



INTERIOR BOARD OF INDIAN APPEALS

Jim and Elsie Meeks v. Aberdeen Area Director, Bureau of Indian Affairs

23 IBIA 200 (02/22/1993)

Reconsideration denied:

23 IBIA 285 (04/01/1993)



United States Department of the Interior

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

JIM and ELSIE MEEKS, : Order Affirming Decision
Appellants :
 :
v. : Docket No. IBIA 93-19-A
 :
ABERDEEN AREA DIRECTOR, :
BUREAU OF INDIAN AFFAIRS, :
Appellee : February 22, 1993

Appellants Jim and Elsie Meeks seek review of a Bureau of Indian Affairs (BIA) decision removing Allotment Nos. 1864-L1 and 1865-L3, Pine Ridge Reservation, from Range Unit (RU) 247 and returning the allotments to RU 26. The two allotments at issue include 310 acres. In a motion received by the Board of Indian Appeals (Board) on January 25, 1993, the Area Director requested expedited consideration of this appeal on the grounds of protection of the trust resource. Expedited consideration is granted. For the reasons discussed below, the Board affirms that decision.

Prior to December 1, 1990, the two allotments at issue here were part of RU 26. According to the administrative record, the Pine Ridge Agency, BIA, determined that, because the allotments were isolated from the main portion of RU 26, they should be removed from RU 26 and added to another range unit in order to facilitate regulation of land use. The agency intended for the change to take effect on December 1, 1990, the beginning of the new permit period. However, the change was not actually entered into the land records system until October 1991.

RU 26 was permitted to Bonnie Page Risse (Risse) for a term beginning December 1, 1990, and ending on October 31, 1995. The permit issued to Risse for RU 26 still included the two allotments.

Although the administrative record does not include a copy of appellants' permit, there is no dispute that RU 247 was permitted to them. The record indicates that when appellants entered into this permit, RU 247 did not include the two allotments.

In October 1991, agency staff determined that the allotments should be removed from RU 26 and added to RU 247. Appellants were sent a Modification of their permit, adding the new acreage. The Modification stated that it took effect on November 1, 1991. Appellants signed the Modification on December 16, 1991, and returned it to the agency. Although the record indicates that the agency believed a corresponding modification, removing the allotments from RU 26, was sent to Risse, it also contains an admission that the agency has no documents to support that belief.

In May 1992, Risse discovered that some of her fence had been removed. She contacted the agency, and was informed that the allotments had been removed from RU 26. Risse appealed this decision to the Area Director. By letter dated June 22, 1992, the Area Director found that the agency lacked authority to modify Risse's contract unilaterally and without notice to her. Accordingly, the Area Director reversed the agency's decision and ordered that the two allotments be returned to RU 26.

By an undated letter, the Area Director notified appellants that the allotments had been removed from RU 247 and returned to RU 26. He informed appellants of their right to appeal the decision. Appellants filed a notice of appeal dated August 17, 1992. The Area Director received the appeal on August 21, 1992. The notice of appeal stated: "This appeal is being made pursuant to 25 CFR * * * Part 2 * * *. Pursuant to §2.10 * * * appellant[s] herein shall file a statement of reasons thirty days from date of the Notice of Appeal." By letter dated September 9, 1992, the Area Director affirmed his earlier decision, stating that "since the original Risse appeal was answered by this office we would have to uphold that decision."

Appellants appealed to the Board. Their notice of appeal argues:

The original Risse appeal was completed without notice to or opportunity for hearing being awarded to the Meeks. This original Risse hearing is in violation of 25 CFR, Part 2 §2.12 which requires service of appeal documents on all other interested parties. The Meeks did not receive notice of such appeal and the matter should be remanded for further hearing.

Pursuant to 43 CFR §4.311 appellant[s] shall file an opening brief 30 days after receipt of the notice of docketing. [Emphasis in original.]

Appellants did not file an opening or reply brief. The Area Director filed an answer brief.

Appellants contend that, although they were interested parties to the Risse appeal, they were not notified of that appeal or given an opportunity to respond. The Board agrees. 25 CFR 2.12(f) provides that

[w]hen [a BIA] official deciding an appeal determines that there has not been service of a document affecting a person's interest, the official shall either serve the document on the person or direct the appropriate legal counsel to serve the document on the person and allow the person an opportunity to respond.

BIA erred initially in not notifying appellants, who were clearly entitled to notification under the regulations, that Risse had appealed the Superintendent's decision. After being informed of the decision and filing an appeal with the Area Director, they were again denied an opportunity to respond when the Area Director issued a decision in their appeal before the time for filing their statement of reasons expired. The Board has previously noted that when a BIA official issues a decision prior to the expiration

of the briefing period, the parties are denied their right to present their arguments. See Jerome v. Acting Aberdeen Area Director, 23 IBIA 137, 138-39 n.1 (1993); Cheyenne River Sioux Tribe v. Aberdeen Area Director, 23 IBIA 103, 107 (1992); Peace Pipe, Inc. v. Acting Muskogee Area Director, 22 IBIA 1, 5-6 (1992). Despite the initial problems in the cases cited, the Board reached the merits of the appeals because the administrative review process gave the appellants an opportunity to present their substantive arguments to the Board.

Here, appellants filed only a notice of appeal, contending that they should have been informed of the Risse appeal, and asking that the matter be remanded to the Area Director. Although they had an opportunity to do so, they did not file a brief addressing the merits of the Area Director's decision. In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving the error in the decision under appeal. See, e.g., French v. Aberdeen Area Director, 22 IBIA 211, 214 (1992), and cases cited therein. An appellant has a responsibility to participate in the administrative appeals process. Appellants have failed to take advantage of the opportunity available to them, and have thereby failed to show error in the Area Director's decision.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Aberdeen Area Director's decision returning the two allotments to RU 26 is affirmed. 1/

//original signed

Kathryn A. Lynn
Chief Administrative Judge

//original signed

Anita Vogt
Administrative Judge

1/ The Board does not affirm the specific basis for the decision set forth in the Area Director's Sept. 9, 1992, letter. The Area Director has authority to reconsider his decisions, especially when a decision was made without full participation by interested parties. The Area Director must, however, show the reason for the change in position in order to show that it was not arbitrary or capricious. Cf., e.g., Hopi Indian Tribe v. Director, Office of Trust and Economic Development, 22 IBIA 10, 16 (1992), and cases cited therein.