



INTERIOR BOARD OF INDIAN APPEALS

Melva Toquothy Knox v. Southern Plains Regional Director,
Bureau of Indian Affairs

53 IBIA 231 (6/27/2011)



United States Department of the Interior

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

MELVA TOQUOTHY KNOX,)	Order Affirming in Part and Vacating in
Appellant,)	Part
)	
v.)	
)	Docket No. IBIA 09-087
SOUTHERN PLAINS REGIONAL)	
DIRECTOR, BUREAU OF)	
INDIAN AFFAIRS,)	
Appellee.)	June 27, 2011

Appellant Melva Toquothy Knox appeals from an April 3, 2009, decision (April 3 Decision) of the Southern Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA), in which he explained that “the southern boundary of your property [Allotment No. 3413] was fixed by the Bureau of Land Management (BLM) when [it] completed a dependent resurvey [in 2006] of portions of the lands located in Sections 5 and 8, inclusive of [Allotment No. 3413].” April 3 Decision at 1 (AR,¹ Tab 44). As a result of BLM’s survey, the Regional Director explained that certain oil wells, including nos. 168 and 171, remain located south of Allotment No. 3413 and, therefore, Appellant “ha[s] no entitlement to any proceeds from those wells.” April 3 Decision at 1. We affirm the Regional Director to the extent that he recognized that the BLM survey defined the official boundaries of the Allotment, and impliedly rejected any request from Appellant to “restore” to the Allotment lands lying outside the BLM-determined boundaries. To the extent that the Regional Director determined that Appellant lacks “entitlement” to proceeds from the oil wells, we vacate his decision on jurisdictional grounds. The Regional Director has not identified nor are we aware of, any authority or jurisdiction for the Regional Director to award damages or otherwise adjudicate Appellant’s claim for monetary relief.

History

Appellant owns an interest in Allotment No. 3413, which she inherited from her father, Robert Toquothy, a.k.a. Robert To-Quothy, a Comanche Indian and the original

¹ “AR” refers to the administrative record submitted to the Board of Indian Appeals (Board) by BIA.

allottee.² Much of the Allotment lies within the Red River, and the Allotment's southern boundary, which is the subject of this dispute, lies in the river bed. *See* AR, Tab 25.

The Red River apparently is dry for much of the year in the particular stretch at issue in this appeal, and is a nonnavigable river. *See Oklahoma v. Texas*, 258 U.S. 574, 587-591 (1922). At times, various trickles of water apparently course through its sandy bed, while at other times flooding may occur. The Red River defines much of the boundary between Texas and Oklahoma, which has led to numerous lawsuits over the past 100 years, including suits before the U.S. Supreme Court.

Red River boundary litigation began over 100 years ago with the United States filing suit against the State of Texas to quiet title to over 1.5 million acres in what is now the State of Oklahoma and just west of what later became Allotment No. 3413. *United States v. Texas*, 162 U.S. 1 (1896). At that time, Texas claimed that its boundary extended to the North Fork of the Red River, while the United States claimed the land to the south bank of the Red River and its South Fork. In 1896, the Supreme Court agreed with the United States, and entered judgment accordingly. *Id.* at 90-91.

Litigation did not end there. After Oklahoma became a state in 1907 and with the discovery of oil and gas deposits in and around the bed of the Red River, the state of Oklahoma brought suit in 1920 against the state of Texas, claiming title to the entire bed of the Red River from one bank to the other; Texas claimed title to the southern half of the river bed. *Oklahoma*, 258 U.S. at 579.³ The United States intervened in the suit to protect its own interests and the interests of certain Indian allottees. *Oklahoma*, 256 U.S. 70, 84

² The 1913 trust patent for Allotment No. 3413 describes its location as follows:

The north half of the southwest quarter and the [sic] Lot five of the southwest quarter of Section five and the [sic] Lot three of the northwest quarter of Section eight in Township five south of Range fourteen west of the Indian Meridian, Oklahoma, containing one hundred twenty-seven and five-hundredths acres.

AR, Tab 6. The Allotment is situated within Tillman County, Oklahoma.

³ Suit was filed in the U.S. Supreme Court, which has original jurisdiction over suits between the states. *See* Art. III, § 2, U.S. Constitution. In the course of this litigation, the Court published numerous interim orders and decisions, which we short cite as *Oklahoma*, followed by the particular citation for the decision or order to which we refer.

(1921).⁴ One of the allottees was Toquothty. *See Oklahoma*, 261 U.S. 345, 349 (1923). The several disputed claims of ownership to the riverbed led the Court, upon the motion of the United States, to place the land in receivership and to authorize the receiver to commence leasing the land for oil and gas exploration and development. *Oklahoma*, 252 U.S. 372, 372-75 (1920).

In 1921, the Supreme Court held that its previous decision in *United States v. Texas* was res judicata as to the location of the boundary between the states of Oklahoma and Texas, i.e., the south bank of the Red River. *Oklahoma*, 256 U.S. at 92-93. The Court further held that the United States owned the riverbed, *id.* at 93, and, in a supplemental order in 1923, held that Allotment No. 3413 “included and covered the right and title to the portions of the river bed between such tract[] and the medial line of the [Red R]iver,” *Oklahoma*, 261 U.S. at 347, 349.

Also in 1923, the Court commissioned two cadastral engineers to survey the boundary between Oklahoma and Texas, i.e., the Red River, 261 U.S. 340, 343 (1923) (*per curiam*), and gave supplemental instructions to the engineers, requiring them also to survey and plat the medial line of the Red River in the vicinity of Allotment No. 3413, and to show “the exact location of all oil wells which are within 300 feet of such medial line,” *Oklahoma*, 262 U.S. 505, 505 (1923).

The surveying work, which was conducted from April 1923 to February 1924, apparently resulted in two surveys. The first survey, completed in July 1923, placed two oil wells, wells nos. F. R. 168 and F. R. 171 on Toquothty’s land. Letter from Secretary of the Interior Hubert Work (Secretary) to Sen. Lynn Frazier, Jan. 5, 1928, *reprinted in* S. Rep. No. 1393, 70th Cong., 2d Sess., at 2 (Jan. 7, 1929) (AR, Tab 13).⁵ Subsequently, “in October 1923, during a flood in the Red River[,] the medial line shifted some distance to the north and well [n]o. 168 was thereafter south of the medial line, as it was finally

⁴ According to the decision, “[t]he United States . . . intervened, and . . . set up an interest as trustee of Indian allottees with respect to certain portions of the bed of the Red [R]iver and as owner in its own right of a large part of the bed and of numerous islands therein.” *Id.*

⁵ The wells apparently were designated “F. R.” — for “Federal Receiver” — because they were drilled and began producing in 1920 at the behest of the receiver appointed by the Court. *See Oklahoma*, 252 U.S. at 372-75; *see also* Letter from Secretary to Sen. Lynn Frazier, Jan. 5, 1928, *reprinted in* S. Rep. No. 1393, 70th Cong., 2d Sess., at 1-2 (Jan. 7, 1929) (AR, Tab 13).

approved by the Supreme Court.” *Id.* The Secretary also reported that well no. 171 also was south of the medial line. *Id.* The second survey was completed in December 1923, and presented to the Court in 1924. *Oklahoma*, 265 U.S. 500, 503, 44 S. Ct. 573, 584, 600 (1924) (*per curiam*).⁶ After a period of time to permit objections and exceptions to the survey, the Court confirmed the report in its entirety. 265 U.S. at 504, 44 S. Ct. at 604; *see also Oklahoma*, 265 U.S. 513, 514 (1924) (*per curiam*) (same). In particular, the Court noted that no exceptions were received concerning the report of the medial line. *Oklahoma*, 265 U.S. 493, 494 (1924).⁷

The result of the Supreme Court’s decision, as understood and followed by the Department of the Interior (Department), set the medial line — as reflected on the December 1923 survey and as accepted by the Supreme Court — as the boundary between the allotted lands on the north side of the line (including Toquothty’s allotment) and the Federal lands on the south side of the line. Following the Supreme Court’s decision, Congress passed a statute in 1926 under which the Kiowa, Comanche, and Apache Indians were entitled to a share of the royalties earned from wells on Federal land south of the medial line. *See* Act of June 12, 1926, 44 Stat. 740.

The Department recognized that during the time that well no. F. R. 168 was located north of the medial line, the well produced oil, which was sold for a profit, and those profits belonged to Toquothty. Letter from Secretary to Sen. Lynn Frazier, Jan. 26, 1928, *reprinted in* S. Rep. No. 1393, 70th Cong., 2d Sess., at 3-4 (Jan. 7, 1929) (AR, Tab 13). Sometime prior to January 20, 1928, the Department presented a bill to Congress to

⁶ The engineers’ report was omitted from publication of the Court’s decision in the United States Reports, 265 U.S. at 503, but is published in its entirety in the Supreme Court Reporter, 44 S. Ct. at 584-604. No record of the July 1923 survey, or any reference thereto, is found in the Court’s various published orders or decisions. The only reference to the July 1923 survey appears in Secretary Work’s correspondence to Senator Frazier.

⁷ The Court subsequently ordered a survey of the side lines of the Indian allotments, including Allotment No. 3413, from the upland on the north bank to the medial line. *Oklahoma*, 262 U.S. 724, 725 (1923). This survey was conducted from May to July 1924. According to the resulting plat, 40.6 acres accreted to Allotment No. 3413 from the boundaries of the allotment to the medial line, and oil wells nos. F. R. 168 and F. R. 171 remained south of the medial line. AR, Tab 25 (“Supplemental Plat”). Under the July 1923 survey, the acreage accreted to Allotment No. 3413 was 55.2 acres. *See* Letter from Secretary to Sen. Lynn Frazier, Jan. 26, 1928, *reprinted in* S. Rep. No. 1393, 70th Cong., 2d Sess., at 3 (Jan. 7, 1929) (AR, Tab 13).

authorize the payment of royalties from well no. 168 to Toquothty up until the time of the flood in October 1923. *See* Act of Mar. 4, 1923, 42 Stat. 1448. As explained by the Secretary in his correspondence to a Congressional committee in 1928 in support of the bill:

The [Supreme C]ourt held in effect that the title to the land south of the medial line of the main channel of Red River is in the United States and title to the land north of that line in the individual owners of the adjacent upland. . . . [A]s surveyed in July 1923, . . . well No. 168 was on Toquothty's land. The position of the medial line as surveyed was subject to the review of the Supreme Court, and in October 1923, during a flood in the Red River the medial line shifted some distance to the north and well No. 168 was thereafter south of the medial line, as it was finally approved by the Supreme Court.

. . . .

Not only was well No. 168 drilled upon lands which prior to the flood were north of the medial line of Red River but Federal receiver's wells Nos. 166 and 171 were also drilled thereon. These latter wells were unremunerative [W]hen it was ascertained that the medial line of the river following the flood of 1923 was north of these wells and made them thereafter the property of the United States the department took no further action looking to the acquisition of the proceeds from well No. 168 but permitted the United States, which was an adverse party in litigation to the Indian, to take judgment for the well and the impounded funds.

. . . .

The wells on what were then the riparian lands of Robert Toquothty were drilled while title to the land was in dispute, and the royalty of 12½ per cent, amounting to \$16,339.69, was produced from one well while the lands were in his ownership. While [Toquothty] has an equal share with the [Kiowa, Comanche, and Apache] Indians in the trust fund created [to give them a share of royalties for wells on the Federal lands], I believe that [Toquothty] is entitled to all the royalties arising from production of Federal receiver well No. 168 until a shift of the medial line of the Red River removed the land from his ownership.

Letter from Secretary to Senator Frazier, Jan. 5, 1928, *reprinted in* S. Rep. No. 1393, 70th Cong., 2d Sess., at 1-2 (Jan. 7, 1929) (AR, Tab 13).⁸

Toquohty died in 1983, and the parties do not dispute that Appellant owns an interest in Allotment No. 3413.⁹ In 2006, BLM conducted a dependent resurvey¹⁰ of certain lands in Oklahoma that included Allotment No. 3413. On May 16, 2006, notice of the completion of the resurvey and information for the filing of protests against the resurvey were published in the Federal Register. *See* 71 Fed. Reg. 28,371 (May 16, 2006) (AR, Tab 23).¹¹ It appears that Appellant did not pursue a protest of BLM's resurvey.

According to the AR, Appellant has sought assistance from BIA in several areas relating to Allotment No. 3413. Relevant to this appeal, Appellant has argued that Allotment No. 3413 is bounded on the south by the medial line of the Red River as it existed prior to October 1923, that the flood of October 1923 did not alter the southern boundary of the allotment because any shift in the medial line occurred by avulsion, and that the Department has erroneously recognized the post-flood medial line as the boundary. Therefore, according to Appellant, Allotment No. 3413 includes wells nos. 168 and 171 for which she seeks past royalties dating back to October 1923, and she seeks "restoration" to the allotment of those lands that lie between the pre-October 1923 medial line and the

⁸ In response to the proposed legislation, attorneys for Toquohty argued that because he had not consented to the wells, and because "the oil was produced while [well No. 168] was on land north of the medial line of the river and part of the allottee's riparian allotment," Toquohty should be paid the entire proceeds, not just the royalties. *See* Letter from Secretary to Senator Frazier, Jan. 26, 1928, *reprinted in* S. Rep. No. 1393, 70th Cong., 2d Sess., at 3 (Jan. 7, 1929) (AR, Tab 13). The Department and Congress did not accept Toquohty's request for the entire proceeds.

⁹ The record does not otherwise contain a title status report or probate decision from Toquohty's estate that would confirm Appellant's ownership interest in Allotment No. 3413.

¹⁰ A "dependent resurvey" is "[a] retracement and reestablishment of the lines of the original survey in their true original positions according to the best available evidence of the positions of the original corners. It includes the restoration of lost corners in accordance with procedures described in the [BLM] Manual of Surveying Instructions." Glossary of BLM Surveying and Mapping Terms at 17 (a copy of relevant pages of the Glossary has been added to the record).

¹¹ A copy of BLM's survey and field notes appear in the record. *See* AR, Tab 22.

post-October 1923 medial line as established by the Supreme Court and by the BLM survey.

The Regional Director informed Appellant “that the southern boundary of your property was fixed by [BLM] when [it] completed a dependent resurvey” that included Allotment No. 3413. April 3 Decision at 1 (AR, Tab 44). He explained that the wells for which she sought past royalties are presently located south of Allotment No. 3413 and, therefore, “it is the finding of the BIA that the Indian landowners [of Allotment No. 3413] have no entitlement to any proceeds from those wells subsequent to October 1923.” *Id.*¹² This appeal followed. Appellant does not dispute the Regional Director’s determination that the two wells are outside the boundaries of Allotment No. 3413 as shown on the 2006 BLM survey. But Appellant continues to maintain that the southern boundary of Allotment No. 3413 did not change following the flood of October 1923, that wells nos. 168 and 171 therefore are and should be recognized as being within the boundaries of Allotment No. 3413, and that she is entitled to all proceeds derived from oil production from these two wells since October 1923.

Discussion

At the outset, we note that both Appellant and the Regional Director variously refer to “two wells” or “three wells” without clearly identifying them. But correspondence from Appellant to BIA shows that the wells in question were nos. 168 and 171. *See, e.g.*, letter from Appellant to BIA, Apr. 5, 2008, at 1 (AR, Tab 33).¹³ As noted, Appellant contended before the Regional Director, and continues to contend before the Board, that wells nos. 168 and 171 are located on land that has always remained within the boundaries of Allotment No. 3413. We conclude that the Regional Director properly relied upon the BLM survey in explaining to Appellant “that the southern boundary [of Allotment No. 3413] was fixed by [BLM].” April 3 Decision at 1 (AR, Tab 44). BLM, not BIA, is charged with determining the boundaries of Federal lands including those lands held in trust by the United States for tribes and individual Indians. And to the extent that

¹² The Regional Director did not identify the wells by name or by number in his April 3 Decision.

¹³ A third well, no. 166, ultimately turned out never to have been on Allotment No. 3413. *See* letter from Secretary to Sen. Lynn Frazier, Jan. 26, 1928, *reprinted in* S. Rep. No. 1393, 70th Cong., 2d Sess., at 4 (Jan. 7, 1929) (AR, Tab 13). In any event, Appellant appeals the decision only to the extent that it pertains to wells nos. 168 and 171. *See* Notice of Appeal at 3 (unnumbered).

Appellant contends that the Regional Director erred by declining to revisit the boundary determination made after the 1923 flood, the Regional Director correctly, if implicitly, recognized that he lacks authority to do so.

As we explained in *Pueblo of Santa Clara v. Acting Southwest Regional Director*, 40 IBIA 251 (2005), it is BLM that possesses the authority on behalf of the Secretary to survey Indian lands and, thus, to determine boundaries. *Id.* at 255 (citing 25 U.S.C. § 176¹⁴). BIA has not been delegated this authority either to determine boundaries of Indian allotments or reservations in the first instance or as a reviewing authority. *Id.* We do not read the Regional Director's April 3 Decision as rendering a decision *per se* as to the boundaries of Allotment No. 3413. Rather, he explained that the boundaries were "fixed by [BLM]," April 3 Decision at 1 (AR, Tab 44), which is a correct statement. This determination by BLM is binding on BIA, and the Regional Director lacks any authority to alter or disregard it. *See Cherokee Nation of Oklahoma v. Muskogee Area Director*, 22 IBIA 240, 247 (1992) ("The Board [holds] that the results of the BLM survey are binding on Departmental officials unless and until the survey is altered by a subsequent BLM survey or by a court of competent jurisdiction.").¹⁵

¹⁴ Section 176 provides:

Whenever it becomes necessary to survey any Indian or other reservations, or any lands, the same shall be surveyed under the direction and control of [BLM], and as nearly as may be in conformity to the rules and regulations under which other public lands are surveyed.

The authority granted to BLM by this provision was transferred to the Secretary in 1950, *see* Reorganization Plan No. 3 of 1950, 64 Stat. 1262, and subsequently delegated back to BLM. *See* 757 Departmental Manual (DM) 2.3C ("[BLM] has the authority to survey all Federal interest lands, trust territories, and Indian lands"); 757 DM 2.7B(3) ("BLM is specifically required to execute cadastral surveys for [BIA] on Indian reservations"). *Pueblo of Santa Clara*, 40 IBIA at 255 & n.7.

¹⁵ To the extent that Appellant seeks to appeal BLM's dependent resurvey or any previous survey in this appeal, we lack jurisdiction. The Board is not a court of general jurisdiction and has not been delegated authority to review decisions by BLM or to review surveys, regardless of whether they affect Indian lands. *See* 43 C.F.R. § 4.1(b)(2); *see generally Hardy v. Midwest Regional Director*, 46 IBIA 47, 58 (2007).

Moreover to the extent that Appellant sought a determination from the Regional Director to “correct” the boundary that the Supreme Court and the Secretary accepted in 1923 as the dividing line between Allotment No. 3413 and Federal land, the Regional Director again properly declined to do so. Certainly, as to the establishment of the southern boundary of Allotment No. 3413 immediately following the flood in October 1923, that boundary was set by the Supreme Court in *Oklahoma*. *Oklahoma*, 265 U.S. at 504, 514. Because Appellant’s father was represented in that litigation by the United States, *see Oklahoma*, 256 U.S. at 84, the boundary accepted by the Supreme Court is res judicata as to Appellant, whose claim is derivative of her father’s, until such time as it can be shown that the medial line has shifted.¹⁶

Therefore, we affirm the Regional Director’s decision to recognize the 2006 BLM survey, which implicitly declined jurisdiction to adjudicate any boundary dispute involving Allotment No. 3413. In so doing, the Regional Director properly recognized that he lacked authority to “correct” the boundary or “restore” lands to Allotment No. 3413.

However, we vacate that portion of the Regional Director’s decision in which he held that Appellant had no entitlement to proceeds from the wells. Neither the Regional Director’s April 3 Decision or his brief provides any legal or factual foundation for exercising authority over, and purporting to adjudicate, Appellant’s claim of entitlement to “proceeds,” nor are we otherwise aware of any authority for the Regional Director to do so. It may be that the Regional Director thought that his conclusion was merely stating the obvious — given his proper refusal to entertain Appellant’s boundary claims — but his statement appears to adjudicate a monetary claim. Therefore, to the extent the Regional Director purported to decide Appellant’s claim for monetary relief, we vacate this portion of his decision.¹⁷

¹⁶ Res judicata is binding on those in privity with the original parties to litigation. *See Cermak v. Acting Minneapolis Area Director*, 32 IBIA 77, 78 (1998) (“Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action’ (emphasis added). *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979)”), *aff’d*, 322 F. Supp. 2d 1009 (D. Minn. 2004), *aff’d*, 478 F.3d 953 (8th Cir. 2007).

¹⁷ As noted earlier, in 1926, Congress designated the proceeds from lands south of the medial line of the Red River, which would include wells nos. 168 and 171, to go into a trust fund for the benefit of the enrolled members of the Kiowa, Comanche, and Apache Tribes (KCA). *See* Act of June 12, 1926, 44 Stat. 740; *see also* Act of March 3, 1927,

(continued...)

Conclusion

For the reasons set forth above, we affirm that portion of the Regional Director's April 3 Decision in which he recognized BLM's survey as setting the official boundaries of Allotment No. 3413, and concomitantly declined to adjudicate any issues relating to the Allotment's boundaries. Because he provides no source of authority or jurisdiction for his decision, we vacate that portion of the Regional Director's decision in which he purports to determine that Appellant is not entitled to proceeds from wells nos. 168 and 171.

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 affirms the Regional Director's April 3, 2009, decision in part and vacates in part.

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

¹⁷(...continued)

44 Stat. 1369 (directing a per capita distribution to recognized KCA tribal members of a portion of the proceeds in the trust fund established under the Act of June 12, 1926). According to an undated document in the AR entitled "General History of Southwest Oklahoma," BLM is responsible for administering the land where wells nos. 168 and 171 are located, and the KCA tribal members continue to benefit from the royalties from oil and gas production certain lands lying between the medial line of the Red River and the south bank of the river. *See* AR, Tab 2, at 14. We do not read the Regional Director's decision, or Appellant's claims, to relate to any per capita distribution to which Appellant may be entitled as a tribal member.