



INTERIOR BOARD OF INDIAN APPEALS

Estate of Nora Angeline Earth

38 IBIA 225 (11/29/2002)

Related Board case:
36 IBIA 168



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF NORA ANGELINE EARTH : Order Affirming Decision
:
:
: Docket No. IBIA 03-25
:
: November 29, 2002

On November 19, 2002, the Board of Indian Appeals (Board) received a notice of appeal from Appellant Della Eastman. Appellant seeks review of an October 2, 2002, order on petition for rehearing issued in the estate of Decedent Nora Angeline Earth by Indian Probate Judge P. Diane Johnson. Probate No. 001-347-2717, IP TC 155 H 99. For the reasons discussed below, the Board affirms Judge Johnson's order.

An order determining Decedent's heirs was originally entered in this estate by Administrative Law Judge William S. Herbert on June 2, 2000. Judge Herbert found that Decedent's property on the Spirit Lake Reservation was subject to purchase by the Spirit Lake Tribe (formerly the Devils Lake Sioux Tribe) under the Act of January 12, 1983, Pub. L. No. 97-459, 96 Stat. 2515. He further found that some of Decedent's property on the Lake Traverse Reservation escheated to the Sisseton-Wahpeton Sioux Tribe under the provisions of the Act of October 19, 1984, Pub. L. No. 98-513, 98 Stat. 2411 (Sisseton-Wahpeton Heirship Act). He ordered that Decedent's property on the Lake Traverse Reservation be distributed to her heirs and to the Sisseton-Wahpeton Sioux Tribe, and that her property on the Spirit Lake Reservation be distributed to her heirs subject to the right of the Spirit Lake Tribe to purchase those interests.

At some point subsequent to the issuance of his June 2, 2000, order in this estate, Judge Herbert apparently started to question the constitutionality of the escheat provisions contained in section 5 of the Sisseton-Wahpeton Heirship Act. In May 2001, he certified fourteen estates, including this one, to the Board for interlocutory review. The Board declined to accept the interlocutory certification and returned the estates to Judge Herbert for decision. Estate of Iris Storvick, et al., 36 IBIA 168 (2001).

On September 20, 2001, Judge Herbert issued a second order in this estate. ^{1/} He held that the escheat provision in the Sisseton-Wahpeton Heirship Act was an unconstitutional

^{1/} This order is consistently referred to as having been issued on Sept. 19, 2001. The copy of the decision provided to the Board is dated Sept. 20, 2001. This is the date which the Board will use.

taking of property without just compensation. He accordingly ordered distribution of all of Decedent's property on the Lake Traverse Reservation to her heirs.

Judge Herbert stayed his September 20, 2001, order to allow any interested party to file a petition for rehearing. Both the Sisseton-Wahpeton Sioux Tribe and the Bureau of Indian Affairs objected to Judge Herbert's ruling.

When Judge Herbert subsequently left the employ of the Department of the Interior, this estate was reassigned to Judge Johnson. Following Board precedent, Judge Johnson held that deciding officials in the Office of Hearings and Appeals of the Department of the Interior lack authority to declare an act of Congress unconstitutional. See Estate of William Youpee, 22 IBIA 248 (1992); Estate of Shonie Curley, 17 IBIA 115 (1989). She therefore vacated Judge Herbert's September 20, 2001, decision and reinstated his June 2, 2000, decision.

Appellant appealed to the Board. Although Appellant incorrectly filed her notice of appeal with Judge Johnson, rather than with the Board, Judge Johnson's office forwarded the notice of appeal to the Board. It was received prior to the expiration of the appeal period and is therefore timely.

In her notice of appeal, Appellant raises only the issue of the constitutionality of the Sisseton-Wahpeton Heirship Act. As Judge Johnson correctly held, the Department of the Interior, this Board, and other Departmental deciding officials, including Administrative Law Judges, are part of the Executive Branch of government. As such, they lack authority to declare an act of Congress unconstitutional. Under the United States Constitution, authority to declare an act of Congress unconstitutional is reserved to the Judicial Branch.

Because the Board has no authority to grant the relief Appellant seeks, *i.e.*, a determination that the Sisseton-Wahpeton Heirship Act is unconstitutional, there is no reason to keep this case on the Board's docket.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Johnson's October 2, 2002, order is affirmed. If Appellant so desires, she can proceed to Federal court.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge