



INTERIOR BOARD OF INDIAN APPEALS

Estates of Newton McNeer and Nancy McNeer

33 IBIA 318 (05/24/1999)



United States Department of the Interior

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

ESTATES OF NEWTON McNEER and : Order Docketing Appeal and Affirming
NANCY McNEER : Decision
: :
: Docket No. IBIA 99-58
: :
: May 24, 1999

Appellant Lou Ann Bratton Duren seeks review of a March 11, 1999, order denying her petition to reopen the estates of Newton McNeer and Nancy McNeer (Decedents), which were closed by a decision issued on April 13, 1920. The March 11, 1999, order denying reopening was issued by Administrative Law Judge Richard L. Reeh, who found that Appellant's petition to reopen was untimely under 43 C.F.R. § 4.242. IP OK 001 P 17-1.

Normally, appellants before the Board of Indian Appeals (Board) are given a briefing schedule in accordance with the provisions of 43 C.F.R. § 4.311. However, when a notice of appeal shows on its face or in conjunction with the materials submitted with it that under no set of circumstances can the appellant prevail, the notice will be addressed without briefing. Estate of Ollie Bourbonnais Glenn Smith, 25 IBIA 1 (1993); Estate of Richard Lip, 15 IBIA 97 (1987), and cases cited therein. After reviewing the materials Appellant submitted with her notice of appeal, the Board addresses her notice of appeal without briefing.

The materials which Appellant has submitted show that Decedents held 387.30 acres of land in Johnson County, Kansas, pursuant to the Treaty with the Shawnees, May 10, 1854, 10 Stat. 1053. This land was designated as Reserve No. 206. The materials further show that only 94 acres remained in Decedents' ownership at the time of their deaths.

Appellant states that her great grandfather told his family that there were 94 acres of land being held for them in Kansas. Appellant's petition indicates that her first inquiries about this land occurred after the fall of 1996, at which time she became aware of a lawsuit which involved the land.

Appellant did not mention the name of the lawsuit, but may have been referring to a case in which Reserve No. 206 was partitioned. See Oyler v. United States, No. 92-2104-JWL (D. Kan. Mar. 17, 1995), 22 Indian Law Rptr. 3208, aff'd, No. 95-3283 (10th Cir. Feb. 8, 1996), 23 Indian Law Rptr. 2067, cert. denied, 116 S.Ct. 2502 (1996).

By letter dated July 25, 1997, Appellant filed a petition to reopen these estates with the Superintendent, Horton Agency, Bureau of Indian Affairs (Superintendent). The Superintendent transmitted the petition to Judge Reeh.

As noted above, Decedents' estates were closed by a decision issued in 1920. Thus, the estates had been closed for 77 years when Appellant filed her petition to reopen. Furthermore, as shown in the materials which Appellant submitted to the Board, Decedents most probably both died in the 1860's. Thus, more than 125 years have passed since Decedents died.

The Board has previously discussed the reopening of old estates. See Estate of George Dragswolf, Jr., 30 IBIA 188, 196-200, modified in non-relevant part, 31 IBIA 228 (1997) (Dragswolf II); Estate of George Dragswolf, Jr., 17 IBIA 10 (1988) (Dragswolf I); Estate of Woody Albert, 14 IBIA 223 (1986). In Dragswolf II, the Board noted that there were several factors which had historically been considered when the Department was asked to reopen estates which had been closed for an extended period of time. It stated:

Many of these decisions [denying reopening of old estates] are grounded, at least in part, upon the premise that "[t]he public interest requires that proceedings relative to the probate of estates be brought to a final conclusion sometime, in order that the property rights of the heirs or devisees may be stabilized." [Dragswolf I,] 17 IBIA at 12, quoting from Estate of Lone Dog, IA-25 (June 12, 1950).

30 IBIA at 196. The Board continued:

Chief among the additional factors considered [in determining whether to reopen an old estate] is the "due diligence" factor. The Department has a well-established requirement that a petitioner for reopening exercise due diligence in pursuing his/her claim. As it was put in Dragswolf I, "[b]ecause of the substantial interest of Indian heirs in the finality of Indian probate decisions affecting their property rights, it is equitable to require a claimant to act on his rights within a reasonable time after he knows or should know of them." 17 IBIA at 12.

Id.

Appellant states that her great grandfather said 94 acres of land were being held for the family in Kansas. Although she does not say when she first learned about the land in Kansas, she also does not contend that she made any inquiries about this land prior to the fall of 1996 when she learned about the lawsuit. She did not file her petition to reopen these estates until July 1997.

Assuming that Appellant otherwise has standing to petition for reopening, 1/ the Board concludes that she has not acted with due diligence.

1/ For example, the Board assumes for purposes of this order that Appellant is in fact a descendant of Decedents, although nothing in the materials which she has submitted proves this.

In Dragswolf II the Board also noted that the Department has been reluctant “to reopen an estate when a significant amount of time has passed since the original probate.” 30 IBIA at 197. The Board explained:

One reason for this may be a concern with the reliability of evidence, *i.e.*, a concern that evidence becomes less trustworthy as time passes because witnesses die and memories fade. *See, e.g., Estate of Frank Pays*, 10 IBIA 61 (1982), denying reopening for lack of due diligence and observing that the petitioner had waited until after the knowledgeable witnesses had died. Another reason, related to the “stability of property rights” concern discussed in Dragswolf I, appears to be the premise that reliance upon the original probate determination increases as time passes, both on the part of the originally determined heirs and on the part of those who deal with them. *See, e.g., [Estate of Belle] Cozad*, [A-25428 (May 2, 1949,)] denying reopening after 16 years, noting *inter alia*, that the originally determined heirs had received oil and gas rentals from the estate property for many years.

Id. at 197-98.

The materials Appellant has submitted, which are presumably the best evidence she has, show that there was a great deal of uncertainty about Decedents’ family history, and even the years of their deaths, when the probate decision was issued in 1920. Nothing which Appellant has submitted provides any information, or any more reliable information, than was available in 1920.

Furthermore, the Oyler decisions cited above show that there has been considerable reliance on the Department’s original probate decision.

Therefore, the Board affirms Judge Reeh’s denial of reopening.

Pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, this appeal is docketed and Judge Reeh’s March 11, 1999, order denying reopening is affirmed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

//original signed
Anita Vogt
Administrative Judge