



INTERIOR BOARD OF INDIAN APPEALS

Wayne L. and Eldon R. Knauf v. Portland Area Director, Bureau of Indian Affairs

32 IBIA 40 (02/03/1998)



United States Department of the Interior

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

WAYNE L. KNAUF and ELDON R. KNAUF, : Order Affirming Decision and
Appellants : Referring Request for Waiver
 : of Regulations to the Assistant
v. : Secretary - Indian Affairs
 :
PORTLAND AREA DIRECTOR, : Docket No. IBIA 96-126-A
BUREAU OF INDIAN AFFAIRS, :
Appellee : February 3, 1998

Appellants Wayne L. Knauf and Eldon R. Knauf seek review of an August 5, 1996, decision of the Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), concerning Appellants' requests for a Special Allotment Timber Harvest Permit, for a refund of previously collected forest management deductions, and for a waiver of future forest management deductions. For the reasons discussed below, the Board of Indian Appeals (Board) affirms the Area Director's decision, but refers this matter to the Assistant Secretary - Indian Affairs for consideration of Appellants' request for a waiver of regulations in 25 C.F.R. Chapter I.

Appellants are brothers who together own the entire beneficial interest in Allotment S-156 on the Colville Indian Reservation. The allotment contains 120 acres, most or all of which is forested. Apparently beginning in 1995, Appellants, who are both graduate foresters and licensed in the State of California, sought authorization to manage their own timber without paying forest management deductions.

By letter dated March 8, 1996, the Superintendent, Colville Agency, BIA (Superintendent), officially responded to Appellants by denying both their request for a refund of previously collected forest management deductions and a waiver of future deductions and their request to manage the timber on Allotment S-156. The Superintendent explained:

Since receiving your request, I have examined the current regulations in 25 CFR 163.25(e) relating to the reduction of forest management deductions. This is an option only for Tribes and is at the discretion of the Secretary. Therefore, the previously collected forest management deductions cannot be refunded nor can future collection of forest management deductions be waived.

There are two types of permits that can be used for the removal of forest products. Each permit has specific requirements and/or limitations. They are:

(1) Special Allotment Timber Cutting Permit. This permit, as per 25 CFR 163.26(d), can be issued to an Indian having sole

beneficial interest in an allotment to sell designated forest products on his or her allotment. As you and your brother are co-owners this is not an option. There are however two options that would make this permit available to you. One of you could gift deed his part to the other. Or, the allotment could be divided in half giving each of you sole ownership of a half.

(2) Paid Permit. A paid permit, as per 25 CFR 163.26(c), can be issued for the removal of forest products. The estimated stumpage value that may be harvested under paid permits in a fiscal year by any individual shall not exceed \$25,000. Based on our estimated volumes on your allotment and timber markets, it appears that the estimated value would [be] significantly higher. Spreading the harvest activities over two or more fiscal years to stay within the yearly limit may be an option. Another option would be for us to prepare a timber contract giving you the right to meet the high bid when advertised. One last option, that I would not recommend, would be to take the allotment out of trust.

Appellants appealed this decision to the Area Director, who issued the decision under appeal on August 5, 1996. The Area Director dismissed the appeal on procedural grounds, stating:

The appeal consists of a one page letter and a number of attachments. The appeal challenges a March 8, 1996, decision * * * and was received in this office on April 4, 1996. No Statement of Reasons was filed with the April 4 notice of appeal, nor within the 30 day time period following its receipt.

Following expiration of the 30 day period for filing a Statement of Reasons, this office contacted the Superintendent to determine the status of the appeal. At that time, it was determined that appellant had served no documents upon the Superintendent. By memorandum dated May 21, 1996, this office furnished the appeal documents to the Superintendent and requested that he provide an Answer to the appeal under 25 CFR 2.11. * * *

By letter dated May 29, 1996, this office notified appellant of the apparent irregularity regarding his failure to file the appeal with the Superintendent.

* * * * *

The appellant failed to follow the explicit regulations setting forth required appeal procedures as enumerated in 25 CFR Part 2. Appellant failed to file the notice of appeal with the Superintendent within the required 30 day period. 25 C.F.R. 2.9(a). Appellant did not file a Statement of Reasons (25 C.F.R. 2.10(a)) and did not certify service. (25 C.F.R. 2.12(a)).

Appellant was specifically advised of the required appeal procedures in the Superintendent's March 8, 1996, decision. A copy of the appeal regulations was furnished. Appellant additionally was requested to contact an identified BIA employee at

the Colville Agency if appellant had any questions concerning the March 8 decision or his appeal rights. The record shows appellant had full notice of the procedures required to correctly file his appeal.

The above described irregularities constitute significant error. Pursuant to 25 C.F.R. 2.17(a) "An appeal under this part will be dismissed if the notice of appeal is not filed within the time specified in § 2.9(a)." The record shows that appellant did not file his notice of appeal in a timely manner as required by Section 2.9(a), and the appeal must therefore be dismissed. 25 C.F.R. 2.17(a).

Aug. 5, 1996, Decision at 1-2.

In addition, the Area Director held that "[e]ven if appellant had timely filed, it is clear that federal regulations would not authorize the Superintendent to grant appellant's request to manage trust land and to have administrative deductions waived or reduced." Id. at 3.

On appeal, Appellants challenge both the dismissal of their appeal on procedural grounds and the substantive decision. They first contend that they filed their appeal with the Area Director pursuant to the instructions contained in the Superintendent's decision.

The Superintendent's decision advised Appellants that the decision could "be appealed to the Area Director * * * in accordance with the regulations in 25 CFR 2.9 (copy attached)." Under 25 C.F.R. § 2.9(a), a notice of appeal is to be filed "in the office of the official whose decision is being appealed." 1/

The Board agrees with the Area Director that Appellants did not file their appeal properly under 25 C.F.R. § 2.9(a). Although it may seem to Appellants to be overly technical, the proper filing of a notice of appeal is jurisdictional.

Even if the Board were to find that it could overlook the procedural problems and address this matter on the merits, it would affirm the Area Director's decision. The Board cannot agree with Appellants' contention that 25 C.F.R. 163.26(d) should be interpreted to allow management of forest resources by more than one Indian owner, even if all owners join in the request. Inter alia, section 163.26(d) provides: "A Special Allotment Timber Harvest Permit may be issued to an Indian having sole beneficial interest in an allotment to harvest and sell designated forest products from his

1/ Standard language setting forth appeal rights from Superintendents' decisions was sent to all BIA Area Directors in 1989, with instructions to distribute it to the Superintendents within their jurisdictions. This standard language was developed to ensure that all parties to BIA decisions were properly informed of their appeal rights. The Superintendent here did not use that standard language. Had the Superintendent used the standard language, it is possible that the appeal would have been properly filed.

or her allotment." The section is clearly written in the singular. Any question that the regulation was intended to apply only when the entire beneficial interest in the allotment was owned by a single individual is dispelled by the following discussion of a comment received during the rulemaking process:

Comment: § 163.26 of the rule should provide for issuance of special allotment timber harvest permits in the case of multiple owners.

Response: The rule has not been revised because issuance of special timber harvest permits when there is more than one beneficial owner would make it difficult or impossible for the Secretary to fulfill the trust responsibility to all beneficial owners involved in such cases.

60 Fed. Reg. 52,250, 52,255 (Oct. 5, 1995).

Appellants cite 25 U.S.C. §§ 406 and 3102(1) (1994) in support of an argument that Congress intended the owners of trust lands to be involved in the management of timber resources on those lands. The Board agrees that these statutes speak of owners of trust timber in the plural. However, it cannot agree that 25 C.F.R. § 163.26(d) violates these general statutes. Furthermore, in order to hold that 25 C.F.R. § 163.26(d) violates these statutes, the Board would be required to declare a duly promulgated Departmental regulation invalid--an action which the Board lacks authority to take. See, e.g., Edwards v. Portland Area Director, 29 IBIA 12, 13 (1995), and case cited therein.

Appellants fail to cite anything granting the Area Director authority to refund previously collected forest management deductions. The Board knows of no such authority.

Finally, Appellants seek a waiver of future forest management deductions. Under 25 C.F.R. § 163.25, such deductions are mandatory unless the total consideration received for the sale of forest products is less than \$5,001.

The Board finds that the Area Director's decision must be affirmed whether on procedural or substantive grounds.

However, the Board also concludes that this matter should receive further consideration. Throughout this proceeding, BIA appeared to understand that Appellants sought either an interpretation of the regulations which would allow them to manage their own timber without paying forest management deductions, or a waiver of those regulations. Waiver is authorized by 25 C.F.R. § 1.2, which provides:

The regulations in chapter I of title 25 of the Code of Federal Regulations are of general application. Notwithstanding any limitations contained in the regulations in this Chapter, the Secretary retains the power to waive or make exceptions to his regulations as found in chapter I of title 25 CFR in all

cases where permitted by law and the Secretary finds that such waiver or exception is in the best interest of the Indians.

Waiver authority has not been delegated to BIA Area Directors or their subordinate officials. Neither has that authority been delegated to the Board. The Area Director could have forwarded Appellants' waiver request to an official with authority to consider and/or grant a waiver. However, he neither forwarded the request nor specifically declined to do so. Because Appellants' waiver request has not yet been acted upon, the Board refers it to the Assistant Secretary - Indian Affairs for consideration.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, this appeal from the Portland Area Director's August 5, 1996, decision is affirmed. However, the matter is referred to the Assistant Secretary - Indian Affairs for consideration of Appellants' request for a waiver of regulations in 25 C.F.R. Part 163.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge