



INTERIOR BOARD OF INDIAN APPEALS

Estate of Dwayne Elwell

56 IBIA 269 (03/29/2013)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 NORTH QUINCY STREET  
SUITE 300  
ARLINGTON, VA 22203

ESTATE OF DWAYNE ELWELL	)	Order Docketing and Dismissing
	)	Appeal
	)	
	)	Docket No. IBIA 13-064
	)	
	)	March 29, 2013

Erma Jane Elwell and Travis Lee Elwell (Appellants) appealed from an Order Granting Rehearing and Modifying Decision (Rehearing Order), entered on February 13, 2013, by Administrative Law Judge (ALJ) Thomas F. Gordon in the estate of Dwayne Elwell (Decedent).<sup>1</sup> Appellants sent their appeal to the Department of the Interior’s Probate Hearings Division office in Portland, Oregon, which transmitted the appeal to the Board of Indian Appeals (Board). We docket but dismiss this appeal because the appeal was not filed with the Board within the 30-day period allowed for filing an appeal following the Rehearing Order.<sup>2</sup>

An appeal from a probate judge’s decision must be filed *with the Board* within 30 days from the date the decision was mailed with accurate appeal instructions. 43 C.F.R. § 4.321(a). The effective date of filing a notice of appeal with the Board is the date of mailing (if sent by U.S. mail) or the date of personal delivery (if not mailed). *Id.*

---

<sup>1</sup> Decedent was a Yakama Indian. The probate number assigned to Decedent’s case in the Department of the Interior’s probate tracking system, ProTrac, is No. P000078098IP. The ALJ’s Rehearing Order modified his May 22, 2012, Decision to add Jackson George (Jackson) as an additional heir (as Decedent’s son) for Decedent’s trust personalty and trust real property interests constituting 5% or more in an allotment. The Rehearing Order was issued following a petition for rehearing filed by the Bureau of Indian Affairs.

<sup>2</sup> Although we dismiss the appeal for lack of jurisdiction, we note that there is some doubt whether Appellants disagree, in fact, with the Rehearing Order. Appellants contend that they want to “deny any rights” to Jackson “in distribution of the ‘less than 5%’ interests or associated funds.” Notice of Appeal. The Rehearing Order did not affect the portion of the Decision that applied to Decedent’s less-than-5% trust real property interests, which the ALJ determined were inherited by Decedent’s eldest child, Dwayne Dewey Elwell II, under the “single heir rule” in 25 U.S.C. § 2206(a)(2)(D)(iii)(I).

§ 4.310(a); see *Confederated Tribes and Bands of the Yakama Nation v. Northwest Regional Director*, 56 IBIA 176, 181-82 (2013). The Board does not have authority to grant an extension for filing a notice of appeal, 43 C.F.R. § 4.310(d)(1), and untimely appeals must be dismissed, *id.* § 4.321(a). “[A]n appellant who fails to follow accurate appeal instructions bears the risk that the appeal will be untimely.” *Estate of Franklin Porter*, 52 IBIA 243, 244 (2010).

The ALJ’s Decision included accurate appeal instructions and included a certification that it was mailed to the listed interested parties (including Appellants) on February 13, 2013. Calculated from that mailing date, the deadline for filing an appeal with the Board expired on March 15, 2013. Appellants did not mail their appeal to the Board, but instead sent the appeal to the ALJ, who transmitted the appeal to the Board, which received it on March 20, 2013. The appeal was filed with the Board after the 30-day deadline expired and thus must be dismissed for lack of jurisdiction.

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 but dismisses it as untimely.

I concur:

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

\_\_\_\_\_  
//original signed  
Debora G. Luther  
Administrative Judge