



INTERIOR BOARD OF INDIAN APPEALS

Donna Linnie Chouteau v. Acting Muskogee Area Director, Bureau of Indian Affairs

34 IBIA 57 (07/30/1999)

Reconsideration denied:

34 IBIA 112



United States Department of the Interior

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

DONNA LINNIE CHOUTEAU, Appellant	:	Order Reversing Decision and Remanding Matter to the Area Director
v.	:	Docket No. IBIA 98-82-A
ACTING MUSKOGEE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	July 30, 1999

Appellant Donna Linnie Chouteau seeks review of a February 18, 1998, decision of the Acting Muskogee Area Director, Bureau of Indian Affairs (Area Director; BIA), holding that there was no right of appeal from the decision of the Superintendent, Osage Agency, BIA (Superintendent), approving an inter vivos trust executed in 1995 by Dale Gusso Chouteau (Dale), Osage AN 5116, who is now deceased. For the reasons discussed below, the Board of Indian Appeals (Board) reverses that decision, and remands this matter to the Area Director for further consideration.

Appellant states that she is Dale's daughter by Joyce Elizabeth Hubbard, that she is 1/16 Osage Indian, and that she is entitled to inherit an Osage headright interest or to be the beneficiary of a trust involving such an interest. The Area Director does not dispute these statements.

Dale owned a .37500 headright interest. On January 24, 1995, he executed a revocable inter vivos trust agreement, which the Superintendent approved on February 8, 1995. The agreement provided that, during Dale's lifetime, all of his trust assets were to be held for him, with all income from the trust being distributed as he directed. It further provided that, upon Dale's death, his wife, Elizabeth Ann Chouteau, was to receive a life estate in Dale's entire estate, with the remainder interest going to the Osage Tribal Council (Minerals) to be used for scholarships. Appellant is not mentioned in the trust.

Dale died on August 25, 1996. Nothing in the materials before the Board shows that, prior to Dale's death, Appellant was aware that Dale had executed an inter vivos trust. Appellant challenged the approval of the trust, contending that Dale had been incompetent when he executed it.

In a letter dated December 3, 1996, the Superintendent informed Appellant that “the approval and distribution of trusts was an area that was committed to agency discretion by law and no disappointed heir would have the ability to challenge a decision to approve or distribute a trust.”

Appellant appealed to the Area Director, who, on February 18, 1998, affirmed the Superintendent’s decision. Appellant then appealed to the Board. Appellant and the Area Director submitted briefs on appeal. Elizabeth Ann Chouteau wrote to the Board, stating that she had not received any of the filings in the appeal, but did not file a brief.

Osage Indians are authorized to pass headright interests through inter vivos trusts by section 6 of the Act of October 21, 1978, 92 Stat. 1660, 25 U.S.C. § 331 note (1978 Act). Section 6 provides in pertinent part:

(a) With the approval of the Secretary of the Interior, any person of Osage Indian blood, eighteen years of age or older, may establish an inter vivos trust covering his headright or mineral interest except as provided in section 8 hereof; [1/] surplus funds; invested surplus funds; segregated trust funds; and allotted or inherited land, naming the Secretary of the Interior as trustee. An Osage Indian having a certificate of competency may designate a banking or trust institution as trustee. Said trust shall be revocable and shall make provision for the payment of funeral expenses, expenses of last illness, debts, and an allowance to members of the family dependent on the settlor.

The question before the Board is whether the Area Director erred in holding that there was no right of appeal to him from the Superintendent’s decision under section 6 of the 1978 Act.

In general, BIA decisions are subject to administrative review under the procedures set out in 25 C.F.R. Part 2 and 43 C.F.R. Part 4, Subpart D. 25 C.F.R. § 2.3 provides:

(a) Except as provided in paragraph (b) of this section, this part applies to all appeals from decisions made by officials of the Bureau of Indian Affairs by persons who may be adversely affected by such decisions.

(b) This part does not apply if any other regulation or Federal statute provides a different administrative appeal procedure applicable to a specific type of decision.

1/ Nothing in sec. 8 applies in this case.

25 C.F.R. § 2.3(b) does not apply here. The 1978 Act does not establish a different administrative appeal procedure, and BIA has not promulgated any regulations specifically applicable to Osage inter vivos trusts.

25 C.F.R. § 2.3(a) is written in very broad terms. It expresses a general intent that BIA decisions are subject to administrative review. Subsection 2.3(a) would appear to allow an administrative appeal from the Superintendent's approval of an Osage inter vivos trust under section 6 of the 1978 Act.

The Area Director argues, however, that there is no right of appeal from a decision under section 6 of the 1978 Act. He starts with the observation that section 6 is silent on the issue of challenges to the approval of an inter vivos trust. Contrasting that fact with the fact that challenges to Osage wills are specifically authorized under section 5(a) of the 1978 Act, the Area Director contends that when Congress includes a provision in one statute, but does not include that provision in a similar statute, there is a presumption that Congress intended a different result. He argues that Congress' failure to provide for challenges to the approval of an Osage inter vivos trust, when it did provide for challenges to Osage wills, shows that Congress did not intend to authorize challenges to inter vivos trusts. He cites the legislative history of the 1978 Act in support of his contention:

Under current laws, an Osage Indian can only dispose of his headright or mineral interest by testamentary instrument which is approved subsequent to his death by the Secretary of the Interior. This procedure has resulted in many contests of an administrative nature followed by contests in probate courts of the State of Oklahoma, and many disputes of heirship have arisen in intestate situations. The tribe requested authority to permit members of the Osage tribe to execute testamentary instruments in the nature of a trust which would provide the settlor with an opportunity prior to his death to firmly establish the disposition that would be made of his property. Section 6 provides that authority.

H.R. Rep. No. 1459, 95th Cong., 2nd Sess., Aug. 9, 1978, as quoted in the Area Director's Answer Brief at 2-3. The Area Director notes that, in 1984, Congress authorized Osage Indians to create testamentary trusts and allowed challenges to those trusts under the same procedures as for wills, but did not amend section 6 to authorize challenges to inter vivos trusts.

The Area Director also emphasizes that this appeal was brought after Dale's death. He contends that allowing a challenge to the Superintendent's decision under these circumstances would result in precisely the situation which Congress sought to avoid in enacting section 6 of the 1978 Act.

Finally, the Area Director suggests that his present interpretation of section 6 is consistent with the contemporaneous interpretation at the time section 6 was enacted, and perhaps with information which BIA provided to Osage tribal members. He indicates that the Superintendent has approved a large number of Osage inter vivos trusts, apparently without including information concerning a right of appeal. While not conceding that there might be a right of appeal, he argues that the “Board should not now create a challenge procedure which the BIA and the settlers did not believe existed.” Answer Brief at 10.

The question of whether an administrative challenge or appeal procedure exists here depends upon the terms of the 1978 Act and the provisions of BIA’s program regulations. As discussed above, 25 C.F.R. § 2.3 indicates that the decisions of BIA officials are appealable under 25 C.F.R. Part 2 unless some other provision is made by regulation or statute. It is clearly possible for BIA to make a particular type of decision final for the Department at the Area Director or Superintendent level, thus exempting it from the general language of 25 C.F.R. § 2.3(a). Examples of such “exemptions” are found in 25 C.F.R. § 88.1(c) and 25 C.F.R. § 62.10(a). 25 C.F.R. § 88.1(c) makes an Area Director’s approval, disapproval, or conditional approval of a tribal attorney contract final. See Welch v. Minneapolis Area Director, 17 IBIA 56 (1989); Principal Chief, Muscogee (Creek) Nation v. Muskogee Area Director, 18 IBIA 105 (1990). 25 C.F.R. § 62.10(a) makes an Area Director’s decision final in certain adverse enrollment actions. See McClure v. Acting Muskogee Area Director, 27 IBIA 154 (1995).

Where no statute or regulation provides for the finality of a particular type of BIA decision, the Board has rejected BIA contentions that its decisions are final for the Department. See Comanche Housing Authority v. Anadarko Area Director, 22 IBIA 271, 275 n.6 (1992) (rejecting a contention that a BIA trespass determination is final for the Department); Welbourne v. Anadarko Area Director, 26 IBIA 69, 76 (1994) (rejecting a contention that a BIA decision in an election contest under 25 C.F.R. § 81.22 is final for the Department).

With its prior decisions as guidance, the Board finds the Area Director’s arguments here unpersuasive. Nothing in the 1978 Act prohibits administrative challenges to decisions under section 6, and the legislative history on which the Area Director relies is too ambiguous to read such a prohibition into section 6.

The differences between sections 5(a) and 6 of the 1978 Act do not require a conclusion that Congress intended to prohibit administrative challenges to decisions under section 6. In section 5(a), Congress established unique procedures for challenging Osage wills. Obviously, if Congress intended to make Osage wills subject to unique procedures, it was necessary that it delineate those procedures. However, there was already a general procedure for challenging BIA decisions--25 C.F.R. Part 2 and 43 C.F.R. Part 4, Subpart D. Therefore, unless it also intended to provide unique procedures for challenging Osage inter vivos trusts, Congress did not need to delineate additional administrative review procedures in section 6.

The Area Director has not supported his assertion as to BIA's contemporaneous interpretation of section 6 of the 1978 with any documentation from that time period. If such documents existed, they might have strengthened BIA's argument. The fact that no documents were produced suggests the possibility that persons affected by the alleged contemporaneous interpretation of section 6, including Congress when it amended the 1978 Act in 1984, might not have been aware of this interpretation.

The Board concludes that section 6 of the 1978 Act does not prohibit administrative challenges to the approval of Osage inter vivos trusts. Furthermore, BIA has not promulgated regulations making the Superintendent's decisions under section 6 final for the Department. In the absence of either a statute or a regulation making these decisions final for the Department, the Board holds that there is a right of appeal under 25 C.F.R. Part 2 and 43 C.F.R. Part 4, Subpart D.

The Area Director suggests that, if the Board holds that there is a right of appeal, it needs to provide "directions * * * as to how * * * a contest is to be conducted." Feb. 18, 1998, Decision at 6. The "contest" is to be conducted as would any other appeal falling under 25 C.F.R. Part 2 and 43 C.F.R. Part 4, Subpart D.

The Board recognizes, however, that a settlor may well wish to keep the terms of an inter vivos trust confidential, just as a testator might wish to keep the terms of a will confidential. Thus the Superintendent who approves an inter vivos trust should not be required to notify interested parties at the time of approval if the settlor requests confidentiality. The necessary result of lack of notice, however, is that an interested party's right of appeal is tolled and thus may be exercised, as it was in this case, after the settlor's death. See 25 C.F.R. § 2.7.

In dicta in his decision, the Area Director also addressed the merits of this appeal. Presumably because this discussion was dicta, Appellant did not brief it in this appeal. On remand, the Area Director should allow Appellant and any other interested parties a full opportunity to brief the merits of the appeal, including, but not limited to, the discussion in the February 18, 1998, decision.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Acting Muskogee Area Director's February 8, 1998, decision is reversed and this matter is remanded to the Area Director for further consideration.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge