



INTERIOR BOARD OF INDIAN APPEALS

Joletta Bird Bear and SOAR v. Bureau of Indian Affairs

59 IBIA 170 (10/20/2014)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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JOLETTA BIRD BEAR AND SOAR,)	Order Docketing and Dismissing
Appellants,)	Appeal Without Prejudice
)	
v.)	Docket No. IBIA 14-116
)	
BUREAU OF INDIAN AFFAIRS,)	
Appellee.)	October 20, 2014

Joletta Bird Bear and SOAR¹ (collectively, Appellants) appealed to the Board of Indian Appeals (Board) from a “Notice of Availability and Appeal Rights” (Notice of Availability), which states that a Finding of No Significant Impact (FONSI) was made by the Bureau of Indian Affairs (BIA) in connection with a proposal for a well pad expansion to accommodate two additional wells (Nos. 148-94-28B-33-11H and 148-94-28B-33-12H) on the Fort Berthold Reservation. The Notice of Availability also contains language and appeal instructions that could be construed, and which Appellants apparently did construe, as giving notice that BIA had issued a decision to approve the well pad expansion, and that the decision and FONSI were appealable to the Board. We dismiss Appellants’ appeal as premature, without prejudice.

Because it was not clear from the Notice of Availability whether BIA had actually issued a decision on the well pad expansion, much less that a decision was issued by a regional director or other BIA official whose decisions are subject to review by the Board, *see* 25 C.F.R. § 2.4(e),² we ordered Appellants to specifically identify and produce the final BIA decision that Appellants sought to appeal.³ We explained that a FONSI is a not a

¹ According to the notice of appeal, SOAR is a voluntary association of members of the Three Affiliated Tribes of the Fort Berthold Indian Reservation, including Joletta Bird Bear, who are impacted by oil drilling on the reservation. *See* Notice of Appeal at 1.

² Section 2.4(e) authorizes review by the Board of decisions made by BIA area directors, who are now titled regional directors. In general, the Board is also authorized to review decisions made by a Deputy to the Assistant Secretary – Indian Affairs. *See* 25 C.F.R. § 2.4(e).

³ *See* Pre-Docketing Notice and Order for Information from Appellants, July 16, 2014 (Order), at 2-3.

“final administrative action or decision,” which is a predicate for the exercise of the Board’s jurisdiction under 43 C.F.R. § 4.331, and thus the Board has declined to consider an appeal of a FONSI until after the issuance of a final decision approving the administrative action for which the FONSI was prepared. See *Viejas Band of Mission Indians v. Pacific Regional Director*, 38 IBIA 73, 73-74 (2002); *Citizens for Safety & Environment v. Northwest Regional Director*, 37 IBIA 282, 282-83 (2002). We also explained that, to the extent the FONSI, or any decision that Appellants seek to appeal, was issued by a BIA superintendent, the Board does not have jurisdiction to directly review actions or decisions of a superintendent, and an appeal must instead be made to the appropriate regional director. See 25 C.F.R. § 2.4(a); 43 C.F.R. § 4.331(a); *Confederated Tribes of Coos, Lower Umpqua, and Suislaw Indians v. Acting Superintendent, Siletz Agency*, 27 IBIA 47, 47 (1994).

Appellants responded that they could not identify or produce a final BIA decision because BIA does not always provide adequate notices of well approvals, and Appellants did not receive notice of any approval in this case apart from the Notice of Availability. Appellants’ Response to Order at 1-2. Appellants also asserted that SOAR submitted a Freedom of Information Act (FOIA) request to BIA for a copy of any decision concerning the proposed well pad expansion and for information concerning other well approvals, and that BIA was still processing the request. *Id.* at 2.⁴

Departmental counsel, on behalf of BIA, subsequently informed the Board and Appellants that the Fort Berthold Agency Acting Superintendent (Superintendent) approved an easement modification for the well pad expansion on August 29, 2014, and submitted a copy of the decision. Appellee’s Response to Order at 1 (unnumbered) & Ex. B (Superintendent’s decision). BIA contends that Appellants’ appeal to the Board was initially and remains premature after the Superintendent’s decision. *Id.* at 1-2 (unnumbered). We agree for reasons explained in our previous order: A FONSI is not reviewable by the Board until a final BIA decision in reliance on the FONSI has been made, and any appeal from the Superintendent’s decision must be made to the Great Plains Regional Director.

BIA also states that, “to the extent that the . . . appeal deprived the BIA of jurisdiction to approve the [easement modification], there is an open question as to the validity” of the Superintendent’s decision. *Id.* at 2 (unnumbered). It is well established that once an appeal is filed with the Board, BIA loses jurisdiction over the matter except to participate in the appeal as a party. *Yakama Nation v. Northwest Regional Director*, 51 IBIA 187, 187 (2010); *Bullcreek v. Western Regional Director*, 39 IBIA 100, 101 (2003).

⁴ The Board has no jurisdiction over FOIA requests. *Descendants and Heirs of Tulalip Allottee Behalh/Katrina Jim v. Northwest Regional Director*, 53 IBIA 131, 132 (2011).

Whether or not a premature appeal, filed before BIA has even issued a decision, should be treated differently, is an issue we need not decide. In the present case, the Superintendent’s “decision” does not conform to the requirements of 25 C.F.R. § 2.7 because it does not contain appeal rights. Upon our dismissal of this appeal, BIA will undoubtedly have jurisdiction to properly issue a decision or reissue the Superintendent’s decision with appeal rights. Dispositive for this appeal, Appellants have not identified as the basis for the appeal any final administrative action or decision made by the Regional Director or other BIA official whose decisions are subject to Board review.

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 appeal without prejudice.⁵

I concur:

// original signed
Thomas A. Blaser
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge

⁵ We do not reach BIA’s “Request for Leave to Amend Distribution List of Interested Parties,” which BIA made conditional on a decision by the Board not to dismiss the appeal as premature.