



INTERIOR BOARD OF INDIAN APPEALS

Estate of John Wayne Smells

48 IBIA 79 (10/29/2008)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

ESTATE OF JOHN WAYNE SMELLS) Order Docketing and Dismissing Appeal
)
) Docket No. IBIA 09-08
)
) October 29, 2008

Appellant John Calvin Smells, Sr., appeals from an Order Denying Reopening entered on March 19, 2008, by Indian Probate Judge Albert C. Jones (IPJ) in the estate of Appellant's father, John Wayne Smells (Decedent), deceased Crow Indian, Probate No. IP-BI-314A-94. The Order Denying Reopening rejected Appellant's petition to reopen an estate that had been closed since 1996 because Appellant had attended the hearing held to probate Decedent's estate and therefore lacked standing to seek reopening. The Board of Indian Appeals (Board) docketed this appeal, but dismisses it for lack of jurisdiction because it was filed with the Board more than 60 days after the date of the IPJ's Order Denying Reopening, and is therefore untimely.

Appeals from orders on reopening must be filed with the Board "[w]ithin 60 days from the date of the decision." 43 C.F.R. § 4.320(b). The 60-day deadline for filing an appeal is jurisdictional. *See id.* § 4.320(b)(3). Untimely appeals must be dismissed. *Estate of Bernard Charles Little Nest*, 47 IBIA 52 (2008); *Estate of Alvin Sherwood LeSage*, 46 IBIA 324 (2008).

The Order Denying Reopening issued on March 19, 2008. The "Notice to All Persons Having or Claiming an Interest in the Subject Matter of this Proceeding" (Notice) that accompanied the Order Denying Reopening contained clear and concise instructions for appealing to the Board, including the time for filing an appeal and the current address for the Board. Appellant is included on the service list for the Order Denying Reopening with the same address he has included with his appeal to this Board, and thus is presumed to have received the Order Denying Reopening and the accompanying Notice. *See Estate of Ella Sarah Case Barnes*, 17 IBIA 72, 74 (1989).

Pursuant to 43 C.F.R. § 4.320(b) and the instructions contained in the Notice, Appellant had until May 19, 2008, to file his appeal with the Board.¹ Appellant did not file his appeal until October 3, 2008, as shown by the postmark on the mailing envelope, *see* 43 C.F.R. § 4.310(a), nearly five months after the time expired for seeking review. Because Appellant's notice of appeal was filed with the Board after the 60-day appeal period expired, his appeal must be dismissed.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board docketed this appeal, but dismisses it for lack of jurisdiction because it is untimely.

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

¹ Appellant gained an extra day for submitting his appeal inasmuch as the 60th day after the date of the Order Denying Reopening, May 18, fell on a Sunday. Pursuant to 43 C.F.R. § 4.310(c), where the last day for filing falls on a nonbusiness day (Saturday, Sunday, or Federal holiday), the filing date is extended to the next business day. *Estate of LeSage*, 46 IBIA at 325. Therefore, the deadline for Appellant's appeal was extended to Monday, May 19.