



INTERIOR BOARD OF INDIAN APPEALS

Richard Pritzkau v. Acting Great Plains Regional Director, Bureau of Indian Affairs

59 IBIA 235 (11/13/2014)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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RICHARD PRITZKAU,)	Order Vacating Decision and
Appellant,)	Remanding
)	
v.)	
)	Docket No. IBIA 12-073
ACTING GREAT PLAINS REGIONAL)	
DIRECTOR,)	
Appellee.)	November 13, 2014

Richard Pritzkau (Appellant), appealed to the Board of Indian Affairs (Board) from a December 28, 2011, decision (Decision) of the Acting Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director dismissed as moot an appeal that Appellant had filed pursuant to 25 C.F.R. § 2.8 (appeal from inaction of official), in which Appellant sought to prompt action or a decision by BIA’s Cheyenne River Agency Superintendent (Superintendent), in a dispute involving a road across an allotment in which Appellant owns an interest. The Regional Director dismissed Appellant’s appeal as moot after receiving a status report from the Superintendent, which the Regional Director treated as a decision, and which was generally favorable to Appellant. The Superintendent also provided the Regional Director with a second status report that reported new facts and a change of course by the Superintendent, but the Regional Director treated it as untimely and declined to consider it in dismissing the appeal. Appellant challenges the Regional Director’s mootness determination because of the Superintendent’s change of course.

We vacate the Decision, not because of the Superintendent’s change of course, but because the Superintendent’s status report, standing alone, was not sufficient to render Appellant’s § 2.8 appeal moot. While we agree with the Regional Director that a decision issued by the Superintendent would have rendered Appellant’s § 2.8 appeal moot, we disagree with the Regional Director that the Superintendent’s first status report constituted a “decision” for purposes of rendering Appellant’s § 2.8 appeal moot as a matter of law. The Superintendent’s status report did not conform to the requirements in 25 C.F.R. § 2.7 for a BIA decision because it did not advise interested parties of their appeal rights.¹ Nor

¹ In relevant part, § 2.7 provides that a BIA official making a decision must give written notice of the decision to all interested parties by personal delivery or mail. With an

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did the Superintendent's second status report. We therefore vacate the Decision and remand the matter for BIA to issue a decision, in accordance with § 2.7, responding to Appellant's substantive demands.

Background

The source of the underlying dispute in this case is a decision by the Superintendent in 2011 to approve a right-of-way easement along a two-track dirt trail across Cheyenne River Allotment 979 (Allotment), in which Appellant owns a 9% undivided trust interest. Decision at 1 (Administrative Record (AR) Tab 8); Title Status Report at 6 (AR Tab 9).² After the Superintendent approved the easement, the Cheyenne Sioux Tribe constructed a gravel road along the easement, which provided access for two individuals to their homesites on adjacent property. In the meantime, however, Appellant challenged the Superintendent's decision and the Regional Director reversed the Superintendent's right-of-way grant, Decision at 1, thus leaving the road across the Allotment with no supporting right-of-way.

Appellant then submitted a demand to the Superintendent to take the following actions: (1) pay the trust landowners for the road trespass; (2) notify the individuals to stop using the road; and (3) remove the road and restore the land to its original condition. Letter from Van Norman to Superintendent, Aug. 17, 2011 (AR Tab 1).³ When the Superintendent failed to respond, Appellant filed a § 2.8 appeal with the Regional Director. Notice of Appeal to Regional Director, Sept. 10, 2011 (AR Tab 2).

The Regional Director asked the Superintendent to provide a status report. Letter from Regional Director to Van Norman, Oct. 21, 2011, at 2 (AR Tab 3). On November 17, 2011, the Superintendent submitted a memorandum to the Regional Director, in which he announced his intention to take several actions responsive to

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exception not relevant here, § 2.7 also requires that the decision "shall include a statement that the decision may be appealed pursuant to [25 C.F.R. Part 2], identify the official to whom it may be appealed, and indicate the appeal procedures, including the 30-day time limit for filing a notice of appeal."

² The record indicates that a collective 38% interest in the Allotment is held in trust, and the remaining interest is held in fee. Email from Murray to Loudermilk, Aug. 18, 2011 (AR Tab 1). The record does not identify the fee owners.

³ As provided in § 2.8, the request also stated that if BIA failed to take action within 10 days, or establish a date by which action would be taken, an appeal would be filed in accordance with 25 C.F.R. Part 2. AR Tab 1.

Appellant's demands. Mem. from Superintendent to Regional Director (First Status Report), Nov. 17, 2011 (AR Tab 5). The Superintendent stated that payment of damages by BIA was not authorized by BIA's regulations, but that he was working to address Appellant's other demands by posting signage, contacting alleged trespassers, and researching the logistics for removing the road. *Id.*

On December 7, 2011, after the time for filing responses to the Superintendent's status report had expired, the Superintendent filed another memorandum with the Regional Director, reporting new facts and a change of course from what he had previously announced. Mem. from Superintendent to Regional Director (Second Status Report), Dec. 7, 2011 (AR Tab 7). In the Second Status Report, the Superintendent informed the Regional Director that the two individuals who were the intended beneficiaries of the road had acquired an ownership interest in the Allotment. *Id.* According to the Superintendent, as co-owners of the Allotment, those individuals now had a right to use the road across the Allotment, and thus Appellant's appeal should be dismissed. *Id.* The Superintendent did not provide a copy of the Second Status Report to Appellant. *See id.*; *see also* Decision at 2.

On December 28, 2011, the Regional Director dismissed Appellant's § 2.8 appeal from the Superintendent's inaction as moot. Decision at 1-2 (AR Tab 8). The Regional Director concluded that when the Superintendent submitted the First Status Report, Appellant had "received the only relief available through an appeal from inaction." *Id.* at 1. The Regional Director noted and described the contents of the Superintendent's Second Status Report, but declined to consider it because it was an *ex parte* communication (i.e., had not been provided to Appellant) and because it was untimely (having been submitted after the time period allowed for filing responses to the (first) status report). *Id.* at 2.

On appeal to the Board, Appellant argues that the First Status Report cannot constitute "action" for purposes of 25 C.F.R. § 2.8 because the Second Status Report effectively negated it. Opening Br., June 6, 2012, at 1. According to Appellant, the Superintendent broke the "promises" made in the First Status Report, and thus Appellant's § 2.8 appeal to the Regional Director was not moot. *Id.* Appellant requests reversal of the Regional Director's decision, or in the alternative, a "remand with instructions directing the Superintendent to act on his written promise to remove the road." *Id.* at 3.

Discussion

Appellant's focus on the underlying merits of the dispute, and whether the Superintendent will or will not implement the actions announced in the First Status Report, is largely misplaced. The issue before the Regional Director, and before the Board, is whether the Superintendent's First Status Report was, as a matter of law, sufficient to render Appellant's procedural § 2.8 appeal moot. We conclude that it was not sufficient

because the Superintendent's status report did not constitute a decision that complied with the requirements for a written BIA decision found in § 2.7, which include advising interested parties of their appeal rights. Whether or not intervening events—the acquisition of an ownership interest in the Allotment by the individuals who primarily benefitted from the road—would provide grounds for a different response on the merits to Appellant's demands than would otherwise be the case, Appellant was entitled to a formal decision, with appeal rights.

Section 2.8 is an action-prompting mechanism that allows the parties to seek action or a decision by a BIA official on the merits of an issue, and if the official fails to respond within the time period allowed, to appeal the official's inaction to the next level of review. *Ramirez v. Great Plains Regional Director*, 57 IBIA 218, 219 (2013). The scope of a § 2.8 appeal is limited to deciding whether BIA must take action or issue a decision, and does not include determining how BIA must act on or how it must decide a matter. *See id.*; *McEvers v. Rocky Mountain Regional Director*, 57 IBIA 99, 99-100 (2013).⁴ Thus, when BIA issues a decision in response to a § 2.8 request, an appeal from BIA's inaction becomes moot, even where an appellant may contend that the BIA decision does not appropriately address her concerns on the merits. *Ramirez*, 57 IBIA at 219; *McEvers*, 57 IBIA at 100.

In a § 2.8 appeal, it is possible that a status report indicating that action will be taken on an appellant's demand may in some cases be sufficient for the appeal to be dismissed as an exercise of discretion. But announced intentions, standing alone, and in the absence of implementation, are not sufficient to constitute "action." And in the absence of issuing a formal decision that complies with § 2.7, including appeal rights, a status report does not constitute a "decision" for purposes of rendering a § 2.8 appeal moot. In that respect, the Regional Director erred in concluding that when the Superintendent submitted his status report, Appellant had "received the only relief available through an appeal from inaction." Decision at 1. The Superintendent had not taken the action requested by Appellant and Appellant had not yet received a decision, favorable or unfavorable, that complied with

⁴ When a party submits a § 2.8 demand for action, there is never a question about whether the BIA official is obligated to issue some type of response: the regulation requires a response within 10 days, and presumptively requires, either within that time period or a reasonable time period thereafter, a decision on the merits of the request. In some cases, BIA may conclude that a decision reaching the merits of issues raised by a party is not appropriate, but BIA must nevertheless issue a decision setting forth that conclusion, and providing appeal rights.

§ 2.7.⁵ In dismissing Appellant’s appeal from inaction as legally “moot,” the Regional Director effectively left the matter unresolved, both procedurally and substantively.

Contrary to Appellant’s assertions, however, the issue of mootness does not depend on whether BIA has taken the action that Appellant requested. As noted earlier, the scope of a § 2.8 appeal is limited to whether BIA must take some action on a § 2.8 request, and does not extend to determining how BIA must respond on the merits to that demand. Thus, this appeal provides no basis for the Board to consider Appellant’s request that we remand it with instructions to the Superintendent to take the action outlined in the First Status Report.

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 vacates the Decision and remands the matter for further proceedings.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge

⁵ Although BIA’s implementation of action in the absence of a formal decision may render a § 2.8 appeal moot, the existence of other interested parties who could be adversely affected by that action would require BIA, prior to taking such action, to issue a formal decision to ensure that the due process rights of interested parties are protected.