



INTERIOR BOARD OF INDIAN APPEALS

Margie Burkhart Lowe v. Acting Eastern Oklahoma Regional Director,
Bureau of Indian Affairs

48 IBIA 155 (12/12/2008)

Related Board case:
38 IBIA 261



United States Department of the Interior

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INTERIOR BOARD OF INDIAN APPEALS
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|---------------------------|---|--------------------------|
| MARGIE BURKHART LOWE, |) | Order Affirming Decision |
| Appellant, |) | |
| |) | |
| v. |) | |
| |) | Docket No. IBIA 08-128-A |
| ACTING EASTERN OKLAHOMA |) | |
| REGIONAL DIRECTOR, BUREAU |) | |
| OF INDIAN AFFAIRS, |) | |
| Appellee. |) | December 12, 2008 |

Appellant Margie Burkhardt Lowe seeks review by the Board of Indian Appeals (Board) of a July 3, 2008, letter from the Acting Eastern Oklahoma Regional Director, Bureau of Indian Affairs (Regional Director; BIA), in which the Regional Director declined to reconsider an earlier decision, dated October 28, 2002 (2002 Decision). That earlier decision became final for the Department of the Interior (Department) on November 27, 2002, when no appeal was filed with the Board by that date.¹ We summarily affirm the Regional Director’s denial of reconsideration on the grounds that res judicata bars Appellant from seeking review of the final 2002 Decision under the guise of a “request for reconsideration,” and thus the Regional Director did not err in relying on the finality of the 2002 Decision to deny such “reconsideration.”

Background²

The underlying issues in this case apparently arise from a dispute over the use and occupancy of a home and improvements located on Osage tribal land within Grayhorse

¹ In December 2002, Appellant filed an appeal with the Board from the 2002 Decision, which the Board dismissed as untimely. *Burkhart v. Eastern Oklahoma Regional Director*, 38 IBIA 261 (2002).

² Because we summarily affirm BIA’s denial of reconsideration, we have not requested the record from BIA. Therefore, to the extent any background is set forth, it is taken from Appellant’s notice of appeal and from her response to the Board’s order to show cause, and is accepted solely for purposes of this decision.

Indian Village (Village), a village reserve set aside for the benefit of Osage Indians. *See* 25 C.F.R. § 91.3(a). Beginning in 1963, Appellant’s parents lived in a home on property within the Village, described as Lots 6, 7, and 8 of Block 16. Appellant’s father died in 1990, and her mother apparently moved elsewhere in 1995 due to declining health. Appellant contends that in February of 1999, she began to repair the house on the property and make other improvements, but at that time did not notify the Grayhorse Indian Village Committee (Village Committee) of her intent to occupy the property. In September of 1999, the Village Committee declared the property abandoned, and subsequently the Village Committee ordered Appellant to vacate the property and remove all structures, or forfeit any interest in them. Appellant appealed the Village Committee’s decision to the Osage Tribal Council, apparently under 25 C.F.R. § 91.6. She contends the Tribal Council refused to make a decision and, instead, referred her to BIA.

Thereafter, Appellant appealed to the Osage Superintendent and, after being denied relief, appealed to the Regional Director, who issued the 2002 Decision. According to Appellant, the Regional Director concluded that BIA did not have authority to review the Village Committee’s decision to declare the property abandoned. The Regional Director advised Appellant that she could appeal the decision to the Board within 30 days of receipt, but Appellant failed to file a timely appeal. *See Burkhart*, 38 IBIA 261 (dismissing Appellant’s appeal as untimely). Appellant did not file a request for reconsideration of the Board’s decision. *See* 43 C.F.R. § 4.315.

However, according to Appellant, she did file an “Application for Reconsideration” with the Regional Director.³ After Appellant’s “repeated correspondence[,]” Response to Order to Show Cause, at 3 (unnumbered), the Regional Director denied reconsideration by letter dated July 3, 2008. In denying reconsideration, the Regional Director briefly

³ Appellant claims that she filed her application with the Regional Director “as permitted by 43 C.F.R. § 4.315” and “within the statutory time limit for filing an application for reconsideration.” Response to Order to Show Cause, at 2-3 (unnumbered). Appellant does not inform the Board of the actual or approximate date on which she first sought reconsideration from the Regional Director. If she sought reconsideration before or during her appeal to the Board in *Burkhart*, the Regional Director would have been divested of jurisdiction over the request for reconsideration by the appeal. *See, e.g., DuBray v. Great Plains Regional Director*, 48 IBIA 1, 18 n.20 (2008). In any event, section 4.315 governs requests for reconsideration submitted to the Board, which must be filed with the Board within 30 days from the date of a Board decision. Section 4.315 does not apply to or authorize requests for reconsideration by BIA.

recounts the history of Appellant's appeals up to the time of the Board's decision in *Burkhardt* and then states,

[Appellant's] Statement of Reasons dated December 6, 2002, with the Application for Reconsideration provided to this office on June 12, 2007, reiterate the statements considered by the Bureau prior to the Regional Director's decision issued on October 28, 2002. Therefore, the Bureau denies the request for reconsideration of the October 28, 2002 decision.

July 3 Letter at 1.

Appellant filed a timely notice of appeal with the Board. On August 15, 2008, and in response to the appeal, the Board issued an Order to Show Cause why the appeal should not be dismissed on res judicata grounds. Appellant submitted a response.⁴

Discussion

We affirm the Regional Director's denial of reconsideration. The Regional Director concluded in 2002 that BIA lacked jurisdiction to review Appellant's challenge to the Village Committee's decision. When Appellant failed to file a timely appeal with the Board, the 2002 Decision became final. 25 C.F.R. §§ 2.6(b), 2.9(a); *Castillo v. Pacific Regional Director*, 46 IBIA 209, 213 (2008). In her July 3 response to Appellant, the Regional Director recounted this history, and declined to consider the merits of Appellant's dispute with the Village Committee, concluding instead that Appellant's request for reconsideration was barred by the res judicata effect of the 2002 Decision.

Res judicata is the effect of a prior judgment in precluding a litigant from reasserting or relitigating a claim that has already been decided on its merits. *Taylor v. Sturgell*, ___ U.S. ___, ___, 128 S.Ct. 2161, 2171 (2008); *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981). Where a claimant fails to exercise her administrative appeal remedies within the requisite appeal period and an administrative decision thereby becomes final, res judicata can bar future efforts to obtain review of the decision. *Taylor v. Heckler*, 765 F.2d 872, 876 (9th Cir. 1985); *Scammerhorn v. Railroad Retirement Board of United States*, 748 F.2d 1008, 1010 (5th Cir. 1984). "The Board applies the doctrine of res

⁴ The Board did not receive any response directly from Appellant. Instead, Appellant sent her response to the Assistant Secretary – Indian Affairs in Washington, D.C., who then forwarded the document to the Board in Arlington, Virginia, where it was received on September 24, 2008.

judicata to final Department [of the Interior] decisions, *including* those rendered by officials whose decisions were subject to appeal to the Board, but for which no timely review was sought.” *Castillo*, 46 IBIA at 212-13 (emphasis added). When a final decision rests on a jurisdictional determination, as did the 2002 Decision, the res judicata effect is limited to the question of jurisdiction. *See Winslow v. Walters*, 815 F.2d 1114, 1116 (7th Cir. 1987) (“a ruling granting a motion to dismiss for lack of subject matter jurisdiction is not on the merits; its res judicata effect is limited to the question of jurisdiction.”).

Appellant contends, however, that “[t]he doctrine of res judicata should not be invoked where the contesting party has not had a ‘full and fair opportunity to litigate the contested issue.’” Response to Order to Show Cause at 1 (quoting *Montana v. United States*, 440 U.S. 147, 153-54 (1979)). But, Appellant *was* afforded a full and fair opportunity to litigate the jurisdictional issue; she failed to exercise that opportunity. Accurate appeal rights were provided to Appellant by BIA in its 2002 Decision, *Burkhart*, 38 IBIA at 261, which would have afforded Appellant another level of review of BIA’s authority. Through no fault of BIA or this Board, Appellant did not avail herself of her appeal rights within the time for seeking appeal. *Id.* Therefore, pursuant to 25 C.F.R. §§ 2.6(b), 2.9(a), the Regional Director’s 2002 Decision became final for the Department at the end of the appeal period, which Appellant does not dispute. Thus, as a decision on the issue of BIA’s jurisdiction to review the Village Committee’s determination that the property had been abandoned, the decision is entitled to res judicata effect. *See Winslow*, 815 F.2d at 1116. It is this *jurisdictional determination* to which res judicata attached and which barred Appellant from seeking “reconsideration” by the Regional Director.⁵

Appellant cites *Arizona v. California*, 460 U.S. 605, 619 (1983) (*Arizona II*), for the well-established tenet that “res judicata and collateral estoppel do not apply if a party moves the rendering court in the same proceeding to correct or modify its judgment.” *See also, e.g.*, Fed. R. Civ. P. 59(e), 60 (both rules govern reconsideration in the Federal district courts). In *Arizona II*, the Supreme Court, which had original jurisdiction over disputed rights to water from the Colorado River by several abutting states, noted that the Court had expressly retained jurisdiction “for the purpose of any order, direction, or modification of the decree [in *Arizona v. California*, 373 U.S. 546 (1964) (*Arizona I*)]” 460 U.S. at 618. Notwithstanding, the Supreme Court construed its jurisdiction narrowly and declined, based on principles of res judicata, to reconsider its decree in *Arizona I* of the amount of practicably irrigable acreage that served as the basis for calculating the water needs of several tribes along the river. The Court held that “a fundamental precept of

⁵ Whether Appellant’s underlying claim against the Village Committee would be subject to the jurisdiction of another court, e.g., tribal court, we express no opinion.

common-law adjudication is that an issue once determined by a competent court is conclusive.” *Arizona II*, 460 U.S. at 619. The Court pointed out that where parties have been given “a full and fair opportunity to litigate,” finality conserves the resources of parties and the courts, and avoids the risk of inconsistent decisions. *Id.* Notably, the Court observed that “[i]n no context is [the need for finality] more true than with respect to rights in real property.” *Id.* at 620. The Court interpreted its retained jurisdiction to be limited to “adjusting the decree in light of unforeseeable changes in circumstances.” *Id.* at 622; *see also Brown v. Felsen*, 442 U.S. 127, 135 (1979) (in a collection action, a guarantor need not litigate all issues “to the hilt in order to protect . . . against the mere possibility that a debtor might take bankruptcy in the future” and invoke res judicata against the guarantor who seeks to avoid discharge of the debt). Thus, notwithstanding the Court’s general statement that res judicata does not preclude a court from modifying a judgment, e.g., as allowed by the Federal rules, the actual discussion and outcome in *Arizona II* actually undercuts Appellant’s argument.

BIA’s administrative appeal process, 25 C.F.R. Part 2, provides for review of BIA decisions and also governs when the decisions then become final. This process is not onerous, and culminates in a final administrative appeal to the Board pursuant to 43 C.F.R. §§ 4.331-4.332. After the Board renders its final decision, the Board’s regulations afford appellants the opportunity to seek reconsideration from the Board. *See id.* § 4.315. No similar regulation extends a party an express right to seek “reconsideration” by BIA. Assuming that BIA has the discretion to reconsider its decisions, BIA acts well within its discretion when it declines the request of a party to reconsider a decision that has become final where the requesting party has not properly pursued appeal rights. Here, Appellant had an opportunity to appeal BIA’s 2002 Decision to the Board, but failed to do so in a timely manner. Nor has Appellant presented any facts or circumstances to evade the effect of res judicata. Thus, we conclude that the Regional Director was justified in declining to allow Appellant an opportunity to revisit and reopen the 2002 Decision under the guise of “reconsideration,” and we affirm the Regional Director’s denial of reconsideration based on the principles of res judicata.⁶

⁶ Appellant’s notice of appeal also invokes the Board’s authority under 43 C.F.R. § 4.318 to go outside the normal scope of review in order to correct manifest error or injustice. Appellant suggests that this regulation gives the Board the authority to review the merits of her dispute with the Village Committee. We disagree. As we explained in *Hoopa Valley Tribe v. Special Trustee for American Indians*, 44 IBIA 247, 251 (2007), section 4.318 is not an independent grant of jurisdiction to the Board. In addition, we do not construe section 4.318 as allowing parties to avoid the normal effects of res judicata, nor does Appellant suggest otherwise in her response to the Board’s order to show cause.

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 July 3, 2008, denial of reconsideration.

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge