



## INTERIOR BOARD OF INDIAN APPEALS

Reservation Transportation Authority v. Pacific Regional Director, Bureau of Indian Affairs

62 IBIA 307 (03/23/2016)



# 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

RESERVATION TRANSPORTATION	)	Order Dismissing Appeal
AUTHORITY,	)	
Appellant,	)	
	)	
v.	)	Docket No. IBIA 16-017
	)	
PACIFIC REGIONAL DIRECTOR,	)	
BUREAU OF INDIAN AFFAIRS,	)	
Appellee.	)	March 23, 2016

This appeal to the Board of Indian Appeals (Board) by the Reservation Transportation Authority (RTA or Appellant)<sup>1</sup> arises under 25 C.F.R. § 2.8, an action-prompting regulation that allows inaction by an official of the Bureau of Indian Affairs (BIA) to become administratively appealable. RTA sought action from BIA's Pacific Regional Director (Regional Director), on RTA's request for arbitration to resolve a funding dispute arising under an agreement between RTA and BIA for a Tribal Transportation Program (TTP). RTA also sought action from BIA on RTA's request for the immediate release of Fiscal Year (FY) 2015 funding.

In correspondence to RTA, and in a status report to the Board, the Regional Director stated that BIA did not believe that arbitration was appropriate, but that BIA was amenable to mediation. Subsequently, the Regional Director issued a decision effectively denying RTA's request for the immediate release of FY 2015 funds, and advising RTA that the decision may be appealed to the Civilian Board of Contract Appeals (CBCA), pursuant to the Contract Disputes Act (CDA), 41 U.S.C. § 7102 *et seq.* The Regional Director then moved for dismissal of this appeal on grounds of mootness. RTA objects to dismissal. We grant the Regional Director's motion and dismiss the appeal because RTA is not entitled to further action-prompting relief under § 2.8, to the extent that provision was even intended to apply in a case such as this.

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<sup>1</sup> RTA is a Southern California regional inter-tribal organization consisting of fourteen Indian tribes.

## Background

RTA and BIA entered into a Tribal Transportation Program Agreement (TTPA or G2G Agreement<sup>2</sup>) in 2013, authorizing RTA to perform planning, research, design, engineering, construction, and maintenance of highway, road, bridge, parkway, or transit facility programs or projects serving its constituent tribal governments. *See* RTA Motion to Dismiss, Mar. 11, 2016, Attachment (Att.) (TTPA, Aug. 6, 2013, at 1). Among the purposes of the TTPA was to provide RTA with its share of TTP funds, pursuant to the Moving Ahead for Progress in the 21st Century Act (MAP-21), Pub. L. No. 112-141, 126 Stat. 405, July 6, 2012; *see* 23 U.S.C. § 201 *et seq.*

In early calendar year 2015, a dispute arose between RTA and BIA over the release of FY 2015 TTP funds to RTA. In April, RTA sent the Regional Director a letter stating that, although FY 2015 funds had been made available to BIA's Pacific Region, BIA had "failed to distribute the FY 2015 TTP funding allocation to the RTA." RTA Motion for Order, Feb. 11, 2016, Exhibit (Ex.) 1 to the Declaration of Tanya Kingsley in Support of Motion, Feb. 10, 2016 (Letter from RTA to Regional Director, Apr. 13, 2015, at 1). According to RTA, BIA's failure to release the funds constituted a breach of the TTPA. *Id.*

Article II, § 4 of the TTPA provides:

**Dispute Resolution.** In the event of a dispute arising under this Agreement, the RTA and the Director [of BIA] agree to use mediation, conciliation, arbitration and other dispute resolution procedures authorized under 25 C.F.R. § 170.934. The goal of these dispute resolution procedures is to provide an inexpensive and expeditious forum to resolve disputes. The Director agrees to attempt to resolve disputes at the lowest possible staff level and by consent whenever possible.

That language tracks some of the dispute resolution language found in the referenced regulation governing BIA's Indian Reservation Roads Program. *See, e.g.*, 25 C.F.R. § 170.934(a) ("Federal agencies should use mediation, conciliation, arbitration, and other techniques to resolve disputes brought by . . . Program beneficiaries"). Section 170.934 additionally incorporates dispute resolution techniques prescribed in the Alternative Dispute Resolution (ADR) Act, 5 U.S.C. § 571-583; the CDA; and the Indian Self-Determination and Education Assistance Act and its implementing regulations. *See id.* § 170.934(b).

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<sup>2</sup> RTA refers to the agreement as its "Government to Government (G2G) Agreement" with BIA.

It appears that BIA released some funding to RTA, but not the entire amount to which RTA claims entitlement. In August 2015, RTA sent a letter to the Regional Director requesting the balance of the funds, and stating that if BIA determined not to distribute, or to delay distribution, RTA requested a decision stating BIA's reasons and the legal authority on which it relied. RTA Motion for Order, Ex. 1 to the Declaration of Stephen V. Quesenberry in Support of Motion, Feb. 10, 2016 (Letter from RTA to Regional Director, Aug. 10, 2015).

The Regional Director apparently did not respond, and on September 3, 2015, RTA advised BIA that it was "invoking the provisions of Article [II], Section 2.K<sup>[3]</sup> and Article II, Section 4, by requesting formal arbitration in this matter in accordance with the [ADR] Act." RTA asked BIA to promptly inform it of BIA's proposed selection of an arbitrator, and "[p]ending completion of arbitration," requested an additional partial distribution of FY 2015 funds. RTA Notice of Appeal (Notice of Appeal), Nov. 5, 2015, Att. (Letter from RTA to Regional Director, Sept. 3, 2015, at 1-2 (unnumbered)).

The ADR Act provides that "[a]n agency may use a dispute resolution proceeding for resolution of an issue in controversy that relates to an administrative program, if the parties agree to such proceeding." 5 U.S.C. § 572(a). The ADR Act further provides that "[a]lternative means of dispute resolution authorized under this subchapter are voluntary procedures."<sup>4</sup>

On September 18, 2015, without expressly referring to RTA's September 3 correspondence, or its request for an additional partial distribution of FY 2015 funding, the Regional Director wrote to RTA regarding a recent review of RTA's TTP conducted by BIA and the U.S. Department of Transportation. *See* Regional Director's Status Report, Dec. 16, 2015, Att. A (Letter from Regional Director to RTA, Sept. 18, 2015). The Regional Director summarized the results of that review, which had resulted in a request for a corrective action plan (CAP) from RTA. The Regional Director concluded by stating that in light of BIA's request for a CAP and additional information, BIA believed "that arbitration is not appropriate at this time." *Id.* at 3 (unnumbered).

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<sup>3</sup> Section 2 of Article II of the TTPA addresses funding, and § 2.K provides: "In the event funds due the RTA under this Agreement are not paid to the RTA in accordance with the requirements of Article II, Section 2.B., the Parties shall rely upon the dispute resolution provisions set forth in Article II, Section 4 of this Agreement."

<sup>4</sup> "Alternative means of dispute resolution" means "any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact finding, minitrials, arbitration, and use of ombuds, or any combination thereof." 5 U.S.C. § 571(3).

Responding to the Regional Director's letter, RTA noted the Regional Director's statement regarding arbitration, and observed that the Regional Director had not included any suggestion of an alternative dispute resolution option. Notice of Appeal, Att. (Letter from RTA to Regional Director, Oct. 21, 2015, at 1 (§ 2.8 Demand)). RTA asserted that BIA's apparent rejection of any form of dispute resolution, and the delay in funding RTA, violated the TTPA. *Id.* at 1-2. RTA "renew[ed]" its request that BIA "proceed with arbitration, or an alternative form of dispute resolution" to address the issues identified in RTA's September 3 letter, and renewed its request that BIA make at least an additional partial distribution of FY 2015 funding. *Id.* at 2-3. Pursuant to 25 C.F.R. § 2.8 (appeal from inaction of official), RTA requested that BIA issue a decision within 10 days, or within that time period establish a reasonable later date for issuing a decision. *Id.*

Section 2.8 is a provision in BIA's appeal regulations that allows a party who believes that its interests are adversely affected by the failure of a BIA official to act, to make the inaction of the official appealable. After first asking a BIA official to take action, a party may then submit a request that the official take the action originally asked of them, and if the official does not respond within 10 days, their inaction becomes appealable to the next level. *See* 25 C.F.R. § 2.8(a)(1), (a)(3), (b).

When the Regional Director failed to respond to RTA's § 2.8 demand, RTA appealed her inaction to the Board. Notice of Appeal. The Board issued an order for a status report from the Regional Director, advising the parties that a § 2.8 appeal is limited to reviewing BIA's inaction, does not divest BIA of jurisdiction to take action on an appellant's request, and does not encompass the underlying merits of the matter. *See* Pre-Docketing Notice and Order, Nov. 13, 2015, at 1-2.

The Regional Director submitted a status report to the Board, which reiterated her belief that arbitration was not appropriate, and stated that she believed that mediation is the appropriate course of action. Regional Director's Status Report at 1-2.

RTA filed a response, arguing that the Regional Director had failed to address the "two separate pending questions" that were the subject of RTA's § 2.8 demand—a request for formal arbitration and BIA's refusal to release funding in violation of the TTPA. RTA Response, Jan. 8, 2016, at 1-2. RTA construed the Regional Director's statement regarding mediation as relating solely to what RTA contends are wholly separate issues arising from the program review, which it contends are not implicated by its § 2.8 demand or this appeal arising under § 2.8. *Id.* at 2.

RTA then filed a Motion for Order Regarding BIA Inaction, in which it sought an order from the Board directing the Regional Director to issue a "final and appealable agency decision" on whether she would agree to arbitration and whether she would

distribute the RTA's FY 2015 funding allocation. RTA Motion for Order. In the alternative, RTA sought an order from the Board determining that the Regional Director's actions constituted final and appealable action denying RTA's request for arbitration and distribution of the funding. *Id.* RTA contended that BIA's inaction had deprived RTA of a legal remedy provided under the TTPA for resolution of disputes. RTA also stated that "[a]t this time, mediation . . . is not a viable remedy." Memorandum in Support of Motion, Feb. 11, 2016, at 3.

The Board allowed the Regional Director to respond to RTA's motion, and also solicited additional briefing from the parties on, among other things, what substantive law would govern a decision by the Regional Director and, assuming the Regional Director issued a decision denying RTA's request for distribution of funding, what law would govern RTA's right of review and in what forum could RTA seek such relief. Order Allowing Response, Feb. 23, 2016, at 2-3.

On March 2, 2016, the Regional Director issued a letter to RTA in response to RTA's "Request for Decision – Distribution of FY2015 TTP Funds." The Regional Director concluded that RTA's program agreement had expired in December of 2015, and could no longer be used to distribute TTP or other Federal Highway Trust funds to RTA. Letter from Regional Director to RTA, Mar. 2, 2016, at 1. The Regional Director advised RTA that the FY 2015 funds would remain available, and that RTA could request a new program agreement, an ISDA contract, or direct service for delivery of its remaining FY 2015 funds. *Id.* The Regional Director further advised RTA that it was entitled to request an informal conference or ADR under 25 C.F.R. § 170.934, regarding the decision, or it could appeal to the CBCA under the CDA, or bring an action directly in the U.S. Court of Federal Claims. *Id.* at 3. The Regional Director filed a notice of her decision with the Board, and a motion to dismiss this appeal as moot.

RTA filed an objection to the Regional Director's motion to dismiss, arguing that the Regional Director failed to respond directly to the questions posed by the Board. RTA also contends that the Regional Director's letter "fails to provide a formal decision on the merits." RTA Response to Motion to Dismiss at 2. According to RTA, dismissal of the appeal would deprive it of its right to the decision requested pursuant to § 2.8, and may deprive RTA of any contractual remedy under the G2G Agreement. *Id.* at 3-4. RTA also faults the Regional Director's letter for failing to address RTA's request for arbitration. *Id.* at 4. RTA disputes, on the merits, the conclusions reached by the Regional Director in her letter, arguing that the G2G Agreement continues in effect, and that dismissal of this appeal could deprive RTA of a contractual remedy. *Id.* at 3-4.

## Discussion

Section 2.8 is purely an action-forcing procedural mechanism. It is well-established that the scope of a § 2.8 appeal to the Board is limited to reviewing BIA's alleged failure to act, and deciding whether to order BIA to issue a decision. *Castillo v. Pacific Regional Director*, 46 IBIA 209, 215 n.8 (2008), and cases cited therein. The scope of a § 2.8 appeal does not extend to deciding how BIA must act. *Id.* In addition, the right to a decision under § 2.8 is premised on a party identifying "interests" that are adversely affected by the absence of such a decision. 25 C.F.R. § 2.8(a).

We are not persuaded that RTA was ever entitled to a formal decision on its request for arbitration. Section 2.8 presumes that a party makes a showing that a BIA official's failure to act adversely affects the party's "interests," *id.*, which we construe to mean legally protected interests. The fact that RTA was, in a general sense, "interested" in engaging in arbitration, an admittedly voluntary form of dispute resolution in this case, does not mean that it had a cognizable "interest," within the meaning of § 2.8, that was "adversely affected" by the Regional Director's failure to issue a formal "decision" on RTA's request.<sup>5</sup> To construe § 2.8 otherwise would mean that a party with no cognizable interest that could be affected by a BIA decision would nevertheless have a "right" to obtain a decision from which no appeal would lie, because the party would lack standing. We are not convinced that was the intent of § 2.8.

In the present case, of course, the Regional Director did communicate to RTA her position on arbitration, albeit without expressly referring to RTA's September 3 request. *See* Letter from Regional Director to RTA, Sept. 18, 2015, at 3 (unnumbered). ("arbitration is not appropriate at this time"). Thus, even if § 2.8 applied to RTA's request for arbitration, the Regional Director's rejection of that alternative—and subsequent expressed willingness to use mediation—was sufficient to moot RTA's request "that the BIA proceed with arbitration, *or an alternative form of dispute resolution* as provided by Article II, Section 4." § 2.8 Demand at 2 (unnumbered) (emphasis added).

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<sup>5</sup> RTA does not contend that it is legally *entitled* to arbitration, pursuant to the G2G Agreement, but even if it did, such a claim apparently would arise as a matter of contract law, which is not a claim over which the Board would have subject matter jurisdiction. It remains unclear why RTA, which contends that BIA's failure to release the funding breaches the G2G Agreement, did not pursue contract-based remedies as soon as it was apparent that the Regional Director would not agree to arbitration as an alternative form of dispute resolution.

With respect to RTA's request for a BIA decision on its request to release FY 2015 TTP funding, to which RTA claims it is entitled pursuant to its G2G Agreement, it is far from clear whether § 2.8 was intended to encompass requests for action on contract-based claims. The CDA has its own action-prompting mechanisms. *See* 41 U.S.C. § 7103 (procedures for submitting claim to contracting official; time for issuance of a decision; failure to issue timely decision is deemed a decision denying the claim). But whether or not § 2.8 was intended to apply in a case such as this one, we agree with the Regional Director that her issuance of the March 2 letter, which included appeal rights, was sufficient to constitute a decision and action by BIA within the meaning of § 2.8, thus mooting the appeal. RTA argues that the letter was not a "formal decision on the merits," and that it "fails to provide any explanation or grounds" for BIA not having distributed RTA's FY 2015 funding at the time RTA made its initial request. But the latter objection goes to the merits of the decision, not to whether the Regional Director's March 2 letter constitutes action or a "decision" within the meaning of § 2.8. It surely does. If RTA believes that the Regional Director's decision is flawed because it does not address RTA's "initial" request for action, RTA Response to Motion at 5, and instead impermissibly relies on subsequent events as the reason not to release the funds, RTA's recourse is to challenge the Regional Director's decision on the merits.

RTA also argues that if this appeal is dismissed, it might effectively be denied its "rights" under § 2.8 and 25 C.F.R. §§ 170.100 – 170.103, "because the Regional Director may argue" that an appeal from the March 2 letter should be confined to the determination made in that letter—that BIA is precluded from distributing funds, i.e., in the absence of a new agreement, etc. RTA Response to Motion at 5. RTA's "right" under § 2.8 was, at most, a right to force the Regional Director to issue a decision on the merits of its request that BIA release the FY 2015 funding to RTA, which the Regional Director has done. What the Regional Director may or may not argue in defense of the decision goes to the underlying merits, and not to a "right" that RTA has under § 2.8. Similarly, any "right" RTA has under §§ 170.100–170.103 goes to the underlying merits of the Regional Director's decision, and not whether the requirements of § 2.8 have been satisfied or otherwise rendered moot.

### **Conclusion**

Whether or not § 2.8 was intended to apply to either or both of RTA's requests for BIA action—a decision on arbitration and release of TTP funding—the actions taken by the Regional Director were sufficient to moot this appeal. No further relief under § 2.8 is appropriate.

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 dismisses this § 2.8 appeal as moot.

I concur:

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

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//original signed  
Robert E. Hall  
Administrative Judge