



## INTERIOR BOARD OF INDIAN APPEALS

Quapaw Tribe of Oklahoma v. Acting Eastern Oklahoma Regional Director,  
Bureau of Indian Affairs

61 IBIA 118 (07/20/2015)



# 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

|                           |   |                          |
|---------------------------|---|--------------------------|
| QUAPAW TRIBE OF OKLAHOMA, | ) | Order Affirming Decision |
| Appellant,                | ) |                          |
|                           | ) |                          |
| v.                        | ) |                          |
|                           | ) | Docket No. IBIA 13-095   |
| ACTING EASTERN OKLAHOMA   | ) |                          |
| REGIONAL DIRECTOR, BUREAU | ) |                          |
| OF INDIAN AFFAIRS,        | ) |                          |
| Appellee.                 | ) | July 20, 2015            |

This appeal raises the question of whether the Bureau of Indian Affairs (BIA) was obligated to issue a determination, at the request of the Quapaw Tribe of Oklahoma (Tribe or Appellant) on behalf of certain members, on whether certain property is “restricted” under Federal law, such that proceeds from the disposal of the property may be considered “derived directly” from trust or restricted land for taxation purposes. We hold that BIA was not required to make such a determination, which would have been an advisory opinion. Therefore, we affirm an April 3, 2013, decision of BIA’s Acting Eastern Oklahoma Regional Director (Regional Director), declining a request from the Tribe to do so.

## Background

This case arose out of the Tribe’s concern that proceeds from the sale of scrap metal from a demolished building that was located on land owned in restricted fee<sup>1</sup> by Osage Tribal members be characterized as “derived directly” from restricted fee land, because such a characterization has tax consequences for the tribal members who are the recipients of the proceeds. The Tribe contends that the law is clear that the building became a fixture on the land and was also restricted as a matter of Federal Indian law, and that the proceeds from the sale of scrap metal from the demolished building are nontaxable. As explained below, BIA never issued a decision or made a determination on the merits of that issue, and this appeal is limited to deciding whether BIA was required to do so.

---

<sup>1</sup> The term “restricted fee” refers to property to which title is held by an Indian owner, but which under Federal law is restricted against alienation without approval by BIA.

The former community of Picher, Oklahoma is now part of the U.S. Environmental Protection Agency's (EPA) Tar Creek Superfund Site, and cleanup activities have included the demolition of various abandoned buildings. One such building had been constructed by a non-Indian business named "Picher Steel" when it held a revocable permit, issued by BIA, to conduct business operations on the Harry Crawfish Allotment, Quapaw No. 97/99 (Allotment). The Allotment is owned by Quapaw tribal members in restricted fee.

In 2011, BIA approved an emergency permit for EPA and the Lead-Impacted Communities Relocation Assistance Trust (LCRAT) to enter onto the Allotment for the purpose of demolishing and removing various vacant buildings. Emergency Revocable Permit, Mar. 25, 2011 (ERP) (AR 11). The Picher Steel building initially was excluded from the permit due to a conflict over its potential value.<sup>2</sup> On May 12, 2011, the Tribe and BIA approved an Amendment to the Emergency Revocable Permit to include the Picher Steel building, with the agreement that steel and metal scrap from the demolished building would be sold for salvage for the benefit of the restricted owners of the Allotment. Amendment to Emergency Revocable Permit, May 12, 2011 (AR 14). The Amendment provided that "[t]he payment of the salvage proceeds will be distributed directly to the landowners" of the Allotment. *Id.*

Following the sale of the scrap material from the Picher Steel building, the Tribe apparently interceded, under circumstances that are not clear from the record, so that the purchaser of the scrap material made payment to the Tribe, and the Tribe apparently accepted the proceeds on behalf of the Indian owners. As we understand the Tribe's contentions, it first had asked BIA's Miami Agency Superintendent (Superintendent) to accept payment from the purchaser, for deposit into the landowners' Individual Indian Money (IIM) accounts, but after the Superintendent refused to do so, the Tribe accepted the funds.

The Tribe then asked the Superintendent to accept the funds from the Tribe and deposit them in the landowners' IIM accounts. Letter from Tribe to Superintendent, Feb. 1, 2012 (AR 15). The Tribe articulated the reasons why it believed the Picher Steel building was "restricted" property and—noting that the proper treatment of the proceeds has financial (i.e., tax) consequences for the owners—asked the Superintendent to "either (a) accept the funds as proceeds from the sale of restricted property and disburse them via

---

<sup>2</sup> The Emergency Revocable Permit allowed EPA and LCRAT to demolish and remove vacant structures from the Allotment without payment of monetary compensation, based on a determination that the structures had no inherent value and reduced the value of the Allotment, and that their removal was beneficial. ERP ¶ 6, at 4.

the IIM system, or (b) issue an appealable decision as to the status of the property as ‘restricted or non-restricted.’” *Id.* at 2 (unnumbered).

On December 28, 2012, the Superintendent issued a decision in response to the Tribe’s request. The Superintendent first concluded that on May 21, 2012, the Tribe had distributed the proceeds from the salvage sale to the Indian landowners, and therefore its request that BIA accept the funds into IIM accounts was moot. Letter from Superintendent to Tribe, Dec. 28, 2012, at 1 (Superintendent’s Decision) (AR 24). Turning to the Tribe’s alternate request for him to issue a decision on the restricted or non-restricted status of the building, the Superintendent, referring to language in an Internal Revenue Service (IRS) Ruling, stated that it appeared to him that the question “is not whether the personal property in question is restricted or non-restricted, but whether the income in question is ‘derived directly’ from the Harry Crawfish allotment.” *Id.* at 2 (unnumbered). The Superintendent concluded that BIA’s regulations governing IIM accounts, 25 C.F.R. Part 115, did not grant him “jurisdiction” to determine whether the funds were “derived directly” from the Allotment, as that term is used in the IRS Revenue Ruling.

The Tribe appealed the Superintendent’s decision to the Regional Director, complaining that the Superintendent had failed to answer the question asked: to “determine the restricted status of structures on restricted property for the benefit of the restricted landowners.” Notice of Appeal of Inaction under 25 C.F.R. § 2.8, Feb. 14, 2013, at 2-3.<sup>3</sup> The Tribe disputed the Superintendent’s assertion that he lacked jurisdiction to determine whether funds are “derived directly” from restricted property, arguing that under 25 C.F.R. Part 115, the Superintendent is required to accept payments into IIM accounts from money derived directly from the conveyance or use of trust or restricted fee lands or trust resources. *Id.* at 3-4 (quoting 25 C.F.R. § 115.702 (table)). The Tribe asked the Regional Director to respond to the question posed and to determine that the structures on the restricted land were also restricted.<sup>4</sup> *Id.* at 4.

---

<sup>3</sup> The Tribe had previously filed an appeal with the Regional Director from the Superintendent’s alleged inaction pursuant to § 2.8, and styled its notice of appeal from the Superintendent’s decision as one from “inaction.” But the Superintendent undoubtedly took action, within the meaning of § 2.8, by issuing his decision, and the Tribe clearly sought review on the merits of the Superintendent’s decision. When a BIA official issues a decision on a request for action, a claim arising under § 2.8 is rendered moot, and the decision itself is appealable on the merits, even if the merits claim includes an allegation that the official did not take the specific action that had been requested.

<sup>4</sup> The Tribe also immediately demanded action from the Regional Director, invoking § 2.8, *see id.* at 4, but such a demand undoubtedly was premature. *See Steward v. Pacific Regional* (continued...)

The Regional Director concluded that because the proceeds from the sale of the scrap material had already been distributed to the individual Indian owners, the issue of BIA accepting or not accepting the funds into their IIM accounts was moot, and thus the Superintendent was correct in finding that the matter of the restricted or non-restricted nature of the building itself was moot. Letter from Regional Director to Appellant, Apr. 3, 2013, at 1-2 (Decision) (AR 27). The Regional Director also concluded that the Tribe had identified no statute or regulation that would require BIA to issue a determination on the question presented by the Tribe in the absence of a specific matter that would require BIA action. *Id.* at 2.

The Tribe appealed to the Board. The Tribe filed an opening brief, the Regional Director filed an answer brief, and the Tribe filed a reply brief.

### Discussion

We affirm the Decision because when the Tribe chose to distribute the proceeds to the Indian landowners, the issue of whether BIA might otherwise have been required to accept the funds into IIM accounts became moot. A matter becomes moot when “nothing turns on its outcome.” *Pueblo of Tesuque v. Acting Southwest Regional Director*, 40 IBIA 273, 274 (2005) (quoting *Schering Corp. v. Shalala*, 995 F.2d 1103, 1105 (D.C. Cir. 1993)). When the question of depositing the funds into IIM accounts became moot, so did the corollary question that might have existed concerning the restricted or non-restricted character of the property from which the proceeds were derived.<sup>5</sup>

---

(...continued)

*Director*, 61 IBIA 70, 72 (2015) (“An appellant cannot use § 2.8 to shorten the normal regulatory timelines for a BIA official to decide an appeal.”).

<sup>5</sup> We say “might have existed” because the Amendment to the Emergency Permit that was approved by both BIA and the Tribe expressly provides that the “proceeds will be distributed directly to the landowners.” Thus, even assuming, as the Tribe contends, that the Picher Steel building was “restricted” property, and that the proceeds were “derived directly” from restricted property, it would not necessarily follow that BIA was required or authorized to accept the proceeds into IIM accounts, or would have needed to address the issue presented by the Tribe. BIA must accept payments of money derived directly from trust or restricted fee lands or trust resources “when paid directly to the Secretary on behalf of the [individual Indian] account holder.” 25 C.F.R. § 115.702 (table). BIA does not accept funds paid directly to an Indian owner (“direct pay” arrangements), unless submitted by the payor after being mailed to the owner and returned to the payor as undeliverable. *Id.*; see 25 C.F.R. § 115.703 (BIA will not accept funds from sources not identified in the table in § 115.702).

On appeal, the Tribe does not dispute BIA's conclusion that the issue of accepting the funds into IIM accounts is moot, *see* Opening Br. at 10 n.5, and 12 n.7, but contends that the underlying question it posed regarding the restricted or non-restricted character of the Picher Steel building is not moot because that issue still has significance to the members who received the proceeds, i.e., because of the potential tax consequences. The Tribe contends that the Superintendent was required under 25 C.F.R. § 115.702 to accept the proceeds from the Tribe into IIM accounts, and in mistakenly refusing to do so, he created "uncertainty" for tribal members and "created a presumption" that the proceeds are taxable. Notice of Appeal, May 6, 2013, at 2, 7. Thus, according to the Tribe, BIA now owes a duty to the landowners to issue a clarification through a determination on the issue. *Id.* at 7. The Tribe argues that BIA undoubtedly has jurisdiction, under 25 C.F.R. § 115.702, to determine whether proceeds from a sale of property are "derived directly" from trust or restricted land.

While the issue raised by the Tribe may have significance to the Tribe's members, e.g., in relation to their dealings with the IRS, it no longer has any legal significance in relation to a matter that is pending before BIA that requires BIA action. And whether or not BIA had jurisdiction to address the restricted-versus-non-restricted character of the Picher Steel building when the Tribe's request was pending for BIA to accept the funds under § 115.702, that regulation creates no obligation on the part of BIA to issue advisory opinions on the subject when there is no such pending request.

The Tribe's assertion that the Superintendent's "refusal"<sup>6</sup> to accept the proceeds from the Tribe created a negative "presumption," which BIA then had a duty to correct, is without any foundation, legal or factual. First, the "rationale" ascribed by the Tribe to the Superintendent for refusing to accept the proceeds apparently is found nowhere in the record except in the Tribe's own correspondence and its own characterizations.<sup>7</sup> *See, e.g.*, Opening Br. at 4 (citing AR 15, Letter from Tribe to Superintendent, Feb. 1, 2012). Second, and more important, even assuming that the Superintendent informally concluded

---

<sup>6</sup> The Tribe's assertion that the Superintendent "refused" to accept the proceeds is not directly supported in or by the record, but it is undisputed that BIA did not deposit the proceeds into IIM accounts. We assume for purposes of this appeal that the Superintendent communicated in some fashion to the Tribe that he was unwilling to accept the funds.

<sup>7</sup> The Board's own review of the record reveals no BIA-generated documents that even informally opine, on behalf of BIA, on the ultimate merits of the issue.

that the Picher Steel building was unrestricted property, such an informal conclusion could have no legal effect or create any “presumption.”<sup>8</sup>

The Tribe also contends that when it disbursed the funds to the landowners, it also issued IRS Form 1099s “regarding the distribution,” and that the Superintendent’s “refusal to answer” the question concerning the restricted or unrestricted status of the Picher Steel Building “has brought the Tribe’s actions into question,” and “confirmation that the proceeds were the result of the sale of restricted property is necessary to assure the Tribe that no further actions or amendments regarding the tax forms are required.” Opening Br. at 19 n.11. Whatever action the Tribe chose to take when collecting the proceeds in the first instance, and then distributing them, was taken of its own volition, and cannot be used to give rise to some obligation on the part of BIA.

To summarize, when the Tribe chose to distribute the proceeds from the Picher Steel building to the landowners, it rendered moot the issue of whether BIA would otherwise have been required to accept those proceeds into IIM accounts. And no statute, regulation, or conduct on the part of BIA created any separate duty to make a determination on the issue presented by the Tribe.<sup>9</sup> Thus, BIA properly declined the Tribe’s request to make a determination on the restricted or non-restricted character of the Picher Steel building.

---

<sup>8</sup> Ironically, the only document the Board located in the record that characterizes the buildings on the allotment as “unrestricted” is a letter from the Tribe. *See* Letter from Yocham to Olds, Jan. 19, 2011 (AR 7).

Of course, even if the Superintendent had memorialized a position on the merits of the issue in writing, whether formal or informal, the Tribe’s disbursement of the proceeds likely would still have rendered the issue—and any challenge to the Superintendent’s decision—moot. The mere existence of a legally ineffective BIA document taking a position on an issue is not enough to defeat mootness, although in some cases the Board has vacated underlying BIA decisions that have become moot as a matter of clarification. *See, e.g., Alcantra v. Pacific Regional Director*, 58 IBIA 252, 253-54 (2014); *Spicer v. Eastern Oklahoma Regional Director*, 50 IBIA 328, 333 (2009).

<sup>9</sup> The Tribe also asks the Board to issue a decision on the merits regarding the restricted or unrestricted nature of the Picher Steel Building. Opening Br. at 6. The Board’s role, and the scope of the appeal, however, is limited to reviewing the Regional Director’s decision. 43 C.F.R. § 4.318. In any event, it is well-established that the Board does not issue advisory opinions. *See, e.g., Forest County Potawatomi Community v. Deputy Assistant Secretary – Indian Affairs*, 48 IBIA 259, 264 (2009), and cases cited therein.

## 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 affirms the Regional Director's April 3, 2013, decision.<sup>10</sup>

I concur:

\_\_\_\_\_  
// original signed  
Steven K. Linscheid  
Chief Administrative Judge

\_\_\_\_\_  
//original signed  
Thomas A. Blaser  
Administrative Judge

---

<sup>10</sup> The Regional Director also concluded that the Tribe lacked standing to appeal from the Superintendent's decision. Except to the extent standing and mootness are related concepts, *see Cheyenne River Sioux Tribe v. Acting Great Plains Regional Director*, 41 IBIA 308, 312 (2005), we express no opinion on that issue. We assume, solely for purposes of this appeal, that the Tribe has associational standing to bring this appeal on behalf of its members who received proceeds from the sale of the scrap material from the Picher Steel building.