INTERIOR BOARD OF INDIAN APPEALS

Estate of Harry Dillon, Sr.

33 IBIA 33 (10/01/1998)

United States Department of the Interior

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

ESTATE OF HARRY DILLON, SR.	:	Order Docketing Appeal and Affirming
	:	Order Denying Motion for Discovery
	:	
	:	Docket No. IBIA 98-96
	:	
	:	October 1, 1998

This is an interlocutory appeal filed by the State of Arizona (Appellant) from a March 23, 1998, order denying motion for discovery issued by Administrative Law Judge William E. Hammett in the Estate of Harry Dillon, Sr. (decedent), IP SA 059N 97. Judge Hammett held that he lacked authority to order the discovery sought by Appellant. He then stated that his ruling constituted a controlling question of law and certified it for interlocutory appeal.

Appellant's notice of appeal indicated that it seeks "to conduct discovery on the Tohono O'odham Reservation of the operator of an Indian Smokeshop that was the subject of a lease between the Tohono O'odham Tribe and [decedent]." Notice of Appeal at 1.

By order dated June 2, 1998, the Board ordered Appellant to show that Judge Hammett has authority under regulations of the Department of the Interior, the Administrative Procedure Act, 5 U.S.C. § 551, or any other law, to order the discovery Appellant seeks in this case. Appellant's initial response was received by the Board on July 20, 1998, and a supplemental response was received on August 17, 1998.

Appellant now states that it believes decedent held a sublease (rather than a lease) of certain trust land on the Tohono O'odham Reservation. The documents submitted by Appellant include a 1971 lease of trust land 1/ to the Papago-Tucson Development Corporation and a 1975 sublease from the Papago-Tucson Development Corporation to decedent.

The premise of Appellant's argument, although nowhere clearly set out, appears to be that, because decedent was an Indian and held a sublease of trust land, the sublease somehow

1/ Although the names of the lessors have been redacted, there are clearly multiple lessors. Accordingly, the land involved must be, at least in part, allotted land.

became trust property and therefore should have been included in decedent's trust estate. 2/ It is apparently based upon this premise that Appellant contends it is entitled to conduct discovery for the purpose of showing that the estate inventory is incomplete.

Appellant cites several sections in 43 C.F.R. Part 4, Subpart D, although not specifically contending that any of the cited provisions authorizes the order for discovery which Appellant seeks. Of the sections cited, the only one with any potential application to the question is 43 C.F.R. § 4.202, which sets out the general authority of administrative law judges in Indian probate matters. That section says nothing specific about the issuance of orders for discovery. Appellant also cites 5 U.S.C. § 556(c), which provides: "Subject to published rules of the agency and within its powers, employees presiding at hearings may)) * * * (2) issue subpenas authorized by law; [and] (4) take depositions or have depositions taken when the ends of justice would be served."

As Appellant seems to recognize, Judge Hammett's jurisdiction in this case extends only to the probate of trust or restricted property that was owned by decedent at the time of his death. The Board assumes, for purposes of this decision, that decedent owned the sublease at the time of his death. 3/ The critical question here is whether the sublease is, or arguably is, trust or restricted property subject to the probate jurisdiction of the Department of the Interior.

Appellant makes a number of general arguments concerning Federal authority over and responsibility for lands held in trust for Indians. However, it never comes to grips with the status of the sublease. In fact, it never actually articulates the theory the Board has ascribed to it))that the sublease is trust property because it was held by an Indian. The result is that, while its case is dependent upon the proposition that the sublease is trust property, Appellant cites absolutely no authority for that proposition. 4/

2/ Appellant does not contend that any of the land subject to the lease was held in trust for decedent. Decedent was a member of the Puyallup Tribe, and it therefore appears unlikely, although not impossible, that he owned trust interests in land on the Tohono O'odham Reservation.

3/ This is far from clear, however, as Appellant's filings demonstrate.

4/ Had Appellant made the semblance of an argument in this regard, the Board would have called for further briefing. The Bureau of Indian Affairs, for instance, would be entitled to brief the issue, because it would be greatly impacted by a conclusion that leases or subleases of trust or restricted land are held in trust for the lessee or sublessee in cases where those persons are Indian. Under the circumstances, however, the Board finds no need for additional briefing.

Appellant has failed to show error in Judge Hammett's March 23, 1998, order. 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 is docketed, and Judge Hammett's order is affirmed.

//original signed
Anita Vogt
Administrative Judge

//original signed
Kathryn A. Lynn
Chief Administrative Judge