INTERIOR BOARD OF INDIAN APPEALS

Estates of Iris Storvick, et al.

36 IBIA 168 (06/06/2001)

Disapproving, 12 IBIA 224

Related Board case:
38 IBIA 225

United States Department of the Interior

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

ESTATE OF IRIS STORVICK,
ESTATE OF VEARL A. TOMAHAWK,
ESTATE OF IRENE MAE PLEETS,
ESTATE OF CHARLES MERRILL OKA,
ESTATE OF FRANCIS CARL LECOMPTE,
ESTATE OF CLIFFORD JOSEPH CHAPMAN,
ESTATE OF HAZEL MARIE HARRIS,
ESTATE OF AMELIA FANNIE MATTSON,
ESTATE OF JULIA PONGA,
ESTATE OF JOSEPH MANY HORSES,
ESTATE OF DELORES IYARPEYA,
ESTATE OF EVELYN M. YOUNG,
ESTATE OF MAE V. WHITEMAN,
and
ESTATE OF NORA ANGELINE EARTH 1/

IBIA 01-121 Decided June 6, 2001

Interlocutory certification of seven questions of law by Administrative Law Judge William S. Herbert.

Interlocutory review denied. Estate of James Largo, 12 IBIA 224, 91 I.D. 185 (1984), disapproved.

1. Indian Probate: Interlocutory Appeals

Interlocutory appeals to the Board of Indian Appeals are governed by 25 C.F.R. § 4.28. Under this provision, an

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1/ The Indian Probate docket numbers for these 14 estates are: Estate of Iris Storvick - IP TC 119 R 98, Estate of Vearl A. Tomahawk - IP TC 054 H 00, Estate of Irene Mae Pleets - IP TC 087 R 98, Estate of Charles Merrill Oka - IP TC 242 H 00, Estate of Francis Carl LeCompte - IP TC 210 R 98, Estate of Clifford Joseph Chapman - IP TC 002 H 99, Estate of Hazel Marie Harris - IP TC 389 H 99, Estate of Amelia Fannie Mattson - IP TC 188 R 98, Estate of Julia Ponga - IP TC 078 H 99, Estate of Joseph Many Horses, IP TC 121 R 92, Estate of Delores Iyarpeya - IP TC 137 R 97, Estate of Evelyn M. Young - IP TC 053 H 00, Estate of Mae V. Whiteman - IP TC 180 H 00, Estate of Nora Angeline Earth (on Petition for Rehearing) - IP TC 155 H 99.

Administrative Law Judge must have issued a decision, and an interested party must have sought permission to file an interlocutory appeal, before the Board will consider the possibility of hearing a question certified by the Administrative Law Judge. Interlocutory review will be granted only upon a showing that the ruling complained of involves a controlling question of law and that an immediate appeal therefrom may materially advance the final decision.

OPINION BY ADMINISTRATIVE JUDGE VOGT

On May 24, 2001, the Board of Indian Appeals received an interlocutory certification of seven questions of law from Administrative Law Judge William S. Herbert. Judge Herbert states that the seven questions relate to the above-captioned estates, which have a common thread))"passage of all or some of the decedents' Indian trust property interests pursuant to one or the other of two similar federal statutes: the Standing Rock Heirship Lands Act of 1980 [Act of June 17, 1980, Pub. L. No. 96-274, 94 Stat. 537,] and the Lake Traverse Heirship Act of 1984[, Act of Oct. 19, 1984, Pub. L. No. 98-513, 98 Stat. 2411]." Certification at 1. 2/

2/ The questions are:

"1. Does the language appearing in the Standing Rock Heirship Lands Act, in Section 3(a)(5), '...to the brothers and sisters of the decedent...' (contrasted with '...to the surviving spouse...' and '...to the surviving parents or parent of the decedent...', which appear in Sections 3(a)(3) and 3(a)(4), respectively) require strict construction and application so as to allow for the distribution of an appropriate decedent's Standing Rock trust land interests to a predeceased sibling's estate:

"(a) in addition to, and therefore to diminish, estate shares to be received by living siblings and/or by the estates of subsequently deceased siblings pursuant to Section 3(a)(5)? * * *

"(b) in lieu of 'escheat' to the Standing Rock Sioux Tribe pursuant to Section 3(a)(6)? * * *

"2. Does the lifetime absence of testamentary capacity in a decedent make a difference in whether the Standing Rock Heirship Lands Act, Section 3(a)(6), should or should not be applied to permit the 'escheat' of an intestate decedent's trust lands to the Standing Rock Sioux Tribe rather than descending to the natural heirs of the decedent who are more distant in relationship than siblings? * * *

"3. Does the failure of the Standing Rock Act to provide for compensation to the decedent's natural heirs who are more distant than siblings, or the failure of the Standing Rock Sioux Tribe to pay such compensation, constitute an occurrence of 'taking without just compensation' tantamount to that within the prohibition established by the U.S. Supreme Court in its Hodel v. Irving[, 481 U.S. 704 (1987),] and Babbitt v. Youpee[, 519 U.S. 234 (1997),]

Judge Herbert provides an extensive discussion of the questions he raises. However, although he seems to suggest preliminary conclusions for some of the questions, he clearly has not issued rulings on any of them.

The regulation governing interlocutory appeals to the Board is 25 C.F.R. § 4.28, which provides:

> There 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 will not be granted except upon a showing that the ruling complained of involves a controlling

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fn. 2 (continued)
decisions when an intestate 'escheat' is found under Section 3(a)(6) of the Act and trust property is therefore decreed to the Tribe? * * *

"4. If the answer to question 3, above, is in the affirmative, is such a result a finding of unconstitutionality of part of the Standing Rock Act of 1980 which would be beyond the authority of an administrative law judge and/or of the Interior Board of Indian Appeals to make?

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"5. Do the answers to questions 1 through 4 above equally apply to similar fact situations adjudicated under Section 3 of the Lake Traverse Heirship Act, in which the descent scheme in Subsections (a)(1) through (a)(6) are precisely identical and the prefatory language of Subsection 3(a) and the concluding phrase of Subsection 3(a)(6) are functionally equivalent to the Standing Rock Act? * * *

"6. Does the exclusion for eligibility to receive any interest greater than a life estate by heirs or devisees not enrolled in the Sisseton-Wahpeton Sioux Tribe, found in the Lake Traverse Act, Sections 2(a) and 4, constitute, as to the remainder interest passing without compensation to the Tribe, an occurrence of 'taking without just compensation' tantamount to that within the prohibition established by the U.S. Supreme Court in its Hodel v. Irving and Babbitt v. Youpee decisions? * * *

"7. Do the answers to questions 3 and 4 above equally apply also to consideration of Section 5 of the [Lake Traverse] Act, which provides for non-descent to any of a decedent's devisees or heirs, and instead for 'escheat' to the Tribe of 'any interest, ... , less than two and one-half acres, or the equivalent thereof, in trust or restricted land within the reservation....', there being no compensation provision therefor in the Act, and none paid by the Sisseton-Wahpeton Sioux Tribe?" (References to specific estates omitted.) Certification at 4-5.

> question of law and that an immediate appeal therefrom may materially advance the final decision. An interlocutory appeal shall not operate to suspend the hearing unless otherwise ordered by the Board.

This regulation contemplates that, prior to an interlocutory appeal, the Administrative Law Judge will have issued a ruling. It also contemplates that interlocutory review will be sought by an interested party, rather than by the Judge.

Judge Herbert's submission indicates that he has reviewed earlier Board decisions concerning interlocutory appeals, in particular, Estate of James Largo, 12 IBIA 224, 91 I.D. 185 (1984), Estate of Neal Kay Manuel, 13 IBIA 58 (1984), and Estate of Jacob William Nicholai, 29 IBIA 157 (1996). He could well have deduced from these decisions that this particular referral was within the scope of the Board's interlocutory jurisdiction.

Largo, the first Board decision to address the question of interlocutory appeals, interpreted 25 C.F.R. § 4.28 very loosely. There, the Board accepted a question for interlocutory review upon certification by an Administrative Law Judge, even though the Judge had apparently not issued a ruling on the question and even though no party had sought interlocutory review.

The Board's reasons for granting interlocutory review in Largo are not apparent from the decision in that case. In Manuel, a case decided the same year as Largo, interlocutory review was denied. The Board there distinguished Largo:

> In contrast to this case, in Largo, supra, it was almost certain that the question of law certified to the Board would not be addressed through the normal appellate review procedures. The issue there involved the Department's responsibility for accurately maintaining land title records to Indian trust allotments. Because the same people would have received title to the trust allotment at issue regardless of the decision on the certified question of law, there would have been no one to bring an appeal. However, if decided incorrectly, a manifest error would have existed in the Department's land title records. Interlocutory review was appropriate in this circumstance.

13 IBIA at 60 n.1. From this statement, it appears that the direct referrals the Board intended to authorize in Largo were those in which there was no party to appeal. Unfortunately, however, the Board's attempt to provide a solution to a particular problem that might arise in Indian probate cases has led to an overly broad interpretation of 43 C.F.R. § 4.28. That interpretation is inconsistent, not only with the language of the regulatory provision, but also with general principles concerning interlocutory appeals. These principles were described in Manuel:

> In order to conserve judicial resources, to expedite final resolution of cases, and to prevent the cost and delay of successive appeals, interlocutory appeals in both judicial and administrative forums are generally reserved for those extraordinary circumstances where prompt appellate consideration is essential, as, for example, in those situations in which the ruling or decision by the trial court or Administrative Law Judge threatens a party with immediate and serious irreparable harm which, as a practical matter, cannot be redressed on appeal. In those cases in which any error in the interlocutory ruling or decision, as well as any other error that might be alleged, can be considered and corrected on appeal, an interlocutory appeal is generally not appropriate.

13 IBIA at 59.

In subsequent cases, the Board has followed the holding in Largo to the extent that it has sometimes considered itself to have jurisdiction over interlocutory questions submitted directly by an Administrative Law Judge (i.e., absent any appeal by a party) and even in the apparent absence of a ruling by the Administrative Law Judge. See Estate of Pamela Gillis Crockett (Ropp), 14 IBIA 77 (1986); Nicholai, supra.

The present case illustrates the danger of proceeding any further along this path. Judge Herbert has clearly put considerable thought into the questions he poses. But his questions are just that--questions. He has issued no rulings that the Board might review. Further, there is no appellant here, hence no true appeal.

Beyond those fundamental problems (admittedly glossed over by the Board in some past cases), there are practical problems here. Given the number of questions posed by Judge Herbert, and the number of estates involved (each with its own set of facts), it appears that the Board would be required either to employ elaborate logistics to properly deal with the multiple factual situations or to ignore the facts and deal with the legal issues in the abstract. Neither approach seems likely to yield a satisfactory result.

Further, at least to this point, the interested parties have not been informed of Judge Herbert's certification to the Board. 3/ Nor, apparently, have most of the parties been given an opportunity to present their positions to Judge Herbert on the questions he raises. 4/

3/ Judge Herbert states that he has not given notice of this certification to the interested parties in the 14 estates, the two tribes concerned, the Bureau of Indian Affairs (BIA), or the Solicitor's Office.

4/ The materials submitted by Judge Herbert show that he invited the Standing Rock Sioux Tribe to participate in the Estate of Julia Ponga and that the Tribe declined his invitation

Finally, it is not clear how these questions would qualify for interlocutory review under the standards in 43 C.F.R. § 4.28 and the principles stated in Manuel.

The Board is an appellate tribunal. Its jurisdiction in Indian probate matters is established in 43 C.F.R. § 4.1(b)(2): "The Board decides finally for the Department appeals to the head of the Department pertaining to: * * * (ii) Orders and decisions of Administrative Law Judges in Indian probate matters other than those involving estates of the Five Civilized Tribes of Indians." It seems apparent from this statement that the Board's jurisdiction in Indian probate matters does not include authority to issue initial decisions but only authority to decide appeals from orders and decisions issued by Administrative Law Judges.

Thus the decision in Largo stretches not only the language of 43 C.F.R. § 4.28 but also the scope of the Board's jurisdiction under 43 C.F.R. § 4.1(b)(2).

[1] The Board concludes that Largo was wrongly decided. It now holds that interlocutory appeals to the Board are authorized only in the circumstances contemplated by 43 C.F.R. § 4.28. Therefore, the Board will no longer consider accepting interlocutory questions certified by an Administrative Law Judge unless (1) the Judge has issued a ruling on the question and (2) interlocutory review has been sought by a party. 5/ In considering

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fn. 4 (continued)
although it furnished him with a copy of the district court decision in Talashie v. Lujan, Civ. 92-1026 (D.S.D. July 30, 1993), upholding the constitutionality of the escheat provision in the Standing Rock Act.

Judge Herbert's materials also show that a contention has been made in the Estate of Nora Angeline Earth that the escheat provision in the Lake Traverse Act is unconstitutional under Babbitt v. Youpee, supra.

5/ The circumstances which gave rise to Largo (no private party to appeal an Indian probate decision) need not result in an inability to correct errors in BIA land records. Where such an error cannot be corrected by the Administrative Law Judge on his or her own motion, the appropriate BIA Superintendent (or equivalent BIA official) is a proper party to appeal the offending probate decision and indeed has a duty to do so. Estate of Thomas Nicholas Black Elk, 34 IBIA 212 (2000); Estate of Walter A. Abraham, 24 IBIA 86 (1993). Of course, in the case of an interlocutory appeal, the Superintendent's appeal would be subject to the requirements of 43 C.F.R. § 4.28. Cf. Black Elk (A Superintendent, like any other party, must follow the regulations).

A Superintendent is also a proper party to seek reopening of a closed Indian probate or rehearing of the original decision in an Indian probate. Estates of Alice Senoya Luna and Guadaloupe Luna, 33 IBIA 283 (1999); Estate of Rose Parshall Dragswolf Crow Flies High,

whether or not to grant interlocutory review, once these threshold requirements have been met, the Board will apply the standards in 43 C.F.R. § 4.28 and will be guided by the principles in the above-quoted statement from Manuel.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, interlocutory review is denied and this matter is returned to Judge Herbert.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge

fn. 5 (continued)
36 IBIA 54 (2000). Thus, a number of mechanisms exist for the correction of errors in BIA land records resulting from Indian probate decisions.