



INTERIOR BOARD OF INDIAN APPEALS

Estate of Cecelia Smith (Borger)

3 IBIA 56 (09/12/1974)

Also published at 81 Interior Decisions 511

Related Board cases:

3 IBIA 68

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Dismissed, *Confederated Tribes & Bands of the Yakima Indian Nation v. Kleppe*,
No. C-76-199 (E.D. Wash. May 27, 1977)

Earlier judicial case:

Stipulated remand, *Philip Brendale, as Executor of the Estate of Caroline B. Charles, Deceased v. United States*, Civil Action No. C-74-21 (E.D. Wash. June 28, 1974)



United States Department of the Interior

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

ESTATE OF CECELIA SMITH (BORGER)

(Yakima Allottee No. 4161, Deceased)

IBIA 75-12

Decided September 12, 1974

This is an order of reopening and remand to an Administrative Law Judge to correct error by the conduct of new and further proceedings.

Remanded.

1. Indian Probate: Reopening: Waiver of Time Limitation

Where it becomes necessary, the Secretary in the exercise of the discretion reserved in 43 CFR 4.242(h) may authorize the reopening of an Indian probate closed for more than three years and direct the conduct of further proceedings necessary to the correction of an apparent error in the original probate.

APPEARANCES: Arthur W. Kirschenmann, of the law firm of Kirschenmann, Devine and Fortier for Philip Brendale.

OPINION BY CHIEF ADMINISTRATIVE JUDGE MCKEE

This matter comes on for consideration as a proceeding collateral to and conducted in conjunction with consideration of the complaint filed in the United States District Court for the Eastern District of Washington, in the action entitled Philip Brendale as Executor of the Estate of Caroline B. Charles, Deceased v. United States of America, et al., Civil Action No. C-74-21, filed February 1, 1974.

A stipulation entered into by the parties in this case is as follows:

IT IS HEREBY STIPULATED AND AGREED by and among the respective parties hereto through their respective counsel that at the request of the Interior Department the claim of the plaintiff be resubmitted to the Office of Hearings and Appeals in order that the same may be reconsidered by the Secretary of Interior

IT IS FURTHER STIPULATED AND AGREED, as aforesaid, that the above-entitled action be held in abeyance pending final administrative action in accordance herewith.

DATED at YAKIMA, WASHINGTON this 28th day of June, 1974.

The proceedings herein are in furtherance of the purpose of the stipulation.

An examination of the probate record discloses the following facts. During her lifetime Caroline B. Charles was the distributee of a 1/8 interest in the allotment of Mary Charles, deceased, Yakima Allottee No. 4244, described as the SW 1/4 sec. 8, T. 7 N. R. 13 E., Willamette Meridian, Yakima County, Washington, containing 160 acres which had been devised to her by the will of Cecelia Smith (Borger) Yakima Allottee No. 4161, the decedent herein. The decedent died July 28, 1958, at the age of 84 years and her will, dated September 14, 1957, was approved on May 15, 1959.

The will was approved as to Yakima land devised to the said Caroline B. Charles under authority vested in the Secretary of the Interior by the Act of June 25, 1910 (36 Stat. 855, 25 U.S.C. § 372), as amended by the Act of February 14, 1913 (37 Stat. 678; 25 U.S.C. § 373), and pursuant to the Act of August 9, 1946 (60 Stat. 968; 25 U.S.C. § 607). The will was correctly held to be inoperative under the Act of August 9, 1946, supra, insofar as it made a devise of land on the Yakima Reservation to Mary (Andle) Andal.

A one-half interest in the decedent's estate including her 1/4 interest in the Mary Charles allotment was ordered distributed under the will to Caroline upon the following findings:

By the terms of decedent's proported will, dated September 14, 1957, she attempts to give her entire trust estate to her nieces, Caroline Charles, and Mary (Andle) Andal, daughters of Morris Charles.

Mary (Andle) Andal has been certified as not eligible to take the decedent's Yakima trust property by the will.

The Act of August 9, 1946, supra, required that anyone taking as an heir or a devisee of a person who died owning an interest in lands on the Yakima Reservation must qualify to take such interest by showing that he was enrolled in the Yakima Tribe and that he was of a quarter blood of the Yakima tribes. The Examiner of Inheritance (now Administrative Law Judge) then found that the part of the will devising an interest in Yakima land to Mary (Andle) Andal, niece, was inoperative and ordered that the interest should pass as intestate property to Morris Charles, brother of the testatrix, her only eligible heir at law.

The record discloses that the Examiner had before him a certificate from the Superintendent of the Yakima Indian Agency dated February 6, 1959, to the effect that Caroline Charles was enrolled and was of 1/4 Yakima blood. In ordering the distribution under the will of this decedent to Caroline Charles he relied upon this certificate.

It now appears as part of the record in the probate of the Estate of Morris Charles, deceased, that the designation of Caroline

Charles as being of a 1/4 blood quantum of the tribe was a matter which had been challenged and was, at the time of the entry of the above distribution order, on appeal. The Secretary issued a final decision on April 11, 1969, in which the finding was made that Caroline Charles was only of 1/8 Yakima blood. Under this decision it now appears that the full 1/4 interest owned by this decedent in the allotment of Mary Charles, deceased, should have passed to Morris Charles, as intestate property, he being the only eligible heir at law of this decedent capable of receiving title to Yakima land interests pursuant to the Act of August 9, 1946, supra.

The foregoing certificate from the Superintendent of the Yakima Agency is attached hereto as "Appendix A," and a copy of the Secretary's decision of April 11, 1969, supra, is attached hereto marked "Appendix B." It is here noted that "Appendix A" and other records show that Morris A. (K.) Charles was Yakima Enrollee No. 4247 and that he was of a 1/4 Yakima Indian blood.

The record in this probate further shows that he died testate on November 23, 1964, and that the hearing in the probate of his estate was held October 17, 1966. However, no decision in the matter of the approval of his will was issued until March 31, 1972, since the Examiner held the estate open pending the determination of the then pending appeal regarding the blood quantum of Caroline Charles named as sole beneficiary in his will.

The entry of the Secretarial order of April 11, 1969, supra, was not made known to the Examiner until March 24, 1972, (see "Appendix C") a date subsequent to the passage of the Act of December 31, 1970 (84 Stat. 1874; 25 U.S.C. § 607), amending the Act of August 9, 1946, supra. The amendment of 1970 permitted the taking of Yakima land by heirs and devisees who were ineligible under the 1946 Act, but it provided that they take such land on the Yakima subject to a right in the Tribe to buy the land upon payment of the fair market value as determined by the Secretary after appraisal.

The present proceedings in this estate are related to like proceedings simultaneously initiated under a separate order of this Board in the Estate of Morris Charles, deceased, Probate No. IP PO 38K 71, which will relate to the interest which he held at his death in the allotment of Mary Charles, No. 4244. He is shown in the probate of his estates to have held a 3/8 interest in that allotment and this will be increased by a 1/8, if the proceedings herein provided for confirm the records as they now appear before the Board.

Morris Charles named his daughter, Caroline Charles, as his sole devisee. Caroline Charles died testate June 25, 1972, and in her will approved by order of Judge R. J. Montgomery entered February 12, 1974, Philip Brendale, her son, was named executor and sole devisee.

He is the apparent successor in interest or right in both the 3/8 and the 1/8 interests in the allotment of Mary Charles.

A finding is made that this matter comes within the provisions of 43 CFR 4.242(h) and that the probate of this estate should be reopened by the Administrative Law Judge (formerly Examiner of Inheritance) having probate authority on the Yakima Reservation. The Judge shall afford the successor in interest an opportunity to show good cause why this probate should not be reopened and why the order of distribution should not be corrected to conform to the Act of August 9, 1946 (60 Stat. 968, as amended, 25 U.S.C. § 607) in force at the date of closing the probate. The notice to show cause should include a notice of a hearing at which any necessary testimony may be taken and at which necessary documents not now of record may be presented for admission into evidence to complete the record in this probate.

NOW, THEREFORE, by authority of 43 CFR 4.1, it is ORDERED that Richard J. Montgomery, Administrative Law Judge of Portland, Oregon, shall issue a notice to show good cause within not less than 20 days, or any extension thereof why the Estate of Cecelia Smith (Borger), deceased, Probate No. E 182-59, should not be reopened for the purpose of holding a hearing to modify the distribution contained in the order approving the will and determining heirs issued by him on May 15, 1959. He is limited in this matter to a

consideration of the correction of the distribution of a 1/8 interest in allotment No. 4244, Mary Charles, deceased, of the Yakima Indian Reservation previously distributed to Caroline Charles under the will of this decedent. After hearing he shall consider distribution nunc pro tunc of said 1/8 interest, to Morris A. Charles, now deceased, as intestate property.

IT IS FURTHER ORDERED that he shall issue a decision final for the Department subject to the right of appeal as provided in 43 CFR 4 subpart D, but the requirement for the filing of a petition of rehearing prior to appeal is waived.

This decision is final for the Department of the Interior.

Done at Arlington, Virginia.

//original signed

David J. McKee
Chief Administrative Judge

I concur:

//original signed

Alexander H. Wilson
Administrative Judge

Attachments

Appendix A
Appendix B
Appendix C

United States
Department of The Interior
Office of The Regional Solicitor
Portland, Oregon
PO Box 3537
Portland 8, Oregon

IBIA 75-12

Superintendent,
Yakima Indian Agency
Toppenish, Washington.

RE: Cecelia Smith Vergote
Yakima No. 4161

Dear Sir:

Please examine the roll of tribal membership prepared under the Act of August 9, 1946 (60 Stat. 969), and advise whether the following named individuals, who appear to be probable heirs in this estate, are enrolled members of the Yakima tribes, of 1/4 or more degree of Indian blood of such tribes, as required by section 7 of that Act:

Mary Andle	Niece
Caroline Charles	Niece
Morris Charles	Brother
Frank (Phillip) Charles (born 1893)	Nephew
Rosa Marie Cushner Simmons (Rose C. Mitchell)	Niece (adopted)

Sincerely,

//original signed
R. J. Montgomery,
Examiner of Inheritance.

RJM:nb

I certify that the above named persons are not eligible as required by the said Act to inherit in the above estate. EXCEPT Morris Charles (1/4 Yakima) and Caroline Charles (1/4 Yakima), whom are eligible as required by the said act to inherit in the above estate.

Date: --- February 6, 1959 -----

Superintendent,
Yakima Indian Agency,
Toppenish, Washington.

United States Department of the Interior
Office of The Secretary
Washington, D.c. 20240

IBIA 75-12
Tribal Operations
INDIAN

April 11, 1969

Dear Mr. Kirschenmann:

You have appealed from the Acting Assistant Commissioner of Indian Affairs' decision of August 6, 1968, which upheld the Acting Deputy Assistant Commissioner's affirmance of the action taken by the Yakima Tribal Council to lower the Yakima blood degree of Caroline B. Charles from 1/4 to 1/2 degree. You base your appeal upon your belief that the tribal council's action in correcting the degree of Yakima blood ascribed to your client was of a judicial nature rather than the mere rectification of a clerical error in the membership records.

As part of its internal sovereignty and in the absence of express statutory provisions or Federal regulations to the contrary, the Yakima Tribal Council has full power to correct clerical errors affecting the descent and distribution of the property of its members. More than that, the Yakima Tribal Council would be remiss in its responsibility to all of the tribal members were errors affecting the descent and distribution of property of the members not corrected. Nothing in the Act of August 9, 1946 (60 Stat. 969), which authorizes and directs the preparation of the Yakima membership roll, prohibits the tribal council from making corrections of clerical errors and the policy of the Bureau of Indian Affairs, as indicated in the Acting Assistant Commissioner's letter of August 6, would not operate to prohibit such corrections of clerical errors.

We concur in the Acting Assistant Commissioner's finding that the tribal council's procedure in changing Miss Charles' degree of Yakima blood was inadequate inasmuch as no follow-up attempt was made to locate her to advise her of the change. However, the responsibility for keeping tribal governing bodies advised of current addresses necessarily lies with the tribal members themselves and the Yakima Tribal Council cannot be held solely responsible for not knowing the whereabouts of your client. Your client apparently neglected to inform the postal authorities of her change of address and as a result, the letter addressed to her by the tribal council could not be forwarded to her. In any event, this lack of proper notification was remedied when Miss Charles was offered an opportunity to present evidence bearing on her blood degree to the Commissioner.

Your client was enrolled under the provisions of Section 1(a) of the Act of August 9, 1946, which pertains to the enrollment of Yakima allottees. That action does not require the minimum possession of any degree of Yakima blood as a prerequisite for enrollment.

Your contention that the Commissioner of Indian Affairs had confirmed Miss Charles' degree of Yakima blood by approving the supplemental roll which contained her name cannot be upheld. The Commissioner approved her enrollment because she was an original allottee and, therefore, met the provisions of Section 1(a).

The record indicates that in her application for enrollment with the Yakima Tribes dated July 27, 1935, your client claimed only 1/8 degree Yakima blood. The Yakima Tribal Enrollment Committee erred when it enrolled her as 1/4 degree Yakima and 1/4 degree Nisqually. When your client was notified by the Chairman of that committee on February 28, 1956, that her application had been accepted and that she was found to possess 1/4 degree Yakima and 1/4 degree Nisqually blood, she should have advised the enrollment committee of its error. The letter dated February 28, 1956, specifically allowed 30 days for correction to be made on the findings of the enrollment committee. Miss Charles did not advise the enrollment committee of its error and allowed that error to go uncorrected for years, accepting those benefits that should rightly have accrued only to those members of the Yakima Tribes who possessed at least 1/4 degree Yakima blood.

Based on the foregoing, we conclude that the determination of the Acting Assistant Commissioner should be sustained. Your appeal is dismissed.

Sincerely yours,

//original signed
Assist. Secretary of the Interior

United States
Department of the Interior
Office of the Solicitor
Washington, D.C., 20240

IBIA 75-12

Mr. Arthur W. Kirschenmann
Attorney at Law
303 E. "D" Street
Yakima, Washington

Dear Mr. Kirschenmann:

This replies to your letter of October 31, 1966, transmitting therewith an appeal by Caroline Charles, Yakima allottee No. 4240.

We have today referred this matter for appropriate disposition to the Commissioner of Indian Affairs, who has jurisdiction over proposed modifications in the blood quantum shown for individuals on the Yakima roll prepared pursuant to the Act of August 9, 1946, 60 Stat 963.

We are also sending a copy of this letter to Hearing Examiner Montgomery so that he will be advised that Miss Charles is appealing from the redetermination of her Yakima blood quantum and will therefore be able to coordinate his handling of the estate of Morris Charles with Miss Charles' appeal.

Sincerely yours,

//original signed

Duard R. Barnes
Assistant Solicitor
Appeals & Litigation

cc: BIA, Att'n: Tribal Operations,
with incoming correspondence,
for action indicated
Hearing Examiner Montgomery
For action indicated

3/31/72: This is the last information we have in the record regarding the appeal. However, Tribal Operations in the Central Office in Washington, D.C. advised this office on 3/24/72, that the appeal had been denied by the BIA.

R. J. Montgomery, Hearing Examiner