



## INTERIOR BOARD OF INDIAN APPEALS

Estates of Pe-Qua, Ke-Ah-Quah-Moke, Nay-Nay-Ko-Thay-Quah,  
and Mes-Quah (Mattie Quah-Nc-Mah)

52 IBIA 181 (10/25/2010)



# 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

ESTATES OF PE-QUA,	)	Order Dismissing Appeals and Referring
KE-AH-QUAH-MOKE,	)	ALJ's Findings and Recommendations
NAY-NAY-KO-THAY-QUAH, and	)	to the Assistant Secretary - Indian
MES-QUAH (MATTIE QUAH-	)	Affairs
NE-MAH)	)	
	)	Docket Nos. IBIA 08-067
	)	08-113
	)	08-123
	)	09-016
	)	
	)	October 25, 2010

Roellen Gentry Hasbrook and Robert E. Gentry (Appellants) have appealed to the Board of Indian Appeals (Board) from findings and recommendations made by Administrative Law Judge (ALJ) Richard L. Reeh at the conclusion of special probate reopening proceedings conducted pursuant to a 1972 order of the Board, which authorized the reopening of estates of Mexican Kickapoo Indians. The estates of Pe-Qua, Ke-ah-quah-moke, Nay-nay-ko-thay-quah, and Mes-quah (Mattie Quah-ne-mah) (collectively Decedents) were among those reopened, and the ALJ's findings and recommendations could, if accepted, lead to actions to recover property interests in Oklahoma for which Appellants are the owners of record.

The immediate purpose of the 1972 order for reopening Mexican Kickapoo probates was to correct probate orders issued between 1958 and 1965 that had erroneously declared as a matter of law that trust or restricted property distributed to Kickapoo Indian heirs who were determined to be Mexican nationals passed to them stripped of its trust or restricted status because of their nationality.<sup>1</sup> In the absence of such correction, the probate orders were considered a barrier to the ability of the Bureau of Indian Affairs (BIA) to exercise supervision and trusteeship over the property held by those heirs. But an added function of

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<sup>1</sup> A copy of the Board's May 23, 1972, Order for Reopening (Waiver of Limitation), Docket No. IBIA 72-16, is attached to this decision. Under the probate regulations in effect in 1972, an Indian probate that had been closed for more than 3 years could only be reopened by order of the Board. See 43 C.F.R. § 4.242(h) (1972).

the proceedings — relevant to these appeals — was to obtain, through the hearings conducted by the ALJ, evidence concerning property that had been affected by the erroneous declarations, some of which had been the subject of conveyances and issuance of patents in fee. An added assignment given to the judge was to make findings and recommendations regarding title and ownership issues, and possible judicial action to quiet titles or recover possession of property.

Appellants are the owners of property interests that were purchased from the Mexican Kickapoo Indian heirs of one or more of the Decedents.<sup>2</sup> In each case, the ALJ recommended that the Department of the Interior (Department) consider initiating action to quiet or recover title and possession of interests in the properties on behalf of the Indian heirs.

We conclude that the issues raised in these appeals, and the ALJ's findings and recommendations, are outside the scope of the Board's jurisdiction, and therefore should be referred to the Assistant Secretary - Indian Affairs (Assistant Secretary) for consideration. The additional function of the reopening proceedings — for the probate judge to gather evidence and make findings and recommendations relating to title issues and possible recovery actions — was intended to provide assistance to BIA and to provide a foundation for Departmental decisions regarding the properties subject to those recommendations. The Board's 1972 order did not purport to expand the decision making authority of the probate judge, nor that of the Board. Although the Board's 1972 order directed that recommendations regarding title and possession be forwarded to the Board for further consideration and Departmental action, the order left the Board's role unclear. We conclude that the delegated authority within the Department to consider those findings and recommendations in these cases, and to take action, if deemed appropriate, lies with the Assistant Secretary (and the Solicitor for the Department), and not with the Board. Therefore, we dismiss these appeals and refer these cases to the Assistant Secretary. In addition, because the ALJ also issued findings and recommendations in other Mexican Kickapoo probate cases, which may be relevant to BIA's administration of property inherited by Mexican Kickapoo heirs, or to possible recovery or quiet title actions, we also

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<sup>2</sup> Roellen Gentry Hasbrook and Robert E. Gentry are the appellants in *Estate of Pe-qua* (Docket No. IBIA 08-067) (Probate No. P000033371IP) and *Estate of Nay-nay-ko-thay-quah* (Docket No. IBIA 08-123) (Probate No. P000033372IP). Roellen Gentry Hasbrook is the appellant in *Estate of Ke-ah-quah-moke* (Docket No. IBIA 08-113) (Probate No. P000011867IP) and *Estate of Mes-quah (Mattie Quah-ne-mah)* (Docket No. IBIA 09-016) (Probate No. P000011594IP).

refer to the Assistant Secretary the additional cases in which the ALJ submitted findings and recommendations.

## Background

In 1958, Examiners of Inheritance in the Office of the Solicitor, who at that time were responsible for probating Indian estates, began reopening the estates of “Mexican Kickapoo” allottees to make determinations on the nationality of the decedents’ heirs.<sup>3</sup> The reopenings were prompted by a decision by the Solicitor that Indians who were Canadian nationals were not Indians who were under the protection and superintendence of the United States, and thus were not individuals for whom property could be held in trust by the United States or whose property was subject to restrictions against alienation. *See* Probate of Estates of Canadian Indians, II Op. Sol. (Indian Affairs) 1623 (Dec. 18, 1953) (M-36186). The Solicitor’s Opinion was interpreted as applying more broadly to Indians who were “nationals of another country,”<sup>4</sup> and as applied to the Mexican Kickapoo, it led to numerous probate reopenings, nationality determinations, and decrees that property distributed to Kickapoo heirs who were Mexican nationals was stripped, by operation of law, of its trust or restricted character. *See, e.g.*, Order Determining Nationality or Citizenship of Heirs, *Estate of Ke-ah-qua-moke*,<sup>5</sup> deceased Mexican Kickapoo Allottee #214 (Probate No. 71289-25; M-91-58) (Apr. 11, 1958) (reopening 1925 probate order).

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<sup>3</sup> As explained by the Acting Solicitor in *Estate of Ab-che-tha-to-qualh*, No. IA-975 (Sept. 16, 1965), at the time of European contact, the Kickapoo Indians were living around the Great Lakes. Eventually, the tribe moved to present-day Kansas and the southern plains. Around 1852, a large body left the main tribe and migrated to Texas and then Mexico, where they became known as “Mexican Kickapoo.” Another group moved to Mexico in 1862, but by 1873, some had returned and settled in Indian Territory (in present-day Oklahoma), where they were later allotted land as Mexican Kickapoo. *Id.* at 5-6. Social and family connections between the groups in the United States and in Mexico resulted in continuing movements of members between the two countries. *See also* Felipe A. Latorre and Dolores L. Latorre, *The Mexican Kickapoo Indians* (1976) (Chapter 1, Historical Sketch).

<sup>4</sup> Memorandum from Commissioner, BIA to All Area Directors and Superintendents, at 1, May 21, 1957 (Determinations as to whether heirs or devisees of deceased Indians are nationals of another country).

<sup>5</sup> The decedent’s name is variously spelled Ke-ah-quah-moke and Ke-ah-qua-moke.

In 1965, based on what he characterized as the unique history of the Kickapoo, the Acting Solicitor overruled the position that Kickapoo Indians who were Mexican nationals fell outside the class of Indians protected by United States laws imposing trust or restricted status on their property, solely by virtue of their nationality. *Estate of Ah-che-tha-to-qua*, No. IA-975 (Sept. 16, 1965). The Acting Solicitor's decision was sustained in *Couch v. Udall*, 404 F.2d 97 (10th Cir. 1968).

In 1970, the authority to probate Indian trust or restricted estates was transferred from the Solicitor's office and delegated to the Hearings Division in the newly created Office of Hearings and Appeals (OHA). The authority to waive the 3-year limitations period for reopening a closed estate, and to decide appeals, was delegated to the Board. *See* 35 Fed. Reg. 12,081 (July 28, 1970). At the time, a number of cases were identified in which determinations of Mexican nationality of Kickapoos had been made, and the Board's Chairman concluded that a second reopening was necessary to eliminate the outstanding orders declaring the inherited property of those Kickapoos to have been stripped of trust or restricted status. *See* Memorandum from Chairman, Board of Indian Appeals to Director, OHA, May 2, 1972.

The Chairman also discussed the possibility of invoking the power of the courts to cancel fee patents, if they had been improperly issued, recognizing that such proceedings by the United States would be under the direction of the Justice Department acting upon recommendations of the Secretary. *Id.* at 6. Thus, in addition to serving the purpose of reopening cases to correct the erroneous decrees regarding the status of the title received by the heirs who had been determined to be Mexican nationals, the Chairman suggested an additional purpose that could be served:

It appears to me that the Examiners could also be authorized to take evidence to determine in each case whether a patent in fee had been issued; whether conveyances have been made by the heirs, and if so, the date such conveyances were made by the heirs, and if so, the date of [de]livery of such conveyances in relation to the date of acceptance of any patent; to determine whether or not the land interests have been taxed by local authorities; to obtain such evidence as might be available bearing upon the validity of the claim of any alleged bona fide purchaser, lessee or mortgagee.

I am informed by [BIA] that it lacks the manpower to conduct the investigations suggested by [the Solicitor's office], and it occurs to me that the necessary information in each case might well be obtained by the Examiner at a well-publicized hearing with actual notice being given to all known persons who might have a claim to the land interests.

*Id.* at 6-7.

On May 23, 1972, the Board issued its order authorizing the reopening of the Mexican Kickapoo cases.<sup>6</sup> After initially noting that it was necessary to set aside the prior orders purporting to “strip[] titles of their trust or restricted status,” *id.* at 1, in order to correct and clarify the status of the title received by heirs, and to remove uncertainty about BIA’s jurisdiction over such property (e.g., if still held by the Indian heirs), the Board’s order addressed the additional issue of property that had passed to third parties through the execution, by heirs determined to be Mexican nationals, of deeds or conveyances without Secretarial approval, and in some instances property for which fee patents had issued:

It is evident that hearings are necessary and advisable in each case so that evidence may be received and a record made as to relevant material issues of fact; and in those instances where fee patents have issued, to obtain a record which would support a recommendation to the Department of Justice to institute proceedings in court for the cancellation of such fee patents.

*Id.* at 2. The Board directed the Examiner to make factual findings on a variety of issues relating to title. Upon completion of the hearings, the Examiner was to issue an order setting aside, modifying, or confirming the earlier probate orders concerning the continuation of the trust or restricted status of the title held by a decedent’s heirs or the heirs of subsequently deceased heirs.<sup>7</sup> That order was subject to eventual appeal to the Board. The Board also directed that,

[f]urther, the Examiner shall issue separate recommendations concerning such court action as shall appear to him to be appropriate for the recovery of possession of the lands involved, for the cancellation of any outstanding conveyances, encumbrances, leases or taxes, and the cancellation of any outstanding patent in fee. If he recommends that affirmative action be taken in relation to any of said matters, then the entire record of the proceedings

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<sup>6</sup> An initial Order for Reopening, signed only by the Board’s Chairman, was issued on May 2, 1972. A May 23, 1972, memorandum from the Chairman to the Hearing Examiner in Tulsa, Oklahoma explained that the May 23 order, signed by two members of the Board, incorporated certain suggestions and was intended to replace the May 2 order.

<sup>7</sup> The Board apparently left open the possibility of confirming previous orders with respect to the trust or non-trust status of inherited property because factors other than the nationality of an heir might warrant confirming the conclusion that property had passed out of trust, albeit for a different reason.

shall be forwarded to the Board of Indian Appeals for further consideration and Departmental action.

*Id.* at 3.

### The ALJ's Findings and Recommendations

There are three properties, or interests in those properties, that are subject to findings and recommendations made by the ALJ that have been challenged by Appellants in these four appeals.

#### I. Mexican Kickapoo Allotment No. 286 (MK-286)<sup>8</sup>

Pe-qua was the allottee of MK-286 and held a full interest upon his death in 1925. In *Estate of Pe-qua*, the ALJ found that a 39/45 interest in MK-286 had passed to Kickapoo heirs<sup>9</sup> who were determined to be Mexican nationals, and whose inherited property had been declared stripped of its trust or restricted status. In 1960, the heirs executed warranty deeds of those interests to W.L. Gentry, which were not approved by the Secretary. In 1961, a fee patent was issued to the original heirs for those interests.<sup>10</sup> In his recommendations for MK-286, the ALJ found that because the warranty deeds were executed prior to issuance of the fee patent, and without approval by the Secretary, the deeds were void. He also found, based on the evidence,<sup>11</sup> that the heirs' application for a fee patent should not be considered voluntary. He then

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<sup>8</sup> MK-286 is described as Lots 3 and 4, Left Bank of the North Fork of the Canadian River, Section 6-T10N-R3E, Pottawatomie County, Oklahoma, containing 67.70 acres.

<sup>9</sup> Pe-qua died testate, but for purposes of this decision, the Board uses the word "heir" to refer both to legal heirs and to devisees under a will.

<sup>10</sup> The 39/45 interest in MK-286 that is at issue was devised to and divided among three of Pe-qua's grandchildren, Mah-nwa-hah (13/45 interest), Nay-nay-ko-thay-quah (13/45 interest), and Ko-ke-pah-ga-quake (13/45 interest). Nay-nay-ko-thay-quah died in 1928, and her interest then passed in equal shares to the other two, who were her siblings, and who each then held a 13/30 interest, and collectively a 26/30 (39/45) interest.

<sup>11</sup> In each of the reopened cases, the ALJ made detailed factual findings and created a sizeable evidentiary record, which we describe here only in a very limited way.

RECOMMENDED that consideration be given to initiating action to (1) declare the warranty deeds void, (2) cancel the fee patent, and (3) recover possession of [Pe-qua's] 39/45 interest in MK-286 for the United States on behalf of the beneficial owners.

IT IS ALSO RECOMMENDED that steps then be taken to remove the interest from state and local tax rolls.

Order of Reopening, Setting Aside Nationality Modification, and Recommending Action at 23-24, *Estate of Pe-qua* (Feb. 29, 2008).

In a related reopening proceeding, *Estate of Nay-nay-ko-thay-quah*, which is the subject of the appeal in Docket No. IBIA 08-123, the ALJ made the same recommendation regarding the 39/45 interest in MK-286. See Order of Reopening and Recommendations for Action at 42, *Estate of Nay-nay-ko-thay-quah* (June 18, 2008). As noted, *supra* note 10, Nay-nay-ko-thay-quah was among the original heirs of Pe-qua, and was included in the patent in fee issued in 1961.

## II. Mexican Kickapoo Allotment No. 214 (MK-214)<sup>12</sup>

Ke-ah-quah-moke (Pe-Qua's daughter) was the allottee of MK-214 and held a full interest upon her death. Her interest was inherited in equal shares by her three children, Mah-nwa-hah, Ko-ke-pah-ga-quake, and Nay-nay-ko-thay-quah, all of whom were determined in prior proceedings to have been Mexican nationals whose inherited property passed to them stripped of its trust or restricted status. See Order Determining Nationality or Citizenship of Heirs, *Estate of Ke-ah-quah-moke*, Probate No. 71289-25 (M-91-58) (April 11, 1958). Roy L. Gentry obtained warranty deeds from Mah-nwa-hah and Ko-ke-pah-ga-quake for their collective full interest in MK-214 (including their inherited interests from Nay-nay-ko-thay-quah), and subsequently (in 1971) a fee patent was issued to Mah-nwa-hah, Ko-ke-pah-ga-quake, and Nay-nay-ko-thay-quah.

As he did with respect to MK-286, the ALJ concluded that because the deeds were executed before a fee patent issued, and were not approved by the Secretary, the deeds were void. He also found that the evidence indicated a possible lack of legal consent by the heirs to the issuance of the fee patent, and found the evidence inconclusive concerning the

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<sup>12</sup> MK-214 is described as the N/2 SE/4 Section 5-10N-R3E, Pottawatomie County, Oklahoma, containing 80 acres.

sufficiency of consideration paid for the purchase of MK-214, which he considered relevant to the issue of consent to issuance of the fee patent.<sup>13</sup> For MK-214, the ALJ

RECOMMENDED that consideration be given to whether a quiet title action should be undertaken, and whether Ke-ah-quah-moke's heirs desire that trust protections be reinstated.

IT IS FURTHER RECOMMENDED that Ke-ah-quah-moke's descendants be apprised of the legal issues (*including the possibility that this interest might be returned to trust status*) and consulted concerning any action that might be undertaken concerning fee patent #35-71-0098.

Order of Reopening, Setting Aside Nationality Determination and Recommending Action at 33, *Estate of Ke-ah-quah-moke* (May 29, 2008).

The ALJ made the same recommendation regarding MK-214 in *Estate of Nay-nay-ko-thay-quah*. See Order of Reopening and Recommendations for Action at 34, *Estate of Nay-nay-ko-thay-quah* (June 18, 2008). As noted above, Nay-nay-ko-thay-quah was an heir to Ke-ah-quah-moke. Nay-nay-ko-thay-quah's siblings, Mah-nwa-hah and Ko-ke-pah-ga-quake, were her heirs, and she was included in the patent in fee issued in 1971.

### III. Mexican Kickapoo Allotment No. 213 (MK-213)<sup>14</sup>

Pah-ko-ne was the allottee of MK-213 and held a full interest upon her death. Upon her death, a 1/3 interest passed to her son, Thy-ka-toke, and through his wife, Mes-quah, a 1/18 interest passed to Kee-way-hah and another 1/18 interest passed to Pa-pea-se, both of whom were determined in prior proceedings to have been Mexican nationals whose inherited property passed to them stripped of its trust or restricted status.<sup>15</sup> Kee-way-hah and Pa-pea-se executed warranty deeds in 1958 conveying their respective 1/18 interests to

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<sup>13</sup> Nay-nay-ko-thay-quah had died in 1928, and thus could not consent to the issuance of the fee patent in 1971. The issue of consent focused on Mah-nwa-hah and Ko-ke-pah-ga-quake.

<sup>14</sup> MK-213 is described as the S/2 NE/4 Section 5-10N-R3E, Pottawatomie County, Oklahoma, containing 80 acres.

<sup>15</sup> Mes-quah was a Comanche and a U.S. citizen, who inherited a 1/6 interest in MK-213 from her husband Thy-ka-toke. Mes-quah's 1/6 interest was inherited by her second husband (Kee-way-hah) (1/18), their son Pa-pea-se (1/18), and Mes-quah's son with Thy-ka-toke, Ah-pe-pea-sca-ca (1/18). Ah-pe-pea-sca-ca, who also inherited a 1/6 interest in MK-213 from Thy-ka-toke, was a U.S. citizen, and his interests are not at issue.

Roy L. Gentry and Rubye E. Gentry. In 1959, a patent in fee (#1195355) was issued to Kee-way-hah (1/18 interest) and Pa-pea-se (1/18 interest).<sup>16</sup> See Order of Reopening, Setting Aside Nationality Determination and Recommending Action at 24-25, *Estate of Mes-quah (Mattie Quah-ne-mah)* (Sept. 10, 2008). With respect to these two 1/18 interests, the ALJ concluded that the deeds were void, and he also concluded that the evidence indicated a possible lack of consent to the issuance of the fee patent. He

RECOMMENDED that consideration be given to initiating action to (1) declare the warranty deeds void, (2) cancel fee patent #1195355 issued on May 4, 1959, and (3) recover possession for the United States on behalf of the beneficial owners of both undivided 1/18 interests in MK-213 inherited by Kee-way-hah and Pa-pea-se.

IT IS ALSO RECOMMENDED that steps then be taken to remove the interest from state and local tax rolls.

*Id.* at 29.

### **Appellants' Challenges to ALJ's Findings and Recommendations**

Appellants appealed from the ALJ's orders in the four probates in which the recommendations described above were made. In each appeal, Appellants contend that there were insufficient facts to support his findings and recommendations and that he committed "errors of law by failing to apply the doctrine of estoppel, laches, and adverse possession." See, e.g., Notice of Appeal, *Estate of Pe-qua*, Docket No. IBIA 08-067. More specifically, in each appeal Appellants raise the following objections to the ALJ's recommendations: (1) the doctrine of laches should bar any attempt to set aside the sale of the property interests, (2) if not acquired through the deeds, the property interests were acquired by adverse possession after the patent in fee issued, (3) the deeds should not be declared void but should be retroactively approved, (4) the fee patent should not be cancelled, (5) Appellants are owners of the property interests as bona fide purchasers, and (6) the Government should be estopped from asserting that the Gentrys did not properly

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<sup>16</sup> Fee patent #1195355 also included Mah-nwa-hah (4/18 interest) and Ko-ke-pah-ga-quake (4/18 interest). At least 6/18 of those interests, are no longer in dispute because the ALJ concluded that Ke-ah-quah-moke, who had inherited a 1/3 (6/18) interest from Pah-ko-ne, had validly conveyed her 1/3 interest prior to her death, and no effort should be made to recover that interest. See Order Modifying Recommendation, *Estate of Ke-ah-quah-moke* (June 18, 2008). It is unclear whether the remaining 2/18 interest, which apparently descended to Mah-nwa-hah and Ko-ke-pah-ga-quake through Pe-qua, are at issue.

purchase the property. *See, e.g.*, Appellant[s'] Clarification and List of Objections at 2-10, *Estate of Pe-qua*, Docket No. IBIA 08-067. In addition to raising legal objections, Appellants recite evidence to support their assertion that all of the transactions through which they acquired their property interests were honest and fair.

### Discussion

As is evident from the above recitation that, in each of these cases, warranty deeds were executed, patents in fee were issued, and the Indian heirs (or their heirs) are no longer in possession of the properties. Appellants, who are the current owners of record of the properties, including the interests that are the subject of the ALJ's recommendations, do not challenge the Department's 1965 decision that property inherited by Kickapoo Indians who were Mexican nationals did not pass to them stripped of its trust or restricted status.<sup>17</sup> Nor do Appellants contend, on some other grounds, that the property passed out of trust to the heirs as a matter of law, so that the ALJ erred by not confirming, on other grounds, the original probate orders that made those declarations. As such, the ALJ's order resulting from the immediate purpose of the reopening proceeding — the actual "probate" decision that he issued to correct the erroneous declarations in prior probate orders concerning the status of inherited property — is not the focus of these appeals.

Instead, what is at issue in these appeals are the recommendations made by the ALJ pursuant to the additional function of the reopening proceedings created by the Board's 1972 order, recommendations concerning possible litigation to declare deeds void, cancel patents, and recover possession of interests in property currently in the possession of

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<sup>17</sup> Of course, even if Appellants sought to reopen that Departmental decision, the Board would not have authority to do so. In the absence of evidence that property passed out of trust to a Mexican Kickapoo heir for a reason other than his or her nationality, *see supra* note 7, the ALJ's orders of reopening to set aside the nationality determinations were, in effect, ministerial actions to make the probate orders conform to the Department's legal position, which was upheld in *Couch v. Udall*, *see supra* at 184, that property passing to Kickapoos who were Mexican nationals was not automatically stripped of its trust character. To the extent that Appellants seek to challenge the ALJ's order setting aside the nationality determinations, we lack jurisdiction to review or reconsider the Department's legal position that was upheld in *Couch v. Udall*. Moreover, although Appellants contend that it would be improper for the Department to "retroactively" apply the corrected orders to support an action against them to recover title, Appellants do not allege any substantive error in the portion of the ALJ's orders that set aside the nationality determinations with respect to the Mexican Kickapoo heirs whose property interests were acquired by Appellants.

Appellants. That additional function was intended to assist BIA. The Board’s 1972 order, directing that recommendations be submitted to the Board “for further consideration and Departmental action,” 1972 Order at 3, did not, in our view, purport to assume that the Board itself had authority to take such final Departmental action with respect to making recovery-of-property recommendations, particularly those involving possible litigation. And the Board, whose authority derives from a delegation of authority and from regulations, has no such authority.

Thus, we conclude that the proper disposition of these appeals is to refer them to the Assistant Secretary who, with the assistance of the Solicitor, may consider the ALJ’s findings and recommendations, as well as the issues raised by Appellants.<sup>18</sup>

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 these appeals and refers these cases, and the additional findings and recommendations made by the ALJ and submitted to the Board pursuant to the Board’s 1972 Order, to the Assistant Secretary for consideration and action, as appropriate.<sup>19</sup>

I concur:

          // original signed            
Steven K. Linscheid  
Chief Administrative Judge

          // original signed            
Debora G. Luther  
Administrative Judge

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<sup>18</sup> The appeal record before the Board includes only Appellants’ summaries of their objections. Because of the threshold issue regarding the Board’s jurisdiction, the Board ordered Appellants, in the first appeal filed, to clarify the grounds for their appeal and their objections to the ALJ’s orders. Appellants have not been afforded a full opportunity, on appeal, to brief the merits of their arguments.

<sup>19</sup> Our disposition of these appeals is also consistent with the revisions to the probate regulations made in 2008, under which inventory disputes arising during a probate proceeding are referred to BIA for resolution. *See* 43 C.F.R. § 30.128. In the present case, the property interests at issue are no longer held in trust, and therefore § 30.128 is not directly applicable, but it reinforces our conclusion that inventory-related disputes are to be resolved, at least in the first instance, by the Indian affairs program office within the Department, and not by the Board.



# United States Department of the Interior

## OFFICE OF HEARINGS AND APPEALS

INTERIOR BOARD OF INDIAN APPEALS

4015 WILSON BOULEVARD

ARLINGTON, VIRGINIA 22203

IN THE MATTER OF:	:	ORDER FOR REOPENING
	:	[WAIVER OF LIMITATION]
MEXICAN KICKAPOOS:	:	IBIA 72-16
TITLE STATUS	:	May 23, 1972

In July 1970, there was pending before the Solicitor the question of the trust or non-trust status of the titles to interests in land held by inheritance or otherwise by members of or descendants of members of the Kickapoo tribe of Indians allotted in Oklahoma. The uncertainty relative to such titles stemmed from the ruling of the court in Couch v. Udall, 404 F.2d 97 (10th Cir., 1968) wherein it was held that " \* \* \* the Mexican Kickapoo represents a member of the class Congress sought to protect" and that the trust or restricted status of the land titles could not be stripped away on the sole ground that such title had vested in one who was or had become a Mexican national or citizen.

The titles in question are separate from but similar to the one considered in Couch, supra, and which, in a succession of decisions issued over a period of years prior to the decision in Couch, had been ruled by the Department to have been stripped of their trust or restricted status when inherited or held by Kickapoos of Mexican nationality.

These probate decisions were over three years old and jurisdiction for reopening proceedings to redetermine the trust or restricted character of such titles rested solely with the Solicitor acting through the Regional Solicitor in Tulsa. However, by delegations of authority, 211 DM 13.7; 35 F. R. 12081, effective July 1, 1970, the reopening jurisdiction was vested in the Board of Indian Appeals. Accordingly, all material pertaining to 39 known probate cases involving Mexican Kickapoos was transferred to the Board of Indian Appeals by the Solicitor's memorandum of November 6, 1970.

A review of the material received from the Solicitor reveals that so long as the Examiner's orders stripping the titles of their trust or restricted status are outstanding, the administrative officers of the Bureau of Indian Affairs are bound by them in each instance. This created certain clouds on the subject titles and uncertainty as to the

Bureau's authority to supervise the use and occupancy of the lands involved in the individual cases. Further, it appears in some instances that the heirs designated as alien Mexican Kickapoos have executed purported conveyances or deeds with or without the approval of the Secretary; and that in some instances, fee patents have been issued to the heirs or to their grantees.

It also appears that there may be other matters affecting these titles not on record before this Board. For example:

Whether or not the grantees in deeds from the Mexican Kickapoos are bona fide purchasers for value without notice; or whether the fee patents were issued without consent of the Indian and are therefore subject to cancellation by the Secretary under authority given by Congress in 25 U.S.C. 352a and 352b.

It is evident that hearings are necessary and advisable in each case so that evidence may be received and a record made as to relevant material issues of fact; and in those instances where fee patents have issued, to obtain a record which would support a recommendation to the Department of Justice to institute proceedings in court for the cancellation of such fee patents.

Further, it is found that the discretion of the Secretary should be exercised under the authority reserved in 25 CFR 1.2 and that the three-year limitation upon the reopening of Indian probates contained in 25 CFR 15.18 (now 43 CFR 242) should be waived.

Therefore, it is ORDERED:

1. The limitation upon the reopening of the estate proceedings in 43 CFR 242(h) is waived and authority is delegated to the Hearing Examiner (Indian Probate) having general probate authority over the restricted and trust estates of the Kickapoo Indians to review upon a petition filed and to reopen any probate where it shall appear that an order has previously been entered whereby the decedent's interest, vested in his heirs of Kickapoo blood, was stripped of its trust or restricted status solely because of the Mexican or other alien nationality.

2. The petition to reopen the probate and to vacate or set aside any previous order terminating the trust status of the decedent's property to be filed by a party in interest or by the Bureau of Indian Affairs shall set forth the following: (a) whether a fee patent has been issued to the heirs, and if issued, whether with heirs' consent; (b) if the trust property has been conveyed by the heirs at law, the amount of the consideration paid; (c) the names and addresses of the

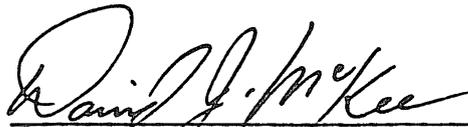
record owners of the decedent's trust property and the land description of each tract held by such record title holder; (d) whether the property is assessed for taxation and if so, for what period of time; (e) all liens, encumbrances, easements of record affecting the title; (f) if the present alleged title holder is not an heir or a purchaser from the heir or heirs, a statement as to the consideration paid by the alleged title holder for the property; (g) the names and addresses of the heirs at law of the decedent and the names and addresses of the heirs of any deceased heir; and (h) any other relevant information.

3. If the Examiner finds the petition sufficient, he shall issue an order reopening the probate and hold a hearing thereon as provided in 43 CFR Part 4, Subparts A, B, and D.

4. Upon the completion of hearings and all other proceedings, the Examiner shall issue an order by which he may set aside, modify, or confirm previous orders concerning the matter of the continuation of the trust or restricted status of the title held by the decedent's heirs or the heirs of the subsequently deceased heirs. Such an order shall be final for the Department unless a petition for rehearing is filed under 43 CFR 4.241. Where a petition for rehearing is filed, the order disposing of such petition shall be final for the Department unless appealed as provided in 43 CFR 4.291.

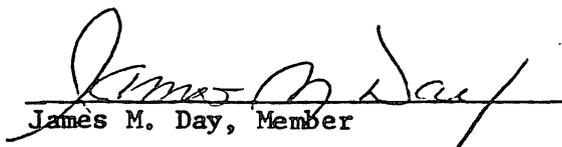
5. Further, the Examiner shall issue separate recommendations concerning such court action as shall appear to him to be appropriate for the recovery of possession of the lands involved, for the cancellation of any outstanding conveyances, encumbrances, leases or taxes, and the cancellation of any outstanding patent in fee. If he recommends that affirmative action be taken in relation to any of said matters, then the entire record of the proceedings shall be forwarded to the Board of Indian Appeals for further consideration and Departmental action.

Dated: May 23, 1972



David J. McKee, Chairman  
Board of Indian Appeals

I concur:



James M. Day, Member