

MARGARET CHICHARELLO, ET AL.,

BUREAU OF INDIAN AFFAIRS

IBLA 73-26 Decided January 23, 1973

Appeal from the decision of the Bureau of Land Management Acting State Director for New Mexico dismissing appellants' protests of the acceptance of recreation & public purposes application NM 14643 and public sale application NM 4503.

Affirmed.

Rules of Practice: Appeals: Dismissal

A notice of appeal to the Board of Land Appeals will be dismissed where such notice is not transmitted within the 30-day period following service of the decision from which an appeal is being taken.

Rules of Practice: Appeals: Statement of Reasons

An appeal to the Board of Land Appeals is subject to summary dismissal when appellant fails to file a statement of reasons in support thereof within the time required.

Attorneys—Practice Before the Department: Persons Qualified to Practice

A field official of the Bureau of Indian Affairs, not otherwise shown to be qualified, is not eligible to practice before the Department by representing individual Indians in appeals to the Board of Land Appeals, notwithstanding that appellants reside within the area administered by the Bureau of Indian Affairs office wherein he is employed.

Indian Allotments on Public Domain: Generally

Where official records show that an Indian allotment application was rejected and the subsequent course of

events show that all parties have treated the subject lands as public domain land, an objection to the acceptance of a public sale application and a recreation and public purposes application for separate parts of the land, alleging that the land is Indian land, will be rejected.

APPEARANCES: Clifford J. Hofmann, Esq., and Donald Klein, Jr., Esq., of Navajo Legal Aid and Defender Service, Window Rock, Arizona for appellants Margaret Chicharello, et al.; Edward O. Plummer, Superintendent, Eastern Navajo Agency, Bureau of Indian Affairs, for appellant Bureau of Indian Affairs; Louis E. DePauli, Esq., of Lebeck, DePauli & Rich, Gallup, New Mexico, for the appellee.

OPINION BY MR. HENRIQUES

On June 13, 1972, the Acting State Director for New Mexico, Bureau of Land Management, denied appellants' protests of the acceptance of the city of Gallup's recreation and public purchase application for the NE 1/4 SW 1/4, N 1/2 SE 1/4, section 28, T. 15 N., R. 19 W., N.M.P.M. This decision also dismissed the protest as it might relate to the public sale of the SE 1/4 SE 1/4 in the same section.

Appellant Bureau of Indian Affairs, Eastern Navajo Agency, filed a notice of appeal dated June 23, 1972, which was received on June 27, 1972. No statement of reasons for the appeal has since been filed, though the applicable regulations state that:

If the notice of appeal did not include a statement of the reasons for the appeal, such a statement must be filed with the Board * * * within 30 days after the notice of appeal is filed. Failure to file this statement of reasons within the time required will subject the appeal to summary dismissal * * * 43 CFR 4.412 (1972).

The notice of appeal of appellants Margaret Chicharello, et al. represented by the Navajo Legal Aid and Defender Service, was not received until July 24, 1972. In this notice, appellants' attorney contended that the decision had been rendered on June 19, and was "received by counsel for the claimants on or about June 30, 1972." The record, however, clearly shows that appellants' attorney signed the return receipt card, which had accompanied a copy of the decision,

on June 16. Furthermore, the receipt card itself was postmarked from Window Rock, Arizona, on June 16. Thus, under 43 CFR 4.411 appellants had 30 days in which to file a notice of appeal, starting from June 16. The failure to timely file a notice of appeal necessitates a summary dismissal unless the notice is filed within the 10-day grace period and it is shown that the document "was transmitted or probably transmitted to the office in which the filing is required before the end of the period in which it was required to be filed." 43 CFR 4.401(a).

By order dated September 14, 1972, appellants were given five days (to commence from the receipt of the order) to make the showing required by 43 CFR 4.401(a). Receipt of this order was acknowledged by the attorneys for the Navajo Legal Aid and Defender Service on September 18, 1972. No explanation, however, was forthcoming.

On September 22, the Bureau of Indian Affairs (to whom a copy of the above order had also been sent) entered an answer in which it alleged: first, that a proper notice of appeal had been transmitted on June 23, 1972; second, that "as representatives of the United States and acting in that capacity" under 28 U.S.C. § 2415(c) no time limit can be placed upon a commencement of an action; and third, that there had occurred various personal problems both in the Bureau of Indian Affairs and in the Navajo Legal Aid and Defender Service, the relevance of which to the question of timely filing is never explained.

What is obvious from this letter is that the Bureau of Indian Affairs is attempting to portray the Navajo Legal Aid and Defender Service as merely a co-counsel to its appeal, and use the notice of appeal timely filed by the Bureau of Indian Affairs to fulfill the notice requirement for the Navajo Legal Aid and Defender Service. Thus, the letter from the Superintendent of the Eastern Navajo Agency states that "With the concurrence of this office, the Navajo Legal Aid and Defender Service, a charitable institution supported by the Navajo Nation, agreed to assist this office in the presentation of this case." The record discloses, however, that both appellants and appellees have treated the Bureau of Indian Affairs and the Navajo Legal Aid and Defender Service as two separate entities and further, that as a matter of law, they must be so deemed if the appeal of the Bureau of Indian Affairs is to have any vitality.

In order to develop these points, it is necessary to examine the history of this case. The subject lands have, for more than 50 years, been considered to be lands administered by the Bureau

of Land Management. During recent years the primary use of the lands has been grazing under § 15 of the Taylor Grazing Act to the Navajo Tribe. On January 23, 1968, John L. and Angelo Cresto, adjacent land owners, petitioned the BLM State Office to reclassify the subject lands so as to make them available for public sale under 43 U.S.C. § 1171 (1970). During the course of the investigations which resulted from this application it came to the State Director's attention that there was an Indian dwelling on the land which evidenced signs of intermittent usage. On November 19, 1969, the Crestos were informed that the McKinley Board of County Commissioners had applied for the N 1/2 SE 1/4 SE 1/4 for use as a sanitary land fill and the S 1/2 SE 1/4 SE 1/4 for public recreational purposes. The public sale applicants were further informed that the city of Gallup had expressed an interest in the subject lands. On July 9, 1970, the McKinley Board of County Commissioners decided to withdraw their two applications. On February 15, 1971, the city of Gallup requested permission to purchase the NW 1/4 SE 1/4, E 1/2 SE 1/4, and NE 1/4 SW 1/4 of section 28 - the subject lands in their entirety.

On March 2, 1971, a realty specialist for the New Mexico State Office, BLM, completed the land report which noted, inter alia, that the subject lands were in the public domain. This report recommended the disposal of the lands. On March 9, 1971, a notice of proposed classification of the lands for public sale was filed on behalf of the State Director. Copies were sent to both the Navajo Tribe, care of the Resources Division at Window Rock, Arizona, and the Superintendent of the Eastern Navajo Agency. Subsequently, their return receipt cards were received by the BLM. On March 21, 1971, McKinley Board of County Commissioners informed the BLM that they would like to purchase the land. On March 30, 1971, the city of Gallup protested the proposed public sale. By agreement formalized May 11, 1971, the city of Gallup withdrew its application as regards the SE 1/4 SE 1/4 while the Crestos withdrew their application relating to the NE 1/4 SW 1/4, N 1/2 SE 1/4. On June 8, 1971, the State Office issued its initial classification under which the SE 1/4 SE 1/4 was classified for disposal by public sale and the NE 1/4 SW 1/4, N 1/2 SE 1/4 was classified for sale or lease under the Recreation and Public Purposes Act. Once again, copies were sent to both the Navajo Tribe and the Superintendent of the Eastern Navajo Agency, and again their receipt was acknowledged. No objection from any party having been received, the classification decision became final on July 8, 1971, pursuant to 43 CFR 2450.5(a).

The State Office proceeded with processing the various applications. On March 29, 1972, the city of Gallup was notified that

its recreation and public purposes application had been accepted. The public sale of the SE 1/4 SE 1/4 was scheduled to be held on May 23, 1972. On April 19, however, the Acting Superintendent of the Eastern Navajo Agency filed a notice of protest concerning the proposed disposal of the NE 1/4 SW 1/4, N 1/2 SE 1/4 to the city of Gallup. By letter dated April 25, 1972, the Superintendent expanded on the grounds for his objection, centering on his contention that the land should be impressed with a trust patent for the heirs of one De Net E Geahl, whose application for an Indian allotment, filed in 1913, was denied in 1918 for reasons which will be more fully examined infra. On May 3, 1972, the Navajo Legal Aid and Defender Service, through its Director, filed a protest on behalf of certain named claimants against the proposed sale of the land to the city of Gallup. It is to be noted that though there had not, up to this time, been any objection to the proposed public sale, the validity of that disposal was dependent upon the correctness of the protestants' contentions regarding the recreation and public purposes application, since the original allotment application of De Net E Geahl also embraced the lands that were to be sold at public sale. The sale was held on May 29, and the high bidder was one John Mihelcic. On June 13, 1972, the Acting State Director issued a decision in which he denied appellants' protests.

In reading this decision, it is clear that the Acting State Director treated appellants' protests as separate protests rather than joint participation in the same protest. Thus he noted: "Protests were filed * * *" and further stated that "Since both protests involved the same objections, they will be considered in one opinion." (Emphasis added.)

This language does not refer to separate protests against both the recreation and public purposes application of the city of Gallup and the public sale application of the Crestos since, as has been pointed out supra, there had been no protest of the public sale application. The Acting State Director instead noted that:

The protests also affect SE 1/4 SE 1/4, Sect. 28, T. 15 N., R. 19 W., which are included in public sale application NM 4503 * * *.

Thus, it is abundantly clear that the Acting State Director considered the parties to be separate and not interchangeable facets of a single protestant.

By letter dated June 23, 1972, the Acting Superintendent of the Eastern Navajo Agency filed a notice of appeal from the above decision, promising that a complete statement of reasons would be forthcoming within 30 days. We have noted *supra*, that the Navajo Legal Aid and Defender Service filed a notice of appeal that was not received until July 24, 1972, eight days late. If, as it appears, it is the contention of the Bureau of Indian Affairs that they are the same party it would not have been necessary for the Navajo Legal Aid and Defender Service to file any notice of appeal. The participants in the protest treated each other as different parties until procedural difficulties occurred, and they cannot, by simple fiat, change the effect of their own courses of conduct.

Secondly, and equally compelling, the Superintendent of the Eastern Navajo Agency must be considered a separate party since he is without authority to appear before this Board and represent individual Indians except in a discharge of his official duties. A field official of the Bureau of Indian Affairs, not otherwise shown to be qualified, is not eligible to practice before the Department by representing individual Indians in appeals to the Board of Land Appeals, notwithstanding that the appellants reside within the area administered by the Bureau of Indian Affairs office wherein he is employed. Julius F. Pleasant, John Moore, Elia Wassillie, 5 IBLA 171 (1972). Thus, a priori, the appeal of Navajo Legal Aid and Defender Service cannot be merely part of the appeal of the Bureau of Indian Affairs since the Bureau of Indian Affairs has standing only when it is acting pursuant to official responsibilities, responsibilities which the individual claimants do not share. Accordingly, the parties in this appeal are deemed to be separate parties and each must individually fulfill the requisite procedural requirements.

We have noted that the notice of appeal of the Navajo Legal Aid and Defender Service on behalf of Margaret Chicharello et al., was not timely filed within the meaning of 43 CFR 4.411 (1972). The requirement of timely filing of the notice of appeal is mandatory as it determines the jurisdiction of this Board over a case. See Tagala v. Gorsuch, 411 F.2d 589 (9th Cir. 1969). Dismissal of their appeal is required. See R. M. Barton, 4 IBLA 464 (1972); R. & F. Enterprises, 5 IBLA 411 (1972).

We have observed, *supra*, that appellant Bureau of Indian Affairs has filed no statement of reasons as to why the decision appealed from is in error. Thus, its appeal is subject to summary dismissal. It is to be noted that the Navajo Legal Aid and Defender Service did provide a statement of reasons for appeal, received on August 25, 1972. This cannot, however, be appropriated by the Bureau of Indian

Affairs for two reasons: first, as we have pointed out, supra, they are separate parties and must individually fulfill the requirements on appeal; and second, the statement of reasons from the Bureau of Indian Affairs was required to be filed as of July 27, 1972, nearly a month earlier than the statement of reasons from the Navajo Legal Aid and Defender Service was received. Without question, the normal procedure would be to dismiss this appeal. But we are not unaware that such a course of action would forestall any consideration of the merits of the appeal, to the detriment of the individual Navajo Indians concerned, simply because of the error or negligence of others. Accordingly, we have looked at the issues presented and make the following observations.

A crucial argument pressed by appellants is that the allotment application of De Net E Geahl should have been granted in 1918 and was not, through the imputed neglect of the responsible Indian agent. A subsidiary argument is that the subject lands have been treated as Indian-owned since that time. We note that the theory of the Bureau of Indian Affairs as it relates to the first contention is simply bootstrap logic: De Net E Geahl did not receive the allotment because the Indian agent was guilty of neglect; the agent's neglect is proven from the fact that De Net E Geahl did not receive the allotment.

On May 3, 1913, De Net E Geahl applied for an Indian allotment for the subject lands. On May 29, 1914, one Josef Briski made an application to contest the Indian allotment claiming occupancy of the lands and an attempt to cultivate the same which had been frustrated by the interference of the contestees. This application to contest was rejected on July 10, 1914, for not being in the proper form and further, on the ground that the allegations were insufficient to cause the issuance of a notice of contest. No appeal from this decision was taken.

The subject lands had been withdrawn from entry, filing or selections under the public land laws by Departmental Order of July 26, 1906. The Act of June 22, 1910, 36 Stat. 583, provided, inter alia:

That those who have initiated non-mineral entries, selections, or locations in good faith, prior to the passage of this Act, on lands withdrawn or classified as coal lands, may perfect the same under the provisions of the laws under which said entries were made, * * *. (Emphasis added.)

By letter dated February 16, 1918, the Assistant Commissioner of the General Land Office sought to inform De Net E Geahl that he must file a corroborated affidavit showing settlement prior to the Act of June 22, 1910, in order to receive the allotment of the subject lands. No such affidavit was submitted within the requisite time (30 days from receipt of the letter) and the allotment application was rejected.

There is apparently an affidavit prepared for De Net E Geahl's signature in the files of the Bureau of Indian Affairs, which would have met the showing required by the General Land Office. It was not, however, signed or otherwise executed. The Bureau of Indian Affairs argues that this affidavit, though unsigned, shows that the Indian agent responsible was guilty of neglect. But an inference could be as easily drawn that De Net E Geahl refused, for whatever reason, to sign the affidavit. The only objective fact that can be ascertained from these records is that De Net E Geahl did not make the showing required by the General Land Office.

We do not rest solely on historical records which show that no allotment was granted. Rather, we find especially compelling the subsequent history of the lands.

It is contended, in effect, the lands have always been considered Indian lands. We are forced to ask, by whom? The record is clear that the Bureau of Land Management has, for more than half a century, felt the subject lands to be within the public domain and has so administered them. On May 1, 1923, one William O. Turner made a homestead entry of the subject lands. This was relinquished on June 23, 1925, on which date one Ben Madero made a homestead entry. This latter entry was canceled for lack of final proof on November 18, 1930. Additionally, on November 13, 1928, an oil and gas permit was granted, canceled on January 27, 1930. Also an oil and gas permit was granted on September 1, 1956, and subsequently terminated. Surely these actions, among others taken, testify to the belief of the responsible BLM officials that the land was in the public domain.

Certainly the Eastern Navajo Agency of the Bureau of Indian Affairs knew that the Bureau of Land Management had not validated the allotment. Thus, on May 12, 1965, the Superintendent of the Eastern Navajo Agency wrote to the State Office of the Bureau of Land Management in an attempt to have the subject lands confirmed as being allotted to De Net E Geahl. In his answer the Acting State Director first noted that the allotment had not been approved and that

the subsequent homestead entries would appear to indicate that the land had not been continuously occupied, but closed by noting:

"You did not indicate in your letter whether the applicant is still living and available for information as to the occupancy * * *. We would be glad to receive any further information which you may be able to gather from an investigation other than the notations on old office records."

This letter was dated on May 21, 1965. No further information was forthcoming.

Nor can it be said that the Navajo Tribe considered the subject lands to be Indian lands. There is presently, and has been since April 7, 1966, pursuant to the Taylor Grazing Act, supra, a grazing lease of the lands in question issued to the Navajo Tribe (Tsoya Toh Group). It is difficult to understand why the Navajo Tribe would obtain a grazing lease from the Bureau of Land Management if they considered the subject lands to be Indian lands. A grazing lease pursuant to the Taylor Grazing Act, could only be issued for public domain lands. See 43 U.S.C. § 315(m)(1970).

In view of the above we find that the Acting State Director correctly dismissed the protest.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal of Margaret Chicharello, et al., is dismissed, and the appeal of the Eastern Navajo Agency, Bureau of Indian Affairs, is denied. The files are remanded to the BLM for appropriate action on the Public Sale and Recreation and Public Purpose applications.

Douglas E. Henriques, Member

We concur.

Edward W. Stuebing, Member

Joseph W. Goss, Member

