



INTERIOR BOARD OF INDIAN APPEALS

Leonard C. DeFoe, Jr. v. Acting Midwest Regional Director, Bureau of Indian Affairs

58 IBIA 1 (09/04/2013)



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

LEONARD C. DEFOE, JR.,)	Order Affirming Decision
Appellant,)	
)	
v.)	
)	Docket No. IBIA 12-014
ACTING MIDWEST REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	September 4, 2013

Leonard C. DeFoe, Jr. (Appellant), pro se, seeks review by the Board of Indian Appeals (Board) of the August 22, 2011, decision (Decision) of the Acting Midwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA). The Regional Director dismissed Appellant’s appeal from a January 14, 2011, decision by BIA’s Minnesota Agency Acting Superintendent (Superintendent), which determined that land previously owned by Mary Sailor (Sailor) is not held in trust or restricted fee and should thus be removed from the Trust Asset Accounting Management System (TAAMS). The land, listed as Tract No. 405 1001 in TAAMS, is described therein as held in restricted fee by Appellant and by over 100 other individuals who are purported heirs of Sailor.¹ The Regional Director dismissed Appellant’s appeal for failure to allege any legal or factual error in the Superintendent’s decision, and also concluded that BIA’s review of the administrative record did not reveal any legal or factual error made by the Superintendent.

We affirm. Appellant has not met his burden to demonstrate error in the Decision.

Factual and Procedural Background

The Superintendent reviewed the title status of the parcel due to a request by the Fond du Lac Band of Lake Superior Chippewa Indians (Band) to place it in trust for the Band. The Band purchased the one-acre tract, located in Carlton County, Minnesota, and

¹ The administrative record does not contain Sailor’s probate file or any printouts from the TAAMS database showing Appellant as a purported owner of the tract, however, we will assume that Appellant is an heir to Sailor’s trust or restricted property and has standing to appeal.

traces its title to a foreclosure sale in 1927 for nonpayment of taxes.² The tract's legal description is as follows:

That part of the Southeast Quarter of the Northeast Quarter, Section 9, in Township 49 North and Range 17 West, described as follows: Commencing at the southwest corner (for a point of beginning) of that six acre tract lying in the form of a square and being in the northeast corner of said Southeast Quarter of the Northeast Quarter (SE $\frac{1}{4}$ NE $\frac{1}{4}$), thence running south two hundred eight and one half (208 $\frac{1}{2}$) feet, thence at right angle west two hundred eight and one half (208 $\frac{1}{2}$) feet, thence at right angle north two hundred eight and one half (208 $\frac{1}{2}$) feet, thence at right angle east two hundred eight and one half (208 $\frac{1}{2}$) feet to the point of beginning, containing about 1.0 acre of land.

Letter from Regional Director to Board, Dec. 28, 2011, at 1 (Administrative Record (AR) Tab 6).³ In conducting his review of the parcel's title status, the Superintendent apparently discovered that the tract was still listed in TAAMS as Tract No. 405 1001 and owned by Appellant and over 100 other purported heirs of one Mary Sailor.

The Superintendent requested an opinion from the Field Solicitor, Twin Cities Field Office, on whether the Band has clear title to the tract. Letter from Superintendent to Field Solicitor, Feb. 4, 2010 (AR Tab 25). After a review of records provided to her by the Minnesota Agency, the Field Solicitor concluded that the land has been unrestricted since its conveyance by the original allottee under a certificate of competency in 1920, and that there did not appear to be any statute or treaty which would have exempted the property from taxation after that point in time. Accordingly, she recommended that the tract be removed from TAAMS following notice of appeal rights to the purported heirs of Sailor. Letter from Field Solicitor to Regional Director, Nov. 30, 2010, at 1-3 (AR Tab 22).

The Field Solicitor determined that, pursuant to Article 3 of the Treaty of 1854, 10 Stat. 1109, the tract was originally allotted to Joseph Posey (Posey) by restricted deed dated September 26, 1893. AR Tab 22 at 1; *see* Title Records (AR Tab 23, Attach. A &

² It is not entirely clear from the record when the Band acquired title.

³ In addition to the legal description, the Regional Director transmitted to the Board a title status report and a property survey, but those documents pertain to a different property. *See* AR Tab 6, Attach. However, the legal description is consistent with other title records contained in the administrative record, discussed *infra*.

B⁴). But she also found that subsequently, on May 29, 1918, Posey was issued a certificate of competency under authority of the Act of June 25, 1910, 36 Stat. 855, which certificate authorized him to sell the land without the involvement of the Secretary of the Interior (Secretary) and without restrictions against alienation. AR Tab 22 at 1; *see* Title Records (AR Tab 23, Attach. C & D). On August 31, 1920, Posey sold the tract to Louis LaPrairie (LaPrairie), by unrestricted deed. AR Tab 22 at 1; *see* Title Records (AR Tab 23, Attach. E). In the Field Solicitor’s judgment, the events that followed had no effect on the tract’s unrestricted status.

LaPrairie next sold the tract to Sailor on April 14, 1921, also by unrestricted deed. AR Tab 22 at 1; *see* Title Records (AR Tab 23, Attach. F). However, the 1921 deed was re-executed and replaced by another deed from LaPrairie to Sailor dated September 18, 1922. AR Tab 22 at 1; *see* Title Records (AR Tab 23, Attach. G).⁵ The 1922 deed contains a statement by the county treasurer that taxes on the land for the year 1921 were paid. AR Tab 23, Attach. G. Yet, the 1922 deed recites that the title conveyed is subject to a restriction on alienation. *Id.* The deed also contains a statement by the then Superintendent (1922 Superintendent) that the consideration paid for the tract derived “from Indian funds under the control of the Secretary of the Interior, under authority of Act of June 30, 1919,” 41 Stat. 3, 14.⁶ *Id.* And it appears that after Sailor’s death in 1926 and the tax forfeiture of the tract the following year, the Department of the Interior (Department) continuously treated the tract as restricted fee. AR Tab 22 at 1.

The Field Solicitor was unmoved by the 1922 deed and the Department’s subsequent treatment of the tract as restricted. She determined that the Act of June 30, 1919—which was the annual appropriation act for BIA and under which the Secretary was

⁴ The title records located behind AR Tab 23 are numbered 1 through 7 in the Superintendent’s transmittal letter to the Field Solicitor, but the title records themselves are tabbed A through G. We refer to them by their tab letter.

⁵ According to the 1922 deed, the prior deed was “recorded” but “not accepted.” AR Tab 23, Attach. G at 1. The record does not indicate who declined to “accept” the 1921 deed or why.

⁶ The Field Solicitor characterized the deed language as a restriction on alienation “purportedly imposed by the [1922] Superintendent.” AR Tab 22 at 1. The deed itself does not recite that a restriction on alienation is being imposed by the 1922 Superintendent but we assume for purposes of our decision that the Superintendent had a role in drafting the language used by the parties to the transaction, in addition to the statement added to the deed by the Superintendent. The 1922 Superintendent did not purport to “approve” the conveyance.

appropriated funds for the erection or purchase of homes for Chippewa Indians whose homes were destroyed by forest fires in 1918—contained no language specifically authorizing the purchase of land or indicating congressional intent that housing purchased with the funds would be restricted against alienation. AR Tab 22 at 2; *see* 41 Stat. 14.⁷ She considered the lack of such an expression significant because “Congress clearly knew how to express its intent when it intended Indian lands to be restricted and nontaxable.” AR Tab 22 at 2. She noted that elsewhere in the same Act, Congress authorized the allotment of land to Blackfeet Indians in Montana and specified that the land so allotted shall be held by a trust patent and be inalienable and nontaxable. *Id.*; *see* 41 Stat. 16. In her opinion, the insertion of restriction-against-alienation language in the deed and the 1922 Superintendent’s recitation of the source of consideration for the sale by LaPrairie to Sailor “was ineffective to make the land nontaxable and could not have operated to prevent the tax forfeiture of the land.” AR Tab 22 at 2 (citing *Work v. Mummert*, 29 F.2d 393 (8th Cir. 1928)).⁸ And “[b]ased on the facts available from the agency file, [she] found no statute or

⁷ The statute provided in pertinent part,

The Secretary . . . is hereby authorized and directed to withdraw from the Treasury . . . the sum of \$60,000, or so much thereof as may be necessary, of the tribal funds of the Chippewa Indians of Minnesota, and to expend or pay the same, under such rules and regulations as he may prescribe, for the erection or purchase of homes for Chippewa Indians . . . whose homes were destroyed by forest fires *Provided*, That said sum may be used for material and labor for the construction of such houses; for the purchase of portable houses; or to pay for the erection of houses under contract, said contract to be executed or approved by the superintendent, who shall also inspect and approve all work done or houses erected or purchased hereunder before making payment therefor.

41 Stat. 14.

⁸ The decision in *Work* held that

when the Secretary of the Interior purchased, or permitted the purchase by the Indian ward of lands which had formerly been taxable by the state and municipal government, knowing that they had been so taxable, he was but exercising the authority granted to him, and must have realized that he was purchasing, or permitting the Indian to purchase such lands with the taxable burden upon them

29 F.2d at 397.

treaty which would have exempted the Sailor property from taxation” and forfeiture for nonpayment of taxes in 1927. AR Tab 22 at 2.⁹

On January 14, 2011, the Superintendent issued the underlying decision giving rise to Appellant’s appeals to the Regional Director and to the Board. The Superintendent’s decision echoed the Field Solicitor’s legal analysis and concluded that “[a] review of title shows administrative and legal error by including the tract in the trust inventory of the estate of Mary Sailor. . . . [T]his parcel is not in Trust status, and should be removed from [TAAMS]. Thus, the purported heirs of Mary Sailor hold no ownership interest in this parcel.” Letter from Superintendent to Appellant, Jan. 14, 2011, at 1-2 (unnumbered) (AR Tab 20).

The Superintendent notified Appellant of his right to appeal “to the Midwest Regional Office . . . in accordance with the regulations in 25 CFR Part 2” by sending “a copy of your notice of appeal to the Midwest Regional Director.” *Id.* at 2 (unnumbered). The Superintendent also advised Appellant, “If you are not represented by an attorney, you may request assistance from this office in preparation of your appeal.” *Id.*

Appellant submitted a timely notice of appeal (NOA) to the Superintendent, with copies to the Regional Director and the Band, in which he stated that he would separately file a statement of reasons. NOA, Feb. 11, 2011 (AR Tab 20). Appellant also submitted a timely “notice of appeal amendment” to the Superintendent, with copies to the Regional Director and the Band, in which he requested certain documents from the administrative record, an extension of time to file a statement of reasons, and “proper assistance in the preparation of this appeal.” NOA Amendment, Feb. 16, 2011, at 1-2 (AR Tab 19).

The Regional Director denied Appellant’s request for an extension of time to file his statement of reasons and instructed Appellant to certify that copies of Appellant’s appeal documents were served on all interested parties, including potential landowners. Letter from Regional Director to Appellant, Mar. 8, 2011 (AR Tab 17). The Regional Director’s letter purported to transmit a list of all individuals identified previously as owners of the subject tract but said nothing in response to Appellant’s request for assistance in preparing his appeal. *See id.* On April 11, 2011, Appellant submitted a certificate of service that

⁹ The Field Solicitor noted that a subsequent Act of June 20, 1936, codified as amended at 25 U.S.C. § 412a, made restricted Indian lands purchased out of trust or restricted funds of individual Indians nontaxable. *See* AR Tab 22 at 2 n.1. However, even assuming that the 1919 appropriations were trust or restricted funds, the 1936 Act was not available to Sailor or her heirs because the property was sold before the 1936 statute was enacted.

showed he had served his NOA and NOA Amendment on the Superintendent, the Regional Director, and the Band. Certificate of Service, Apr. 11, 2011 (AR Tab 16).

On June 1, 2011, the Acting Regional Director sent Appellant a letter notifying him that, in light of his request for certain documents from the administrative record, and BIA's transmittal of those documents on March 10, 2011, Appellant was being granted a 30-day extension in which to file a statement of reasons. Letter from Acting Regional Director to Appellant, June 1, 2011 (AR Tab 15).

Appellant responded to the Acting Regional Director's letter by way of a "notice of appeal response." NOA Response, July 12, 2011 (AR Tab 14). Appellant acknowledged his extension to file a statement of reasons but contended that BIA had committed clear error. *See id.* at 1 ("it's apparent and clear . . . the facts and issues in this matter are being confused and twisted"). He also contended that although the Superintendent's decision letter offered assistance in the preparation of his appeal, and although Appellant requested assistance, BIA had been "*silent regarding consideration*" of his request. *Id.* at 1-2. Appellant again "request[ed] assistance . . . in preparation of [his] appeal in this matter," and asserted that it would be a "mis[]carriage of justice" and "contrary to the United States' fundamental trust responsibilities" for BIA to disregard Appellant's request. *Id.* at 2. Appellant also informed BIA that he had never received the list of individuals previously identified as owners of the tract. Certificate of Service, July 13, 2011 (AR Tab 14).

The Regional Director next issued the August 22, 2011, Decision from which Appellant appeals to the Board. The Regional Director stated that, "[a]fter review of the administrative record, and because you have not alleged that the Agency made a legal or factual error in [its] decision, we are dismissing your appeal. Our review of the administrative record does not reveal any factual or legal error(s) made by the Agency in making their decision." Decision at 1; *see id.* at 2.

Appellant filed with the Board a timely notice of appeal and an opening brief. Included with Appellant's opening brief was a copy of a request that he sent to the Midwest Regional Office for BIA's assistance "in service of copies to all known heir[s] of the enclosed supporting documents in this matter," and for copies of certain documents in the administrative record. Appellant's Request to Midwest Regional Office, Mar. 9, 2012, at 1.¹⁰ The Board's docket attorney contacted BIA realty staff on March 27, 2012, to ensure

¹⁰ Appellant also submitted with his opening brief, without explanation, documents concerning the degree of Indian blood of himself and his uncle. Appellant did not explain how they are relevant to Appellant's appeal and, finding no relevance, we consider them no further.

that BIA would assist Appellant with serving his opening brief and that Appellant would receive the documents that he requested in his March 9 request. Report of Contact, Mar. 27, 2012. BIA subsequently informed the Board that it transmitted the administrative record documents to Appellant on April 3, 2012. Letter from Regional Director to Appellant, Apr. 3, 2012. The Board received an answer brief from the Regional Director on April 5, 2012. The Board did not receive a reply brief from Appellant.

Discussion

I. Standard of Review

An appellant bears the burden of proving that BIA's decision was in error or not supported by substantial evidence. *Tuttle v. Acting Western Regional Director*, 56 IBIA 53, 59 (2012); *Brinkoetter v. Midwest Regional Director*, 52 IBIA 59, 61 (2010). That burden is not met with simple disagreement or bare assertions concerning BIA's decision. *Thurston County, Nebraska v. Acting Great Plains Regional Director*, 56 IBIA 62, 66 (2012); 43 C.F.R. § 4.322(a) ("Each appeal must contain a written statement of the errors of fact and law upon which the appeal is based."). Thus, Appellant's burden on appeal is to show that BIA committed a specific error(s) of law or of material facts, failed to consider evidence in the record, or otherwise abused its discretion. *Koontz v. Northwest Regional Director*, 55 IBIA 177, 186 (2012); *Park v. Eastern Oklahoma Regional Director*, 54 IBIA 26, 30 (2011).

The Board reviews questions of law and the sufficiency of evidence *de novo*. *Tuttle*, 56 IBIA at 59; *Brinkoetter*, 52 IBIA at 61. We will uphold the decision if it comports with the law, is supported by substantial evidence, and is not arbitrary or capricious. *Koontz*, 55 IBIA at 186. Unless manifest error or injustice is shown, the Board's scope of review is limited to reviewing those issues that were before the BIA official on review. 43 C.F.R. § 4.318. Therefore, we ordinarily will not consider allegations of error or evidence raised for the first time on appeal. *Koontz*, 55 IBIA at 186.

II. Analysis

We affirm the Regional Director's Decision. Rather than repeat the Field Solicitor's analysis upon which the Superintendent and the Regional Director based their decisions, we summarily concur with her analysis as described *supra*.¹¹

¹¹ Furthermore, as we recently observed in *Chee v. Navajo Regional Director*, 57 IBIA 54, 63 n.17 (2013),

(continued...)

Appellant challenges the Decision on several grounds, none of which is sufficient to meet his burden of proving error in BIA's decision. As we understand Appellant's allegations, he argues that it is so "apparent and clear . . . [that] the facts and issues in this matter are being confused and twisted" that a statement of reasons was and is not necessary to meet his burden on appeal. *See* Opening Br. at 3. We reject this argument because it again fails to identify specific error in BIA's decision, *see, e.g., Koontz*, 55 IBIA at 186, and is legally erroneous. In the proceedings before the Regional Director, 25 C.F.R. § 2.10(a) required that "[a] statement of reasons *shall* be filed by the appellant in *every* appeal, and shall be accompanied by or otherwise incorporate all supporting documents." (Emphases added.) And in order to carry the burden of proof on appeal to the Board, an appellant must identify some error in the decision being appealed, whether in a notice of appeal, statement of reasons, or an opening brief. *See* 43 C.F.R. §§ 4.332(a)(2), 4.311(a); *see also Wolfe v. Acting Eastern Regional Director*, 45 IBIA 95, 97a (2007). Bare allegations will not suffice. *Scrudder v. Southern Plains Regional Director*, 56 IBIA 206, 207 (2013).¹² Moreover, it is evident that the Regional Director considered all of Appellant's submissions despite Appellant's failure to identify any of them as his statement of reasons, and dismissed his appeal after concluding that "none of [Appellant's] submissions support a reversal or a remand" of the Superintendent's decision. *See* Decision at 2; 25 C.F.R. § 2.10(d) (whether filed with the NOA or separately, the "statement of reasons" should be clearly labeled as such).

(...continued)

BIA is statutorily "empowered and directed" to maintain "a record of every deed executed by any Indian, his heirs, representatives, or assigns, which may require the approval of . . . the Secretary of the Interior." 25 U.S.C. § 5. And, as both the legal owner of record and the recorder of beneficial Indian land titles, BIA has the ability to correct its own errors with respect to land titles. *See, e.g.,* 25 C.F.R. § 150.7.

Thus, after the Superintendent's discovery of error, and the concurrence of the Field Solicitor, BIA was within its authority to remove Tract No. 405 1001 from TAAMS. Of course, in doing so, BIA must give notice to all interested parties and provide appeal rights. *See* 25 C.F.R. § 2.7.

¹² Of course, where manifest error is evident the Board has the authority to correct the error, even if not identified by an appellant. *See* 43 C.F.R. § 4.318. But we find no error in the Decision, manifest or otherwise. In any event, the discretionary authority of the Board to correct manifest error is not intended to relieve appellants of the primary responsibility to identify the specific alleged errors for which they seek Board review.

Next, Appellant argues that the Superintendent's decision instructed Appellant to appeal to the Regional Director even though 25 C.F.R. § 2.4(a) provides for appeal to an "Area Director." *See* Opening Br. at 2. We reject this argument because Appellant failed to present it to the Regional Director and we find insufficient cause to depart from our rule against considering arguments raised for the first time on appeal. *See, e.g., Koontz*, 55 IBIA at 186.¹³

Finally, Appellant argues that it was manifestly unjust, legally erroneous, biased, and a breach of trust responsibility for BIA to disregard Appellant's requests for assistance pursuant to 25 C.F.R. § 2.9(b) to prepare his appeal. *See* Opening Br. at 3-4. He also argues that BIA failed to provide him with a list of individuals identified previously as owners of the tract, which prevented Appellant from serving copies of his appeal documents on interested parties as was directed by BIA. *See* Opening Br. at 1-2; *see also* 25 C.F.R. §§ 2.9(a) & (c)(6), 2.12(a) (requirements for serving appeal documents on interested parties).

With respect to these final arguments, we agree that BIA committed procedural error, but we conclude that the error is not grounds to vacate BIA's decision. BIA's appeal regulations provide that "[w]hen the appellant is an Indian or Indian tribe not represented by counsel, the official who issued the decision appealed shall, upon request of the appellant, render such assistance as is appropriate in the preparation of the appeal." 25 C.F.R. § 2.9(b); *see also* 43 C.F.R. § 4.332(c) (corresponding provision in the Board's appeal regulations). Thus, when Appellant requested BIA's assistance in the preparation of his appeal, BIA was required to provide him assistance. But the assistance that would have been appropriate for BIA to provide was limited. Pursuant to 25 C.F.R. § 2.12(c), the official with whom the appeal is filed "shall . . . personally or by mail serve a copy of all appeal documents on the official who will decide the appeal and on each interested party known to the official making such service." *See also* 43 C.F.R. § 4.333(a) (corresponding Board regulation). We have long held that "these regulations require BIA to serve appeal documents and allow access to Government records and documents, but do not require BIA to obtain an attorney for the appellant, or to act as the appellant's attorney by preparing the appellant's appeal documents or otherwise advising the appellant on the merits of the appeal." *Evans v. Sacramento Area Director*, 28 IBIA 124, 127 (1995); *see also Toledo v. Acting Western Regional Director*, 55 IBIA 276, 277 n.3 (2012); *Roach v. Muskogee*

¹³ We note that the previously designated "Area Directors" are now (and were at the time of Appellant's appeal from the Superintendent) designated Regional Directors, and that Appellant suffered no prejudice from any confusion caused by the Superintendent's instruction because he properly filed his NOA with the Superintendent and copied the Regional Director. *See* 25 C.F.R. § 2.9(a) (requirements for filing an NOA).

Area Director, 20 IBIA 244 (1991). Indeed, imposing on BIA an obligation to advise an appellant on the merits of his appeal may well raise ethical issues. See *One Hundred and Ninety-One Navajo Landowners v. Navajo Regional Director*, 57 IBIA 271, 290 (2013).

Thus, we conclude that BIA procedurally erred when it failed to reply to Appellant's requests for assistance and when it did not assist him with service of appeal documents. However, we conclude that BIA's procedural error was not prejudicial to Appellant because Appellant's appeal was not dismissed by BIA for any failure to complete service of his appeal documents on interested parties and, to the extent that Appellant desired BIA's assistance with preparing his arguments for appeal, BIA was not required to satisfy such a request. And because Appellant failed to meet his burden to demonstrate error in BIA's decision itself—and we find none—we affirm the Decision.

Conclusion

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 August 22, 2011, Decision.

I concur:

// original signed
Thomas A. Blaser
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge