



INTERIOR BOARD OF INDIAN APPEALS

Estate of Isgrigg Towendolly

50 IBIA 206 (09/16/2009)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

ESTATE OF ISGRIGG)	Order Affirming Decision
TOWENDOLLY)	
)	Docket No. IBIA 08-55
)	
)	September 16, 2009

Appellants are eight heirs of Isgrigg Towendolly (Isgrigg or Decedent).¹ They appeal to the Board of Indian Appeals (Board) from an Order Denying Petitions for Rehearing (Order Denying Rehearing) entered January 23, 2008, by Administrative Law Judge Thomas F. Gordon in the Estate of Isgrigg Towendolly, deceased Pit River Wintun Indian, Probate No. P000017270IP. The Order Denying Rehearing addressed the substantive conclusion rendered in two decisions by Indian Probate Judge M.J. Stancampiano: an Order Determining Heirs dated April 10, 2007, and an Order of Clarification dated May 22, 2007. In each of these orders Judge Stancampiano recognized that a particular parcel of land owned by Decedent at the time of his death was a fee parcel; it therefore would be outside the jurisdiction of the Office of Hearings and Appeals (OHA), which extends only to the assets of a deceased Indian that are held in trust. Appellants raise a series of procedural arguments on the basis of which they seek a new hearing to reconsider the status of the parcel. They also reiterate the substantive argument presented in their Petitions for Rehearing to contend that the parcel automatically reverted to ownership by the United States in trust for Decedent, as a result of a 1983 court decision, in a manner that must necessarily relate back at least to the time of his death, notwithstanding Decedent's death in 1974.

We reject the arguments on appeal. With respect to the various procedural claims, Appellants' due process rights were protected by the process available to them to file petitions for rehearing, and they continue to be protected by the right of appeal to this Board. In both cases, in order to obtain a new hearing, they were obligated to show that a rehearing might have a substantive bearing on the case. On the substantive issue, Appellants merely restate the arguments made to and rejected by Judge Gordon, and we agree that he was correct. We thus affirm the Order Denying Rehearing.

¹ The eight Appellants are the following grandnieces and grandnephews of Decedent: Hazel Beatrice Wilkes, Eugene Ronald Wilkes, Edward Ronald Wilkes, Leonard Clyde Wilkes, Violet Mae Wilkes, Caroline Wilson, Eileen Wilkes Siaz, and Arnold Wilkes.

Background

Isgrigg Towendolly was a Pit River Wintun Indian of the Redding Rancheria in Shasta County, California.² He was born in 1889, and died intestate on May 27, 1974. His wife Nellie Towendolly survived him; Nellie and Isgrigg had one child who predeceased them both without issue. Nellie died in 1975. At the time of his death, Decedent lived in or near Redding, California, and owned interests in several properties. The only land at issue here is a 0.77-acre parcel, No. 049-400-003, known as the Redding Rancheria Parcel 7.

The Redding Rancheria Parcel 7 lies within the boundaries of the Redding Rancheria in Shasta County, California. At the time of Decedent's death in 1974, he held fee title to the parcel. A 1984 proceeding of the Superior Court of the State of California, Shasta County, distributed the parcel as community property to Nellie's estate and a related judgment in 1984 distributed it to Nellie's heirs.³ Through a series of subsequent transactions, the parcel ultimately was acquired by the Redding Rancheria.

In 2007, Judge Stancampiano conducted probate proceedings with respect to Decedent's estate. On February 22, 2007, OHA issued a notice that a hearing would be conducted to determine the heirs of the estate on March 23, 2007. On March 20, 2007, OHA received a letter from attorney Larry Leventhal, asserting that "a continuance and change of location of the hearing is desired," and asking for a hearing to be conducted in Sacramento some 4 to 6 months in the future so that he could "become more fully informed of the assets" of the estate. Judge Stancampiano proceeded to conduct the hearing to determine the heirs on March 23, 2007.

On April 10, 2007, Judge Stancampiano issued his Order Determining Heirs, concluding that Decedent's trust or restricted property, listed on an attached inventory, was to be distributed with a 50% share descending to the estate of Nellie Towendolly, and the remaining 50% descending in equal shares (1/16 each) to Appellants. Attached to the Order

² "Redding Rancheria" may, depending on context, refer either to the Federally recognized Tribe or to the Tribe's geographic land base.

³ These State proceedings, under case numbers 15608 and 15521, were initiated by petition of the personal representative of the estate of Nellie Towendolly. The petitioner and Nellie's heirs were unrelated to Isgrigg. We refer to the cases collectively as the "State Court proceeding."

was an inventory of real property interests owned by Decedent at the time of his death; page 1 of the inventory listed the Redding Rancheria Parcel 7 as a “fee interest tract.”⁴

Some background was given in the Order and the inventory, and is necessary at this juncture. The Redding Rancheria was included in a group of Indian rancherias and reservations subject to termination under the California Rancheria Act of August 18, 1958, Pub. L. No. 85-671, 72 Stat. 619. In purporting to implement the Act, the United States conveyed fee ownership of lands within the former boundary of the Rancheria, which previously were held by the United States in trust, to certain Indians including Decedent. *See* 27 Fed. Reg. 5840 (June 20, 1962) (Notice of Termination). A March 22, 1961, Deed conveyed the Redding Rancheria Parcel 7 to Decedent in fee. Seventeen rancherias filed a class action in the United States District Court for the Northern District of California to challenge the Federal government’s implementation of the Act and to set aside the Notice of Termination. *Tillie Hardwick, et al v. United States of America*, C-79-1710 SW (*Hardwick* case). Any Indian heir who received Redding Rancheria Parcel 7 became a class member by virtue of the fact that the parcel had previously been held in trust but was conveyed to Decedent in fee. Stipulation for Entry of Judgment (1983 Stipulation), ¶ 2.⁵ In 1983, the *Hardwick* parties entered into a stipulated settlement, adopted by order of the court, in which certain rancherias, including the Redding Rancheria, were restored to recognition as Indian tribes, and class members were restored to their status as Indians. With respect to those class members who had interests in fee land based on distribution of rancheria assets as a result of the rancherias’ dissolution, the 1983 Stipulation established, at paragraphs 6 and 8, that any such person “may elect to convey to the United States any land for which the United States issued fee title . . . to be held in trust for his/her individual benefit . . .” 1983 Stipulation ¶ 8. There is no argument in this appeal that Decedent never made such an election, or could have, given that he predeceased the 1983 Stipulation. Nor did any heir make such an election. As previously noted, in 1984 the State Court proceeding ordered Redding Rancheria Parcel 7 to pass to Nellie’s estate, and then to Nellie’s heirs.

By letter to Judge Stancampiano dated April 30, 2007, the Redding Rancheria complained to him that the inventory attached to the Order Determining Heirs had created a

⁴ The proper distribution of the estate among heirs is not at issue in this appeal. In the probate proceeding, Appellants challenged distribution of any portion of Decedent’s estate to the estate of Nellie Towendolly, but they do not raise this argument on appeal.

⁵ Paragraph 2 of the 1983 Stipulation required the Court to “certify a class consisting of all those persons who received [fee lands] pursuant to the California Rancheria Act and any Indian Heirs, legate[e]s or successors in interest of such persons with respect to any real property they received as a result of the implementation” of the Act.

problem for the Rancheria. The attachment to the Order of the inventory led some of Decedent's heirs to interpret the Order as having conveyed the Redding Rancheria Parcel 7 to them. Claiming that the Redding Rancheria owns the Parcel, the Rancheria asked for a clarification of the Order Determining Heirs in a "Nunc Pro Tunc Order."

On May 22, 2007, Judge Stancampiano issued a one-page Order of Clarification, served on Appellants, explaining that OHA's jurisdiction extends only to lands held in trust or restricted status. This Order clarified that the Order Determining Heirs "does not apply to the fee parcel."

Appellants each submitted a Petition for Rehearing, generally identical to each other's Petitions. They charged various procedural errors in Judge Stancampiano's willingness to entertain the Rancheria's letter, identifying it as an improper "ex parte communication." In arguments relevant to this appeal, Appellants asserted that the Order of Clarification effectively reversed the Order Determining Heirs and "transform[ed] a finding of trust lands to be distributed to blood heirs to accepting without argument a post-hearing contention that such lands are fee lands, that have been dealt with and distributed in accordance with State law in a proper manner." Petitions for Rehearing at ¶¶ 6, 7. The Petitions argued that the status of the Parcel had been decided improperly in the Order of Clarification and demanded a rehearing because the status "w[as] not the subject of any hearing" and was "not addressed," that "no record was developed," and that Appellants were "not provided any real opportunity for this proposition to be addressed and argued." *Id.* at ¶¶ 4, 5, 6, 8, 9, 11. They also complained that Judge Stancampiano's failure to grant the continuance requested by attorney Leventhal on March 20, 2007, had prejudiced their rights to present their case.

In response, Judge Thomas Gordon, who by then was assigned the case, issued a Notice of Petition for Rehearing and Request for Further Information (Notice). In this Notice, Judge Gordon advised Appellants, the Bureau of Indian Affairs (BIA), and the Redding Rancheria of the filing of the Petitions and their asserted issues and advised all parties to present arguments and evidence for their positions with respect to the status of the Redding Rancheria Parcel 7 within 30 days of October 4, 2007. All parties did so. Appellants, represented by Leventhal, submitted a joint Response to Information Request, to which they attached the 1983 Stipulation in the *Hardwick* case and the 1983 court order adopting the Stipulation, and a Stipulation for Entry of Judgment that was specific to the Redding Rancheria and a court order adopting that Stipulation, both rendered in 1992. They argued that under paragraphs 3 and 4 of the 1983 Stipulation, the status of the rancherias and individual members of the subject tribes was restored. They contended: "Language that speaks to the future election to restore property is not the operative language." Citing the 1992 Stipulation, Appellants argued that it restored Federal jurisdiction over the Redding Rancheria and, therefore, that the State Court had no authority

to distribute the Redding Rancheria Parcel 7 as community property in 1984 and that State law had been “misapplied.”

Appellants concluded that, as a result of the 1983 and 1992 Stipulations and Orders in the *Hardwick* case:

Isgrigg Towendolly predeceased his wife. Her interests are limited by federal law and the blood relatives of Isgrigg Towendolly have a clear interest and entitlement as to real property included within his Estate. The State Court never had proper jurisdiction and, hence, its Orders are a nullity, and any appeal period has no relevance.

Appellants’ Response at 2-3.

In his Order Denying Petitions for Rehearing, Judge Gordon carefully analyzed arguments presented by all parties. He disagreed with Appellants. Judge Gordon found paragraphs 6 and 8 of the 1983 Stipulation in the *Hardwick* case to be the operative provisions governing the property. Judge Gordon explained:

By its terms, the 1983 Stipulation applies to 17 Rancherias, specifically including the Redding Rancheria. (1983 Stipulation, ¶ 1). The 1983 Stipulation directs the Court to certify a class, which consists of those persons who received any of the assets of the listed Rancherias pursuant to the California Rancheria Act, and Indian heirs, legatees, or successors in interest of such person (with respect to real property).

Paragraph 6 of the 1983 Stipulation states:

Any named individual plaintiff or class member who received or presently owns fee title to an interest in any former trust allotment by reason of the distribution of the assets of any of the Rancherias listed in paragraph 1 shall be entitled to elect to restore such interest to trust status, to be held by the United States for the benefit of such Indian Tribes.

Paragraph 8 of the 1983 Stipulation states in part:

Any named plaintiff or other class member herein may elect to convey to the United States any land for which

the United States issued fee title in connection with or as a result of the distribution of assets of said rancherias to be held in trust for his/her individual benefit of any other member or members of the rancheria

Thus, the 1983 Stipulation provided a means whereby class members (including heirs) could, if they chose, turn certain fee (or private) land into trust land. The 1983 Stipulation also restored and confirmed the status of the class members as Indians (1983 Stipulation, ¶ 3), and recognized the “Indian tribes, Bands, Communities [and] groups” of the listed Rancherias as “Indian entities with the same status as they possessed prior to distribution of the assets of these Rancherias under the California Rancheria Act” (1983 Stipulation, ¶ 4).

Order Denying Rehearing at 4-5.

Turning to the Redding Rancheria Parcel 7, Judge Gordon explained that none of the owners of the parcel ever “exercised the option provided by the 1983 Stipulation to turn the parcel into trust land.” *Id.* at 8. He disagreed with Appellants that the 1983 and 1992 Stipulations effectuated a “fundamental change” causing the parcel to revert to the status of trust land, subject to the jurisdiction of OHA, in the absence of the affirmative act of election specified in paragraphs 6 and 8. He explained that the parcel became “‘Indian country,’ as that term is defined in federal law,” and therefore was “subject to the regulatory jurisdiction of the Redding Rancheria, to the same extent any private land within the boundaries of an Indian Reservation in California is subject to the regulation of the governing Tribe.” *Id.* But he also explained that OHA does not have jurisdiction over private land merely because it is within the boundaries of the Rancheria unless it is “trust property.” *Id.* at 8-9. Judge Gordon explained that the attachment to the Order Determining Heirs of an inventory which included fee land was the source of confusion created for Appellants.

Appellants submitted a Notice of Appeal and an Opening Brief. Their arguments fall into two categories — procedural and substantive. In both cases they reiterate complaints presented to and addressed by Judge Gordon. The majority of the arguments are procedural in nature and we address them first.

Appellants complain that they were denied due process because the Order of Clarification “amended,” or “transformed,” the Order Determining Heirs as a result of the Rancheria’s “ex parte communication” which was not served on Appellants before the order was issued. Opening Brief at 5, 6, 7. They complain that the hearing proceeded too

“briskly” and provided no opportunity for Appellants to “describe why they were not ready to proceed at that time, nor what their position was.” *Id.* They contend that Judge Stancampiano misconstrued attorney Leventhal’s request for a continuance. *Id.* at 6. They contend that they “had no opportunity to address the issue as to whether the parcel in question is a fee parcel or is a parcel held in trust or beneficial trust.” *Id.* at 7. They claim that “there was no record developed as to what options may have been exercised” with respect to restoring the parcel into trust status, and “no opportunity at all to argue, or even address, the rather complex legal authority that may be applicable, nor to develop a factual record associated with such legal authority as the Parties may wish to offer.” *Id.* at 7, 9, 10. They claim that the denial of rehearing was undertaken against them “in a selective manner” because it is OHA’s “policy generally . . . to commonly grant rehearing when requested when any individual has not had a full opportunity to prepare and participate.” *Id.* at 9.

Appellants repeat their complaint that Judge Stancampiano improperly took up the Rancheria’s ex parte letter, and allege that he failed to follow an administrative counterpart to the rules governing the judiciary set forth in the American Bar Association Model Code of Conduct, Rule 2.9, and the Rules of Professional Conduct of the State of California, Rule 5-300, in his handling of the letter. Opening Brief at 10. They assert that the result was to give an “unfair advantage” to the Redding Rancheria. *Id.* at 11 (citing *Home Box office Inc. v. Federal Communications Commission*, 567 F.2d 9 (D.C. Cir. 1977), and an ethics thesis). They argue that the consequence of Judge Stancampiano’s “unwise and prejudicial” conduct in entertaining the Rancheria’s letter is that a new hearing must be held and, in any event, “little resources will be lost by reconvening a full new hearing and providing for full participation by interested parties” in front of a newly assigned probate judge. Opening Brief at 12.

In the substantive category, Appellants contend that the inventory attached to the Order Determining Heirs designated that the “specified lands were part of the estate to be distributed to heirs,” and that they had “every reason to rely on the original inventory.” Opening Brief at 8. They claim that Judge Gordon’s Order Denying Rehearing “reaches back to revise the initial BIA Inventory.” *Id.* at 9. Briefly addressing the stipulations and orders in the *Hardwick* case, *id.* at 12-14, Appellants characterize the operative paragraphs as the ones restoring the status of the Redding Rancheria, *id.* at 13, and assert that the *Hardwick* orders and stipulations were “additionally meant to reestablish the Tribal character to the lands therein.” *Id.* They conclude that the State Court had no jurisdiction to address the Redding Rancheria Parcel 7 in 1984, and that, even “if it did, the Court would have been compelled to follow de[s]cent and distribution pursuant to the Code of Federal Regulations and it did not.” *Id.* Appellants conclude that they “have a clear interest and clear entitlement as to real property included within [Decedent’s] estate.” *Id.*

No other briefs were submitted.

Discussion

An appellant's burden of proof in overcoming an order on rehearing is to show that it was issued in error. *Estate of Verna Mae Pepion Hill Hamilton*, 45 IBIA 58, 63 (2007). Relying primarily on their procedural challenges, Appellants appear to believe that if they can prove now that Judge Stancampiano committed a procedural error, they can obtain another hearing in order to present their substantive case. They restate their beliefs regarding the effect of the *Hardwick* case, without directly addressing Judge Gordon's careful and articulate analysis of that case. This strategy is entirely unsuccessful. Appellants fail to cite or demonstrate to this Board any error on Judge Gordon's part.

What Appellants miss is that the alleged procedural defects they cited in Judge Stancampiano's actions were rendered moot by Judge Gordon when, in response to the Petitions for Rehearing, he issued the Notice to all parties to put forth their substantive cases for why another hearing should or should not take place. Appellants' many complaints that the Redding Rancheria's letter was "ex parte communication" were rendered moot by Judge Gordon's response to the Petitions for Rehearing. Appellants' complaints that they were not given a chance to "describe why they were not ready" or to present their position to Judge Stancampiano were also rendered moot when Judge Gordon provided them the very 6 months they had sought in their request for continuance. Their complaints regarding a lack of "record development" are likewise solved by the fact that Judge Gordon permitted them to submit into the record whatever evidence they believed would support their position. If they thought more evidence existed to justify another hearing to gather evidence they failed to track down by then, then they sat on their rights. Their complaint that Judge Gordon treated them "in a selective manner," based on a supposed OHA "policy . . . to commonly grant rehearing when requested" is wholly unsupported.

Thus, even if Appellants could prove that there had been a procedural defect in Judge Stancampiano's orders, the opportunity to submit the Petitions for Rehearing was the vehicle to protect their due process rights. Judge Gordon correctly proffered them the opportunity to show that procedural defects resulted in an error justifying reversal of the orders issued by Judge Stancampiano. They did not do so, and they have failed to show, or even allege, that Judge Gordon did anything other than grant them all the procedure to which they were entitled. In the absence of showing that *he* committed any error, they have no recourse to this Board on appeal. Moreover, the existence of a right of appeal to this Board protects a party's right to due process. *Quantum Entertainment, Ltd. v. Acting Southwest Regional Director*, 44 IBIA 178, 208 (2007) ("appellant's due process rights are protected by the right to appeal a BIA decision to this Board"), and cases cited therein.

The applicable rule on rehearing was 43 C.F.R. 4.241 (2007).⁶ Under subsection 4.241(a)(1), a petition must clearly and concisely state, under oath, the grounds on which it was based. If based on newly-discovered evidence, the petition must (i) be accompanied by an affidavit or declaration stating fully what the new testimony is to be, and (ii) provide “justifiable reasons for the failure to discover and present [newly discovered] evidence” not presented during the probate hearing. 43 C.F.R. § 4.241(a)(2).

Setting aside whether Appellants meant to submit petitions under subsection (a)(1) or (a)(2), Judge Gordon plainly understood the import of Appellants’ arguments that they had been denied due process when the Redding Rancheria submitted the letter regarding the Order Determining Heirs. He allowed all parties to brief their substantive positions, considered their evidence, and rendered a substantive conclusion. That Appellants believed their procedural rights were affected by Judge Stancampiano was plain to Judge Gordon; he protected them by giving them the right to present their case. Appellants’ problem is that Judge Gordon did not agree with their substantive position, but they have no claim that he did not afford them the process they were due.

Appellants’ substantive arguments are too unformed in the Notice of Appeal and Opening Brief to constitute contentions as to why Judge Gordon erred in construing the documents from the *Hardwick* case. In order to obtain a remand at this juncture, Appellants would have to argue successfully that Judge Gordon erred in construing that material.⁷

⁶ The Department’s probate regulations were amended effective December 15, 2008, to incorporate the provisions of the American Indian Probate Reform Act of 2004, *as amended*, primarily codified at 25 U.S.C. §§ 2201, *et seq.* See 73 Fed. Reg. 67,256 (Nov. 13, 2008). The rules governing Indian probate hearings will be codified at 43 C.F.R. Part 30. See 73 Fed. Reg. at 67,289. Judge Gordon’s rehearing proceedings were governed by the prior version of the regulations, and the citations to 43 C.F.R. Part 4 are to regulations published in 2007, unless otherwise noted.

⁷ Appellants’ complaint that Judge Gordon somehow “reached back” to amend the inventory is likewise specious. Neither the Order Determining Heirs nor the inventory identified the Redding Rancheria Parcel 7 as trust property. The Order of Clarification neither changed the first Order nor prejudiced Appellants when it emphasized the inventory’s notification that the Redding Rancheria Parcel 7 was a fee tract. Judge Gordon merely acknowledged this fact.

We find no reason to reverse Judge Gordon’s analysis and conclusion. Appellants contend that all trust land that converted to fee status after implementation of the California Rancheria Act of 1958 automatically reverted back to trust status as a result of *Hardwick*, and necessarily in a manner that related back, presumably, to the date the fee title was issued. Nothing in the 1983 Stipulation (and Order) in the *Hardwick* case purported to create such a consequence. As Judge Gordon explained, paragraphs 6 and 8 of the Stipulation permitted any individual plaintiff or class member “who received or presently owns fee title” to make an *election* to convert fee ownership of the land back to trust status. The Stipulation did not cause lands to be automatically reverted to trust status without action by a class member. A request for conveyance back into trust was required.

We recognize the dilemma faced here by Appellants. Fee title to the Redding Rancheria Parcel 7 was issued in 1961. Isgrigg and Nellie Towendolly died in 1974 and 1975, before the 1983 Stipulation which would have allowed Isgrigg, or Nellie as his heir, to make an election to convert that fee land back into trust status. And the fee land then passed as community property to Nellie’s estate in the State Court proceeding, thus removing from Appellants any right of inheritance that could have given rise to a right of election as class members. Nonetheless, Judge Gordon was correct that returning the property to trust status required an election by the fee owner or heir, and that OHA only has jurisdiction to probate lands held in trust or restricted status.

The Department is authorized only to conduct probate proceedings for trust or restricted assets and does not have jurisdiction to probate non-trust assets of Indian-owned businesses. *See Estate of Florence Whiteman*, 39 IBIA 180, 183 (2003); *Estate of Pansy Jeanette (Sparkman) Oyler*, 16 IBIA 45, 47 (1988). Non-trust assets are subject to probate in the appropriate tribal or state court. *Estate of Oyler*, 16 IBIA at 47.

Estate of Robert Henry Moran Sr., 44 IBIA 245, 245 (2007).

In the absence of an election by any heir by 1984, the State Court proceeding took place with respect to Decedent’s fee lands. We have no authority to declare it a nullity, so as to deprive the State Court’s order of the finality that attached when no challenge was presented. Nor do we have the power to “undo” any of the subsequent legal actions with respect to the parcel that eventually led it to be sold to the Redding Rancheria. That Appellants plainly would wish to make an election now under the 1983 Stipulation is irrelevant because they cannot do so; by its express terms, the election could only be made by a class member who must have been an “heir, legatee, or successor in interest.” No such person made an election. Appellants may presume that they had rights to make an election that they did not exercise, perhaps because they were unaware of them. But they have not

shown that they ever were heirs, and we need not guess at whether they should have been declared to be heirs under State or tribal law at one time prior to 1984, such that they might have then been able to make an election, because we have no jurisdiction over the probate of non-trust property, nor do we have the power to invalidate the acquisition by the Redding Rancheria of title to a fee parcel.

Conclusion

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 Order Denying Rehearing is affirmed.

I concur:

// original signed
Lisa Hemmer
Administrative Judge*

// original signed
Steven K. Linscheid
Chief Administrative Judge

*Interior Board of Land Appeals, sitting by designation.