

ASSISTANT SECRETARY – INDIAN AFFAIRS
UNITED STATES DEPARTMENT OF THE INTERIOR

GERALDINE B. SHEPHERD, TRUSTEE;)
KENNETH A. SEXTON, TRUSTEE;)
WENDY SHEPHERD; EARL B. SHEPHERD,)
TRUSTEE; AND WENDELL B. SHEPHERD,)
TRUSTEE,)
APPELLANTS,)
)
v.)
)
PACIFIC REGIONAL DIRECTOR,)
BUREAU OF INDIAN AFFAIRS,)
APPELLEE.)
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ORDER DISMISSING APPEAL

INTRODUCTION

Under the applicable rules of the Department of the Interior (Department), the public is provided notice of land-into-trust decisions by publication in a newspaper of general circulation. All of the appellants obtained notice through this method, and none filed a timely appeal. While an interested person can obtain personal notice by mail simply by informing the Bureau of Indian Affairs (BIA) of an interest in such notice and providing a mailing address, most of the appellants in this case failed to indicate their interest in the case in any manner or failed to do so with enough specificity to allow BIA to provide actual notice. The Federal Government is not omniscient, and it does not have boundless resources. It is fair to ask interested citizens to speak up and act in good faith if they wish to receive personal notice of government decisions. One of the appellants, Geraldine Shepherd, received actual notice of the decision, but claims she was entitled to a second copy of the decision in a separate legal capacity. Accepting this argument would elevate form over substance, undermine government efficiency, and encourage dilatory tactics. For reasons explained more fully below, this appeal will be dismissed for failure to file a timely appeal.

PROCEDURAL HISTORY

On June 8, 2015, we received a copy of a Notice of Appeal by Geraldine B. Shepherd, Trustee; Kenneth A. Sexton, Trustee; Wendy Shepherd; Earl B. Shepherd, Trustee; and Wendell B. Shepherd, Trustee, (Appellants)¹ challenging the December 24, 2014 decision (Decision) of

¹ The Decision is also the subject of eight previously filed appeals over which we have assumed jurisdiction. However, for purposes of this Order, the term "Appellants" shall only refer to: Geraldine B. Shepherd, Trustee; Kenneth A. Sexton, Trustee; Wendy Shepherd; Earl B. Shepherd, Trustee; and Wendell B. Shepherd, Trustee.

the Regional Director, Pacific Region, BIA, concerning the acquisition of the Camp 4 property in trust for the Santa Ynez Band of Chumash Indians (Tribe). On June 11, 2015, the Interior Board of Indian Appeals (IBIA or Board) issued a Pre-Docketing Notice.

By memorandum dated June 19, 2015, we notified IBIA of our assumption of jurisdiction over this appeal. On June 24, 2015, the Board transferred this appeal to us, pursuant to 25 C.F.R. § 2.20(c). The Board also transferred all documents filed with or issued by the Board concerning these appeals to us, pursuant to 43 C.F.R. § 4.332(b).

The parties raised the timeliness of the Appellants' Notice of Appeal, and on July 2, 2015, we ordered "briefing by the Appellants, the Regional Director, and the Tribe on the issues of whether the Notice of Appeal was timely filed."² On July 10, 2015, we received a Joint Request for Modification of the Briefing Schedule, submitted by counsel for the Appellants, the Regional Director, and the Tribe. On July 21, 2015, we issued an Order granting the request. All of the parties filed timely briefs in accordance with the modified briefing schedule, and briefing concluded on August 12, 2015. After carefully considering the parties' briefs, we conclude that none of the Appellants filed their Notice of Appeal within the deadlines prescribed by the Department's regulations, which are jurisdictional, and consequently, we dismiss this appeal.

DISCUSSION

We stand in the same capacity as the Board in reviewing whether this appeal is timely. We have therefore, adopted the same standards used by the Board in reviewing the parties' briefs and evaluating the timeliness of the appeal. In this case, the burden is on the Appellants to establish that their Notice of Appeal was timely filed.³ Appeals that are untimely must be dismissed for lack of jurisdiction.⁴

Appellants argue, in essence, that their appeal is timely because they never received proper notice of the Decision.⁵ They assert that the Regional Director was required to provide each of the Appellants with written notice of the Decision as "known interested parties" under 25 C.F.R. § 151.12, and failed to do so.⁶ Appellants have not alleged that the Regional Director failed to include the appropriate appeal procedures.⁷

At the onset, we note the regulatory framework providing the requirements for timely appeals of decisions to take land into trust on behalf of Indian tribes. In general, a Notice of Appeal from a BIA administrative decision must be filed with the Board "within 30 days after receipt by the

² Order Setting Briefing Schedule on Timeliness, at 2.

³ See *Saguaro Chevrolet, Inc. v. Western Regional Director*, 43 IBIA 85, 85 (2006).

⁴ See *No More Slots et al. v. Pacific Regional Director*, 56 IBIA 233, 238 (2013).

⁵ App. Br. at 2.

⁶ See *id.*

⁷ 25 C.F.R. § 2.7(c) requires that "[a]ll written decisions, except decisions which are final for the Department . . . shall include a statement that the decision may be appealed pursuant to this part, identify the official to whom it may be appealed and indicate the appeal procedures, including the 30-day time limit for filing a notice of appeal."

appellant of the decision from which the appeal is taken.”⁸ Any Notice of Appeal “not timely filed shall be dismissed for lack of jurisdiction.”⁹

In addition, 25 C.F.R. § 151.12 sets forth the time period for appealing trust acquisition decisions by BIA. The regulation was amended in 2013 to:

Ensure notice of a BIA official decision to acquire land into trust, and the right, if any, to file an administrative appeal of such decision by requiring written notice to all interested parties who have made themselves known in writing to the BIA official, as well as State and local governments having regulatory jurisdiction over the land to be acquired, and expanding notice through newspaper publication.¹⁰

In particular, the new rule provides that “[t]he administrative appeal period under part 2 of this chapter begins on . . . [t]he date of receipt of written notice by the applicant or interested parties entitled to notice under paragraphs (d)(1) and (d)(2)(ii) of this section.”¹¹ Meanwhile, for unknown interested parties, the time to file a Notice of Appeal begins to run upon the date of first publication in a newspaper of general circulation servicing the area affected by the Decision.¹²

Because “[t]imeliness of the appeal must be affirmatively established by the evidence,” We evaluate below the timeliness of each of the Appellants’ appeal in this matter.¹³

I. Geraldine Shepherd

Appellants assert that Geraldine Shepherd is a “known interested party” under 25 C.F.R. § 151.12 because she submitted letters to the Department on October 17, 2011, August 29, 2013, September 20, 2013, September 30, 2013, December 16, 2013, June 18, 2014, and June 25, 2014, as well as an email on September 30, 2013.¹⁴ They contend that she “was not given the written notice of the decision and of her right to file an administrative appeal by mail or by personal delivery to which she was entitled by law.”¹⁵ In a Declaration, Geraldine Shepherd likewise claims that she never “received written notice by mail or by personal delivery of the decision on the Application or of [her] right to file an administrative appeal of such decision.”¹⁶

⁸ 43 C.F.R. § 4.332(a).

⁹ *Id.* See also *Ducheneaux v. Acting Great Plains Regional Director*, 52 IBIA 213, 217 (2010); *Wick v. Midwest Regional Director*, 44 IBIA 20, 20 (2006) (affirming that this deadline is jurisdictional).

¹⁰ 8 Fed. Reg. 67,928, 67,929 (Nov. 13, 2013).

¹¹ 25 C.F.R. § 151.12(d)(3)(i). Pursuant to 25 C.F.R. part 2, interested parties must file a notice of appeal within 30 days from the date that they receive notice of a BIA official’s decision. See 25 C.F.R. §§ 2.7, 2.9. “If interested parties fail to appeal within that timeframe, judicial review is unavailable due to the failure to exhaust administrative remedies.” 78 Fed. Reg. 67,928, 67,930 (Nov. 13, 2013) (citing *Darby v. Cisneros*, 509 U.S. 137 (1993); *Klaudt v. U.S. Dep’t of the Interior*, 990 F.2d 409, 411-12 (8th Cir. 1993); *Fort Berthold Land & Livestock Ass’n v. Anderson*, 361 F. Supp. 2d 1045, 1051-52 (D.N.D. 2005)).

¹² See 25 C.F.R. § 151.12(d)(3)(ii).

¹³ *No More Slots*, 56 IBIA at 239 n.7

¹⁴ App. Br. at 4.

¹⁵ *Id.* at 6.

¹⁶ *Id.* at Ex. C.

However, the record demonstrates that Geraldine Shepherd received notice of the decision as Treasurer of Santa Ynez Valley Concerned Citizens¹⁷ on January 5, 2015.¹⁸ Furthermore, Ms. Shepherd states in her Declaration that on January 5, 2015, she “accepted delivery of a copy of the December 24, 2014 Notice of Decision addressed to the post office box for The Santa Ynez Valley Concerned Citizens.”¹⁹ Because Geraldine Shepherd did not file a Notice of Appeal within 30 days of January 5, 2015 as required by the Department’s regulations, her appeal is untimely, and must be dismissed.

Appellants go to great lengths to differentiate “personal notice” to Ms. Shepherd in her individual capacity from notice to Ms. Shepherd in her role as an officer of a citizens’ group.²⁰ This argument elevates form over substance, and is unsupported by law. Neither the regulatory provisions in 25 C.F.R. § 151.12, nor those in 43 C.F.R. § 4.332(a) “delineate between . . . multiple capacities.”²¹ The Regional Director was not required by these rules to send Geraldine Shepherd another identical letter. Doing so would be a waste of government resources. In any event, it is far from clear in her correspondences to BIA that Ms. Shepherd had ever made an explicit distinction from her participation in a community group.²²

Even if we were to accept the Appellants’ position that Geraldine Shepherd was entitled to separate notice as a known interested party, the theory that her Notice of Appeal is still timely is untenable. According to Appellants, Ms. Shepherd never received written notice of the Decision, and as a result, she could conceivably file a timely Notice of Appeal at any point in the future.²³ As illustrated by the Regional Director and the Tribe, this notion of an indefinite tolling of the time for filing an appeal was squarely rejected by IBIA in *Valley Center-Pauma Unified School District v. Pacific Regional Director*.²⁴ In *Valley Center*, although the Regional Director did not send a copy of the Decision directly to the Appellant, the Board found that the appeal period began to run as soon as the Appellant received a copy of the decision secondhand from a state agency.²⁵

We find the *Valley Center* case applicable to the present circumstances.²⁶ As in that case, any failure by BIA to formally send a copy of the Decision to Ms. Shepherd’s personal mailing

¹⁷ On February 2, 2015, we received a timely appeal of the Decision filed by Santa Ynez Valley Concerned Citizens. On February 9, 2015, we assumed jurisdiction over that appeal pursuant to 25 C.F.R. § 2.20(c) and 43 C.F.R. § 4332(b).

¹⁸ See AR0125.00007.

¹⁹ App. Br. at Ex. C.

²⁰ See App. Br. at 7-8; Reply Br. at 1-3.

²¹ Reply at 2.

²² In fact, the communications from Ms. Shepherd provided by the Appellants as evidence that she is a “known interested party” all include the same email address for her. See App. Br. at Ex. C. Moreover, as noted by the Regional Director, Ms. Shepherd’s letter of September 20, 2013 incorporates by reference an earlier letter written by her, presumably on behalf of Santa Ynez Valley Concerned Citizens. See *id.*; Reg’l Dir. Br. at 7-8.

²³ See App. Br. at 4-6; Reply at 1.

²⁴ 53 IBIA 155, 157 (2011). See Reg’l Dir. Br. at 4-5; Tribe Br. at 5-6.

²⁵ See *id.* at 156, 158-59.

²⁶ Appellants cite *Johnson v. Acting Minneapolis Area Director*, 28 IBIA 104 (1995), for the proposition that “second-hand knowledge is insufficient to satisfy [25 C.F.R. § 2.7(c)] to explain appeal procedures.” Reply at 1-2

address did not eliminate the requirement that she file an appeal within 30 days of receiving the Decision, even when such a decision is received through another avenue.²⁷ Because Geraldine Shepherd did not file her Notice of Appeal within 30 days after receiving the Decision, we dismiss her appeal as untimely.

II. Earl B. Shepherd and Wendell B. Shepherd

Appellants argue that Earl B. Shepherd and Wendell B. Shepherd were entitled to separate notices of the Decision as known interested parties, and that they never received written notices of the decision in person or by mail.²⁸ They allege that they only “became aware of their right to appeal the decision” on May 21, 2015, when they were notified by their counsel of their appeal rights.²⁹ In support of this claim, Appellants attach Declarations and two nearly identical comment letters from Earl Shepherd and Wendell Shepherd, dated September 30, 2013, regarding the preparation of an Environmental Assessment as part of the National Environmental Policy Act (NEPA) process.³⁰

We are doubtful that Messrs. Shepherd were interested parties for purposes of 25 C.F.R. § 151.12. As the Regional Director has noted, BIA cannot assume that each individual or entity that submits comments on NEPA documentation is entitled to separate notice of the Decision, especially when such comments are sent to the Department as part of an organized form letter campaign.³¹ Neither Earl Shepherd, nor Wendell Shepherd, requested a copy of the Decision or asked to be included on any service list. In fact, their September 30, 2013 letters do not include mailing addresses.³²

The administrative appeal period for Earl Shepherd and Wendell Shepherd, as unknown interested parties, began on the date of first publication of the notice of the Decision.³³ The administrative record in this case clearly shows that BIA published notices in the Sacramento Bee on January 9, 2015, and in the Santa Barbara News Press on January 10, 2015, as required by 25 C.F.R. § 151.12.³⁴ Because Earl Shepherd and Wendell Shepherd did not file their Notice of Appeal within 30 days of the date of the publication of these notices, their appeal is untimely and must be dismissed.

(emphasis in original). Appellants contend that *Johnson* is inconsistent with *Valley Center*, and that the former is the “better reasoned case.” *Id.* at 2. *Johnson* is inapposite to this appeal, because that case involves the failure of the BIA to include the appropriate appeal procedures under 25 C.F.R. § 2.7(c), and not notice of the decision itself. *Johnson*, 28 IBIA at 106. Instead, as the IBIA explained in *Valley Center*, any tolling of the time period for the appeal allowed by 25 C.F.R. § 2.7 “is tied to compliance with §2.7(c)—i.e., a decision must contain correct appeal instructions.” 54 IBIA at 157.

²⁷ See *id.* at 159.

²⁸ See App. Br. at 8; Reply at 1.

²⁹ App. Br. at 8.

³⁰ See App. Br. at Exs. G, H.

³¹ See Reg'l Dir. Br. at 8-10.

³² See App. Br. at Exs. G, H.

³³ See 25 C.F.R. § 151.12(d)(3)(ii).

³⁴ See AR0124.00001-3.

As discussed above, even if Messrs. Shepherd were entitled to individual written notice of the Decision, any failure by BIA to send direct notice to them cannot result in an indefinite time period in which to file an appeal.³⁵ It is not enough for the Appellants to state that they only became aware of their appeal rights in May 2015, but then fail to disclose when they obtained the actual Decision, even if by indirect means.³⁶ Because “[t]imeliness of the appeal must be affirmatively established by the evidence,” We conclude that Earl Shepherd and Wendell Shepherd have not met their burden of establishing the timeliness of the appeal.³⁷

III. Kenneth A. Sexton and Wendy Shepherd

Appellants likewise argue that Kenneth A. Sexton and Wendy Shepherd never received the written notice of the Decision to which they were entitled.³⁸ To bolster their case, Appellants similarly include a NEPA comment letter from Bunnie Shepherd Sexton, as well as Declarations executed by Kenneth Sexton and Wendy Shepherd stating that they were not aware of their appeal rights until May 21, 2015.³⁹

Appellants fail to provide any evidence that Mr. Sexton and Ms. Shepherd were ever known to BIA, or that they ever communicated their desire to be included on the service list for the Decision. In fact, we found no indication in the entire administrative record that demonstrates their interest in the Decision. The attached letter from Bunnie Shepherd makes no mention of any of the Appellants here.⁴⁰

Because we find that Mr. Sexton and Ms. Shepherd were unknown for purposes of 25 C.F.R. § 151.12(d)(3)(ii), the administrative appeal period began on the date that notice of the Decision was published in a newspaper of general circulation.⁴¹ Because Mr. Sexton and Ms. Shepherd did not file a notice of appeal within 30 days of that publication, we dismiss their appeal as untimely.

³⁵ See *Valley Center*, 53 IBIA at 158.

³⁶ See *No More Slots*, 56 IBIA at 239 n.7 (“When the timeliness of an appeal is an issue, an appellant may not demonstrate that the Board has jurisdiction by simply refusing to provide relevant factual information.”).

³⁷ *Id.*

³⁸ See App. Br. at 8; Reply at 1.

³⁹ See App Br. at Exs. D, E.

⁴⁰ See App Br. at Exs. D, E.

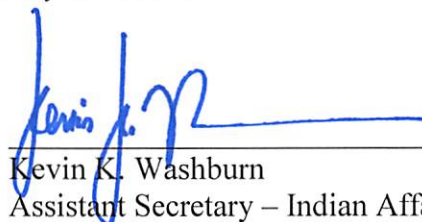
⁴¹ See AR0124.00001-3.

CONCLUSION

None of the Appellants has met their burden to demonstrate that their notice of appeal was timely filed as required by the regulations. We therefore dismiss this appeal for lack of jurisdiction.

Any party that has questions regarding procedure may submit questions by email to f2appeals@bia.gov or by telephone to Ms. Kathryn Isom-Clause, Senior Counselor to the Assistant Secretary – Indian Affairs, at (202) 208-7163. Please be advised that counselors to the Assistant Secretary cannot engage in any *ex parte* communications with parties regarding the substance of this or any other appeal that is currently before us.

Dated: OCT 14 2015



Kevin K. Washburn
Assistant Secretary – Indian Affairs

CERTIFICATE OF SERVICE

I certify that on the 16th day of ~~September~~^{October}, 2015, I caused to be delivered a true copy of the foregoing Memorandum to each of the persons named below, either by electronic mail or by depositing an appropriately addressed copy in the United States mail.

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