decision," that no "Notice of Appeal" had been received, and therefore he "determined that [Appellant] did not properly file an appeal of the Superintendent's decision." AR Tab 37 (emphasis added).

Thereafter, on June 28, 2010, the Regional Director summarily dismissed Appellant's appeal on the grounds that Appellant's April 19 letter merely "notified [BIA] that [Appellant] intended to appeal the decision [to take the Koweta Property into trust, but BIA] did not receive a 'Notice of Appeal' from [Appellant] [BIA] has determined

(...continued)

BIA of an application to take 79 acres into trust. Res. TR 08-067, Apr. 26, 2008 (AR Tab 1). According to the Superintendent's decision, AR Tab 28 at 2, 3, this resolution was submitted as the fee-to-trust "application." The specific property to be taken into trust apparently is the subject of an attachment referenced in the resolution but which was omitted from the record submitted to the Board by BIA. For purposes of our decision, the absence of the attachment or actual fee-to-trust application is irrelevant. However, they would be relevant to an appeal of the merits of a decision on a fee-to-trust request.

that you did not properly file an appeal . . . ; therefore, . . . the appeal is dismissed.” AR Tab 40.

Appellant appealed to the Board. The Regional Director provided the Board with the administrative record, which included a table of contents. The table of contents identified Appellant’s April 19 letter as “April 19, 2010 Letter from [Appellant] to appeal decision.” AR, Table of Contents, at 2 (unnumbered).

Discussion

We reverse and remand for two reasons. First, it cannot reasonably be disputed—despite the Regional Director’s decision—that Appellant’s April 19 letter is a notice of appeal. Second, we reject the Regional Director’s contention that, even if the April 19 letter were construed as a notice of appeal, it lacked sufficient grounds to support the appeal. It may be that Appellant’s reasons in support of its appeal are not persuasive or lack foundation, but they nevertheless are entitled to consideration on the merits of whether to accept the property in trust. It was error to dismiss the appeal without such consideration.

In its brief notice of appeal, Appellant first identifies the property that is the subject of the trust acquisition request, followed by a paragraph that explains that accepting the land into trust will cost Appellant \$127,906 in tax revenue, which it asserts “will be sorely felt.” AR Tab 30. The next and last paragraph states that “[i]t is the intent of [Appellant] to appeal the [Regional Director’s] decision. . . . We appreciate any consideration you may give to this request.” *Id.* All of Appellant’s Board members signed the appeal. The Regional Director erroneously seized on Appellant’s use of the word “intent” to conclude that Appellant had not yet decided whether to appeal and would be submitting something further. To the extent that Appellant expressed an “intent” to appeal the Superintendent’s decision in its April 19 letter, it is evident that it was a *present* intent to appeal, not a vague, future intent to appeal. Even if Appellant intended to follow up with a formal notice of appeal, the Regional Director clearly accepted the April 19 letter as meeting the requirements of an appeal when he “acknowledge[d] receipt of the Notice of Appeal” from Appellant. Letter from Regional Director to Appellant, May 11, 2010 (AR Tab 32). For the Regional Director to then, on June 17, 2010, revisit the adequacy of Appellant’s notice of appeal after the appeal period had ended,² and tell Appellant that its April 19 letter

² Pursuant to 25 C.F.R. § 2.9(a), Appellant had 30 days from the date of its receipt of the Superintendent’s decision to file its appeal. Assuming that Appellant received the Superintendent’s decision on or about April 7, 2010, Appellant had until on or about May 7, 2010, to file its appeal.

would no longer be construed as a notice of appeal does not reflect well on the Regional Office.

In his answer brief, the Regional Director reluctantly concedes his error,³ but argues that summary dismissal remains appropriate because “the loss of *ad valorem* taxes . . . is the only statement in the record that hints at what [Appellant’s] objection is.” Answer Brief at 3. The Regional Director maintains that Appellant should have filed a statement of reasons to flesh out its argument by putting the loss of tax revenue into some context for the Regional Director’s consideration and providing supporting documentation. The Regional Director also argued that “[Appellant] did not discuss any payments made by the Nation which would, in whole or in part, offset the claimed loss of revenue.” *Id.* Thus, the Regional Director maintains that dismissal—based on a failure of context for Appellant’s arguments—is appropriate. We disagree.

It goes without saying that merely filing a written statement asserting, *without more*, that one is appealing a particular decision is insufficient to merit consideration for the very reason that there is nothing *to* consider. See *Rabbithead v. Great Plains Regional Director*, 55 IBIA 44, 48 (2012). The very definition of “appeal” is “a written request for review of an action or . . . inaction . . . *that is claimed to adversely affect the interested party making the request.*” 25 C.F.R. § 2.2 (emphasis added). Thus, it is incumbent upon the appellant to show how the action or inaction has adversely affected appellant and, essentially, convince BIA that its decision should be rescinded or modified. The regulations require a statement of reasons, *id.* § 2.10, to assist appellants in perfecting their appeals. It is a “document submitted by the appellant [to] explain[] why the decision being appealed is in error.” *Id.* § 2.2. This “statement of reasons” may be included in or filed with the notice of appeal, *id.* § 2.10(b), or filed within 30 days after filing the notice of appeal, *id.* § 2.10(c). Summary dismissal is appropriate only where an appeal is untimely, an appellant has failed to post a required bond or an appellant has failed to “state the reasons why the appellant believes the decision being appealed is in error, or the reasons for the appeal are not otherwise evident in the documents.” *Id.* § 2.17.

The Regional Director urges the Board to uphold summary dismissal of Appellant’s appeal, relying on our decision in *Peace Pipe, Inc. v. Acting Muskogee Area Director*, 22 IBIA 1 (1992), *aff’d sub nom. Pipes, Inc. v. United States*, No. 92-C-373-B (N.D. Okla. Nov. 4, 1992). The Regional Director maintains that even if Appellant filed an adequate appeal, it

³ He concedes that the April 19 letter “may perhaps be described as a notice of appeal.” Answer Brief at 3. And when he prepared the record for submission to the Board, the Regional Director characterized Appellant’s April 19 letter in the table of contents as a “letter. . . to appeal decision.” AR, Table of Contents, at 3 (unnumbered).

offered no evidence or “rationale” for its opposition. Thus, according to the Regional Director, “summary dismissal is appropriate where the rationale for the appeal cannot be determined.” Answer Brief at 3. But Appellant *did* assert a “rationale” for its appeal—the loss of tax revenue. Appellant provided the total amount of tax revenue that would be lost and how much various local governmental entities would lose out of the revenue generated by the Koweta Property, and argued that the loss of tax revenue, combined with decreased revenue from other sources, would adversely impact Wagoner County.⁴ And the Nation responded to Appellant’s contentions by providing information on payments it provides to Wagoner County and the services that it provides to county residents in lieu of taxes. *See* Letter from Nation to Regional Director, May 21, 2010, at 1-2 (AR Tab 36). At its option, Appellant could have addressed with specificity how its services will be impacted by the loss of tax revenue from the parcel and it could have addressed offsets provided by the Nation.⁵ Such arguments might strengthen Appellant’s position, but they are not required for the purpose of avoiding summary dismissal. What was required was a decision from the Regional Director *on the merits* of Appellant’s appeal, for which reason we reverse the Regional Director’s decision and remand this matter to him.⁶

⁴ In a separate submission, the Wagoner County assessor provided the breakdown of the amount of funds that would be distributed to various local public entities from the tax revenue generated by the Koweta Property. Letter from County Assessor to Regional Director, Apr. 15, 2010 (AR Tab 36). The county assessor, as an office within the county government, submitted information to the Superintendent and to the Regional Director that should be considered by the Regional Director on remand just as if it had come directly from Appellant.

⁵ The Regional Director asserts that he has “no information regarding . . . whether there is any mitigation of the loss [of tax revenue] by tribal payments.” Answer Brief at 4. The Regional Director errs. The Nation provided this information to the Regional Director in its letter of May 21, 2010. AR Tab 36. Moreover, the Regional Director suggests that it is Appellant’s burden to provide this information. *See* Answer Brief at 3 (Appellant “did not discuss any payments made by the Nation which would, in whole or in part, offset the claimed loss of revenue.”). The Regional Director errs. It is the Nation that desires to have the land taken into trust and therefore it would be in the Nation’s interest to provide this information to BIA and to provide BIA with whatever information it may have to enable BIA to make an informed decision.

⁶ We decline the Regional Director’s invitation to require him “to obtain full briefing from all the interested parties on the effects of any purported tax loss.” Answer Brief at 4. He may determine on remand what additional briefing, if any, is appropriate. We note that the Nation provided a response on the merits of the County’s appeal by letter dated May 21, 2010 (AR Tab 36). *See supra* at 208 and n.5.

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 reverses the Regional Director's June 28, 2010, summary dismissal of Appellant's appeal and remands this matter for consideration on the merits.

I concur:

// original signed
Debora G. Luther
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge