

CLEMENTINE JOSEPHSON
Acting Regional Solicitor
SAPPHIRE DIAMANT-RINK
Assistant Regional Solicitor
Department of the Interior
Office of the Solicitor
Pacific Southwest Region
2800 Cottage Way, E-1712
Sacramento, CA 95825
Telephone: (916) 978-4667
Facsimile: (916)-978-5694
Sapphire.diamant-rin@sol.doi.gov

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF THE ASSISTANT SECRETARY – INDIAN AFFAIRS

TIFFANY L. (HAYES) AGUAYO, *et al.*,

Appellants

v.

ACTING PACIFIC REGIONAL DIRECTOR,
BUREAU OF INDIAN AFFAIRS,

RESPONSE TO NOTICE OF
PROCEDURES

Appellee

GINA HOWARD, *et al.*,

Appellants

v.

ACTING PACIFIC REGIONAL DIRECTOR,
BUREAU OF INDIAN AFFAIRS,

Appellee

On behalf of the Bureau of Indian Affairs, Pacific Regional Director, the undersigned hereby submits this Response to the Notice of Procedures issues by the Assistant Secretary-Indian Affairs on April 26, 2013.

BACKGROUND

Two appeals that were consolidated pursuant to 25 C.F.R. § 2.18, are before the Assistant Secretary of Indian Affairs (AS-IA), brought by Appellants Aguayo and Howard (collectively, Appellants). Appellants contested their disenrollment by the Executive Committee (EC) of the Pala Band of Mission Indians (the Band). The disenrollments occurred on two separate dates, either June 1, 2011, or February 3, 2012. Appellants were disenrolled on the basis that they do not possess a sufficient degree of Indian blood of the Pala Band. Following this action by the EC, appeals were filed with the Pacific Regional Director, Bureau of Indian Affairs (Regional Director). In February of 2012 and again in June of 2012, the Regional Director determined that under Tribal law the Regional Director lacked authority to decide enrollment appeals, and that her authority was instead limited to providing recommendations to the Band concerning disenrollment actions by the EC. The Regional Director sent letters to disenrollees on February 24, 2012, and June 7, 2012, informing them of her review and recommendations to the Band. The Regional Director recommended that the disenrollees “remain enrolled with the Band as there was no evidence provided to support the disenrollment of these individuals.”¹

Appellants appealed the Regional Director’s recommendations to the Interior Board of Indian Appeals (IBIA). Forty-four individuals appealed the Regional Director’s June 7, 2012, letter

¹ IBIA Administrative Record, *Aguayo v. Acting Pacific Regional Director, BIA*, Docket Nos. IBIA 12-127, IBIA 12-128, Exhibit 10: Letter Dated June 7, 2012, from BIA Pacific Regional Office to Thor O. Emblem Addressing Review of Appeal.

through Attorney Thor Emblem (Appellants I). Thirty-six individuals appealed both the June 7th letter and a similar February 24, 2012, letter from the Regional Director through Attorney Dennis Chappabitty (Appellants II). Appellants I also appealed directly to the AS-IA and filed suit in District Court.² The IBIA held that it lacked subject matter jurisdiction over the disenrollments pursuant to 43 CFR § 4.330(b)(1), which provides, in relevant part: “Except as otherwise permitted by the Secretary or the Assistant Secretary..., the Board shall not adjudicate: (1) Tribal enrollment disputes.”³ The IBIA referred the appeal from Appellants II directly to the AS-IA.⁴

The NOA submitted by Appellants I states that “appellants appeal the Pala Band’s Executive Committee’s “EC” action taken that assert that appellants, each and every one, are ‘no longer a member of the Pala Band of Mission Indians’ as set forth in the EC’s letter dated February 3, 2012.”⁵ Appellants I make a series of assertions in their Statement of Reasons,⁶ which was included in the NOA, relating to the decision being appealed concerning the disenrollment of Appellants by the Pala Band Executive Committee.

² *Aguayo et al. v. Salazar*, 3:12-cv-00551-WQH-KSC (S.D. Cal.).

³ The IBIA also stated that “certain tribal enrollment disputes are appealable to the AS-IA pursuant to the regulations in 25 C.F.R. Part 62. And when, as here, it is not clear whether an appeal concerning a tribal enrollment dispute falls within the scope of Part 62, the Board has relied on 43 C.F.R. § 4.330 (b) to dismiss and refer such matters to AS-IA,” citing *Vedolla v. Acting Pacific Regional Director*, 43 IBIA 151, 154 (2006).

⁴ July 18, 2012, IBIA Order referring the docket to the AS-IA. The IBIA did not refer the appeals of Appellants I to the AS-IA because their appeal was delivered to the AS-IA directly.

⁵ Administrative Record, Tab 25, Notice of Appeal from the Pala Band of Mission Indians Executive Committee’s February 3, 2012 Decision to Terminate Appellants’ Tribal Membership, dated February 21, 2012, at 2.

⁶ *Id.* at 2-3. These assertions include that the EC did not “state the factual or legal basis for terminating appellants’ membership and benefits immediately and violates appellants’ due process rights,” that the Pala Band publicly admits that it is organized under the Articles of Association, that the “Articles of Association are the Band’s governing documents since the constitution was never ratified by a majority of tribal members,” that Appellants do qualify for membership in the Band, that “collateral estoppels prevents relitigating the issue” of Margarita Britten’s blood degree, violations of the equal protection and due process provisions of the Indian Civil Rights Act, and that the EC’s “exclusive and secretive control of the Band’s membership roll” “violates ICRA and appellants’ fundamental right to communicate with tribal members.”

Appellants II submitted a NOA to the Regional Director for one group of disenrollees on June 28, 2011, and for another group of disenrollees on February 27, 2012. The June 28, 2011, NOA is titled: “Appeal of June 1, 2011 Decision of Executive Committee to Disenroll and Request for an Expedited Decision.”⁷ The February 27, 2012, NOA is titled: “Appeal of February 1, 2012 Decision of Executive Committee of Pala Band of Mission Indians to Disenroll Appellants.”⁸ As with the NOA submitted by Appellants I, the subject of the appeals concerns actions by the Executive Committee of the Pala Band to disenroll Appellants. Although neither NOA submitted by Appellants II correctly labels its contents as “statement of reasons”, as required by 25 C.F.R. § 2.10 (d)(1), the statement of reasons appears to be included nonetheless. Appellants II submit a series of arguments in support of their position concerning the disenrollment decisions by the Tribal EC.⁹

DISCUSSION

The Regional Director appropriately exercised her limited authority to address the appeals by issuing recommendations.

⁷ Administrative Record, Tab 5, Appeal of June 1, 2011 Decision of Executive Committee to Disenroll and Request For an Expedited Decision, dated June 28, 2011, at 1.

⁸ Appeal of February 1, 2012 Decision of Executive Committee of Pala Band of Mission Indians to Disenroll Appellants, dated February 27, 2012, at 1.

⁹ These arguments include that the letters sent by the Band to Appellants’ on June 1 and June 8, 2011, were defective, and that violations of the Indian Civil Rights Act may have occurred.

In examining the disenrollment decision, the Regional Director reviewed the Pala Band's most recent Constitution,¹⁰ as well as the applicable membership ordinance¹¹, and determined her authority was limited to rendering recommendations concerning the disenrollment actions.

The Regional Director considered the Band's enrollment requirements as set forth in Article II of the Constitution, which state as follows:

Section 1. MEMBERSHIP REQUIREMENTS

The membership of the Band shall consist of:

- (A) Those persons whose names appear on the Pala Allotment Rolls as approved by the Secretary of the Interior on April 12, 1895, and November 3, 1913, who were living on the date of the approval of the Pala Band's original Articles of Association by the Commissioner of Indian Affairs.
- (B) All living descendants of persons on the Allotment Rolls covered in Section 1(A) above regardless of whether the original allottees are living or deceased, provided that they are direct lineal descendants and have one-sixteenth (1/16) or more degree of Indian blood of the Pala Band.
- (C) Those persons who have been adopted by the Band and such adoption has been approved by the Bureau of Indian Affairs.¹²

Section 8 of the Band's 2009 Revised Enrollment Ordinance —Appeals of Eligibility Decisions, allows an appeal to the Pacific Regional Director of applications rejected by the EC.¹³ On appeal, the "Regional Director shall review the decision of the Executive Committee and the written

¹⁰ Administrative Record, Tab 27, Constitution of the Pala Band of Mission Indians.

¹¹ Administrative Record, Tab 27, Pala Band of Mission Indians Ordinance No. 1, revised July 22, 2009.

¹² Administrative Record, Tab 27, Constitution of the Pala Band of Mission Indians, at 2.

¹³ Administrative Record, Tab 27, Pala Band of Mission Indians Ordinance No. 1, revised July 22, 2009. This Section is marked as Section 8, but the document is missing a Section 7.

appeals statement submitted by the applicant and make a recommendation to the Executive Committee as to whether it should uphold or change its decision and stating the reasons for the recommendation.”¹⁴ After receiving the recommendation of the Regional Director, the EC makes the final decision on the application.

Specifically, the Regional Director determined:

Because the Band’s Enrollment Ordinance does not invoke any provision of federal law that would provide the Bureau of Indian Affairs with the authority to decide enrollment appeals, there is no required federal action to take with regard to these requests, and we cannot render any decision regarding the Executive Committee’s actions.¹⁵

Hence, the Regional Director acknowledged that the Band’s Enrollment Ordinance allows the Regional Director to make recommendations regarding disenrollment actions that are undertaken by the Executive Committee. The Regional Director, under the limited authority given to her by the Band, proceeded to make such recommendations in support of the continued enrollment of Appellants.

The Regional Director appropriately relied upon the most recent Tribal Constitution and was not required to render a decision concerning the validity of the Tribal Constitution.

In several sections of their appeals, Appellants argue that the Regional Director should not have relied upon the Band’s most recent Constitution in rendering recommendations concerning the disenrollment actions undertaken by the EC. However, the validity of the Tribe’s Constitution

¹⁴ *Id.*

¹⁵ Administrative Record, Tab 2, June 7, 2012, letter.

was never previously challenged, and was not the subject of the appeals before the Regional Director. Rather, consistent with 25 C.F.R. § 2.9, the appeals before the Regional Director concerned only the disenrollment actions undertaken by the Pala EC.

Pursuant to 25 C.F.R. § 2.9 (c) (4), a notice of appeal (NOA) shall “contain a statement of the decision being appealed that is sufficient to permit identification of the decision.” Use of the word “shall” illustrates the mandatory nature of this provision. In addition, pursuant to 25 C.F.R. § 2.10, a Statement of Reasons “means a written document submitted by the appellant explaining why the decision being appealed is in error.” A Statement of Reasons lists the reasons that appellants believe a decision made by a BIA official is incorrect.

As initially noted, the NOAs and Statement of Reasons submitted by Appellants appealed the disenrollments of Appellants. There was no statement that any decision by the BIA concerning the validity of the Pala Constitution was being appealed to the Regional Director. Moreover, even assuming *arguendo* that a BIA decision concerning the Tribe’s Constitution was being appealed, claims brought under the Administrative Procedure Act (APA) are subject to a statute of limitations, and must be filed within six years after the right of action first accrues consistent with the APA at 28 U.S.C. § 2401.¹⁶ Specifically, “a cause of action accrues when a plaintiff knew or should have known of the wrong and was able to commence an action based upon that wrong.”¹⁷ The statute of limitations is triggered by actual notice.¹⁸

¹⁶ 28 U.S.C. § 2401(a).

¹⁷ *Wild Fish Conservancy v. Salazar*, 688 F. Supp. 2d 1225, 1233 (E.D. Wash. 2010) (citing *Shiny Rock Mining Corp. v. United States*, 906 F. 2d 1362, 1364 (9th Cir. 1990)).

¹⁸ *Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F. 2d 588, 590, 592-93 (9th Cir. 1990).

The Tribe's most recent Constitution containing the language about the Regional Director having only the authority to make recommendations regarding enrollment matters, was adopted in 1997, and approved by the BIA in 2000.¹⁹ The Constitution and amendments thereto have not been kept secret from Tribal members. The Constitution has been amended three times, and Tribal members have voted on amendments. The General Council of the Pala Band passed a motion in 2003 that Tribal members are provided with a copy of the Constitution upon turning 18.²⁰ Appellants had knowledge or should have had knowledge of the Constitution and could have asserted their claim within six years, prior to the expiration of the limitations period, rather than eleven or twelve years after BIA approval.

CONCLUSION

The Pala Band Executive Committee's decision to disenroll Appellants was the only action specifically appealed to the Regional Director. The Regional Director appropriately examined and relied upon the most recent Tribal Constitution in making recommendations regarding the disenrollments, consistent with her limited authority under Tribal law to provide recommendations concerning disenrollment actions by the EC. Although Appellants have suggested the Regional Director should not have relied upon the most recent Tribal Constitution, no appeal concerning the Constitution was ever addressed by the BIA, nor was any such appeal before the Regional Director when she made her recommendations concerning the

¹⁹ Administrative Record, Tab 27, Constitution of the Pala Band of Mission Indians.

²⁰ Memorandum of Points and Authorities in Support of Federal Defendants' Motion to Dismiss, dated August 13, 2012, Tiffany L. (Hayes) Aguayo, et al., v. Salazar, No. 12-CV-0551 WQH (KSC), at 11, and exhibits.

disenrollments. Even if Appellants had appealed BIA's approval of the Constitution, they would have been time barred from doing so. The actions of the Regional Director were limited in this instance by the limited authority the Tribe's Constitution and Ordinance provided. The Regional Director appropriately exercised her limited authority to render recommendations concerning the disenrollment actions of the Tribal EC.

Clementine Josephson
Regional Solicitor



Sapphire Diamant-Rink
Assistant Regional Solicitor

cc: Service List