



INTERIOR BOARD OF INDIAN APPEALS

Estate of Frances Marie Ortega

50 IBIA 322 (11/16/2009)

Petition for Reconsideration denied:

51 IBIA 29

Second Petition for Reconsideration dismissed:

51 IBIA 80



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
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ESTATE OF FRANCES MARIE	)	Order Vacating Recommended
ORTEGA	)	Decision and Referring Inventory
	)	Dispute to Bureau of Indian
	)	Affairs
	)	
	)	Docket No. IBIA 09-086
	)	
	)	November 16, 2009

Wilford Ward (Appellant) appealed to the Board of Indian Appeals (Board), seeking review of a Recommended Decision on Inventory Dispute (Recommended Decision) entered on April 9, 2009, by Administrative Law Judge (ALJ) Thomas F. Gordon in the estate of Appellant’s great-aunt, Frances Marie Ortega (Decedent), deceased Luiseno Mission (La Jolla Band) Indian, Probate No. P000017498IP.<sup>1</sup> We vacate the Recommended Decision and refer the matter to the Bureau of Indian Affairs (BIA) because revised Indian trust probate regulations, which became effective on December 15, 2008, required the ALJ to refer this inventory dispute to BIA for a decision. The revised regulations supplanted a prior standing order of the Board that authorized probate judges to issue recommended decisions in such disputes.

### Background

During the probate proceedings for Decedent’s trust estate, Appellant raised numerous questions about BIA’s trust property inventory for the estate, contending that the inventory should include additional trust property. Based on the Board’s standing order in *Estate of Douglas Leonard Ducheneaux*, 13 IBIA 169 (1985), which authorized probate judges to consider inventory disputes that arose during a probate proceeding, the ALJ held several hearings to receive evidence concerning Appellant’s challenges to the inventory. BIA personnel testified and provided extensive documentation to respond to Appellant’s questions and contentions.

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<sup>1</sup> The ALJ also issued a probate Decision on April 9, 2009, which determined the distribution of Decedent’s estate, and under which Appellant received a share of the estate. That Decision was not appealed.

After the probate hearings were completed, but before any decision was issued, the Department of the Interior (Department) promulgated revised Indian trust probate regulations, which became effective on December 15, 2008. *See* 73 Fed. Reg. 67,256 (Nov. 13, 2008). In relevant part, those regulations provide as follows:

**§ 30.128 What happens if an error in BIA’s estate inventory is alleged?**

This section applies when, during a probate proceeding, an interested party alleges that the estate inventory prepared by BIA is inaccurate and should be corrected.

(a) Alleged inaccuracies may include, but are not limited to, the following:

• • • •

(3) Trust property interests should be added to the inventory;

• • • •

(b) When an error in the estate inventory is alleged, the OHA<sup>[2]</sup> deciding official will refer the matter to the BIA for resolution under 25 CFR parts 150,<sup>[3]</sup> 151,<sup>[4]</sup> or 152<sup>[5]</sup> and the appeal procedures at 25 CFR part 2.

73 Fed. Reg. at 67,294.

The ALJ issued his Recommended Decision after the above regulation had become effective. He recognized that under the new procedures in the revised probate regulations, allegations of error in trust property inventories are referred to BIA. Nevertheless, he concluded that it was appropriate to follow the Board’s standing order from *Ducheneaux* to resolve the inventory dispute in the present case because the inventory dispute was initiated and the hearings conducted before the revised regulations became effective. The Recommended Decision addressed in detail various questions and assertions made by Appellant, and concluded that Appellant’s contentions of error in BIA’s inventory were without merit. The ALJ provided a notice of appeal rights (Notice), to which the Recommended Decision was attached. The Notice stated that the Recommended Decision

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<sup>2</sup> Office of Hearings and Appeals.

<sup>3</sup> Regulations governing land records and title documents.

<sup>4</sup> Regulations governing land acquisitions.

<sup>5</sup> Regulations governing the issuance of patents in fee, certificates of competency, removal of restrictions, and sale of certain Indian lands.

would become final 30 days from the date the of mailing, which was April 9, 2009, unless an appeal was filed with the Board within that time period.

Appellant mailed an appeal to the ALJ, whose office transmitted it to the Board. The Board received it on May 14, 2009. Upon receipt of the appeal, the Board asked Appellant to inform the Board when he received the Recommended Decision, and Appellant reported that, to the best of his knowledge, he received it either on April 13 or 14, 2009.

## Discussion

### I. Timeliness of Appeal

We first address our own appellate jurisdiction by considering whether this appeal is timely, and conclude that it is. The Notice advised Appellant that he had 30 days from April 9, 2009 — the date of mailing — to file an appeal with the Board, and provided him with the Board's correct address. Appellant mailed his appeal to the ALJ, rather than to the Board, and the Board did not receive it until May 14, 2009, which was after expiration of the 30-day deadline stated in the Notice. *See* 43 C.F.R. § 4.310 (a) (date of filing is the date of mailing to Board, or if not mailed, the date of personal delivery). The Board has consistently held that a notice of appeal is not timely when an appellant has been given correct appeal information but files a notice of appeal with an official other than the Board, resulting in untimely receipt of the notice of appeal by the Board. *See, e.g., Wilkins v. Rocky Mountain Regional Director*, 39 IBIA 21 (2003).

In the present case, however, we conclude that the appeal instructions provided in the Notice were not correct because under the procedures employed in the *Ducheneaux* decision, Appellant should have been afforded 30 days from *his receipt* of the Recommended Decision to file an appeal, and not 30 days from the date of mailing. The procedures established in *Ducheneaux* were adapted from 43 C.F.R. §§ 4.337 - 4.339, which apply to administrative appeals and which authorize the Board to refer matters to ALJs for proposed findings of fact and conclusions of law. Section 4.339 provides that an appeal from an ALJ's recommended decision must be filed with the Board within 30 days after receipt of the recommended decision. When *Ducheneaux* was decided, and until recently, the probate regulations allowed appeals to be filed from a judge's probate order within 60 days from the date of mailing. *See* 43 C.F.R. § 4.320(a) (2007). Recognizing this, the Board in *Ducheneaux* ordered that the time period for filing an appeal from a probate inventory dispute recommended decision be extended to correspond to the time period provided for appealing a probate decision. *Estate of Ducheneaux*, 13 IBIA at 178.

The revised probate regulations shortened the appeal period for probate decisions, and now require that appeals to the Board be filed within 30 days after the probate judge's decision is mailed. *See* 73 Fed. Reg. at 67,288, *to be codified at redesignated* 43 C.F.R. § 4.321. In the present case, the ALJ correspondingly accepted the shortened appeal period — including the date-of-mailing trigger — as applicable to the Recommended Decision. But the result was to advise Appellant of an appeal period that was even shorter than the time allowed by section 4.339, which is triggered by date of receipt, and on which the *Ducheneaux* procedures were based. The *Ducheneaux* decision *extended* the appeal period for recommended decisions because, at the time, the period for filing a probate appeal was longer than the period provided in section 4.339. But we do not construe *Ducheneaux* as intended to independently adopt the probate appeal period, even when it is *shorter* than the period allowed by section 4.339 (which is now the case, unless a probate decision is received on the same day that it is mailed).

Appellant informed the Board that, to the best of his knowledge, he received the Recommended Decision on either April 13 or 14, 2009. If, in fact, he received it on April 14, then his appeal was received by (filed with) the Board on the 30th day after receipt. On the other hand, if in fact he received it on April 13, then it was received (filed) on the 31st day after receipt. Because we conclude that the ALJ's appeal instructions were incorrect; because Appellant's best recollection of date of receipt includes a date from which the appeal would be timely; and because we cannot determine from the evidence that the appeal was untimely, we accept it as timely.<sup>6</sup>

## II. *Ducheneaux* Standing Order and ALJ's Authority to Issue Recommended Decision

As quoted above, the probate regulations now require that “[w]hen an error in the estate inventory is alleged, the OHA deciding official will refer the matter to BIA for

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<sup>6</sup> Although we have determined that the shorter appeal period provided in the revised probate regulations does not apply to a *Ducheneaux* appeal, we do note that the 30-day trigger for filing a probate appeal requires that the probate decision be mailed *with accurate appeal instructions*. *See* 73 Fed. Reg. at 67,288, *to be codified at redesignated* 43 C.F.R. § 4.321. Thus, to the extent that *Ducheneaux* was intended to be a hybrid of probate and administrative appeal procedures, the appeal period arguably was tolled by the ALJ's incorrect appeal instructions.

resolution.” 73 Fed. Reg. at 67,294, *to be codified at* 43 C.F.R. § 30.128(b).<sup>7</sup> We conclude that when this express provision in the regulations became effective, the Board’s standing order in *Ducheneaux* was superseded and dissolved by operation of law. Although the inventory dispute in this case was initiated, and the hearings were held, before the revised regulations became effective, the revised regulations do not “grandfather” in *Ducheneaux* proceedings that were pending before a probate judge when the regulations took effect. In the absence of such a provision, the plain language of the regulation controls, and required the ALJ to refer the matter to BIA.

We are mindful of the substantial effort expended by the ALJ and BIA in collecting evidence, developing a record, and responding to the numerous questions raised by Appellant concerning the inventory of Decedent’s estate. But we are constrained by the revised regulations, and because we conclude that once they became effective, they required the ALJ to refer the inventory dispute to BIA for a decision, we are required to vacate the Recommended Decision and refer the matter to BIA.

On the other hand, nothing in our decision precludes BIA from accepting the evidentiary record developed by the ALJ as the record for considering the inventory dispute, or from adopting the ALJ’s Recommended Decision, in whole or in part, as BIA’s decision. And nothing in our decision precludes BIA from requiring Appellant to clearly identify the parcel(s) that are the subject of the inventory dispute and to state with specificity the grounds for his disagreement with findings and conclusions stated in the ALJ’s Recommended Decision. But if BIA decides to adopt findings or conclusions in the Recommended Decision, in whole or in part, its decision must be based on BIA’s own review and consideration of Appellant’s arguments, and of the record. Upon issuance of its decision, BIA must advise interested parties of their appeal rights, as required by 25 C.F.R. § 2.7(c).

Pursuant to 43 C.F.R. § 30.128(b), 73 Fed. Reg. at 67,294, the probate Decision, *see supra* note 1, is subject to administrative modification once the inventory dispute has been resolved.

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<sup>7</sup> The regulations do not define the term “OHA deciding official,” but the term necessarily is broad enough to include the ALJ, who is within the Probate Hearings Division of OHA. Previously the regulations did define the term “deciding official,” which expressly included ALJs. *See* 43 C.F.R. § 4.201 (2007).

## Conclusion

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 docketed this appeal, vacates the Recommended Decision, and refers the matter to the Pacific Regional Director for a decision by BIA.<sup>8</sup>

I concur:

\_\_\_\_ // original signed  
Steven K. Linscheid  
Chief Administrative Judge

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Debora G. Luther  
Administrative Judge

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<sup>8</sup> In referring this matter to the Regional Director, we leave it to the Regional Director to decide whether the initial BIA decision should be made at the agency level or the regional level.