



INTERIOR BOARD OF INDIAN APPEALS

California Valley Miwok Tribe v. Central California Agency Superintendent,
Bureau of Indian Affairs

47 IBIA 91 (06/10/2008)

Related Board case:

53 IBIA 51

51 IBIA 103

46 IBIA 249



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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CALIFORNIA VALLEY MIWOK)	Order Dismissing Appeal
TRIBE,)	
Appellant,)	
)	
v.)	
)	Docket No. IBIA 08-58-A
CENTRAL CALIFORNIA AGENCY)	
SUPERINTENDENT, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	June 10, 2008

On March 28, 2008, the California Valley Miwok Tribe (Tribe) filed an appeal with the Board of Indian Appeals (Board), seeking review of a December 14, 2007, decision of the Central California Agency Superintendent, Bureau of Indian Affairs (Superintendent; BIA), which returned, without further action or approval, an Indian Self-Determination Act (ISDA) contract proposal for Fiscal Year 2008 submitted by Silvia Burley on behalf of the Tribe. The Superintendent returned the proposal on the grounds that BIA does not recognize any current governing body for the Tribe, in effect concluding that Burley had not shown that the Tribe had authorized her to submit the ISDA contract proposal.¹

The Superintendent treated his decision as one that was appealable under BIA's default appeal procedures found in 25 C.F.R. Part 2 (Part 2), instead of being governed by the administrative review remedies that are found in the ISDA regulations, *see* 25 C.F.R. §§ 900.152 - 900.158. Part 2 does not apply if other regulations, e.g., the ISDA regulations, provide a different administrative appeal procedure for a particular type of BIA decision. *See* 25 C.F.R. § 2.3(b). Because the Superintendent apparently believed that his

¹ The appeal was filed in the name of the Tribe, and the Board has captioned the case accordingly. The Board is well aware that the authority of Sylvia Burley or the Burley tribal council to submit an ISDA contract proposal on behalf of the Tribe is the subject of the dispute between Burley and the Superintendent that gave rise to this appeal. The Board's caption of this case and its references to the "Tribe" as the appellant shall not be construed as a determination on the merits regarding the authority of Burley or the Burley tribal council to represent the Tribe or to bring an appeal in the name of the Tribe.

decision was subject to Part 2, he advised the Tribe that it had 30 days to appeal his decision under Part 2. He did not advise the Tribe of the administrative review remedies available under the ISDA regulations, which also have a 30-day deadline for requesting review. The Tribe did not exercise any right of review, by appeal or otherwise, within 30 days from its receipt of the Superintendent's decision. The Tribe did, on the 31st day, file with the Superintendent a request for an informal conference, which is one of the administrative remedies available under the ISDA regulations, and when the Superintendent failed to respond, the Tribe filed this appeal to the Board. The Tribe now contends that the Superintendent's failure to provide the correct ISDA administrative review instructions tolled the deadline for seeking review, and therefore its appeal to the Board is timely.

We disagree. The ISDA regulations do not include a provision for tolling the period for seeking administrative review of an ISDA decision, and in the present case, because the Superintendent did advise the Tribe that it could seek review of his decision within 30 days, and because the Tribe failed to seek *any* relief within the 30-day time period, we reject the Tribe's argument that the time period should be deemed to have been tolled — even assuming (without deciding) that the Board has the authority to find that the ISDA deadline for seeking administrative review is subject to tolling.

Regulatory and Factual Background

When a tribe seeks administrative review of a BIA² decision refusing to approve an ISDA contract proposal from a tribe, the tribe may either appeal the decision directly to the Board or it may request an informal conference with BIA to try to resolve the dispute without a hearing (after which an appeal may still be taken to the Board).³ *See* 25 C.F.R.

² The ISDA regulations are not limited to decisions issued by BIA, but because the decision in the present case was issued by a BIA official, we describe the regulations with reference to BIA.

³ A tribe may also proceed directly to court. *See* 25 C.F.R. § 900.153. For purposes of determining whether the Board has jurisdiction over this appeal under the ISDA regulations, we accept the Tribe's contention that the Superintendent's decision was subject to review under the ISDA regulations, and not under Part 2. *Cf. Navajo Nation v. Office of Indian Education Programs*, 40 IBIA 2, 14 (2004) (BIA's action refusing to consider or to approve a proposed ISDA contract on the threshold ground that the proposal was not authorized by the tribe characterized as an "otherwise appealable action under 25 C.F.R. § 900.150(i)). Of course, if the decision was subject to Part 2, the Board would still lack

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§§ 900.153, 900.158. Regardless of which type of review is sought, the ISDA regulations require that the tribe file its appeal or request for an informal conference within 30 days from the date that it received BIA's decision. *Id.* §§ 900.154, 900.158. BIA's decision must advise the tribe of its right, within the 30-day deadline, to appeal the decision or to request an informal conference. *Id.* § 900.152. If a tribe requests an informal conference, which concludes with the issuance of a recommended decision, the tribe may still file an appeal with the Board from the original decision within a new 30-day window that begins when the tribe receives the recommended decision. *Id.* § 900.157. The ISDA regulations are silent with respect to any consequences resulting when BIA provides erroneous advice for seeking administrative review or fails entirely to advise a tribe of its administrative review rights.

BIA's default appeal procedures found in Part 2 also specifically require BIA to advise interested parties of their appeal rights, and provide a 30-day deadline for filing an appeal. 25 C.F.R. § 2.7(c). Unlike the ISDA regulations, however, Part 2 expressly provides that if BIA fails to give written notice of appeal rights, "the time to file a notice of appeal regarding such a decision shall not begin to run until notice has been given in accordance with [§ 2.7(c)]." *Id.* § 2.7(b). As noted earlier, Part 2 "does not apply if any other regulation . . . provides a different administrative appeal procedure applicable to a specific type of decision." *Id.* § 2.3(b).

In the present case, the Superintendent's decision did advise the Tribe that it was entitled to file an appeal within 30 days of receipt of the decision, but the appeal rights described were those found under BIA's Part 2 appeal procedures instead of the ISDA regulations. And most relevant to the Tribe's argument in this case, the Superintendent did not advise the Tribe that, in lieu of exercising an immediate right of appeal, it was entitled to request an informal conference.

The Tribe did not file an appeal. Instead, on January 17, 2008, the Tribe filed a request with the Superintendent for an informal conference, pursuant to the ISDA regulations. However, the Tribe filed its request 31 days after it received the

³(...continued)

jurisdiction, regardless of the timeliness issue, because an appeal under Part 2 from a Superintendent's decision must be taken to the Regional Director, and not to the Board. *See Hardy v. Midwest Regional Director*, 42 IBIA 255, 256 (2006).

Superintendent's decision.⁴ On March 28, 2008, after the Superintendent had failed to respond to the Tribe's request for an informal conference, the Tribe filed this appeal with the Board. In its notice of appeal, the Tribe argued that this appeal is timely because it was filed approximately 30 days after it became clear that the Superintendent would not respond to the request for an informal conference. The Tribe relied on the Board's decision in *Pascua Yaqui Tribe v. Acting Tucson Area Director, Indian Health Service*, 32 IBIA 98 (1998). In *Pascua Yaqui*, the tribe had filed a timely request for an informal conference, had been led to believe that such an informal conference would occur, and then appealed to the Board after the Area Director failed to respond to follow-up correspondence.⁵ The Board found that the regulations did not anticipate a situation in which an informal conference is not held once it has been requested — i.e., a situation in which no recommended decision is issued that would trigger a new time period for filing an appeal — and found that under the circumstances the tribe's appeal was timely filed.

In the present case, the Tribe's notice of appeal overlooked the fact that its request for an informal conference had been filed outside the 30-day deadline, and instead focused solely on the time period allowed for filing an appeal to the Board when no informal conference occurred. The Board, however, noted the apparent untimeliness of the request for an informal conference. The Board ordered the Tribe to show cause why this appeal should not be dismissed as untimely on the grounds that the request for an informal conference had been untimely, and it was undisputed that the Tribe failed, within the initial 30-day deadline, even to comply with the appeal instructions that it had been given.

The Tribe responded to the Board's show cause order, and argues that because the Superintendent, in his December 14, 2007, decision, failed to advise the Tribe that it had a right to request an informal conference pursuant to the ISDA regulations, the Board should find that the time period for filing such a request was tolled, and that its appeal to the Board is timely.

⁴ The Tribe concedes that it received the Superintendent's decision on December 17, 2007, which is 31 days before January 17, 2008, the date on which it filed its request for an informal conference.

⁵ Under the ISDA regulations, an informal conference must be held within 30 days of the date the request is received. 25 C.F.R. § 900.155(a).

Discussion

We conclude that because the ISDA regulations, unlike Part 2, do not include a tolling provision that applies when BIA fails to properly advise a tribe of its available administrative review rights, we have no basis to find that the 30-day deadline for the Tribe to request an informal conference was automatically tolled in this case, as the Tribe suggests. In addition, even assuming — without deciding — that the Board may have implicit authority, with sufficient justification, for finding that the regulatory deadline for seeking administrative review under the ISDA regulations may be tolled, we conclude that no such justification exists in the present case because the Tribe failed to avail itself, within the 30-day time period that is the same for both Part 2 and ISDA, of the appeal rights that were offered.

We begin with the plain language of the ISDA regulations that govern the time period for a tribe to file a request for an informal conference: The tribe “shall file its request for an informal conference . . . within 30 days of the day it receives the decision.” 25 C.F.R. § 900.154. Unlike section 2.7(b) in Part 2, the drafters of the ISDA regulations did not include a provision for tolling the 30-day deadline when the required administrative review rights had not been provided.⁶ The ISDA regulations do grant the Board limited authority to grant an extension of time for a tribe to file an *appeal* — so long as the request for an extension is itself timely filed — but they do not provide for the tolling of any deadlines, either for filing an appeal or for filing a request for an informal conference. Thus, our starting point is that the regulatory language itself provides a firm deadline for filing a request for an informal conference and does not provide that the deadline is tolled when BIA fails to give proper instructions for requesting an informal conference.

The Tribe argues, however, that in other cases the Board has required strict adherence to the requirement that BIA provide appeal notifications with their written decisions and has applied tolling when BIA fails to do so. The Tribe emphasizes — quite correctly — that the ISDA regulations provide that “*every* decision of the BIA to decline^[7] a self-determination contract must include a specific notice of appeal rights *and* informal

⁶ The tolling provision in Part 2 was promulgated in 1989. *See* 54 Fed. Reg. 6478, 6481 (Feb. 10, 1989). The ISDA regulations were promulgated seven years later, in 1996. *See* 61 Fed. Reg. 32,501 (June 24, 1996).

⁷ As noted above, *supra* note 3, the Board has characterized a decision refusing to approve an ISDA contract proposal on the grounds that it was not authorized by the tribe as an “otherwise appealable” action under 25 C.F.R. § 900.150(i), rather than as a declination under 25 C.F.R. § 900.150(a), but the difference is not material to the discussion here.

conference rights.” Tribe’s Response to Show Cause Order, at [4] (unpaginated) (citing 25 C.F.R. § 900.152). We agree with the Tribe that the ISDA regulations create a nondiscretionary duty for BIA to advise tribes of their administrative review rights. The problem for the Tribe is that with a single exception, the Board decisions on which it relies to argue that BIA’s failure to comply with its duty should result in tolling are not ISDA cases. Instead, they are Part 2 cases. In Part 2 cases, the Board was not applying a Board-created tolling doctrine, but was simply applying the express tolling provision found in 25 C.F.R. § 2.7(b). And even under 25 C.F.R. Part 2, the time period is not tolled simply because BIA’s appeal instructions contained an error: An appellant must still attempt to comply with the instructions given, at least when they do not purport to reduce the time period for filing an appeal. *See Hendry County v. Eastern Regional Director*, 40 IBIA 135, 136 (2004) (Regional Director gave appellant correct 30-day deadline but incorrect address for appealing to the Board, but appellant made no showing that it attempted to follow those instructions).⁸

The sole ISDA case on which the Tribe seeks to rely is of no help to it because in that case BIA did give the tribe correct appeal instructions under the ISDA regulations, the tribe failed to follow those instructions, and the Board dismissed the appeal. *See Quileute Indian Tribe v. Portland Area Director*, 34 IBIA 98 (1999) (dismissing appeal as untimely). Citing several Part 2 cases, the Board in *Quileute* emphasized that when BIA provides correct appeal instructions, an appellant who fails to comply and mails its appeal to the wrong office bears the risk of delays in the transmittal of its appeal to the Board. *Id.* at 98-99. In that case, however, because BIA had provided correct appeal instructions, the Board had no occasion to address what the consequences would be if, in an ISDA case, BIA advised a tribe of a right of appeal, correctly set forth a 30-day deadline, but failed to advise the tribe of its right to request an informal conference. Thus, *Quileute* is factually distinguishable, although we do note that in the decision, the Board stated that “the regulations place responsibility for the timely initiation of an appeal squarely on the appellant.” *Id.* at 99.

In the absence of a tolling provision in the ISDA regulations, we think that even assuming that the Board might have implicit authority to apply tolling, it must be on a case-by-case basis, and a tribe seeking the benefit of tolling bears a strong burden to justify its application. As a general rule, parties dealing with the Department of the Interior are charged with the knowledge of its duly promulgated regulations. *See King v. Eastern Regional Director*, 46 IBIA 149, 155 (2007); *Jackson v. Portland Area Director*, 35 IBIA 197, 201 (2000); *DuBray v. Acting Aberdeen Area Director*, 30 IBIA 64, 68 (1996); *Kiowa*

⁸ Of course, when BIA provides *no* appeal instructions at all, or fails to include the 30-day deadline, the time period will be tolled pursuant to 25 C.F.R. § 2.7.

Business Committee v. Acting Anadarko Area Director, 18 IBIA 401, 404 (1990). Thus, in determining whether tolling should apply to a given case, the Board at a minimum would need to consider both the nature of the erroneous BIA action or inaction and the fact that tribes are chargeable with notice of the ISDA regulations.⁹

In the present case, the Superintendent *did* advise the Tribe that it had an administrative right of review — a right to appeal — and advised the Tribe that it had 30 days to seek such review. Assuming, as we do, that the *form* of review identified by the Superintendent was incorrect or incomplete, the *deadline* for seeking review was not. The Tribe failed to seek any review within the 30-day period. At a minimum, in this case, before the Tribe can seek to obtain the benefit of tolling of the 30-day deadline under the ISDA regulations, we think it should have complied with the appeal instructions that *were* given and filed a timely appeal, if only as a protective measure. *Cf. Hendry County*, 40 IBIA at 136; *Pascua Yaqui Tribe v. Acting Tucson Area Director, IHS*, 45 IBIA 55, 57 (2007) (Board has previously cautioned that when uncertainties arise concerning the time for filing an ISDA appeal, a tribe would be well-advised to file a protective notice of appeal).

Because the Tribe's request for an informal conference was untimely, it cannot avail itself of the Superintendent's failure to convene an informal conference as triggering a new 30-day window for filing an appeal to the Board, and we conclude that the Tribe's appeal to the Board is untimely.¹⁰

⁹ In its Response to Show Cause Order, the Tribe asserts that it received the Superintendent's decision on December 17, 2007, and "subsequently learned of its right to request an 'informal conference.'" The Tribe does not include an affidavit stating that prior to December 17, 2007, neither Burley nor tribal counsel had knowledge of the provisions in the ISDA regulations allowing a tribe to request an informal conference to resolve a dispute. The Tribe's previous experience with ISDA contracts makes its profession of ignorance of the ISDA regulations doubtful at best. See Notice of Appeal at 1 ("As early as January 1, 2002, the Tribe began entering into annual self-determination agreements with the BIA pursuant to [ISDA] and the associated regulations."). Solely for purposes of deciding this appeal, however, the Board will assume that until sometime after December 17, 2007, neither Burley nor tribal counsel had actual notice of the Tribe's right to seek an informal conference from a decision declining an ISDA contract proposal.

¹⁰ Because we conclude that the Tribe's request for an informal conference was untimely, we need not decide whether its appeal to the Board under these circumstances could otherwise have been deemed timely under the Board's decision in *Pascua Yaqui*, 45 IBIA 56.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1 and 25 C.F.R. § 900.160, the Board dismisses the Tribe's appeal as untimely.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Charles E. Breece
Acting Administrative Judge