



INTERIOR BOARD OF INDIAN APPEALS

Lewis P. Geysler, Robert B. Corlett, and Larry Jett v.
Pacific Regional Director, Bureau of Indian Affairs

63 IBIA 299 (08/31/2016)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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| LEWIS P. GEYSER, ROBERT B. |) | Order Dismissing Appeal |
| CORLETT, AND LARRY JETT, |) | |
| Appellants, |) | |
| |) | |
| v. |) | Docket No. IBIA 16-060 |
| |) | |
| PACIFIC REGIONAL DIRECTOR, |) | |
| BUREAU OF INDIAN AFFAIRS, |) | |
| Appellee. |) | August 31, 2016 |

An administrative appeal to the Board of Indian Appeals (Board) from a decision of a regional director of the Bureau of Indian Affairs (BIA) must be filed within 30 days after “receipt” by the appellant of the decision from which the appeal is taken. 43 C.F.R. § 4.332(a). In 2013, BIA amended its trust land acquisition regulations, as applicable to interested parties who did not make themselves known in writing to the BIA decision maker, to provide that publication of notice of the decision in a newspaper of general circulation serving the affected area triggers the appeal period and constitutes receipt by such parties. *See* Final Rule, 78 Fed. Reg. 67928, 67938 (Nov. 13, 2013) (25 C.F.R. § 151.12(d)(3)); Proposed Rule, 78 Fed. Reg. 32214, 32219 (May 29, 2013).

Lewis P. Geysler, Robert B. Corlett, and Larry Jett (Appellants) did not make themselves known, in writing, to BIA’s Pacific Regional Director (Regional Director) before she issued a decision to accept several parcels of land in trust for the Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation of California (Tribe).¹ More than 30 days after the Regional Director published notice of the decision in newspapers of general circulation serving the area in which the property is located, Appellants filed an appeal with the Board. We conclude that the constructive notice provided to Appellants through publication constituted their receipt of the decision, within the meaning of § 4.332(a), and because they filed their appeal more than 30 days later, the appeal is untimely and must be dismissed for lack of jurisdiction.

¹ See Notice of Decision, Feb. 16, 2016 (Decision) (Administrative Record (AR) 27). The parcels are collectively referred to as the Mooney-Escobar property, and total approximately 2.13 acres.

Background

On February 16, 2016, the Regional Director issued her decision to approve the Tribe's request for BIA to accept the Mooney-Escobar property in trust. When a BIA official approves a trust acquisition request, BIA's regulations require the official to promptly provide written notice of the decision, by mail or personal delivery, to "[i]nterested parties who have made themselves known, in writing, to the official prior to the decision being made." 25 C.F.R. § 151.12(d)(2)(ii)(A). The regulations also require the official to

[p]romptly publish a notice in a newspaper of general circulation serving the affected area of the decision and the right, if any, of interested parties who did not make themselves known, in writing, to the official to file an administrative appeal of the decision under part 2 of this chapter[.]

Id. § 151.12(d)(2)(iii). As relevant to this appeal, the regulations then provide that "[t]he administrative appeal period under part 2 of [25 C.F.R.] begins on . . . [t]he date of first publication of the notice for unknown interested parties under paragraph (d)(2)(iii) of this section." *Id.* § 151.12(d)(3)(ii). When these provisions were proposed, BIA explained that they were intended to supplement 25 C.F.R. § 2.7,² "by providing that, for unknown interested parties, the time for appeal begins to run upon publication in the newspaper." Proposed Rule, 78 Fed. Reg. at 32217.

The Regional Director published notice of the decision on February 23, 2016, in two newspapers, the Santa Barbara News Press and the Sacramento Bee. AR 28 & 29. The notices stated that they were being published to comply with 25 C.F.R. § 151.12(d)(2)(iii), and that the decision could be appealed to the Board, and they gave appeal instructions. More specifically, the notices stated that an appeal to the Board must be either "**mailed (if you use mail) or delivered (if you use another means of physical delivery, such as FedEx or UPS) to the [Board] within 30 days from the date of publication of this notice.**" Thirty days from February 23, 2016, was March 24, 2016.

Appellants filed their notice of appeal with the Board on April 8, 2016, as evidenced by the postmark on the envelope in which the appeal was mailed. The Board consolidated

² Section 2.7 requires written notice of a BIA decision by personal delivery or mail to all interested parties known to the decision maker.

the appeal with three previously filed appeals,³ while noting that Appellants' notice of appeal did not include sufficient information to determine if it was timely, and that the Board had not yet received the administrative record. Pre-Docketing Notice for Geysler Appellants, Apr. 19, 2016, at 2.

The Tribe filed a motion to dismiss the appeal, arguing that Appellants had not asked to receive written notice of the decision, and that their appeal was untimely because it was filed more than 30 days after Appellants had received constructive notice of the decision through BIA's publication of notice. Tribe's Motion to Dismiss, Apr. 28, 2016, at 2, 5.

Appellants filed a response, arguing that (1) Appellant Geysler had "multiple interactions" with an attorney in the Department of the Interior's Solicitor's Office, in which he made clear his opposition to "each and every" fee-to-trust acquisition involving the Tribe; (2) it seemed clear to Geysler, from his receipt of the Board's pre-docketing notice for the other three appeals, that the Regional Director understood his interest and opposition; (3) the only notice of the decision that Appellants received was through their receipt of the Board's March 24, 2016, pre-docketing notice for the other appeals, which triggered the 30-day appeal period; and (4) BIA's choice of newspapers in which to publish notice, "[w]hile conforming perhaps to legal requirements," was a disingenuous attempt to avoid giving notice to thousands of people residing in the Santa Ynez Valley because neither newspaper is very prominent. Appellants' Information and Objection to Tribe's Request for Dismissal, May 11, 2016, at 2-3.

The Board allowed additional briefing on the issue of timeliness, and the Regional Director filed a response, arguing that the appeal is untimely because newspaper publication triggered the 30-day appeal period. Appellee's Response, June 16, 2016. Appellants did not file a reply.

Discussion

Appellants have produced no evidence that they made themselves known as interested parties, in writing, to the Regional Director before she issued her decision to accept the Mooney-Escobar property in trust.⁴ Appellants' bare allegation of "interactions" between Appellant Geysler and an attorney in the Solicitor's Office, regarding his opposition

³ See *County of Santa Barbara, California; No More Slots; and Preservation of Los Olivos v. Pacific Regional Director*, Docket Nos. IBIA 16-051, 16-053, and 16-054. Our dismissal of this appeal does not affect those appeals, which remain pending.

⁴ For purposes of deciding the jurisdictional issue of timeliness, we need not and do not decide whether Appellants could qualify as "interested parties" for purposes of standing.

to trust acquisitions involving the Tribe, does not satisfy Appellants' burden to affirmatively establish that they made themselves known, in writing, to the Regional Director. Nor is the test for a party to be entitled to actual written notice of a trust acquisition decision whether the BIA decision maker "understood" a party to be asserting interested party status.⁵ The regulations plainly require the interested party to make its interest known in writing to the official.

Because Appellants did not make themselves known in writing to the Regional Director, BIA's only obligation for giving notice of the decision to them was to provide constructive notice through publication, which was done on February 23, 2016. The regulations make clear that the administrative appeal period for parties not entitled to actual written notice begins on the date of first publication. 25 C.F.R. § 151.12(d)(3)(ii). As explained in the proposed rule, the date of publication is intended to be deemed the "date of receipt" for interested parties who did not make themselves known in writing. 78 Fed. Reg. at 32219. And to the extent Appellants complain about BIA's choice of newspapers, they have failed to produce any evidence that the two newspapers are not "of general circulation serving the affected area." 25 C.F.R. § 151.12(d)(2)(iii). In fact, Appellants apparently concede, albeit grudgingly, that the notice conformed "perhaps to legal requirements." Appellants' Information and Objection to Dismissal at 3.

As noted earlier, the Board's regulations provide that an administrative appeal from a decision of a BIA official must be filed with the Board "within 30 days after receipt by the appellant of the decision from which the appeal is taken." 43 C.F.R. § 4.332(a). Under the special rules applicable to trust acquisition decisions, the Regional Director's publication of notice of her decision constituted constructive notice to Appellants of the decision, and is deemed to be their receipt of such notice, thus triggering the 30-day appeal period.⁶ And

⁵ Appellant Geyser's apparent belief that the Regional Director "understood" Appellants to be interested parties seemingly is based on the fact that he was included on the distribution list for the Board's pre-docketing notice for the other three appeals. But as correctly surmised by the Regional Director in her response, Geyser was included on the Board's distribution list because he had been included on the list of parties served by No More Slots for its notice of appeal, not because Appellants were recognized as interested parties by the Regional Director. *Compare* Decision, Feb. 16, 2016, at 16-19 (Distribution List) (AR 27) *with* No More Slots Notice of Appeal, Mar. 15, 2016, at 5 (Certificate of Filing and Service).

⁶ Although not raised by Appellants, we note that BIA's regulation refers repeatedly to administrative appeals, exhaustion of administrative remedies, and the appeal period, "under" or "pursuant to" 25 C.F.R. Part 2. *See, e.g.*, 25 C.F.R. §§ 151.12(d), (d)(2)(ii), (d)(3). The Board's appeal regulations are, of course, found in 43 C.F.R. Part 4. But the
(continued...)

under the Board’s regulations, a notice of appeal that is not timely filed “shall be dismissed for lack of jurisdiction.” 43 C.F.R. § 4.332(a).

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 appeal for lack of jurisdiction.⁷

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Robert E. Hall
Administrative Judge

(...continued)

Board is designated “under 25 C.F.R. Part 2” to consider and decide appeals from decisions of BIA regional directors, *see* 25 C.F.R. § 2.4(e), and the exhaustion requirement under Part 2 clearly includes appeals to the Board from decisions of a BIA regional director, *see* 25 C.F.R. § 2.6 (applicable to decisions that are subject to appeal to a superior authority). At most, BIA’s reference to “part 2,” and its failure to explicitly reference the Board’s appeal regulations, creates an ambiguity that we would resolve in favor of the otherwise overwhelmingly clear intent in the rulemaking to make constructive notice of a trust acquisition decision “receipt” for purposes of triggering the 30-day appeal period, for parties who did not make themselves known in writing to the decision maker.

⁷ Our decision is consistent with a decision of the Assistant Secretary – Indian Affairs that also applied the publication-as-receipt rule in the trust acquisition regulations for parties who had not made themselves known in writing to the BIA decision maker. *See Shepherd v. Pacific Regional Director* (Assistant Secretary – Indian Affairs Order Dismissing Appeals Oct. 16, 2015) (Tribe’s Motion to Dismiss, Exhibit 4).