



## INTERIOR BOARD OF INDIAN APPEALS

Lisa Estes v. Acting Great Plains Regional Director, Bureau of Indian Affairs

50 IBIA 110 (08/07/2009)



# United States Department of the Interior

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

LISA ESTES,	)	Order Affirming in Part, Vacating in Part,
Appellant,	)	and Remanding Decision
	)	
v.	)	
	)	Docket No. IBIA 07-127-A
ACTING GREAT PLAINS REGIONAL	)	
DIRECTOR, BUREAU OF	)	
INDIAN AFFAIRS,	)	
Appellee.	)	August 7, 2009

Lisa Estes (Appellant) has appealed the July 27, 2007, decision of the Acting Great Plains Regional Director (Regional Director), Bureau of Indian Affairs (BIA), in which he determined whether and how BIA could implement two orders reopening the estates of Appellant's grandfather, Solomon Grassrope (Solomon), and father, Gordon Grassrope (Gordon), from which Appellant had been initially omitted as an heir. The reopening order in her father's estate determined that Appellant was his sole heir, rather than his father, Solomon; the reopening order in her grandfather's estate determined that Appellant was an heir entitled to 1/5 of the intestate estate by representation through her predeceased father, Gordon. In implementing the two orders, the Regional Director determined that Appellant was entitled to her share of the funds in Solomon's Individual Indian Money (IIM) account as of the date of his death. As to the decedents' interests in trust lands, BIA's title records were changed to reflect distribution to Appellant of her share of those real property interests that still remained in the names of the original heirs; to the extent that the land interests had escheated to a tribe or had been sold to a good faith purchaser prior to the date of the reopening order, the Regional Director determined that Appellant was not entitled to a share of the lands or to a share of the proceeds from any sales. Finally, as to income from any of the lands in the decedents' estates, the Regional Director determined that Appellant was only entitled to her share from the date of the respective reopening orders. In sum, the Regional Director determined that Appellant was due \$1,071.02, which would be recouped from the IIM accounts of the remaining heirs. Appellant contends that the Regional Director erred in (1) concluding that she could not participate in the proceeds from the sale of those land interests; (2) finding that she was eligible for lease income only as of June 21, 2005, rather than as of the date of her grandfather's death; and (3) determining that she

should be reimbursed by debiting her co-heirs' IIM accounts instead of by BIA paying her the funds in a lump sum.

We conclude that the Regional Director erred as a matter of law in determining that the operative date governing Appellant's entitlement to lease income was the date of the order reopening each estate. Similarly, we conclude that the Regional Director erred when he determined that, as a matter of law, Appellant could not share in the proceeds from the sales of certain land interests because the sales were completed prior to the date of the order reopening Solomon's estate. As the parties both agree and as we conclude, the reopening orders supersede the original probate decisions, and thus the operative date for determining Appellant's share of the estate assets, including any sales thereof, is the date of death. Therefore, the Regional Director's decision is vacated as to that portion of his decision in which he determined that Appellant's entitlement to income and sale proceeds commences as of the dates of the reopening orders and not before. We remand the decision to the Regional Director with instructions to determine whether means are or remain available to provide Appellant with her 1/5 share of both the proceeds from the sales of the lands that were part of Solomon's estate and the income from the lease of lands in both estates, calculated from the dates of the decedents' deaths, and, if so, to recalculate the amounts due to her consistent with this decision. To the extent Appellant contends that she is entitled to a lump sum payment directly from BIA that is not recouped from the IIM accounts of the remaining heirs, we disagree. Appellant cites no authority for her demand for a lump sum, nor does she have standing to assert the rights of the remaining heirs with respect to recouping her share of Solomon's estate from their IIM accounts.

### **Factual and Procedural Background**

Solomon died on June 20, 2000. At the time of his death, his trust assets consisted of \$4,325.05 in his IIM account and various interests in real property on the Rosebud, Yankton, Lower Brule, Standing Rock, Lake Traverse, and Crow Creek Reservations. Appellant was identified as the daughter of Solomon's pre-deceased son, Gordon, on the Form OHA-7 (Data for Heirship Finding and Family History) provided to the Administrative Law Judge (ALJ) by BIA. *See Estate of Solomon Grassrope*, Probate No. IP RC-131-C-01. In addition, the January 26, 2001, Affidavit of Family History provided to BIA by her aunt, Theresa Grassrope, as part of Solomon's probate, identified Appellant as Gordon's daughter. She therefore was sent notice of Solomon's probate hearing. Upon learning of the hearing, Appellant states that she notified BIA that she would not be able to attend because she lived a great distance away and was told that it was all right for her not to attend and that BIA would pass that information on to the appropriate people. *See Letter from Lisa M. Grass Rope-Estes to "Whom it may concern," Mar. 11, 2005, Administrative Record (AR) Tab 23 (Appellant's Mar. 11, 2005, Letter).*

Solomon's probate hearing was held on June 12, 2001. At that hearing, there was testimony questioning whether Appellant was, in fact, Gordon's daughter, and the ALJ ended the hearing by indicating that he would see what he could find out about Appellant's paternity and Gordon's other possible children. Transcript at 12, AR Tab 29.

The ALJ issued his Order Determining Heirs and Decree of Distribution in Solomon's estate on October 16, 2001. This order determined Solomon's heirs to be his three surviving children — Theresa M. Grassrope, Victor D. Grassrope, and Merlin H. Grassrope — each of whom received 1/4 of his estate, and the four children of his prior deceased daughter Lucinda — Conrad Medicine Crow, Rosita Medicine Crow, Eileen Medicine Crow, and Antoine Medicine Crow — each of whom received 1/16 of the estate. The order does not mention Appellant or Gordon or explain why she was not determined to be one of Solomon's heirs; however, the Form OHA-7 contains the notation "No Proof" and a penciled strike-out line through Appellant's name in the "Children of Deceased Children" section of the form. *See* AR Tab 29.<sup>1</sup> Appellant was not sent a copy of the order and apparently "assumed" that she had been determined to be one of Solomon's heirs. *See* Appellant's Mar. 11, 2005, Letter.

Solomon's estate included trust assets he had erroneously inherited from Gordon, which consisted of land interests in the Crow Creek, Lake Traverse, and Yankton Reservations.<sup>2</sup> *Estate of Gordon Grassrope*, Probate No. IP TC-173-G-99-1. Despite being named as Gordon's daughter in an obituary included in the record, Appellant was given no notice of the probate of Gordon's estate; the September 17, 1999, probate order made no mention of her; and she did not receive a copy of the September 17, 1999, order.<sup>3</sup> On March 7, 2002, the Crow Creek Agency Superintendent submitted a petition to reopen Gordon's estate based on newly discovered evidence — Appellant's birth certificate naming Gordon as her father — indicating that a manifest injustice would occur if the estate were

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<sup>1</sup> Although the last page of the Form OHA-7 contains a statement that Theresa Grassrope submitted an affidavit stating that Gordon was in Vietnam when Lisa was conceived, the affidavit contains no such statement. Rather, at the hearing, both Theresa and Victor Grassrope testified that Gordon had malaria when he was in Vietnam and could not have children.

<sup>2</sup> At the time of his death Gordon's IIM account had a zero balance; by the time his estate was submitted for probate, the balance was \$175.94, as a result of accumulated lease income from his real property interests.

<sup>3</sup> Appellant was not identified by BIA as Gordon's daughter on the Form OHA-7.

not reopened and Appellant included as an omitted heir. After providing notice to Solomon's heirs of the petition and receiving no response, the ALJ issued an Order Granting Reopening of Estate on June 25, 2002 (2002 Reopening Order), which determined that Appellant, not Solomon, was Gordon's sole heir entitled to 100% of his estate. Notice of the 2002 Reopening Order was sent to Solomon's heirs and to the Superintendents of the Lower Brule, Standing Rock, Cheyenne River, Rosebud, Yankton, and Sisseton Agencies; the Crow Creek Agency Superintendent was not listed as one of the interested parties. *See* AR Tabs 28 and 30. Although Gordon's estate was reopened and modified, no similar modification was sought at that time for Solomon's estate.

In April and August of 2004, five of Solomon's then-determined seven heirs — his three children and two of his grandchildren — sold their interests in certain tracts on the Rosebud Reservation that they had inherited from Solomon's estate; each of the participating children received \$310 and each of the participating grandchildren received \$91 as a result of the sale. *See* AR Tab 27. In July and November 2004, all of Solomon's then-determined heirs submitted applications for the sale of Crow Creek Tract 52-3, another property in Solomon's estate. *See* AR Tab 21. BIA approved the sale on January 21, 2005, and Deeds to Restricted Indian Land were issued to the buyers. According to the deeds, each of Solomon's children received \$15,040 for his or her interest in the Tract 52-3, and each of his four grandchildren received \$3,760 for his or her interest in the tract, for a total purchase price of \$60,160. *See id.*; *see also* AR Tab 25.

On February 16, 2005, the Lower Brule Agency Superintendent submitted a petition to reopen Solomon's estate to include Appellant as an heir to Solomon's estate, citing newly discovered evidence indicating that Solomon was Appellant's paternal grandfather, which included her birth certificate and the 2002 Reopening Order in Gordon's estate identifying her as Gordon's daughter and sole heir. After notifying Solomon's original heirs of the petition and affording them the opportunity to show cause why the estate should not be reopened, to which none of them responded, the ALJ reopened the estate on June 21, 2005, to include Appellant as one of Solomon's heirs entitled to 1/5 of his trust estate, including income earned post-death; the remaining 4/5 of the estate was redistributed to his three surviving children (1/5 each) and to the four children of his prior deceased daughter (1/20 each). *See* AR Tab 23.

Appellant appealed the approval of the sale of Tract 52-3 to the Regional Director on August 30, 2005. *See* AR Tab 22. She explained that she first learned of the sale in December 2004 and contacted the Lower Brule Agency about the sale, but was told that no

one was selling any land.<sup>4</sup> She further averred that it was then that she discovered that she had not been included as an heir to Solomon's estate despite having been assured, before the 2001 probate hearing, that the appropriate people would be advised of her inability to attend the hearing because of distance. She asserted that, given the absence of any notification informing her that she was not an heir, she had assumed that she was one, and contended that if she had been notified of the decision, she would have appealed that omission years earlier, long before the sale of Tract 52-3 took place. She therefore maintained that she was entitled to her share of Solomon's estate, including her share of the proceeds from the sale of Tract 52-3.

By letter dated January 24, 2006, Appellant, now represented by counsel, followed up on her August 2005 appeal, clarifying that she was seeking not only monetary compensation in the amount of \$12,032 for the erroneous sale of her interest in Tract 52-3, but also income from the tract that accrued prior to its sale, as well as her share of any funds distributed from Solomon's IIM account. *See* AR Tab 19. She further complained that BIA's records were neither accurate nor current, and requested that BIA audit her inherited interests. The Regional Director subsequently directed BIA to correct and update its records regarding Appellant's interests in both Gordon's and Solomon's estates. *See, e.g.*, AR Tabs 11-17.

The Regional Director issued his decision on July 27, 2007. *See* AR Tab 1. Relevant to our decision, the Regional Director stated that the interests belonging to Gordon in various Crow Creek and Yankton tracts initially distributed to Solomon had been redistributed to Appellant on August 15, 2006, except for Gordon's Lake Traverse tracts, which had escheated to the Sisseton-Wahpeton Tribe pursuant to the Sisseton-Wahpeton Act of October 19, 1984, Pub. L. No. 98-513, 98 Stat. 2411.<sup>5</sup> He noted that the Crow Creek Agency had updated their payout system to include Appellant as of the date she became an heir of Gordon and Solomon and that she, therefore, had been paid all the lease income due her from the Crow Creek tracts; however, she had not received the income from the Rosebud, Yankton, and Standing Rock tracts held by Gordon

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<sup>4</sup> The Lower Brule Agency's lack of knowledge of the sale most likely stemmed from the fact that Tract 52-3 was under the jurisdiction of the Crow Creek, not the Lower Brule, Agency, and the Crow Creek Agency was processing the sale of Tract 52-3.

<sup>5</sup> We note that this portion of the Act was held to be unconstitutional and the Department has been enjoined from "further" use of the escheat provision. *See* Final Judgment, *DuMarce v. Kempthorne*, No. CIV 02-101-1026 (D.S.D. Nov. 1, 2007).

and Solomon as of the date she was determined to be their heir and was therefore entitled to \$206.01 for lost income from both estates for those tracts.

The Regional Director rejected Appellant's claim that she was entitled to her share of both the proceeds from the sale of Tract 52-3 and the income accruing from that tract before the sale. Relying on the facts that the sale had been approved on January 21, 2005, *before* the June 21, 2005, determination that she was one of Solomon's heirs, and that the land had been conveyed to a third party good faith purchaser, the Regional Director concluded that the sale would stand as approved. He found that orders redetermining heirs had no effect on property no longer in the possession of the heirs, a finding he also applied to the previous sale of five of the seven heirs' interests in the Rosebud tracts. He thus determined that Appellant was not entitled to any additional compensation for her interests in the trust real property in Solomon's estate. The Regional Director did, however, agree that she was entitled to 1/5 of the \$4,325.05 that was in Solomon's IIM account when he died, which came to \$865.01. Accordingly, the Regional Director calculated the total amount due Appellant as \$1,071.02, including the \$206.01 in lost income from the decedents' interests in the Rosebud, Yankton, and Standing Rock tracts. He added that these funds would be recouped through restrictions on the IIM accounts of the original heirs, who had mistakenly received this money, pursuant to 25 C.F.R. Part 115.

This appeal followed.

### **Standard of Review**

We review the Regional Director's decision to determine whether it is arbitrary or capricious, in accordance with the law, and supported by substantial evidence. *Quinault Indian Nation and Anderson & Middleton Co. v. Northwest Regional Director*, 48 IBIA 186, 193-94 (2008); *LeCompte v. Acting Great Plains Regional Director*, 45 IBIA 135, 142 (2007). We review de novo any legal determinations made by the Regional Director. *Quinault Indian Nation*, 48 IBIA at 194; *Bernard v. Acting Great Plains Regional Director*, 46 IBIA 28, 29, 33 (2007). An appellant bears the burden of showing error in the Regional Director's decision. *Valley Bank of Glasgow v. Director, Office of Indian Energy and Economic Development*, 49 IBIA 42, 50 (2009); *Quinault Indian Nation*, 48 IBIA at 193; *LeCompte*, 45 IBIA at 142.

### **Discussion**

In her Opening Brief, Appellant raises three issues. First, she contends that BIA and the ALJ breached their trust responsibility to her by failing to include her as an heir to

Solomon's estate in the initial probate proceeding and by failing to include her in the sale of Tract 52-3. Second, she asserts that the Regional Director's decision denying her a share of both the proceeds from the sale of Tract 52-3 and other income from Solomon's estate is arbitrary, capricious, and not in accordance with law and is not supported by substantial evidence. Third, she avers that the Regional Director's decision to recoup the amounts she is owed from the IIM accounts of Solomon's heirs, rather than as one lump sum from BIA itself, is in error. In her Reply Brief,<sup>6</sup> Appellant submits that the 2005 Reopening Order modifying Solomon's estate to include her as one of Solomon's heirs is retroactive to and substitutes for the initial 2001 probate decision. She also maintains that, even though Solomon's estate had been redistributed and some of it sold before the estate was modified to include her as an heir, she nevertheless is entitled to all of her share of the estate assets from the date of the initial order, including her share of the proceeds from the sale of Tract 52-3 and of the Rosebud interests sold in 2004, and her portion of any other interests owned by Solomon. She further insists that BIA, as the party responsible both for the errors leading to the failure to include her as an heir in the initial probate proceeding and for approving the sale of Tract 52-3 (and the Rosebud interests), despite having actual knowledge that she was Gordon's heir and should have been recognized as Solomon's heir, has the authority and the obligation to pay her the monies due to her from its own funds. She has not cited any statutory or other authority for this assertion.

We resolve this appeal by concluding that the Regional Director erred as a matter of law when he determined that, with the exception of funds in Solomon's IIM account as of the date of his death, Appellant was only entitled to lease income as of the dates of the reopening orders and could not share in the sales proceeds of land interests sold prior to the

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<sup>6</sup> Appellant submitted her Reply Brief to respond to two questions the Board asked both Appellant and BIA to address in its December 7, 2007, Order Concerning Standing, Docketing Notice, and Order Setting Briefing Schedule: (1) whether the 2005 Reopening Order modifying Solomon's estate to include Appellant as one of Solomon's heirs is retroactive to and/or substitutes for the initial 2001 probate order or is operative only from its issuance date of June 21, 2005; and (2) if Solomon's estate had already been distributed or sold in whole or in part as of the date the estate was modified to include Appellant as an heir, the statutory or other authority for BIA to redistribute the estate or to otherwise provide Appellant the funds to which she may be entitled as Solomon's heir, including whether the funds can be recovered from the IIM accounts of the original heirs or from some other source. Dec. 7, 2007, Order at 4.

date of the 2005 Reopening Order. Thus, we need not reach Appellant's remaining arguments concerning her entitlement to income.<sup>7</sup>

We agree with the briefs of both the Regional Director and Appellant that the 2005 Reopening Order relates back to and replaces the initial 2001 probate order determining Solomon's heirs and is operative from the date of the initial order. *See, e.g., Estate of Ada Thompson*, 38 IBIA 164, 165 (2002); *Estates of Sam A. Simeon and Stephen (Steven) Aloysius Simeon*, 15 IBIA 135, 138 (1987); *see also Estate of Rena Marie Edge*, 7 IBIA 53, 59 n.9 (1978). In his decision, however, the Regional Director concluded that Appellant was entitled to income only from the date of the reopening orders. The Regional Director does not explain or provide authority for limiting Appellant's inheritance.

The 2005 Reopening Order explicitly states that trust real property, including any income accruing *after the date of decedent's death* and the trust personalty in Solomon's IIM account, should pass to the heirs identified in that order; it does not state that only the real property and income existing on and/or accruing after the date of the order falls within the parameters of the order; the 2002 Reopening Order contains comparable language. The Regional Director has not provided any explanation for disregarding the ALJ's express orders. We therefore vacate the Regional Director's decision to the extent it limited the monies due to her to those accruing after the date of the respective reopening orders.

We reject, however, Appellant's contention that these funds must be repaid by BIA itself in one lump sum.<sup>8</sup> She has cited no statutory or other authority for this assertion, and the Regional Director denies that any statute or regulation requiring or even authorizing such a payment in probate-related proceedings exists. We leave it to BIA in the first instance to determine the appropriate mechanism, *if any*, for paying these funds to Appellant.

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<sup>7</sup> To the extent that Appellant seeks damages for her breach-of-trust allegations, the Board has no authority to award damages. *See High Sierra Fellowship v. Western Regional Director*, 45 IBIA 197, 199 n.4 (2007).

<sup>8</sup> To the extent Appellant's objection to recoupment of these funds from the IIM accounts of Solomon's other heirs can be construed as an attempt to assert the rights of the heirs whose accounts would be restricted (rather than as an assertion of her right to receive an immediate lump sum payment of those funds), she has no standing to assert those rights. *See Wadena v. Midwest Regional Director*, 47 IBIA 21, 27 (2008).

## Conclusion

In sum, we conclude that the Regional Director has not provided any authority for disregarding the ALJ's reopening orders in which Appellant was determined to be an heir of Gordon and Solomon as of the dates of their deaths. On this narrow issue we vacate the Regional Director's decision as to the distribution to Appellant of income and of proceeds from the sales of real property interests. Thus Appellant's rights as an heir to a share of both the proceeds from the sale of Tract 52-3 and the other income generated by the assets in the estates, relate back to the date of death. Whether or not these funds remain available for distribution to Appellant must be determined by the Regional Director on remand.<sup>9</sup> We express no opinion on whether authority exists for BIA to compensate Appellant for any additional funds due her.

In the absence of authority, we reject Appellant's claim that BIA itself *must* reimburse her for the monies due to her. We therefore affirm the Regional Director's decision to the extent it rejected Appellant's demand that BIA pay her the funds in one lump sum.

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 affirms in part and vacates in part the Regional Director's decision and remands the matter for further action consistent with this decision.

I concur:

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// original signed  
Sara B. Greenberg  
Administrative Judge\*

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// original signed  
Debora G. Luther  
Administrative Judge

\*Interior Board of Land Appeals, sitting by designation.

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<sup>9</sup> We note that the Regional Director determined that the Kennerly process — *see Kennerly v. United States*, 721 F.2d 1252 (9th Cir. 1983) — will be used to recover Appellant's share of funds in Solomon's IIM account.