



INTERIOR BOARD OF INDIAN APPEALS

Todd M. McCabe v. Acting Rocky Mountain Regional Director, Bureau of Indian Affairs

60 IBIA 85 (03/09/2015)



# 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

TODD M. MCCABE,	)	Order Affirming Decision
Appellant,	)	
	)	
v.	)	Docket No. IBIA 12-121
	)	
ACTING ROCKY MOUNTAIN	)	
REGIONAL DIRECTOR BUREAU OF	)	
INDIAN AFFAIRS,	)	
Appellee.	)	March 9, 2015

Todd M. McCabe (Appellant) appealed to the Board of Indian Appeals (Board) from a May 16, 2012, decision of the Acting Rocky Mountain Regional Director (Regional Director), Bureau of Indian Affairs (BIA), dismissing as untimely Appellant’s appeal from a demand for payment of charges assessed against Appellant for trespass. Appellant contends that his appeal to the Regional Director was timely. We affirm the Regional Director’s dismissal of Appellant’s appeal.

## Background

Appellant has leased farm land on the Fort Peck Reservation, including Tribal Tract T902 (Tract T902) owned by the Fort Peck Tribes, for many years.<sup>1</sup> See Notice of Appeal to Regional Director, Mar. 9, 2012 at 1 (unnumbered) (AR Tab 5) (stating that his family

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<sup>1</sup> An error in the land description used in some of the earlier communications in the record was corrected by the Fort Peck Agency in a letter to Appellant dated September 13, 2011. The correct land description for T902 is: SE<sup>1</sup>/<sub>4</sub>, S<sup>1</sup>/<sub>2</sub> NE<sup>1</sup>/<sub>4</sub>, S<sup>1</sup>/<sub>2</sub> N<sup>1</sup>/<sub>2</sub> NE<sup>1</sup>/<sub>4</sub>, S<sup>1</sup>/<sub>2</sub> N<sup>1</sup>/<sub>2</sub> N<sup>1</sup>/<sub>2</sub> NE<sup>1</sup>/<sub>4</sub>, Section 33-T33N-R52E. Letter from Superintendent to Appellant, Sept. 13, 2011 (Administrative Record (AR) Tab 17) (correcting legal description in initial trespass notice of Sept. 9, 2011). The error was repeated, however, in the Regional Director’s May 16, 2012, decision dismissing Appellant’s appeal of the trespass charges as untimely. See Letter from Regional Director to Appellant, at 1 (unnumbered) (Decision) (AR Tab 3). The location of Tract T902 is not disputed by the parties and any error in land descriptions is not germane to our decision on this appeal.

has leased the tract “for the past 40 years”); *see also* Note to File, Sept. 15, 2011 (AR Tab 15) (confirming that Appellant “[w]as the prior lessee for many years”). In early November 2010, Appellant was notified that he was once again the successful bidder for Tract T902 and that he had 20 days to execute the proposed lease and return it for approval, along with the lease fee. Letter from BIA to Appellant, Nov. 3, 2010 (AR Tab 21) (“The enclosed lease must be submitted . . . for approval within Twenty (20) calendar days . . . or the lease will be dropped and no more consideration will be given it”).

Appellant did not return the proposed lease and lease fee within the designated time and, on December 14, 2010, Appellant was informed by certified mail that the proposed lease was dropped from BIA’s active files and that the tract “[would] be available to the public for lease.” Letter from Fort Peck Agency Realty Specialist to Appellant (AR Tab 21). Appellant’s wife signed the return receipt for this letter on December 16, 2010. Email from Sheryl Berger, Fort Peck Agency, to Anita Bauer, Fort Peck Agency, Sept. 6, 2011 (AR Tab 21); *see also* Copy of Certified Mail Receipt (AR Tab 21). The tract, consisting of 300 acres of land of which up to 286 acres may be cultivated, was subsequently leased by Brad and Chanel Johnson (the Johnsons) for a 5 year term, beginning January 2011. *See* Johnson Lease of Allotment T902, Feb. 24, 2011 (AR Tab 26).

On August 15, 2011, Brad Johnson informed BIA by telephone that Appellant had returned to the tract and harvested the crop, which Johnson confirmed had been seeded by Appellant in the spring after the Johnsons had acquired the lease. Note to File (AR Tab 25). At BIA’s request, *see* Note to File, Aug. 22, 2011 (AR Tab 23), the Johnsons submitted a letter recording the events surrounding the leasing of Tract T902 and the subsequent trespass. Letter from the Johnsons to Superintendent, undated (stamped “received” on Aug. 24, 2011) (AR Tab 22). The Johnsons stated therein that, when they noticed in May 2011 that the field had been seeded, Brad Johnson called Appellant and offered to pay for the seed and custom seeding, but that Appellant “just hung up the phone.” *Id.* at 1 (unnumbered). The Johnsons also noted that they had secured a bond and purchased crop insurance, in addition to paying for the lease. *Id.* BIA conducted a field inspection of Tract T902 and confirmed that the crop had been cut. Field Inspection Report, Aug. 17, 2011 (AR Tab 24).

BIA issued a notice of trespass to Appellant on September 9, 2011. Letter from Superintendent to Appellant (Trespass Notice) (AR Tab 18). In this notice, BIA informed Appellant that by seeding and harvesting the crop on Tract T902, Appellant had committed

trespass, as defined in 25 C.F.R. § 166.800.<sup>2</sup> *Id.* at 1 (unnumbered). BIA informed Appellant that he was required to “reimburs[e] Mr. Brad Johnson for his payment of the 2011 lease rental, the 2011 Federal Crop Insurance premium on this parcel, as well as the value of the pea crop [Appellant] illegally removed.” *Id.* Appellant was advised to contact the Fort Peck Agency within 10 days to discuss arrangements for resolving the trespass. *Id.* Appellant called BIA as advised, thereby avoiding additional charges including a penalty of double the value of the crop removed which may be imposed pursuant to 25 C.F.R. § 166.812(a). *See* AR Tab 15 (confirming that by calling BIA, Appellant had “satisfied the corrective action requirement in his initial trespass letter” and “avoid[ed] being penalized double”).

After completing the crop assessment and determining the amount paid by the Johnsons for the Federal Crop Insurance premium, BIA submitted an invoice to Appellant for trespass charges “in the amount of \$80,924.50, covering the reimbursements owed Mr. Johnson as outlined in [the] trespass notice.” Letter from Superintendent to Appellant, Sept. 13, 2011 at 1 (unnumbered) (AR Tab 16). In a worksheet included with the invoice, BIA detailed that the \$80,924.50 assessment was derived from a lease rental of \$8,611.50, a Federal Crop Insurance premium of \$1,528.00, and an estimated crop value of \$70,785.00. *Id.* (Breakdown of Trespass Damages).<sup>3</sup> Appellant was provided with correct appeal instructions, should he wish to dispute the imposition of trespass charges or the amount of the invoice. *Id.* at 2 (unnumbered). He was also informed that, “If no appeal is timely

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<sup>2</sup> 25 C.F.R. § 166.800 provides that “trespass is any unauthorized occupancy, use of, or action on Indian agricultural lands. These provisions also apply to Indian agricultural land managed under an agricultural lease or permit under part 162 of this title.”

<sup>3</sup> We note that the proceeds recovered from Appellant as a result of his trespass are to be distributed in accordance with 25 C.F.R. § 166.818. This regulation provides that proceeds may be distributed to:

- (1) Repair damages of the Indian agricultural land and property;
- (2) Reimburse the affected parties, including the permittee for loss due to the trespass, as negotiated and provided in the permit; and
- (3) Reimburse for costs associated with the enforcement of this subpart.

25 C.F.R. § 166.818(b). The regulations further provide that “[i]f any money is left over after the distribution of the proceeds described in paragraph (b) of this section, we will return it to the trespasser . . . .” 25 C.F.R. § 166.818(c). Therefore, any proceeds remaining after payment of interest and penalties, repairing any damage to Tract T902, reimbursing the Johnsons for their losses (including the 2011 lease rental, the 2011 Federal Crop Insurance premium, and the estimated lost agricultural profits), and reimbursing BIA for costs associated with enforcement, should be returned to Appellant.

filed, this decision will become final for the Department of the Interior at the expiration of the appeal period. No extension of time may be granted for filing a Notice of Appeal.” *Id.*

Following a payment due reminder, *see* Letter from Superintendent to Appellant, Sept. 20, 2011 (AR Tab 13), and a second request for payment which also included a notice of appeal rights and procedure, *see* Letter from Superintendent to Appellant, Nov. 30, 2011 (AR Tab 10), the Superintendent sent Appellant a demand for payment of the initial \$80,924.50 plus interest and penalties, for a new total of \$83,588.43. Demand for Payment, Feb. 1, 2012, at 1-2 (unnumbered) (AR Tab 9). The Superintendent again afforded Appellant 30 days from Appellant’s receipt of the Demand for Payment to appeal the trespass charges, interest and penalties. *Id.* at 2. The return receipt confirms that Appellant received the Demand for Payment on February 8, 2012. Copy of Certified Mail Return Receipt (AR Tab 9). After several conversations with BIA, Appellant filed an appeal postmarked March 10, 2012. Notice of Appeal to Regional Director at 9 (unnumbered). In his appeal, Appellant stated that he was not aware that BIA had not awarded him the lease on Allotment T902 until after he “seeded, sprayed, rolled, and presprayed” the acreage. *Id.* at 1 (unnumbered). He stated that while he acknowledged his fault and was “willing to pay the price of the lease and any penalties and interest accrued,” he could not pay the total crop value without any reduction for his expenses in producing the crop. *Id.* at 2 (unnumbered).

On May 16, 2012, the Regional Director issued his decision dismissing Appellant’s appeal. Decision at 1-2 (unnumbered). The Regional Director stated that, pursuant to 25 C.F.R. § 2.9(a), an appeal is treated as filed on the date that it is postmarked. *Id.* Because Appellant failed to file an appeal within the 30 day appeal period, ending March 9, 2012, the Regional Director considered the Supervisor’s decision to be final and dismissed Appellant’s appeal. *Id.* On June 13, 2012, Appellant filed a notice of appeal and statement of reasons with the Board. Notice of Appeal and Statement of Reasons (Appeal) (AR Tab 2). Appellant has filed no further briefs or documents with the Board.

### **Discussion**

In his appeal of the Regional Director’s Decision, Appellant argues that his appeal should not be treated as untimely because he placed it in the mail prior to the last advertised pickup on March 9, 2012. *See* Appeal at 1-2; *see also id.*, Affidavit of Appellant, June 12, 2012, at 1-2 (stating that Appellant deposited his appeal in the mailbox between 3:30 p.m. and 4:00 p.m. on March 9, 2012, and that the last advertised collection time is 4:45 p.m.). Appellant cites to Montana state law, which in turn references the legal encyclopedia, American Jurisprudence, as authority for his position that “mail is deemed delivered on the day that the envelope is placed in the mailbox.” Appeal at 2.

While the Board may, in certain circumstances, look to state law as a convenient source of general common law principles where there is no applicable Federal law, regulation, or cases, *see, e.g., Franks v. Acting Deputy Assistant Secretary-Indian Affairs (Operations)*, 13 IBIA 231, 235 (1985) (quoting *Walch Logging Co., Inc. v. Assistant Area Director (Economic Development), Portland Area Office*, 11 IBIA 85, 98 (1983) in reference to general contract law), that is not the situation here. Federal regulations governing appeal of a decision of a BIA official provide that the notice of appeal must be filed within 30 days of Appellant's receipt of the notice of administrative action and that "[a] notice of appeal *that is filed by mail* is considered filed on the date that it is *postmarked*." 25 C.F.R. § 2.9 (emphasis added).<sup>4</sup> "The burden of proof of timely filing is on the appellant" and notices of appeal not timely filed "shall not be considered, and the decision involved shall be considered final." *Id.* It was therefore Appellant's burden, when he filed the appeal by mail, to ensure that the appeal was timely *postmarked*. Appellant failed to meet this burden.<sup>5</sup>

### 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 May 16, 2012, decision.

I concur:

                    // original signed  
Robert Hall  
Administrative Judge

                    //original signed  
Steven K. Linscheid  
Chief Administrative Judge

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<sup>4</sup> The effective date of filing of a notice of appeal or other document with the Board is defined under the applicable regulations as "the date of mailing or the date of personal delivery." 43 C.F.R. § 4.310. Despite the difference in wording, the Board has also found the postmark to be dispositive in determining the timeliness of filing, for documents filed by mail. *See, e.g., Blackdeer v. Midwest Regional Director*, 35 IBIA 92, 92 (2000).

<sup>5</sup> We note that in the case cited by Appellant, the court found that a letter from the Postmaster confirming that the sender brought the letter to the post office on the date indicated, although the envelope did not receive a postmark until the following day, provided "uncontroverted evidence" that the sender had timely mailed the letter. *Johansen v. Montana*, 983 P.2d 962, ¶ 16 (Mont. 1999). Appellant has produced no similar evidence from a U.S. Postal Service employee, and thus we need not address whether such evidence would satisfy the "postmark" language in BIA's regulations.