



INTERIOR BOARD OF INDIAN APPEALS

In the Matter of the Will of Frank Eugene Fugate

29 IBIA 3 (12/06/1995)

Denying reconsideration of:
28 IBIA 279



United States Department of the Interior

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

IN THE MATTER OF THE WILL OF : Order Denying Reconsideration
FRANK EUGENE FUGATE :
: Docket No. IBIA 96-11
:
: December 6, 1995

On November 13, 1995, the Board of Indian Appeals (Board) dismissed as untimely an appeal filed in the above case by the Osage National Council, through its Speaker, Edward Red Eagle, Jr. 28 IBIA 279.

On November 20, 1995, the Board received a note from Julia L. Fugate Lewis, stating: "I am in agreement with the National Council's appeal of the will of Frank Eugene Fugate. I made a call on Aug. 17-1995 and objected to the disposition of the remainder interest to the Osage Tribe."

I believe Frank Eugene Fugate's share of the headright should go to the remaining heirs at the death of my aunt Joyce Fugate." This note was written on the bottom of a copy of a document headed "Interior Board of Indian Appeals, Office of Hearings and Appeals," and entitled "Motion to Strike or Hold in Abeyance Pending Action by the Area Director." The motion, which was signed by Red Eagle, but which was undated and showed no distribution, argued that an appeal from a decision issued by the Osage Agency Superintendent, Bureau of Indian Affairs (Superintendent; BIA), concerning an Osage will should be taken to the Muskogee Area Director, BIA, under 25 CFR Part 2.

Although this motion appeared to be addressed to the Board and to seek a stay of the Board's November 13, 1995, dismissal, the Board refrained from taking any action on the motion because it was clearly not an original document, and was not filed with the Board by the National Council. The Board has not yet received an original motion.

However, because it is possible that the National Council believes it has filed a motion for stay, the Board has determined to treat the copy of the motion it received from Smith as a petition for reconsideration of its dismissal of the National Council's notice of appeal. 1/

1/ The regulations in 25 CFR Part 17, which govern Departmental consideration of Osage wills, do not address petitions for reconsideration. The Board considers this petition under 43 CFR 4.315. 43 CFR 4.315(b) allows a party to file only one petition for reconsideration. Because of the circumstances of this case, the Board will not apply 43 CFR 4.315(b) against the National Council, should the National Council file a timely petition for reconsideration of this order.

25 CFR 17.14 sets out the procedures for appealing from a decision concerning an Osage will. Section 17.14(a) states: "Notwithstanding the provisions of part 2 of this chapter (25 CFR Part 21 concerning appeals generally from administrative actions, any appeal from the action of the superintendent of approving or disapproving a will shall be taken to the Secretary." As the Board stated in its original order in this matter, the Secretary has delegated his review authority under 25 CFR 17.14(a) to the Board through Departmental Manual Release No. 2937. Accordingly, the Board, not the Muskogee Area Director, is the proper forum to review the Superintendent's decision.

The notes filed by Lewis and Smith are considered filings made in the appeal filed by the National Council. Because the National Council's appeal was dismissed as untimely, there is no pending appeal an which the notes can be considered. 2/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior in 25 CFR 17.14, 43 CFR 4.1, and Departmental Manual Release No. 2937, this petition for reconsideration of the Board's November 13, 1995, order dismissing this appeal as untimely is denied.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge

2/ It is possible that Lewis and Smith do not understand the nature of the appeal which the National Council attempted to bring. They both state that decedent's headright should go to his heirs. However, the National Council's notice of appeal argued that the decision "interpreting the Will of the above named decedent to vest the devise of a remainder Headright interest to the so called 'Tribal Council' and not the Osage Nation is contrary to law and the constitutional mandate of the Osage Nation."