



INTERIOR BOARD OF INDIAN APPEALS

Ethel H. Not Afraid v. Billings Area Director, Bureau of Indian Affairs

3 IBIA 235 (01/31/1975)

Also published at 82 Interior Decisions 51

Reconsideration denied:

3 IBIA 268

3 IBIA 273



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

ADMINISTRATIVE APPEAL OF

ETHEL H. NOT AFRAID

v.

AREA DIRECTOR, BILLINGS, ET AL.

IBIA 74-45-A

Decided January 31, 1975

Appeal from an administrative decision denying application for patent in fee.

Affirmed and dismissed.

1. Indian Lands: Allotments: Patents: Application

Application for patent in fee will be denied where applicant is found incapable of properly or adequately managing her own affairs.

APPEARANCES: Stanton, Hovland & Torske, Attorneys at Law, for Ethel H. Not Afraid, appellant.

OPINION BY ADMINISTRATIVE JUDGE WILSON

The above-entitled matter comes before this Board on an appeal by Ethel H. Not Afraid, hereinafter referred to as appellant, through her counsel, Stanton, Hovland & Torske, from a decision of the Area Director, Bureau of Indian Affairs, Billings, Montana, dated March 13, 1974. The Area Director's decision affirmed the decision of December 19, 1973, of the Superintendent, Crow Agency, in denying appellant's application for a patent in fee for her original Allotment Crow No. 3398 described as: all of section 7, N/2 NW/4, N/2 S/2 NW/4, section 18, T. 6 S., R. 30 E., Principal Meridian, Montana, containing 760 acres, more or less.

The appellant filed her application with the Superintendent of the Crow Agency on September 21, 1973, giving in support of her application the following reasons:

To pay off the Crow Tribal Loan, medical needs for (sic) supplies cause I'm a diabeted (sic); To help my only son to purchase some land around close by his ranch to enlarge the ranch.

The Superintendent on December 19, 1973, advised the appellant that the Crow Tribal Land Resource Committee at its November 21 1973, meeting indicated an interest in purchasing the tract of land involved in the application and that action

thereon was being withheld pursuant to 25 CFR 121.2 which in pertinent part provides:

Action on any application, which if approved would remove Indian land from restricted or trust status, may be withheld, if the Secretary determines that such removal would adversely affect the best interest of other Indians, or the tribes, until the other Indians or the tribes so affected have had a reasonable opportunity to acquire the land from the applicant. * * *

The appellant on January 7, 1974, appealed the Superintendent's decision to the Area Director, Billings. In support of her appeal, the appellant cites the Board's conclusion in the Administrative Appeal of Frances M. Shively Kevern, 2 IBIA 123, 80 I.D. 804 (1973), to the effect that the Department of the Interior could not withhold the issuance of a patent in fee solely for the reason provided in 25 CFR 121.2.

The Area Director in his decision of March 13, 1974, sustained the Superintendent's decision of December 19, 1973, in the following language:

Accordingly, the decision of the Superintendent not to approve Mrs. Not Afraid's application for a patent-in-fee is affirmed on the grounds that neither the tribe nor individual Indians have had an opportunity to acquire the property and thereby keep Indian lands in Indian hands and we further deny this appeal on the grounds that Mrs. Not Afraid is not competent to handle her affairs and that the removal of the subject tract from her ownership would critically impair her annual income.

In support of his denial on competency grounds, the Area Director, among other things, set forth the following reasons:

1. The appellant is 54 years of age in poor health, being afflicted with diabetes and a heart condition.
2. The appellant has only an 8th grade education, without any specialized training and who has been employed from time to time as a kitchen aide and a bus driver.
3. That the appellant is delinquent on a tribal RCF Loan in the amount of \$2,707.55 and on another tribal loan in the amount of \$210.05.
4. A duplex situated in Lodge Grass, Montana, which the appellant purchased in February 1963, is now unoccupied and uncared for.
5. The appellant resides in a Turnkey III home situated on her daughter's land, on which she is, as of February 1, 1974, behind in her rentals in the amount of \$585 to the Crow Housing Office and that she has paid no rent on the home for eleven (11) months.
6. The appellant, as security for her tribal loans and eligibility for tribal housing, has assigned the income from her only

wholly owned asset-producing income (land subject of the application) and

7. To allow her to dispose of her only wholly owned asset would not be in the appellant's best interest.

It is from the decision of March 13, 1974, that the appellant has appealed to this Board.

The appellant in support of her appeal contends that her allotment of land, subject of the application, was to be held in trust for her sole use and benefit and that upon the expiration of the trust period, or upon her being classified as competent and capable of managing her affairs, whichever occurred first, the Secretary of the Interior was to cause to be issued to her a patent in fee simple. The appellant considers the foregoing to be the law and cites in support thereof the Administrative appeal of Frances M. Shively Kevern, supra, wherein the Board of Indian Appeals at 2 IBIA 128, 80 I.D. 806 stated that:

We are of the opinion that the contents of the General Allotment Act referred to supra, clearly express the legislative intent and the dictates of Congress, i.e., that the United States will cause a patent in fee simple to be issued to the allottee if before the expiration of the trust period the Indian allottee becomes competent and capable of managing his or her own affairs.

The appellant apparently contends this appeal is in all respects similar to the Kevern case, supra, and is governed thereby. We disagree. The Kevern case differs from this appeal in two respects. First, in the Kevern case, supra, there was no question as to the applicant's competency to handle her own affairs, whereas the appellant's competency in this appeal is in issue. Secondly, the provisions of 25 CFR 121.2 were inapplicable in the Kevern case since her application was filed prior to April 24, 1973, the effective date of said provisions, whereas in the appeal herein the appellant's application was filed on September 21, 1973, and therefore subject to the said provisions. Accordingly, we see no departure from our ruling in the Kevern case as applied in the appeal herein.

The record indicates that the appellant's application for a patent in fee was denied on the following grounds:

(1) That the approval of the application would adversely affect the best interests of the tribe or other Indians, pursuant to 25 CFR 121. 2, and

(2) Incompetency of the applicant to properly manage her affairs.

Withholding action on appellant's application pursuant to 25 CFR 121.2 by the Superintendent in itself would have been

proper and valid provided the provisions thereof had been complied with. Unfortunately, the record as presently constituted, indicates only a casual interest by the Tribe through its Crow Tribal Land Resources Committee in purchasing the allotment. No firm written commitment or offer in that respect appears in the record. No further action appears to have been taken in the matter subsequent to the committee's meeting of November 21, 1973. Under the foregoing circumstances it must be concluded and found that the Tribe and other Indians have had reasonable opportunity to acquire the land from the appellant or at least to have entered into serious negotiations in connection therewith. To expect the appellant to extend indefinitely the opportunity under these circumstances would be entirely unreasonable.

Incompetency as the final ground for denying the application on the other hand must be sustained. Definition of competent with respect to patents in fee appears in 25 CFR 121.1(e):

"Competent" means the possession of sufficient ability, knowledge, experience, and judgment to enable an individual to manage his business affairs, including the administration, use, investment, and disposition of any property turned over to him and the income or proceeds therefrom, with such reasonable degree of prudence and wisdom as will be apt to prevent him from losing such property or the benefits thereof.

25 CFR 121.5(a) further provides in pertinent part that:

