



INTERIOR BOARD OF INDIAN APPEALS

James Robert Burchard v. Acting Billings Area Director, Bureau of Indian Affairs

19 IBIA 254 (03/08/1991)

Reconsideration denied:

19 IBIA 276



United States Department of the Interior

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

JAMES ROBERT BURCHARD

v.

ACTING BILLINGS AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 91-3-A

Decided March 8, 1991

Appeal from a decision concerning the rejection of Indian allotment applications.

Dismissed.

1. Board of Indian Appeals: Jurisdiction--Bureau of Land Management--Indians: Lands: Allotments on the Public Domain: Generally

The Board of Indian Appeals lacks jurisdiction over appeals from decisions of officials of the General Land Office or the Bureau of Land Management concerning Indian allotments on the public domain.

2. Indians: Lands: Allotments on the Public Domain: Generally-- Rules of Practice: Appeals: Timely Filing

An untimely appeal from the rejection of an Indian allotment application must be dismissed.

APPEARANCES: James Robert Burchard, pro se.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant James Robert Burchard seeks review of an August 31, 1990, decision of the Acting Billings Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning the rejection of allotment applications filed by appellant's grandmother. For the reasons discussed below, the Board dismisses this appeal.

Background

In 1913 and 1914, appellant's grandmother, Mary Dubois, a Chippewa Indian, applied for public domain allotments for herself and her minor children, under section 4 of the General Allotment Act of 1887, 24 Stat. 388, as amended by the Act of February 28, 1891, 26 Stat. 794, 25 U.S.C.

334, 336 (1988). ^{1/} The applications were filed with the United States Land Office, Department of the Interior, at Havre, Montana. On December 3, 1914, the applications were rejected by the Assistant Commissioner, General Land Office (GLO), based on the recommendation of the Second Assistant Commissioner of Indian Affairs, who stated that he was unable to certify that the applicants were entitled to receive allotments on the public domain under existing law. On January 2, 1915, Mary Dubois appealed the rejections through her attorney, L. V. Beaulieu. GLO transmitted the appeal to the Commissioner of Indian Affairs for consideration. On February 27, 1915, the Second Assistant Commissioner of Indian Affairs advised the Commissioner of GLO that he had re-examined the record but that his recommendation remained the same. He stated that a report prepared by the Superintendent of the Turtle Mountain School indicated that Mary Dubois and her family

have never affiliated or associated with [the Turtle Mountain Band of Chippewa] Indians in any way, but were born in the State of Montana, many miles away from this reservation, where they have continuously resided.

They have lived in all respects as other citizens of the State of Montana, adopting the modes and customs of white people. Any rights they may have had in the years gone by have been voluntarily forfeited by them by their severance of all ties and connections with any band or tribe of Indians.

They have not complied with the homestead law wherein residence, cultivation and improvements are required to maintain a valid claim upon the land.

They are unaffiliated, unattached, mixed bloods who have long since severed their relationship with any tribe, and who are not

^{1/} Mary Dubois's applications were numbered 024200-024206, Havre Series.

25 U.S.C. § 334 (1988) provides:

“Where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, Act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, or to his or her children, in quantities and manner as provided in this Act for Indians residing upon reservations.”

25 U.S.C. § 336 (1988) provides:

“Where any Indian entitled to allotment under existing laws shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her and to his or her children in manner as provided by law for allotments to Indians residing upon reservations.”

recognized by any tribe of Indians, and their claim to membership now is for the sole purpose of securing land to which they have not the least right.

(Feb. 27, 1915, letter at 2). ^{2/} On August 4, 1915, the Acting Assistant Commissioner, GLO, again rejected the applications and, in a notice to Mary Dubois dated August 10, 1915, the Register and Receiver, Havre District Office, stated:

[Y]ou are advised that under date of Aug. 4, 1915, the Commissioner of the General Land Office advised that [Indian allotment applications 24200 through 24206] were held for rejection, as per copy of letter enclosed.

Thirty days from notice are allowed within which to comply with the requirements of the Commissioner, or to appeal from his decision to the Secretary of the Interior; and upon your failure to take action within the time specified the case will be reported for appropriate action.

By letter dated September 16, 1915, the Register and Receiver advised the Commissioner of GLO: "I have the honor to transmit herewith proof of service of notice and to report no action taken."

Nothing further happened until February 2, 1927, when appellant's father, Charles Burchard, wrote to the Secretary of the Interior inquiring about the application made by Mary Dubois in 1914 on behalf of appellant's mother, Anna May Dubois. Burchard stated that Mary Dubois had indicated she had "never received any registered letter rejecting" the application. The Acting Assistant Commissioner of GLO responded on February 12, 1927:

The records in this office disclose that Mary Dubois filed on March 16, 1914, Indian Allotment application Havre 024203 in behalf of her daughter, Anna May Dubois, for the E¹/₂ SE¹/₄, NW¹/₄ SE¹/₄, NE¹/₄ SW¹/₄, Sec. 14, T. 30 N., R. 16 E., P. M. Montana, under sec. 4 of the act of February 8, 1887 (24 Stat., 388) as amended.

On October 29, 1914, the Commissioner of Indian Affairs informed this office that that office was unable to certify that

^{2/} Although the Second Assistant Commissioner of Indian Affairs did not cite the "existing law" under which he considered Mary Dubois's application, it appears from his mention of the Turtle Mountain Band that he referred to, not only the General Allotment Act, but also the Act of Apr. 21, 1904, 33 Stat. 193, 195, which authorized allotments on the public domain for members of the Turtle Mountain Band who could not secure land on the Turtle Mountain Reservation. Unlike the General Allotment Act public domain allotment provisions, the Turtle Mountain statute did not require settlement.

For a discussion of the Turtle Mountain allotment authority, see Voigt v. Bruce, 44 L.D. 524 (1916).

the applicant was entitled to receive an allotment. The allotment application was held for rejection on December 3, 1914, for the above reason and applicant was allowed 30 days from receipt of notice thereof in which to show cause why it should not be rejected, or to appeal. The registry return receipt card in the case discloses that service was made of the said decision on Mary Dubois through her agent Joe Dubois.

There was no action taken and the application was finally rejected on October 23, 1915.

In the early 1980's, appellant contacted Senator Melcher, apparently alleging that land had been unjustly taken from his family. Senator Melcher requested assistance from the Billings Area Office. On August 12, 1981, the Area Director wrote to the Senator, describing, inter alia, research done by BIA staff in BIA, Bureau of Land Management (BLM), and local public records concerning appellant's allegations. 3/

In 1984, appellant made preparations to file suit against the Department in the United States District Court for the District of Montana. The record includes a complaint, signed by appellant and members of his family, which alleges wrongful deprivation of an allotment. A notation in the record indicates that the complaint was never filed.

On June 29, 1989, appellant wrote to the Secretary of the Interior, concerning the allotment issue and other matters. The letter was referred to the Area Director. Area Office staff met with appellant, reviewed the GLO documents he submitted, conducted further research, and consulted the Aberdeen Area Office, BIA, concerning the tribal affiliation of appellant's ancestors. 4/ In a letter to appellant dated August 31, 1990, the Area Director stated that he believed the denial of an allotment to Mary Dubois had been proper. He gave appellant the right to appeal to the Board.

Appellant's notice of appeal was received by the Board on September 21, 1990. Appellant made several subsequent filings.

3/ From BIA's letter to Senator Melcher, as well as appellant's later allegations, it appears that appellant claimed, not only that his grandmother was unjustly deprived of an allotment, but also that land owned by members of his family was taken from them by the Havre Trading Company and/or others. BIA's research into the land records indicated that the Dubois family never had title to land in the area claimed by appellant.

4/ The Aberdeen Area Director's response attached correspondence concerning appellant's attempts to have his children share in a Pembina Chippewa judgment fund distribution under the Act of Dec. 31, 1982, P.L. 97-403, 96 Stat. 2022. Appellant was apparently included in the distribution as a member of the Little Shell Band of Chippewa Indians; it appears, however, that his children were rejected under section 7 of the act, relating to non-member Pembina Chippewa descendants, because they had less than 1/4 Pembina Chippewa blood. Appellant unsuccessfully appealed his children's exclusion and made several unsuccessful requests for reconsideration.

Discussion and Conclusions

In his several filings with the Board and BIA, appellant alleges a far-reaching conspiracy to deprive his family of land. Most of the alleged conspirators, e.g., the local sheriff, a local attorney, the Havre Trading Company, supposed parties to a conspiracy to foreclose on property owned by his family, have no connection with the Department of the Interior. Of the wrongs alleged by appellant, the only one based on an action taken by a Department of the Interior official is the rejection of appellant's grandmother's allotment applications. Even narrowing this appeal to this one issue, however, the Board finds that it lacks jurisdiction over the appeal for two reasons.

[1] First, the decision appellant is actually challenging is not the Area Director's decision but the 1915 decision made by an official of GLO. This Board does not have jurisdiction over appeals from decisions of GLO officials or those of its successor, BLM. See 43 CFR 4.1.

[2] Second, as further discussed below, the appeal is untimely. Both this Board and the Board of Land Appeals, which hears appeals from BLM decisions, have held that the timely filing of an appeal is jurisdictional and that, absent a timely filing, the Boards have no authority to entertain the appeal. See, e.g., Beck v. Bureau of Indian Affairs, 8 IBIA 211 (1980); George Schultz, 81 IBLA 29 (1984).

The allotment applications at issue here were rejected in 1915. Because of the great length of time that had passed, the Board requested appellant to show why his appeal should not be dismissed in accordance with Baker v. Anadarko Area Director, 17 IBIA 218 (1989). In that case, the Board dismissed as untimely an attempted appeal of a 1959 action taken by the Commissioner of Indian Affairs. Appellant contends that his appeal is distinguishable from Baker because he has been requesting a hearing for over 50 years. There is, however, no evidence in the record that appellant made any inquiries concerning this matter prior to the early 1980's.

Appellant argues that his grandmother never received notice of the August 4, 1915, decision finally rejecting her allotment applications. The administrative record for this appeal includes a copy of an envelope sent by registered mail and addressed to Mary Dubois, Havre, Montana, with a notation at the bottom of the envelope which appears to read "c/o L. V. Beaulieu, Atty." This envelope was returned to GLO by the Post Office, marked "unclaimed." There is no legible date on the record copy of this envelope. The record also includes a copy of a return receipt card signed by Joe Dubois as agent for Mary Dubois, which also lacks a legible date. The record shows that both the December 3, 1914, and August 4, 1915, decisions were sent by registered mail. It appears likely that the unclaimed envelope contained the later decision, because Mr. Beaulieu apparently did not become involved in the matter until he filed the appeal on January 2, 1915.

It is appellant's apparent contention that, because the envelope was unclaimed, his grandmother never received notice of the decision. However,

it has been the longstanding rule of this Department in public lands cases that, when a decision is mailed to a party's last address by registered or certified mail, return receipt requested, constructive service has been accomplished even though delivery was unsuccessful. E.g., J-O'B Operating Co., 97 IBLA 89 (1987); Circular, "Notice of Hearings and Decisions," 5 L.D. 204 (1886). This rule applies in cases where, as here, the decision was returned by the Post Office marked "unclaimed." John H. Blackwood, 89 IBLA 379 (1985); John Oakason, 13 IBLA 99 (1973). In order to defeat application of the rule, an appellant must show error in Post Office procedure amounting to negligence in transmitting the decision. J-O'B Operating Co., 97 IBLA at 92. Appellant has not shown such error. Accordingly, the only conclusion possible is that Mary Dubois received at least constructive notice of the rejection in 1915. 5/

Further, in 1927, appellant's father was informed of the rejection after he inquired about the matter. 6/ Appellant alleges, without, however, any evidence to support his allegation, that his father did not receive the February 12, 1927, GLO response to his inquiry. The Post Office is assumed to have properly performed its duties; in order to rebut this assumption, an appellant must produce probative evidence to the contrary. E.g., Blackwood, 89 IBLA at 382. Appellant has not produced such evidence here. Therefore it must be assumed that the Post Office delivered the GLO letter to appellant's father.

The rules concerning notice of decisions and timely filing of appeals may sometimes appear harsh, particularly when an appellant misses a deadline by only a day or two. In this case, however, 75 years have passed since the challenged decision was issued. Other parties have long since acquired rights in the land appellant's grandmother applied for. Appellant's family can hardly be said to have pursued its claim with diligence. Even if the strict notice and filing rules discussed above did not exist, appellant's appeal would require dismissal on the grounds of laches, because of appellant's family's failure to pursue its claim within a reasonable time.

5/ With respect to the return receipt card in the record, appellant alleges that Joe Dubois had no authority to sign on behalf of Mary Dubois. If the returned envelope contained the 1915 decision, then the return receipt card must have been attached to the 1914 decision. It is clear that Mary Dubois received the 1914 decision, because she appealed it. Even if the return receipt card was attached to the 1915 decision, however, it would not help appellant's argument. Under the rules concerning service of public lands decisions, notice is effective when delivery is made to an applicant's address. E.g., J-O'B Operating Co., supra.

6/ Although the 1927 GLO letter was incomplete in that it did not discuss Mary Dubois's appeal of the Dec. 3, 1914, decision, or the resulting Aug. 4, 1915, decision, it still served to provide appellant's father with notice that the applications had been rejected.

For the reasons discussed, this appeal must be dismissed as untimely.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal is dismissed.

//original signed

Anita Vogt
Administrative Judge

I concur:

//original signed

Kathryn A. Lynn
Chief Administrative Judge