



## INTERIOR BOARD OF INDIAN APPEALS

Ernest Merrifield v. Pacific Regional Director, Bureau of Indian Affairs

64 IBIA 12 (10/31/2016)

Related Board case:  
62 IBIA 52



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
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ERNEST MERRIFIELD,	)	Order Docketing and Dismissing
Appellant,	)	Appeal
	)	
v.	)	
	)	Docket No. IBIA 16-101
PACIFIC REGIONAL DIRECTOR,	)	
BUREAU OF INDIAN AFFAIRS,	)	
Appellee.	)	October 31, 2016

Ernest Merrifield (Appellant) appealed to the Board of Indian Appeals (Board) from a July 11, 2016, decision (Decision) of the Pacific Regional Director (Regional Director), Bureau of Indian Affairs (BIA), concerning the proposed partition of Round Valley Allotment No. 227 (RV-227). The Decision from which Appellant now appeals was issued in the wake of the Board’s decision in Appellant’s earlier appeal, which granted the Regional Director’s motion to vacate the original decision and remand the matter for further consideration. *See Merrifield v. Acting Pacific Regional Director*, 62 IBIA 52 (2015). We docket but dismiss this appeal as untimely.

A notice of appeal from a decision of a BIA regional director 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). The burden is on the appellant to show that the appeal was timely filed. *No More Slots v. Pacific Regional Director*, 56 IBIA 233, 238 (2013). The effective date for filing a notice of appeal with the Board is the date of mailing (if sent by U.S. mail) or the date of personal delivery (if not mailed). 43 C.F.R. § 4.310(a)(1); *see Confederated Tribes and Bands of the Yakama Nation v. Northwest Regional Director*, 56 IBIA 176, 181-83 (2013). The 30-day deadline for filing an appeal is jurisdictional, 43 C.F.R. § 4.332(a), and cannot be extended by the Board, *see id.* § 4.334. Untimely appeals must be dismissed. *Id.* § 4.332(a). In the present case, the Decision contained accurate appeal instructions advising that any appeal from the Decision must be filed within 30 days of receipt and it cited the Board’s appeal regulations, which include the requirements for filing an appeal with the Board. Decision at 6.

The Board received Appellant’s notice of appeal on August 22, 2016. The appeal was mailed to, and thus filed with, the Board on August 19, 2016, as shown by the postmark on the envelope. Because the Regional Director sent the Decision to Appellant by certified mail, and the U.S. Postal Service’s tracking service on its website reported that

the Decision was delivered to Appellant more than 30 days prior, on July 13, 2016, the Board ordered Appellant to show cause (i.e., explain) why the appeal should not be dismissed as untimely. Pre-Docketing Notice, Order for Appellant to Show Cause, and Order to Complete Service, Aug. 24, 2016, at 1-2 (OSC).<sup>1</sup>

In response, Appellant acknowledges that the Decision “had a certified mail receipt which [Appellant] signed proving that he received a copy of the Decision on July 13, 2016.” Appellant’s Response to OSC, Sept. 23, 2016, at 2 (Response). Appellant argues that the Decision “did not contain proof of service” and that his attorney “Mr. Marston was never served a copy of the Decision by the Regional Director.” *Id.* Appellant argues that he has been represented by Mr. Marston for over 10 years and that “up to the time of the filing by Mr. Marston of the Merrifield remand brief, Mr. Marston was included on every proof of service list for the filings of pleadings in the case utilized by [BIA’s Central California Agency and Pacific Regional Office] and the Solicitor’s Office . . . .” *Id.* Therefore, Appellant argues, he “assumed” that a copy of the Decision had been sent to his legal counsel. *Id.* Citing 43 C.F.R. § 4.22(b), Appellant further argues that “where a party knows that another party is represented by legal counsel, service of a document is not perfected until the party’s attorney is served with the document.” *Id.* at 6.

Without expressing any opinion regarding Appellant’s interpretation of 43 C.F.R. § 4.22(b), we note that the regulation is generally applicable to the service of documents filed by parties in proceedings before the Hearings Division and Appeals Boards of the Office of Hearings and Appeals.<sup>2</sup> It is not applicable to the requirements for providing notice to interested parties of an administrative decision or action by BIA, which is governed by BIA’s administrative appeal regulations in 25 C.F.R. Part 2, and in particular by § 2.7. That regulation requires that the BIA deciding official “give all interested parties known to the decisionmaker written notice of the decision.” 25 C.F.R. § 2.7. An “interested party” is defined as “any person whose interests could be adversely affected by a decision in an appeal.” *Id.* § 2.2. In this case, notice of the Regional Director’s Decision was effective when it was received by Appellant—an interested party—on July 13, 2016. Appellant cites no regulation in 25 C.F.R. Part 2 (nor are we aware of any) that provides

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<sup>1</sup> The Board also ordered Appellant to complete service of his appeal on all interested parties, *see* 43 C.F.R. §§ 4.310(b) and 4.333(a), and to notify the Board that he had done so. OSC at 2-3. The Board received confirmation from Appellant that he completed service. The Board also received, on August 25, 2016, a Motion to Dismiss from the Regional Director, which is rendered moot by this dismissal.

<sup>2</sup> In the interest of clarity and completeness only, we note that the regulations specially governing appeals to the Board of Indian Appeals are separately located in 43 C.F.R. Part 4, subpart D.

that, even after an interested party has received written notice of a regional director's decision, the notice is not "perfected" until the interested party's attorney also receives the decision. To the contrary, in our view once Appellant received the Regional Director's Decision, the burden initially fell upon him to authorize and coordinate with his legal counsel to file an appeal with the Board.

Because Appellant received the Decision on July 13, 2016, the deadline for Appellant to file an appeal with the Board expired 30 days later, on August 12, 2016. The appeal was not filed until August 19, 2016, after that deadline expired. As previously explained, the Board does not have authority to extend the time for filing an appeal, 43 C.F.R. § 4.334, and it must dismiss untimely appeals for lack of jurisdiction, *id.* 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 docketed but dismisses this appeal as untimely.

I concur:

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// original signed  
Robert E. Hall  
Administrative Judge

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//original signed  
Thomas A. Blaser  
Chief Administrative Judge