



INTERIOR BOARD OF INDIAN APPEALS

Estate of Kin Nip Pah a.k.a. Kin Nip Pa

43 IBIA 176 (06/30/2006)



## United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
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ESTATE OF KIN NIP PAH : Order Accepting Recommendation  
a.k.a. KIN NIP PA : for Trust Property to Escheat  
: to the United States in Trust  
: for the Navajo Nation  
:  
: Docket No. IBIA 04-90  
:  
: June 30, 2006

On April 6, 2004, Administrative Law Judge (ALJ) Patricia McDonald (now McDonald Dan) issued an Order to Escheat (Escheat Order) in the estate of Kin Nip Pah (Decedent), deceased allotted Navajo No. 2015, Navajo Census No. 10005, Probate No. 997-780-160G. Judge McDonald Dan determined that Decedent died leaving no legal heirs and recommended that Decedent's trust property escheat to the United States to be held in trust for the Navajo Nation (Nation), as authorized by 25 U.S.C. § 373b. No potentially interested party challenged the Escheat Order, which Judge McDonald Dan transmitted to the Interior Board of Indian Appeals (Board). As further explained below, a recommendation for designating an Indian beneficiary for individual Indian trust property that escheats to the United States requires action by the Board, even if no appeal has been filed. For the reasons discussed below, the Board accepts Judge McDonald Dan's recommendation to designate the Nation as beneficiary of Decedent's escheated trust property.

### Legal Framework

Section 373b of 25 U.S.C. governs the disposition of certain Indian trust or restricted property when the Indian owner dies without a will and without any heirs, and provides in relevant part:

If an Indian found to have died intestate without heirs was the holder of a restricted allotment or homestead or interest therein on the public domain, the land or interest therein and all accumulated rents, issues, and profits therefrom shall escheat to the United States \* \* \* and the land shall become part of the public domain \* \* \* *Provided*, That if the Secretary

determines that the land involved lies within or adjacent to an Indian community and may be advantageously used for Indian purposes, the land or interest therein shall escheat to the United States to be held in trust for such \* \* \* Indians as the Secretary of the Interior may designate, where the value of the estate does not exceed \$50,000 [1/] \* \* \* .

Section 4.205 of 43 C.F.R. provides in relevant part:

An administrative law judge or Indian probate judge will determine whether any Indian holder of trust property died intestate without heirs and \* \* \* [w]ith respect to trust property on the public domain, submit to the Board of Indian Appeals the records thereon, together with recommendations as to the disposition of said property under 25 U.S.C. 373b.

### Factual Background

The record in this probate case, which apparently was initiated in 1960, is replete with inconsistencies and apparent errors in various heirship data forms filled out by the Bureau of Indian Affairs (BIA) between 1960 and 1992. The following factual background, however, can be constructed based on the record.

Decedent was a Navajo Indian who was likely born sometime in the 1850s and died intestate in 1938. At the time of her death, Decedent owned an interest in Navajo Allotment No. 2015 (Allotment No. 2015), which was allotted from the public domain and is described as the NE $\frac{1}{4}$  of Sec. 34, T. 19 N., R. 9. W., McKinley County, New Mexico, containing approximately 160 acres. Decedent was issued Patent No. 681050 for Allotment No. 2015, in trust, on June 2, 1919. 2/ A probate inventory certificate dated March 7, 1960 reported Allotment No. 2015 as Decedent's only trust property, and listed its appraised value as \$200.

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1/ The current \$50,000 cap was set by the Act of May 2, 1983, Pub. L. No. 98-25, § 3. Prior to 1983, the cap in section 373b was \$2,000. If the value of an estate subject to escheat exceeds the cap, section 373b requires congressional action to designate the Indian beneficiary or beneficiaries.

2/ The original trust patent reserved the mineral interest in coal to the United States. On February 17, 2000, a supplemental mineral patent was issued to Decedent, or her heirs, devisees, or assigns, conveying the interest in coal that had been reserved.

On March 7, 1960, a realty officer at BIA's Navajo Agency forwarded a "Data for Heirship Finding" form (1960 Heirship Form) to the Office of the Hearing Examiner in Gallup, New Mexico. <sup>3/</sup> The 1960 Heirship Form states that Decedent was born in 1851 and died "about 1938," that the names of Decedent's parents were unknown, and that Decedent had never married and had no issue.

The same 1960 Heirship Form, however, listed several individuals as "probable heirs" of Decedent, and identified their relationship to Decedent as grandchildren, without reconciling that with the statement in the same report that Decedent had no children. In addition, one individual listed as a potential heir — "Glip-pah" — is identified on the Form as Decedent's "great-grandmother," although Glip pah's birth date is listed as 1888, approximately 30 years after Decedent's birth date. <sup>4/</sup>

On April 12, 1960, an Examiner of Inheritance held a hearing to probate Decedent's estate at Whitehorse Lake, New Mexico. <sup>5/</sup> The only transcribed statement taken at the hearing was that of Jake Chee. <sup>6/</sup> Chee did not identify himself as an heir or interested party to the estate, but stated that he had known Decedent, that he believed she had died in 1938, and that Decedent had never married or had any children. Chee also stated that "he [did] not know of any blood relatives who survived" Decedent. The Examiner of Inheritance noted that Glip pah, a.k.a. Glee Baa Grey Eyes, Allottee No. 2017, Census No. 9733, had alleged that "she was raised by [Decedent]" and was present at the hearing. <sup>7/</sup> The Examiner asked Chee if he knew anything about Glip pah's allegation. Chee responded, "[t]hat was before my time so I do not know about that to be true. Of my own

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<sup>3/</sup> There is no explanation provided for the delay between the date of death and the forwarding of the probate file in the record, or any indication of what finally triggered action in 1960.

<sup>4/</sup> In addition to the records transmitted to the Board by Judge McDonald Dan with the Escheat Order, see 43 C.F.R. § 4.205, the Board also requested and obtained from BIA the complete probate files for Decedent and for Glip pah.

<sup>5/</sup> The Escheat Order identifies the Examiner of Inheritance as Walter Andre.

<sup>6/</sup> The Escheat Order identifies Chee as a "local community or chapter official at the time."

<sup>7/</sup> It is unclear whether Glip pah made this allegation at the April 12, 1960 hearing, and her statement was not transcribed. The Escheat Order, at 3, states that Glip pah made this statement at a probate hearing held in the Estate of Jesus Greyeyes, but the probate records for Jesus Greyeyes were not part of the record transmitted to the Board.

knowledge, however, I have heard that story.” At the conclusion of Chee’s testimony, the Examiner of Inheritance continued the case pending further investigation.

On February 11, 1964, Examiner of Inheritance Richard B. Denu held a hearing to take additional evidence in the case at Whitehorse Lake, New Mexico. Glip pah attended the hearing, as did her four living children, Fred Willie, Annie B. Begay, John Charley, and Ben Tsosie. Only Glip pah testified. She testified that her father, Hoshka cha nos sta, was a brother to Decedent, that Decedent also had three sisters, and that all of these individuals had died. Glip pah also testified that Decedent had “[n]o living relatives,” although when asked by Examiner Denu if Decedent was her aunt, Glip pah responded “[y]es.” No testimony was solicited from or offered by Glip pah to establish the identity of Decedent’s parents, or the parents of Glip pah’s father, to corroborate that they were siblings. At the conclusion of Glip pah’s testimony, Examiner Denu continued the hearing “for further investigation.”

No further action was taken in this case until late 1991, when the Eastern Navajo Agency prepared an inventory of Decedent’s estate and a certificate as to the amount in Decedent’s Individual Indian Money (IIM) account, dated December 18, 1991. The certificate showed that the amount in Decedent’s IIM account at the time of her death was \$0, but that the balance accrued to her account “after death” was \$2,870.94. The certificate identified the source of Decedent’s IIM account funds as “Grazing Allotments #02015.0 - \$921.31 + interest.”

On January 9, 1992, Mary B. Sandoval completed a Certificate of Death for Decedent. Sandoval identified herself as Decedent’s “great granddaughter.” The probate record of Glip pah, however, identifies Sandoval as Glip pah’s granddaughter. Sandoval stated that Decedent had died on May 11, 1938 in Whitehorse Lake, New Mexico, and identified the cause of death as “suicide.” Sandoval did not elaborate on her relationship with Decedent or state whether she had direct knowledge of Decedent’s death, or had learned the information from others.

On July 13, 1992, BIA completed a Data for Heirship Finding and Family History form (OHA-7 Form) for Decedent. The OHA-7 Form was forwarded to the Office of Hearings and Appeals, along with the certificate of death. The 1992 OHA-7 Form inexplicably identifies Glip pah as Decedent’s mother, but as already noted, Glip pah’s date of birth post-dates that of Decedent by approximately 30 years. 8/

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8/ The OHA-7 Form includes a line for the ALJ or Indian Probate Judge (IPJ) to sign, certifying that the information on the form has been modified and conformed to the evidence after hearing. The OHA-7 form in Decedent’s record is not signed.

On December 4, 1992, Judge McDonald Dan held another hearing to probate Decedent's estate, in Crownpoint, New Mexico. The only individual to attend the hearing or offer any evidence was an individual named Evelyn J. Toledo. The Escheat Order identifies Toledo as Glip pah's great-granddaughter, although a basis for that identification is not in the record. The only portion of Toledo's testimony that was transcribed provides no substantive evidence concerning possible relatives of Decedent. 9/

Judge McDonald Dan issued her Escheat Order on April 6, 2004, which summarized evidence presented at the 1960, 1964 and 1992 hearings, as well as the information provided in the 1960 and 1992 Data for Heirship Finding Forms. 10/ With respect to the 1960 Heirship Form, Judge McDonald Dan concluded that:

[t]he alleged related probate cases and probate records of the now deceased probable heirs \* \* \* fail to show that they are descendants or collateral heirs of the decedent. Even if some degree of consanguinity exists there is not enough evidence to find the individuals listed above as heirs of the decedent. As previously mentioned the decedent's probate record does not list a parent or a grandparent by which a genealogy search can be done. The purported related probate cases also do not list a common ancestor for a genealogical linkage to be established.

Escheat Order at 3. Judge McDonald Dan considered Glip pah's testimony at the 1964 hearing that Decedent was her aunt, but concluded that the testimony "remains unsubstantiated." Id. at 4. In addition, Judge McDonald Dan noted that both Chee and Glip pah testified that Decedent had no living blood relatives. Judge McDonald Dan

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9/ The transcript contains a "Recorder's Note" that the remainder of the testimony was not transcribed "because it merely confirmed and did not add to or significantly alter the information provided by the Bureau of Indian Affairs." Considering the apparent unreliability and confusion in the records in this case, it is unclear what information may have been "confirmed" by the additional testimony.

10/ The Escheat Order itself contains several errors. For example, the Escheat Order concludes that it is likely that Decedent died later than 1938 because she had not received her trust patent until 1943. This conclusion appears to be based on a misreading of the patent, which is dated June 2, 1919, but also states that it was issued in the one-hundred and "FORTY-THIRD" year of the independence of the United States.

concluded that, “this forum has checked all plausible leads including Agency allotment records, Tribal census records and all relevant probate records to try to reconstruct decedent’s family. The evidence, however, remains insufficient to determine decedent’s heirs.” Id. Accordingly, Judge McDonald Dan determined that Decedent had no heirs at law.

Judge McDonald Dan found that Decedent’s allotment lies within lands predominantly occupied by Navajo people and within the boundaries of Navajo Indian Country and that the land could be advantageously used for Indian purposes. Id. at 4-5. She therefore recommended that Decedent’s allotment escheat to the United States, to be held in trust for the Navajo Nation, as authorized by 25 U.S.C. § 373b.

The Order to Escheat was mailed to all identified potentially interested parties, including the heirs and devisees of Glip pah. The Order provided that it would become final 60 days after the date of the order, unless a petition for rehearing was filed. No petition for rehearing was filed.

#### Discussion

As an initial matter, we address the status of the Escheat Order and the procedure to be followed in escheat cases subject to 25 U.S.C. § 373b and 43 C.F.R. § 4.205. These cases seldom arise, and the Board has not previously decided what happens when there is no appeal from an ALJ’s determination that a decedent had died intestate and without heirs. 11/

The Escheat Order in the present case is styled as an order which becomes final in 60 days if no petition for rehearing is filed. This was consistent with the usual rule applicable to probate decisions issued by ALJs. See 43 C.F.R. § 4.240(c). However, following issuance of the order, Judge McDonald Dan’s office transmitted it to the Board and in a cover letter stated that the Order “was inadvertently entitled an Order to Escheat \* \* \* [but] recommends that the trust property \* \* \* escheat to the [Nation].” April 27, 2004 Letter from Janet Yazzie to Board (emphasis added). This raises the question whether 43 C.F.R. § 4.205 should be interpreted as rendering the entire Escheat Order a recommendation to the Board.

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11/ Because this case involves an ALJ, we use the term ALJ to collectively refer to action by either an ALJ or IPJ.

We conclude that it does not. Although the designation of an Indian beneficiary for escheated interests is a recommendation that requires Board action, we conclude that an ALJ's determination that an Indian decedent died intestate without heirs is a decision that is subject to a petition for rehearing and that becomes final after 60 days if no such petition is filed.

Section 4.205 of 43 C.F.R. has two distinct components for an ALJ to address. The ALJ must first "determine" whether an Indian decedent "died intestate without heirs." If so, with respect to property on the public domain, the ALJ must submit to the Board a "recommendation" as to the disposition of said property under 25 U.S.C. § 373b.

The general provision for probate decisions, 43 C.F.R. § 4.240(a)(1), requires an ALJ to "decide the issues of fact and law involved in any formal [probate] proceedings and [to] incorporate the following in his or her decision: [findings regarding heirs and descent and distribution] or the fact that the decedent died leaving no legal heirs." (Emphasis added.) Decisions issued pursuant to subsection 4.240(a) become final 60 days after notice of the decision, if no petition for rehearing has been filed. See 43 C.F.R. §§ 4.240(c), 4.241(a).

We conclude that the first component of section 4.205 — the lack-of-heirs determination — and subsection 4.240(a)(1) must be read together, and that an ALJ's determination under 4.205 that an Indian decedent died intestate without heirs is a decision that is subject to a petition for rehearing and which becomes final if no such petition is filed within 60 days. Our conclusion is consistent with the general rule that heirship determinations should first be made by the ALJ, based on testamentary and other evidence, and that aggrieved parties must first seek rehearing before appealing to the Board. Therefore, Judge McDonald Dan's Escheat Order correctly advised potentially interested parties that they must file a petition for rehearing if they wished to challenge the determination that Decedent died without heirs, and the order correctly stated, with respect to the lack-of-heirs determination, that it became final after 60 days if no petition was filed.

Because no petition for rehearing was filed, Judge McDonald Dan's determination that Decedent died intestate and without heirs became final for the Department 60 days after the April 6, 2004 notice was mailed to potentially interested parties. Thus, that determination is not before the Board.

The Escheat Order was incorrect, however (as Judge McDonald Dan recognized), with respect to its statement that the entire order would become final for the Department if no petition for rehearing was filed, because the second component of section 4.205 limits the ALJ's action to making a recommendation. Action is required by the Board to make a

final designation of an Indian beneficiary of escheated trust property. Therefore, we now address the sole issue that is properly before the Board — the recommendation that Decedent’s property escheat to the United States in trust for the Nation, as authorized by 25 U.S.C. § 373b.

The proviso in section 373b authorizes the Secretary to designate an Indian beneficiary when Indian trust or restricted property on the public domain escheats to the United States if the Secretary determines that the land lies within or adjacent to an Indian community and may be advantageously used for Indian purposes and if the value of the estate does not exceed the statutory cap.

Prior to 1983, the valuation cap for escheating Indian property that was subject to Secretarial disposition under 25 U.S.C. § 373b was \$2,000. The 1960 valuation of Decedent’s estate was \$200. Although the record contains no appraised value for Decedent’s trust property at the time of death, and the Escheat Order made no findings on valuation, it is reasonable to conclude that the value of Decedent’s estate was below \$2,000 at the time of death, and therefore subject to Secretarial disposition. 12/

Judge McDonald Dan found that Allotment No. 2015 is located in the Eastern Navajo Agency of BIA, within the community of Whitehorse Lake, New Mexico. She also found that the area is predominantly Navajo, is served by the Nation, is in close proximity to other Navajo communities, and is surrounded by other Navajo allotments and trust property. Based on these findings by Judge McDonald Dan, the Board concludes that Decedent’s allotment “lies within or adjacent to an Indian community and may be advantageously used for Indian purposes,” 25 U.S.C. § 373b, and accepts her recommendation that Decedent’s trust property escheat to the United States to be held in trust for the Nation.

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 accepts Judge McDonald Dan’s

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12/ We note that section 373b was enacted in 1942 (56 Stat. 1022) — four years after Decedent’s death. However, Decedent died intestate and without heirs, her allotment was from public domain lands of the United States, and legal title remained in the United States. Therefore, application of section 373b to the escheating trust property does not raise issues of giving a statute “retroactive” effect, see generally Landgraf v. USI Film Prods., 511 U.S. 244 (1994), and we conclude that the authority granted to the Secretary in section 373b with respect to the disposition of interests escheating to the United States is appropriately applied to the estates of Indians who died prior to enactment.

recommended disposition of this property, and orders that Decedent's trust property, including rents, issues, and profits thereon, escheat to the United States, to be held in trust for the benefit of the Navajo Nation.

I concur:

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

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// original signed  
Amy B. Sosin  
Acting Administrative Judge