



INTERIOR BOARD OF INDIAN APPEALS

In the Matter of the Will of Frank Eugene Fugate

28 IBIA 279 (11/13/1995)

Reconsideration denied:
29 IBIA 3



United States Department of the Interior

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

IN THE MATTER OF THE WILL OF : Order Docketing and Dismissing
FRANK EUGENE FUGATE : Appeal
:
: Docket No. IBIA 96-11
:
: November 13, 1995

On September 25, 1995, the Superintendent, Osage Agency, Bureau of Indian Affairs (Superintendent), approved the August 10, 1984, last will and testament of Frank Eugene Fugate, an Unallotted Osage (decedent). As relevant to this appeal, the Superintendent found that the remainder interest in decedent's headright should vest in the Osage Tribal Council under decedent's will which devised the remainder interest to "the Osage Nation." The certificate of mailing for the decision states that it was mailed on September 25, 1995.

A notice of appeal was filed with the Superintendent by "the Osage Nation" through Edward Red Eagle, Jr., the Speaker of the Osage National Council. The record was prepared and transmitted to the Board of Indian Appeals (Board) in accordance with Departmental Manual Release No. 2937, which delegated the Secretary's review authority over Osage will determinations to the Board.

The Board views the Osage National Council as being the appellant in this matter. The certificate of service for appellant's notice of appeal states that the notice was mailed on October 24, 1995. Included in the materials sent to the Board is a November 1, 1995, letter from the Superintendent informing appellant that the notice of appeal was untimely and that, therefore, the September 25, 1995, decision stood.

Regulations governing appeals from Osage will determinations are found in 25 CFR 17.14, which states in relevant part:

(b) Any party desiring to appeal from the action of the superintendent shall within 15 days after the date of the mailing of notice of the decision file with the superintendent a notice in writing of [the] intention to appeal to the Secretary, and shall, within 30 days after the mailing date of such notice by the superintendent, perfect [the] appeal * * * by service of the appeal upon the superintendent who will transmit the entire record to the Secretary. If no notice of intention to appeal is given within 15 days, the superintendent's decision will be final.

It is clear that appellant failed to file a timely notice of appeal. Appellant's notice of appeal was mailed on October 24, 1995, and was received by the Superintendent on October 25, 1995. Both dates are more than 15 days from September 25, 1995, the date of mailing of the Superintendent's decision. Therefore, this appeal must be dismissed as being untimely filed.

However, there is a question as to whether the Superintendent has authority to dismiss an untimely appeal, as he purported to do in his November 1, 1995, letter. Parties are required to file notices of appeal with the Superintendent so that he is aware of the filing, and can begin preparation of the record for transmittal to the Board. The Superintendent's responsibilities at this point are ministerial only. Jurisdiction to determine whether a notice of appeal is timely filed lies with the reviewing authority, i.e., the Board.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal from the Osage Agency Superintendent's September 25, 1995, decision is docketed and dismissed as being untimely filed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge