



INTERIOR BOARD OF INDIAN APPEALS

Estate of Chester Brent Spencer

40 IBIA 187 (01/05/2005)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF CHESTER BRENT SPENCER : Order Dismissing Appeal as
: Premature
:
: Docket No. IBIA 05-02
:
: January 5, 2005

On October 12, 2004, the Board of Indian Appeals (Board) received a notice of appeal from the Nez Perce Tribe (Tribe). The Tribe seeks review of an August 13, 2004, Order of Remand to Reappraise Decedent's Property, entered in the Estate of Chester Brent Spencer (Decedent), deceased Umatilla Indian (Probate No. IP SA 11 N 01; Enrollment No. 143U000476), by Administrative Law Judge (ALJ) William E. Hammett. The Board docketed the appeal, but dismisses it because the August 13, 2004, order was not a final order that is appealable of right.

Decedent's estate apparently includes allotment interests that are subject to the Tribe's statutory right to purchase interests in a deceased Indian's trust estate. See 43 C.F.R. § 4.300(a)(3). Under 43 C.F.R. § 4.306, the Tribe is required to pay the full fair market value for such interests. The fair market value is determined by a deciding official in the Office of Hearings and Appeals (OHA), 1/ based on a valuation report prepared by the Bureau of Indian Affairs (BIA), or if that report is contested, following a hearing. Id. §§ 4.300(b)(1)(iii); 4.305. Upon conclusion of the hearing, the OHA deciding official must "issue a decision which determines all of the issues including, but not limited to, a judgment establishing the fair market value of the interests purchased by the tribe." Id. § 4.305(c). The decision must specify the right of appeal to the Board. Id.

In his August 13 order, after conducting a valuation hearing on Decedent's estate, Judge Hammett remanded to BIA an appraisal it had prepared, and ordered BIA to conduct a reappraisal of Decedent's property in order to determine the fair market value. The August 13 order did not purport to be a judgment determining the fair market value of the interests in

1/ "OHA deciding official" is defined as either an administrative law judge, appointed pursuant to the Administrative Procedure Act, 5 U.S.C. § 3104, or an Indian probate judge. 43 C.F.R. § 4.201. OHA deciding officials are within the Hearings Division of OHA.

Decedent's estate that are subject to the Tribe's right of purchase. Nevertheless, the final paragraph of the remand order stated that the decision was final for the Department of the Interior unless a notice of appeal was timely filed with the Board. Consistent with the instructions provided, the Tribe filed a notice of appeal with the Board.

On receipt of the appeal, the Board noted that — notwithstanding the language of finality and appeal instructions — the August 13 order appeared to be an interlocutory order, from which an appeal could not be taken to the Board without certification from the ALJ and permission from the Board. Section 4.28 of 43 C.F.R. provides that “[t]here shall be no interlocutory appeal from a ruling of an administrative law judge unless permission is first obtained from an Appeals Board and an administrative law judge has certified the interlocutory ruling or abused his discretion in refusing a request to so certify.” Permission to appeal from an interlocutory order is granted only under limited circumstances. See id.; Estate of Neal Kay Manuel, 13 IBIA 58 (1984). While tentatively concluding that this appeal was not properly before it, the Board allowed briefing on the issue.

In response, the Tribe makes three arguments why the Board should accept this appeal. First, the Tribe contends that 43 C.F.R. § 4.320 provides the Board with authority to consider the appeal. Section 4.320(a) provides that “[a] party in interest has a right to appeal to the Board from an order of an OHA deciding official on a petition for rehearing, a petition for reopening, or regarding tribal purchase of interests in a deceased Indian's trust estate.” Second, the Tribe argues that whether or not the finality language and appeal instructions in the August 13 order were correct, Appellant relied on and complied with those instructions and it would be unfair for the Board to conclude that the order was interim and not accept the appeal. Third, the Tribe asserts that “by not allowing for timely review of Judge Hammett's order, the Board will only be delaying conclusion of this issue for the family and all affected parties.” Appellant's Brief in Support of Jurisdiction at 2.

The Board disagrees that the general language of section 4.320(a) provides authority for the Board to accept this appeal. Section 4.320(a) identifies three contexts in which an order of an OHA deciding official may be appealed to the Board — orders on a petition for rehearing, on a petition for reopening, or regarding tribal purchase of interests in a decedent's estate. Read in conjunction with other provisions in the regulations, however, section 4.320(a) must be construed as referring only to final orders. In the context of a tribal right of purchase of interests in a deceased Indian's estate, the only decision identified in the regulations that must advise interested parties of their right of appeal, is the final decision which “determines all of the issues including, but not limited to a judgment establishing the fair market value.” 43 C.F.R. § 4.305(c). And in the context of the regulations generally, construing section 4.320(a) as authorizing a right of appeal from non-final orders would be inconsistent with Board precedent and would eviscerate, for Indian probate proceedings, the specific prohibition against interlocutory appeals found in 43 C.F.R. § 4.28. See, e.g., Estate of Neal Kay Manuel,

supra (applying 43 C.F.R. § 4.28 in Indian probate proceedings). Therefore, the Board interprets section 4.320(a) as only describing the types of *final* orders that are appealable to the Board, and not as authorizing appeals of right from interim orders, simply because they fall within one of the three contexts described in section 4.320(a).

The Board also disagrees with Appellant's argument that dismissal of this appeal will delay resolution of this case. To the contrary, dismissal of this appeal will allow Judge Hammett to proceed as soon as he receives a reappraisal, rather than await a Board decision in this interlocutory appeal. Dismissal will therefore permit entry of a final decision earlier than would be the case if the Board were to retain jurisdiction over this appeal. Appellant will have an opportunity to appeal from Judge Hammett's final decision, at which time it can make the arguments it would have made in this appeal, as well as any arguments it might make with respect to the final decision.

In summary, the Board concludes that Judge Hammett's August 13 order was an interim order, for which an appeal could be requested only pursuant to 43 C.F.R. § 4.28. Cf. Estate of Ruby Ruth Maldonado, 38 IBIA 196 (2002) (appeal from an order determining tribal right to purchase, but preceding valuation determination, was interlocutory); Estate of Ruby Ruth Maldonado, 36 IBIA 8 (2001) (returning case to ALJ); Estate of Peter Vallee, 3 IBIA 167 (1974) (post-appraisal but pre-fair-market-value-determination proceedings were interlocutory). Those procedures were not followed, and therefore this appeal must be dismissed.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board dismisses this appeal as premature. This dismissal is without prejudice to Appellant's right to appeal from Judge Hammett's final decision.

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Anita Vogt
Senior Administrative Judge