INTERIOR BOARD OF INDIAN APPEALS

Estate of John Fredericks, Jr.

57 IBIA 204 (07/11/2013)

United States Department of the Interior

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

ESTATE OF JOHN FREDERICKS, JR.	)	Order Affirming Decision
	)	
	)	Docket No. IBIA 11-125
	)	
	)	July 11, 2013

Susan, John, Casey, Mary, and Shawn Fredericks (collectively, Appellants) appealed to the Board of Indian Appeals (Board) from a May 31, 2011, Order Denying Rehearing (Rehearing Order) for the estate of Appellants' father, John Fredericks, Jr. (Decedent).[1] The Rehearing Order left undisturbed the June 20, 2009, probate decision (Decision) for Decedent's estate, which ordered distribution pursuant to the American Indian Probate Reform Act of 2004 (AIPRA).[2]

Among other things, the Decision determined that Judy Fredericks (Judy), Decedent's surviving spouse, was entitled to a "life estate without regard to waste," pursuant to 25 U.S.C. § 2206(a)(2^1)(A)(i),[3] in trust lands in which Decedent owned at least 5% of the undivided whole. Appellants petitioned for rehearing; Judy, along with Fred and Kathy (Johnson) Fredericks, two of Decedent's children, (collectively, Respondents) opposed Appellants' petition. Appellants' arguments for rehearing centered mostly on the constitutionality and applicability of AIPRA to Decedent's probate and on the rights and authorities of life tenants and remaindermen created under AIPRA. The Rehearing Order rejected Appellants' arguments and affirmed the Decision.

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[1] Decedent was a member of the Three Affiliated Tribes of the Fort Berthold Reservation (Tribes). His probate was assigned No. P000047582IP in the probate tracking system maintained by the Department of the Interior (Department).

[2] AIPRA, Pub. L. 108-374, 118 Stat. 1773, was a set of amendments to the Indian Land Consolidation Act, 25 U.S.C. § 2201 *et seq*.

[3] Section 2206(a) has two subsections identified as "(2)." The section we cite above appears immediately after § 2206(a)(1)(B)(ii) and we will refer to it as § 2206(a)(2^1). The second § 2206(a)(2), which we also cite in our decision, we will refer to as § 2206(a)(2^2). Section 2206(a)(2^2) appears immediately following § 2206(a)(5).

We now affirm the Rehearing Order. We will not consider arguments that were not raised in the rehearing proceedings, that go beyond the scope of Decedent's probate proceedings, or that raise issues that the Board does not have authority to adjudicate. As to Appellants' remaining arguments, we reject them on their merits. We hold that AIPRA applies to Decedent's estate and that mineral interests are interests in land, and thus subject to AIPRA's rules that apply to trust real property. We also hold that nothing required the probate judge to declare how permanent improvements on Decedent's trust land would descend because the specific regulatory provision relied upon by Appellants does not apply to this case.

Background

Decedent died intestate on December 27, 2006, owning surface and mineral interests in trust or restricted land on the Fort Berthold Reservation. He was survived by his wife, Judy,[4] and nine children, seven of whom are considered Decedent's heirs under AIPRA.[5] Decedent's trust estate included 22 interests in land in which Decedent's interest was 5% or more of each parcel, 3 that were each less than 5%, and trust personalty (money) in his Individual Indian Money (IIM) account.

Two probate hearings were held for Decedent's estate. At the first, on July 11, 2008, the hearing officer recused himself due to a potential conflict of interest. First Hearing Transcript (Tr.) at 13-14 (Probate Record (PR) Tab 4). The matter was then reassigned to Indian Probate Judge James Yellowtail (IPJ). At the second hearing, the IPJ rejected several claims against the estate and the parties presented arguments concerning the estate's distribution. *See* Second Hearing Tr., Dec. 4, 2008 (PR Tab 3). In short, Appellants argued that AIPRA is unconstitutional and does not apply to Decedent's estate, that an older version of 25 C.F.R. Part 179 (governing the administration of life estates by the Bureau of Indian Affairs (BIA)) applies rather than AIPRA or a newer version of Part 179, and that Decedent's mineral interests were not interests in land subject to AIPRA. Second Hearing Tr. at 58-60.

The IPJ issued the Decision on June 20, 2009. PR Tab 40. He determined that because Decedent died after AIPRA's effective date (June 20, 2006), AIPRA's provisions for descent and distribution applied to the probate of Decedent's estate. *Id.* at 3. He found that Judy, as the surviving spouse, was entitled to a "life estate without regard to waste,"

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[4] Appellants, at times, have contested Judy's status as Decedent's surviving spouse, but do not pursue that argument before the Board.

[5] Two of Decedent's biological children were adopted by other families and thus were determined not to be heirs. *See* 25 U.S.C. § 2206(j)(2)(B)(iii).

25 U.S.C. § 2206(a)(2^1)(A)(i), in those land interests in which Decedent's interest was 5% or more and was entitled to 1/3 of the funds in Decedent's IIM account "at the time of death." Decision at 3-5 & n.2. Each of Decedent's seven children would receive a 1/7 remainder interest in the life estate properties and a 2/21 share of the IIM date-of-death balance. Decision at 4-5. Susan, as the oldest surviving child, would receive all of the less-than-5% land interests under AIPRA's "single heir rule," 25 U.S.C. § 2206(a)(2^1)(D)(iii)(I). Decision at 5. The IPJ summarized AIPRA and Part 179 (2009), stating that Judy's "life estate without regard to waste" meant that she may "cause minerals to be depleted from [the properties subject to her life estate] to the exclusion of the remaindermen" and she will receive "all royalties and/or income generated" from those properties. *Id.* at 4. He also held that mineral interests held in trust are subject to AIPRA. *Id.* at 3.

Appellants timely petitioned for rehearing.[6] Petition for Rehearing (Petition), July 16, 2009 (PR Tab 37); *see also* PR Tabs 37, 34, 25, 22, 19, 17, 16, 14, 13, 12, 11, 10, & 9 (additional filings in rehearing proceedings). Appellants argued that AIPRA was not in effect when Decedent died; that AIPRA and its implementing regulations are unconstitutional; that the failure to apply Part 179 (2007) denied them due process; and that Decedent's marriage to Judy was never sufficiently established. Petition at 1-2 (unnumbered). They also requested a certified chain of title for all the mineral interests in Decedent's estate. *Id.* at 2 (unnumbered). In later filings, Appellants raised arguments concerning the parties' rights and authorities with respect to lands subject to Judy's life estate, and they sought rescission of an oil and gas lease and a pasture lease, both of which they claim were granted by BIA after the Decision issued and the heirs were known.[7] Amended Petition for Rehearing, Dec. 10, 2009 (PR Tab 24); Motion for Emergency Action, May 10, 2010 (PR Tab 19).

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[6] The Tribes also sought rehearing regarding a claim against the estate that was rejected in the Decision. The Tribes' petition for rehearing was denied. Rehearing Order at 2-3. The Tribes did not appeal.

[7] Appellants argued that they were not challenging the determination of heirs. *See* Motion for Emergency Action at 4 (unnumbered). Rather, they characterized their claims as "deal[ing] with matters other than the determination of heirs." *Id.* Appellants further averred that "[t]here will be no appeal concerning [the] determination of heirs." *Id.* But that is precisely what Appellants have done in arguing that AIPRA is unconstitutional or should not otherwise apply to Decedent's estate. If AIPRA were invalidated, a different law of descent would necessarily apply that could well alter the determination of heirs, and not necessarily in Appellants' favor. *See, e.g.,* N.D.C.C. § 30.1-04-02 (North Dakota's law of intestate descent where a widow survives).

Respondents objected to rehearing and responded to Appellants' arguments. Objections of Surviving Spouse, July 30, 2009 (PR Tab 34); Amended Objections of Surviving Spouse, Dec. 28, 2009 (PR Tab 22). In addition, Respondents requested that all income added to Decedent's IIM account after his death be "allocated" to Judy as the life tenant of the lands that generated the income;[8] Appellants opposed the request. Motion to Allocate Income to Judy, July 22, 2010 (PR Tab 12); Response to Motion, Aug. 13, 2010 (PR Tab 11).

Administrative Law Judge R.S. Chester (ALJ) denied rehearing on May 31, 2011. He found that Decedent's and Judy's marriage was sufficiently established. Rehearing Order at 6-7. He held that any arguments related to the constitutionality or validity of AIPRA were beyond his jurisdiction. *Id.* at 7. He also stated that AIPRA applied to the trust estates of Indians who died on or after its effective date and that it superseded any conflicting regulations at that time. *Id.* at 7-8. He held that he lacked authority to rescind BIA-issued leases and noted that arguments concerning leases approved after Decedent's death were beyond his jurisdiction. *Id.* at 8-9. Finally, the ALJ referred Appellants' chain-of-title arguments to BIA as an inventory dispute under 43 C.F.R. § 30.128(b). *Id.* at 9-10; Notice of Referral, May 31, 2011 (PR Tab 7).

Appellants timely appealed the Rehearing Order and filed opening and reply briefs.[9] Respondents submitted an answer brief.

Discussion

Generally, the issues raised by Appellants fall into one of four categories: Issues raised for the first time on appeal; issues that are outside the scope of these probate proceedings; issues over which we have no jurisdiction; and issues that we decide on the

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[8] Respondents did not explain why they presume that the only properties in the estate that generated income were those subject to Judy's life estate. *See* Motion to Allocate Income at 1-2. As noted *supra*, the ALJ determined that Decedent's interests in three trust properties would descend entirely to Susan pursuant to the single heir rule.

[9] Ten months after submitting their reply brief, Appellants submitted a document entitled "Supplemental Authority," which purported to amend the opening brief. They did not seek leave to file an amendment. Respondents opposed the filing as untimely and also on its merits. Appellants explain that "[t]he reason for this [amendment] is that BIA issued an oil and gas lease after. . .[the Decision issued]." Supplemental Authority at 1. As we explain below, the administration of trust property is within the purview of BIA, not the Department's probate judges, and thus Appellant's Supplemental Authority, untimely or not, is irrelevant to this proceeding.

merits. We conclude that none of the issues raised by Appellants merit vacating the Rehearing Order, and we affirm.

I. Issues Not Preserved for Appeal to the Board

The Board's scope of review in an appeal from a rehearing order generally is limited to those issues that were raised before the ALJ. 43 C.F.R. § 4.318; *Estate of Thomas Jefferson Boe*, 56 IBIA 15, 22 (2012). Ordinarily, we will not consider arguments that could have been, but were not, raised in the rehearing proceedings. *Estate of Boe*, 56 IBIA at 22.

On appeal to the Board, Appellants argue that life estates created under AIPRA do not include mineral interests. Opening Brief (Br.) at 3-6; Reply Br. at 2-3. They also argue that minerals extracted from a decedent's trust land after a decedent's death (under a lease approved after the decedent's death) become trust personalty subject to distribution as part of the decedent's trust estate under AIPRA. Opening Br. at 7.[10] Because Appellants did not raise these issues before the ALJ, we will not consider them now.[11]

II. Issues Not Within the Scope of Decedent's Probate Proceedings

The ALJ correctly determined that several issues raised by Appellants are not within the scope of these probate proceedings and, therefore, he did not consider them. Each of these arguments relates to leases of lands in Decedent's estate that are subject to Judy's life estate and that were executed after Decedent's death. *See* Opening Br. at 8-11 (consent requirements of leases of trust lands subject to an AIPRA-created life estate); Reply Br. at 3-7 (same), 9-11 (allocation of income generated by leases that were approved after

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[10] Appellants raised the opposite of this argument in the second probate hearing. They claimed that "oil interests . . . are personalty and should *not* be distributed according to [AIPRA]." Second Hearing Tr. at 59 (emphasis added). So, while Appellants purported to incorporate into their petition for rehearing "every argument" made at the hearings, Petition at 2, the argument they assert now—that minerals are personalty that *should* be distributed pursuant to AIPRA—was not raised at the hearings.

[11] If we did consider these arguments, we would reject them. First, it is clear that "AIPRA governs the descent and distribution of mineral rights to the same extent as other property rights." 73 Fed. Reg. 67256, 67264 (Nov. 13, 2008).

Second, a decedent's estate is fixed at the time of death. *Estate of Samuel R. Boyd*, 43 IBIA 11, 23 (2006). Even if extracted minerals could be considered trust personalty, trust personalty that accrues after a decedent's death is not trust personalty *belonging to the decedent*. *Cf. id.* (income generated from allotments after the date of death attaches to the allotments themselves and is not added to the estate).

Decedent's death); *see also* Supplemental Authority at 2-3 (same) & *supra* note 10. In response to each of these arguments, the ALJ held that he lacked jurisdiction to consider them because they were not relevant to the probate proceedings. Rehearing Order at 8-9. The ALJ is correct and we affirm.

In broad terms, the function of probate judges in the Department is to conduct proceedings to determine the heirs of an Indian decedent, probate a will if one exists, determine the applicable law(s) of descent for an intestate decedent, identify the interests in trust real property and trust personalty that pass to one or more beneficiaries, and enter an order accordingly. *See* 43 C.F.R. § 30.120 (delineating the authority of probate judges).[12] However, the authority to implement the judge's order, and thereafter to administer the trust interests, including the distribution of post-death income generated by assets in a decedent's trust estate, is not a probate function but a BIA function. The probate judge may have authority to *preserve* post-death income by requiring, e.g., that such funds be maintained in an IIM account established for a decedent's estate until a final probate decision is rendered. *See, e.g.*, *id.* § 30.120(w). But it is BIA that then distributes both the trust personalty and the trust real property interests, including any income therefrom, in the wake of a final probate decision. Here, the ALJ determined that Judy receives a "life estate without regard to waste," a direct quote from 25 U.S.C. § 2206(a)(2[1])(A)(i). We agree with the ALJ that matters pertaining to the validity of leases, the distribution of rental and other income generated by leases, and related matters—in short, the meaning of "life estate without regard to waste," *as administered*—falls outside the jurisdiction of the Department's probate judges. To the extent that the ALJ nevertheless elaborated on the law as it pertains to the definition of "without regard to waste," *see* 25 U.S.C. § 2201(10), or BIA's implementing regulation, found at 25 C.F.R. Part 179, or leases of trust lands and the distribution of income therefrom, we do not construe his order as purporting to adjudicate or to assert that he had jurisdiction over such matters.[13]

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[12] Probate judges can and do conduct certain other functions that may be considered non-probate, such as approving agreements to consolidate land interests and conducting, where appropriate, the sale of decedents' land interests. *See* 43 C.F.R. § 30.120(f), (g). These functions are specifically authorized by AIPRA. *See* 25 U.S.C. § 2206(e), (o).

[13] On appeal to the Board, Appellants submitted a lease executed by Judy and approved, according to Appellants, by the Acting Superintendent of BIA's Fort Berthold Agency. The lease purports to authorize Kodiak Oil and Gas (USA), Inc., to extract oil from Allotment No. M1029A-A, which is one of the trust assets in Decedent's estate. Appellants seek an order from the Board declaring the lease invalid, ordering the "segregation" of lease income (including all bonus money), and requiring distribution of the lease income in accordance with the Fort Berthold Mineral Leasing Act of July 7, 1998, Pub. L. 105-188, 112 Stat. 620. This submission was received by the Board on June 20, 2013, when this appeal was

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III. Issues Not Within the ALJ's Jurisdiction

Appellants raised two issues that were not within the ALJ's jurisdiction and which they press on appeal before the Board. They argue that AIPRA is unconstitutional, specifically the "single heir rule," 25 U.S.C. § 2206(a)(2[1])(D)(iii), and they claim that certain provisions in AIPRA "violate the government's trust responsibility" and rise to the level of a Fifth Amendment taking. Opening Br. at 11-15; Reply Br. at 8-9. Neither this Board nor the Department's probate judges have authority to adjudicate the constitutionality of duly promulgated statutes and regulations or to declare them otherwise invalid. *See, e.g.*, *Estate of Joyce Mary James*, 4 IBIA 81, 82 (1975) ("Only the Courts have the authority to take action which runs counter to the will of the Legislature."); *see also Estate of Frances Marie Ortega*, 51 IBIA 29, 29 (2009). Therefore, we affirm the ALJ's decision as to these arguments.

IV. Merits Issues

Appellants raise two arguments in this appeal that we address on their merits. They argue that AIPRA was not effective on its statutory effective date and that the ALJ erred when he failed to include in his order a statement describing AIPRA's treatment of permanent improvements. We reject each argument.

A. AIPRA's Effective Date

Appellants claim that AIPRA is not applicable to Decedent's probate because its supporting regulations did not go into effect until nearly 2 years after Decedent's death.[14] This argument fails.

AIPRA's rules of descent and distribution, enacted in 2004, apply—by AIPRA's terms—to the estates of Indian decedents who own trust or restricted property and who die

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under active consideration. Even if the submission were considered timely, it would still be outside the scope of this probate proceeding, and we deny the motion accordingly. Appellants must exhaust their administrative remedies within BIA—through the administrative appeals process—prior to seeking review from this Board. *See* 25 C.F.R. Part 2; *Morgan v. Rosebud Agency Superintendent*, 53 IBIA 85, 86 (2011).

[14] As illustrated by the next section of our discussion, Appellants are not consistent on the issue of whether AIPRA does or does not apply. Apparently, they would have some provisions apply, and not others, though they also argue that the allegedly unconstitutional provisions in AIPRA render the entire statute invalid.

on or after "the date that is 1 year after the date on which [the Secretary of the Interior (Secretary) certifies that notice of AIPRA's provisions has been given]." *See* 25 U.S.C. § 2206 Note (Effective and Applicability Provisions – 2004 Acts). On June 20, 2005, the Secretary certified that the requisite notice had been given. 70 Fed. Reg. 37107 (June 28, 2005). Therefore, with limited exceptions for certain provisions not relevant here, AIPRA became applicable one year later to the trust estates of Indian decedents who died on or after June 20, 2006. Nothing in AIPRA conditioned its effectiveness or applicability on the promulgation of implementing regulations. *See* 25 U.S.C. § 2201 Note (Regulations) ("The Secretary is authorized to adopt such regulations as may be necessary to implement the provisions of this Act."). Therefore, we reject Appellants' argument that, because no implementing regulations had yet been adopted, AIPRA was inapplicable to Decedent's estate.

B. The Descent of Permanent Improvements

Appellants argue that the probate order should have included a statement concerning the descent of improvements located on trust land in Decedent's estate. *See* 43 C.F.R. § 30.236(d) (requiring statement in probate order regarding 25 U.S.C. § 2206(a)(2^2) (intestate descent of permanent improvements)). Neither the regulatory nor the statutory provision concerning the descent of permanent improvements existed at the time of Decedent's death in 2006: The statute was enacted in 2008, *see* Pub. L. 110-453, 122 Stat. 5031 (Dec. 2, 2008), and the regulation followed in 2011, *see* 76 Fed. Reg. 7500, 7507-08 (Feb. 10, 2011). The regulation is applicable only to the estates of decedents who died on or after December 2, 2008. *See id.* at 7501. Thus, this procedural rule has no applicability to the probate of Decedent's trust estate.

Conclusion

We will not consider arguments that were not preserved for appeal, that are beyond the scope of Decedent's probate, or that are beyond our jurisdiction. We reject the remainder of Appellants' arguments on their merits. 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 the May 31, 2011, Rehearing Order.

I concur:

// original signed	//original signed
Debora G. Luther	Steven K. Linscheid
Administrative Judge	Chief Administrative Judge