



## INTERIOR BOARD OF INDIAN APPEALS

Estate of James Jones, Sr.

51 IBIA 132 (02/17/2010)

Related Board cases:

47 IBIA 36

60 IBIA 102



accordance with the procedures provided in the Board's standing order issued in *Ducheneaux*.

On December 15, 2008, revised probate regulations promulgated by the Department of the Interior (Department) became effective, and those regulations now require that inventory disputes arising during a probate proceeding be referred to BIA for a decision, subject to a right of an appeal to the Board from BIA's decision. *See* 43 C.F.R. § 30.128(b). In *Estate of Francis Marie Ortega*, the Board held that the regulations superseded and dissolved by operation of law the Board's standing order in *Ducheneaux*. *See* 50 IBIA 322, 326 (2009).

In *Estate of Ortega*, we concluded that the regulations divested an administrative law judge of jurisdiction to issue a recommended decision under *Ducheneaux*, even though the proceedings in that case had been initiated and hearings had been held before the revised regulations became effective. We now conclude that the revised regulations apply as well to *Ducheneaux* appeals pending before the Board. Thus, the regulations preclude the Board from reviewing a recommended decision issued by a probate judge to resolve an inventory dispute, and limit the Board to considering and deciding the dispute only after a decision has been issued by BIA (and based on BIA's own administrative record). Therefore, we vacate the portion of the Recommended Decision that is the subject of this appeal; we dismiss the appeal insofar as it constitutes an appeal from a probate proceeding; and we refer the inventory dispute to BIA for a decision. Because of the unique circumstances of this case — a stipulated settlement and referral of the matter by the Director to the Board — we retain jurisdiction over the inventory dispute in order to fully preserve our authority to consider and decide on the merits any objections that may be filed after the Regional Director issues a decision.

## **Background**

### **I. Tribe's Challenge to the Inventory of Decedent's Estate**

During the probate of Decedent's estate, the Tribe challenged the validity of the inventory of Decedent's trust property that had been prepared by BIA. BIA's inventory included interests in allotments 119-HC3869 and 119-HC3900, which the Tribe contended should be removed from Decedent's estate because of certain transactions between the Tribe and Decedent. On February 15, 2008, after a hearing, the IPJ issued his Recommended Decision, pursuant to the Board's order in *Ducheneaux*.

Based on an admitted error by BIA relating to a 1993 transaction, and apparently with BIA's concurrence, the IPJ recommended that the estate inventory be modified to remove an interest in 119-HC3869 that Decedent had inherited from the Estate of Solomon Jones and from the Estate of Marion Jones (totaling a 4.444% interest). The IPJ determined that this interest was subject to a BIA-approved *inter vivos* sale from Decedent to the Tribe, for which the deed prepared by BIA had failed to accurately describe the entire 4.444% interest that Decedent intended to convey. No objections to this portion of the Recommended Decision were filed with the Board.

With respect to the remainder of the inventory dispute, involving transactions in 1997 for the conveyance by Decedent to the Tribe of interests in both 119-HC3869 and 119-HC3900 that Decedent expected to inherit through the probate of his brother's estate (William Jones), the IPJ recommended that the inventory be confirmed, leaving those interests in the estate and subject to inheritance by Decedent's heirs.<sup>3</sup> It is this portion of the Recommended Decision to which the Tribe filed objections with the Board.

## II. The Revised Probate Regulations

As noted earlier, in 2008, the 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:

(1) Trust property interests should be removed from the inventory because the decedent executed a gift deed or gift deed application during the decedent's lifetime, and BIA had not, as of the time of death, determined whether to approve the gift deed or gift deed application;

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<sup>3</sup> The February 15, 2008, Order Determining Heirs in Decedent's estate determined that Decedent died intestate on June 10, 2003, and that his heirs were his sons James Jones, Jr., and Maynard M. Jones.

(b) When an error in the estate inventory is alleged, the OHA deciding official will refer the matter to the BIA for resolution under 25 CFR parts 150,<sup>[4]</sup> 151,<sup>[5]</sup> or 152<sup>[6]</sup> and the appeal procedures at 25 CFR part 2.

43 C.F.R. § 30.128.

## Discussion

### I. Applicability of Revised Probate Regulations to *Ducheneaux* Appeals

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 resolution.” 43 C.F.R. § 30.128(b). In *Estate of Ortega*, the Board held that when section 30.128 became effective, “the Board’s standing order in *Ducheneaux* was superseded and dissolved by operation of law.” 50 IBIA at 326. Even though the inventory dispute in that case had been initiated and hearings held before the revised regulations became effective, the revised regulations did not purport to “grandfather” then-pending *Ducheneaux* proceedings, and thus the Board concluded that the probate judge had erred in issuing a recommended decision instead of referring the matter to BIA. *Id.*

The Board has not yet addressed whether the revised regulations apply equally to *Ducheneaux* proceedings completed by a probate judge but pending on appeal before the Board after the effective date of the revised regulations. We now conclude that they do. The regulations apply to an “OHA deciding official,” and although that term is not defined by the regulations, we construe it to include the Board, which is part of OHA. *See* 43 C.F.R. § 4.1(b)(2).<sup>7</sup>

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<sup>4</sup> Regulations governing land records and title documents.

<sup>5</sup> Regulations governing land acquisitions.

<sup>6</sup> Regulations governing the issuance of patents in fee, certificates of competency, removal of restrictions, and sale of certain Indian lands.

<sup>7</sup> Although subsection 30.128(b) is located in the probate regulations governing hearings that are conducted by IPJs and administrative law judges (ALJs), the narrower term “judge” is used in those regulations to refer specifically to IPJs and ALJs. *See* 43 C.F.R. § 30.100. The broader reference to an “OHA deciding official” is used in subsection 30.128(b). *Cf.* 25 C.F.R. § 2.4 (Board referred to as an “official” who may decide appeals from BIA administrative actions).

As we held in *Estate of Ortega*, when section 30.128 became effective, the Board's standing order in *Ducheneaux* was superseded and dissolved. Although the inventory dispute in the present case was initiated, hearings were held, and a recommended decision was issued before the revised regulations became effective, the revised regulations do not "grandfather" *Ducheneaux* proceedings that were pending when the regulations took effect. See *Estate of Ortega*, 50 IBIA at 326. In the absence of such a provision, the otherwise clear language of the regulation controls, and requires us to refer the matter to BIA for a decision.

## II. Effect of Stipulated Settlement and Retention of Jurisdiction

There is one circumstance unique to this appeal that we must consider before referring the matter to BIA. After the Board dismissed the Tribe's appeal as untimely, 47 IBIA 36, and the Tribe challenged that dismissal in court, the parties agreed to, and the court entered an order for, dismissal of the lawsuit pursuant to a stipulation by the parties. That stipulation provided that the matter "will be remanded to the Director of the Office of Hearings and Appeals, who will refer the matter to the Board of Indian Appeals who will consider the matter on the merits." Stipulation, *Upper Skagit Indian Tribe v. Salazar*, No. C08-0750-MJP (W.D. Wash. July 14, 2009).

On the one hand, the reference to consideration "on the merits" might simply have been intended to ensure that, on remand, the Board could not simply reconsider its ruling on the timeliness of the Tribe's appeal and still reach the same result that the appeal was untimely, thus preventing the Tribe from having any right to have its challenge considered on the merits. On the other hand, the reference to consideration "on the merits" could be read to mean that the parties intended to *require* the Board to review the *Recommended Decision* on the merits, in disregard of the revised regulations. But because the stipulation made no mention of the revised regulations, it was unclear to the Board whether or not those involved in drafting the stipulation were aware of or considered the revised regulations.

Because of this lack of clarity, and in order to determine whether either party might interpret the stipulation as *requiring* the Board to review the Recommended Decision directly, the Board issued an order describing alternative procedures and providing the parties with an opportunity to respond (or to offer their own proposed procedures). Under the first alternative, the Board would, consistent with 43 C.F.R. § 30.128, vacate the portion of the Recommended Decision within the scope of this appeal and remand the matter to BIA for a decision. Under the second alternative, the Board would direct the Regional Director to set forth a position on the inventory dispute, including but not limited to a position on the Recommended Decision, and allow additional briefing, after which the Board would decide the appeal from the Recommended Decision.

The Tribe did not respond. The Regional Director expressed support for following the *Ducheneaux* procedures that were in effect at the time of the original hearing before the IPJ. The Regional Director suggested that BIA is not in a position to hold hearings and gather evidence, and because the IPJ has already collected evidence and prepared a recommendation, it would serve no purpose for BIA to reexamine the evidence already presented to the IPJ.

No party has suggested that a referral by the Board to BIA for a decision, pursuant to the revised regulations, would conflict with the stipulated settlement. Thus, in the absence of any such constraint, we consider whether the Board's review of the matter on the merits, through a review of the IPJ's Recommended Decision and pursuant to the *Ducheneaux* procedures, is either authorized or warranted. We conclude that even if, under the unique circumstances of this case, consideration under the *Ducheneaux* procedures may be authorized, it nevertheless is not warranted.

As already discussed, in the absence of any extra-regulatory requirement that the Board consider this matter under the *Ducheneaux* procedures, the revised regulations must control. But even if the Director's referral of this matter gives the Board discretion to proceed under *Ducheneaux*, we are not persuaded by the Regional Director's suggestion that proceeding in such a manner is appropriate, or that it would be more efficient for the Board to proceed under *Ducheneaux*.

First, BIA is no less equipped to handle this probate-related dispute concerning trust property transactions than it is to handle and decide disputed property transactions arising outside of the probate context. *See, e.g., Bitonti v. Alaska Regional Director*, 43 IBIA 205 (2006); *Racine v. Rocky Mountain Regional Director*, 36 IBIA 274 (2001). Second, the evidentiary foundation laid by the IPJ will actually assist BIA in its consideration of the matter. The issue is not so much who has gathered the evidence, as who must *decide* the dispute. A referral to BIA may require BIA to allow interested parties to submit briefs and any additional evidence they may believe must be considered, but it does not require BIA to start the evidentiary process from the beginning, or to hold a formal hearing. BIA will be able to use the record created by the IPJ, supplemented only as necessary to address any additional evidentiary or factual issues that may arise. Third, even if the Board were to proceed under *Ducheneaux*, the Regional Director would not avoid being required to reexamine the evidence already presented to the IPJ. To the contrary, the Board would require the Regional Director to fully examine all of the evidence and submit a statement of position not only with respect to the legal conclusions reached by the IPJ, but also with respect to any discretionary matters related to the inventory dispute that were not addressed by the IPJ.

In this respect, it may well be more efficient to refer the matter to the Regional Director for a decision, rather than to proceed under *Ducheneaux*. Even under *Ducheneaux*, the role of the probate judges and the Board was limited. There was a narrow standard for reviewing an inventory challenge: did BIA do something it should not have done, or fail to do something that it should have done, such that the error or omission was responsible for the transaction not being completed during a decedent's lifetime. See *Estate of Laura Wetsit Wells*, 42 IBIA 94, 97 (2006); *Estate of Aaron Francis Walker*, 16 IBIA 192, 197 n.6, 198 (1988). This is the standard under which the IPJ evaluated the dispute in the present case. Recommended Decision at (unnumbered) 4.

In a few cases, apparently with BIA's consent, or at least without its objection, a decision issued under *Ducheneaux* directed BIA to approve and record conveyances. See, e.g., *Estate of Wells*, 42 IBIA 94; *Estate of Mary Dorcas Gooday*, 35 IBIA 79 (2000). But in other cases, the Board recognized that even if it held that BIA had erred, the Board might still be required to refer the matter to BIA for the exercise of its discretion. See *Estate of Walker*, 16 IBIA at 198 n.7, 199 n.9; cf. *Estate of Gooday*, 35 IBIA at 84 n.4. Thus, as applied to the present case, even if the Board were to review the Recommended Decision, we might still be required to remand the matter to BIA, thus bifurcating the proceedings and delaying their ultimate resolution. Moreover, if BIA were to decide either to approve or to disapprove the disputed transactions, and rely on one or more grounds not addressed by the IPJ, or rely on the exercise of its discretion, it would be far more efficient for the Board to review the matter on the merits only once, and not twice, as might be the case if we were to proceed under *Ducheneaux*.<sup>8</sup>

We are mindful that a referral to BIA may place some additional burden on BIA that would not otherwise be the case — e.g., affording interested parties an opportunity to brief the matter, as appropriate, or to supplement the evidentiary record; and addressing the

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<sup>8</sup> We observe that the IPJ focused on the authority of a probate judge (or the Board) to approve a conveyance in the absence of a signed deed, and he also suggested that the same rule would apply to BIA. The IPJ did not, however, have an opportunity to consider the implications of new section 30.128(a)(1), *see supra* at 134, which refers to a decedent's execution of a "gift deed *or* gift deed application," and to BIA's determination "whether to approve the gift deed *or* gift deed application." (Emphases added.) The referral of this matter to BIA will allow it to consider whether or how this language may be relevant to a decision, either as a matter of law or of discretion, in the present case.

arguments and evidence in a decision — but we are not convinced that the burden outweighs fidelity to the revised regulations.<sup>9</sup>

In one respect, however, we conclude it is appropriate to depart, in form if not in substance, from the revised regulations. If we were to apply the regulations fully, we would simply dismiss the entire appeal for lack of jurisdiction and refer the dispute to BIA. Following a decision by BIA, an adversely affected party would still have a right to file a new appeal with the Board, under 25 C.F.R. Part 2, from the Regional Director's decision, but the Assistant Secretary - Indian Affairs would also have the right to assume jurisdiction over that new appeal. If that were to occur, the Board would not be able to comply with the stipulation by the parties that the Board "consider the matter on the merits." *See supra* at 136. Thus, in order to preclude the possibility of this potential inconsistency between the stipulation and the regulations, the Board will retain jurisdiction over the inventory dispute to the extent necessary to review any objections to BIA's decision. But until any such objections are filed, we administratively close this appeal.

We dismiss the appeal in part, however, to the extent it arises from the probate proceedings and from our *Ducheneaux* order.<sup>10</sup> Pursuant to 43 C.F.R. § 30.128(b)(2)(ii), the probate decision is subject to administrative modification once the inventory dispute has been resolved.

### III. Procedures Following a Decision by BIA

The Regional Director's decision shall advise interested parties that they have 30 days from the date of their receipt of the decision to file objections with the Board. *Cf.* 25 C.F.R. § 2.7. Upon issuance of his decision, the Regional Director shall submit the decision to the Board and send copies to all interested parties. If one or more objections are filed, the Board will reopen this case and will set forth procedures for considering any timely objections to the Regional Director's decision. If no timely objections are filed with the Board, the Regional Director's decision shall become final for the Department.

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<sup>9</sup> In the present case, it appears that the Superintendent of the Puget Sound Agency, BIA, submitted information and responses to the IPJ, but the Regional Director did not participate in the proceedings, and thus the IPJ did not consider the Regional Director's position.

<sup>10</sup> No party appealed from the IPJ's probate Order Determining Heirs.

## 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 vacates the Recommended Decision, dismisses this appeal to the extent it arises from the probate proceedings, and refers the matter to the Northwest Regional Director for a decision by BIA on the inventory dispute. The Board retains jurisdiction to consider any objections that may be lodged from BIA's decision.

I concur:

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Steven K. Linscheid  
Chief Administrative Judge

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// original signed  
Debora G. Luther  
Administrative Judge