



INTERIOR BOARD OF INDIAN APPEALS

Estate of Edward Spencer Elk

57 IBIA 164 (06/27/2013)



# 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 EDWARD SPENCER ELK	)	Order Docketing and Dismissing
	)	Appeals
	)	
	)	Docket Nos. IBIA 13-104
	)	13-107
	)	
	)	June 27, 2013

Ava Martin, and Anthony Elk, Gloria Longoria, and Mable Snow (collectively, Appellants)<sup>1</sup> separately appealed from an Order Denying Rehearing (Rehearing Order), entered on May 6, 2013, by Indian Probate Judge (IPJ) Albert C. Jones in the estate of Edward Spencer Elk (Decedent).<sup>2</sup> Appellants sent their appeals to the Department of the Interior’s Probate Hearings Division office in Billings, Montana, which transmitted the appeals to the Board of Indian Appeals (Board). We docket but dismiss these appeals because they were not filed with the Board within the 30-day period allowed for filing an appeal following the Rehearing Order.

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> Martin’s appeal is assigned Docket No. IBIA 13-104, and Elk, Longoria, and Snow’s appeal is assigned Docket No. IBIA 13-107. The Board consolidates these appeals for purposes of this decision.

<sup>2</sup> Decedent was an Indian of the Three Affiliated Tribes of the Fort Berthold Reservation. The probate number assigned to Decedent’s case in the Department of the Interior’s probate tracking system, ProTrac, is No. P000085040IP. The Rehearing Order left in place the IPJ’s, March 20, 2012, Decision, which found that Decedent had one daughter, Francine B. Counter, and which ordered the distribution of Decedent’s estate to her. The Rehearing Order denied a petition filed by Elk, Longoria, Snow, and Thomas Eaglestaff, who are nieces and nephews of Decedent, and who sought an order for DNA testing, arguing that Counter is not Decedent’s daughter.

§ 4.310(a)(1); 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 Rehearing Order included accurate appeal instructions and included a certification that it was mailed to the listed interested parties (including Appellants) on May 6, 2013. Calculated from that mailing date, the deadline for filing an appeal with the Board expired on June 5, 2013. Appellants did not mail their appeals to the Board, but instead sent them to the IPJ, who transmitted the appeals to the Board. The Board received Martin’s appeal<sup>3</sup> on June 10, 2013, and Elk, Longoria, and Snow’s appeal<sup>4</sup> on June 17, 2013. Because the appeals were filed with the Board after the 30-day deadline expired, they must be dismissed as untimely and for lack of jurisdiction.

---

<sup>3</sup> Martin contends that she is Decedent’s daughter, relying on her birth certificate as evidence in support of that claim. In the Decision, the IPJ considered Martin’s birth certificate, but found that a preponderance of the evidence established that Martin is not Decedent’s daughter.

Even if Martin’s appeal were timely, the issue she raises appears to be outside the scope of an appeal from the Rehearing Order, which was limited to addressing the petition filed by Elk, Longoria, Snow, and Eaglestaff regarding Decedent’s paternity of Francine. Martin did not submit a timely petition for rehearing to the IPJ, and thus the issue she raises would require reopening the Decision. Martin is not precluded from filing a petition for reopening with the probate judge, but in doing so, she must comply with 43 C.F.R. § 30.243 which, among other things, requires that she fully set forth the grounds for reopening and provide evidence of when she first became aware of the alleged error in the Decision. It is not clear when or whether Martin received the Decision, which was sent to her in care of the Fort Berthold Agency Superintendent, Bureau of Indian Affairs. The Board encloses with this order a copy of the Decision for Martin.

<sup>4</sup> Elk, Longoria, and Snow again seek to compel DNA testing to determine whether Counter is Decedent’s daughter. Neither the Board nor probate judges have the authority to order DNA testing. *Estate of Jerome Hummingbird*, 55 IBIA 210, 211 n.2 (2012). We also note that in denying rehearing, although the IPJ addressed and rejected their request for an order requiring DNA testing, the IPJ also found that these Appellants, as Decedent’s nieces and nephews, lacked standing to seek rehearing.

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 but dismisses these appeals.

I concur:

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

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