



INTERIOR BOARD OF INDIAN APPEALS

Estate of Virginia Grijalva Johnson

59 IBIA 24 (07/11/2014)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
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ESTATE OF VIRGINIA GRIJALVA	)	Order Dismissing Appeals
JOHNSON	)	
	)	Docket Nos. IBIA 14-087
	)	14-091
	)	
	)	July 11, 2014

Arthur E. Orsua and Theodore R. Orsua (collectively, Appellants), appealed to the Board of Indian Appeals (Board) from an April 4, 2014, Modification Order issued by Administrative Law Judge (ALJ) Thomas F. Gordon in the estate of Appellants’ cousin, Virginia Grijalva Johnson (Decedent).<sup>1</sup> The Modification Order granted a petition submitted by the Southern California Agency Superintendent, Bureau of Indian Affairs (BIA), to remove the estate of Decedent’s half sibling, Richard G. Arvizu, as the heir to Decedent’s trust estate on the basis that Richard was a non-Indian and therefore was not an “eligible heir” under the American Indian Probate Reform Act of 2004 (AIPRA), 25 U.S.C. § 2201(9) (definition of “eligible heirs”).<sup>2</sup> The Modification Order substituted the Morongo Band of Mission Indians (Tribe) as the heir to Decedent’s trust estate. Under the rules of intestate succession (i.e., when property does not pass pursuant to a will) in AIPRA, if no eligible heirs in the line of succession exist, trust or restricted real property descends to “the Indian tribe with jurisdiction over the interests in trust or restricted lands.” 25 U.S.C. § 2206(a)(2)(B)(v); *see id.* § 2206(a)(2)(D)(iii)(IV). Appellants dispute the substitution of the Tribe as heir to Decedent’s trust or restricted land and assert that they, and their sister, Eleanor Garcia, as Decedent’s only living relatives of Indian blood, should inherit the land.<sup>3</sup> We dismiss the appeals for lack of standing.

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<sup>1</sup> Decedent, who was also known as Frances Johnson, was a Morongo Band of Mission Indians, California, Indian. The probate number assigned to Decedent’s case in the Department of the Interior’s probate tracking system, ProTrac, is No. P000089515IP.

<sup>2</sup> Richard survived Decedent, and thus was a “surviving sibling,” under 25 U.S.C. § 2206(a)(2)(B)(iv), but was not also an “eligible heir,” as defined and required by AIPRA.

<sup>3</sup> The land claimed by Appellants is Morongo Allotment No. 247 (mineral and surface), in Riverside County, California, consisting of 5.240 acres.

Appellants, as cousins of Decedent, are not in the line of intestate succession under AIPRA to inherit Decedent's allotment, and therefore lack standing to appeal from the Modification Order. Although Theodore's proposal to allow Appellants and their sister Eleanor to inherit Decedent's allotment in sequence may be consistent with AIPRA's policy against Indian land fractionation, it cannot be reconciled with AIPRA's clear language governing intestate succession, which omits Appellants from inheriting Decedent's land. Therefore, we dismiss the appeal.

### Background

Decedent's birth and death bookended two significant developments in Federal Indian law relevant to this appeal: passage of the Indian Reorganization Act of 1934, which ended the policy of allotting Indian reservation lands and took steps to prevent the further loss of previously-allotted lands; and the effective date of AIPRA, which, in support of a policy of stemming the further fractionation of undivided ownership interests in Indian trust or restricted lands upon the death of current interest holders, and consolidating tribal lands, established a uniform Federal probate code for Indian trust estates.<sup>4</sup> According to Appellants, the land to which they claim entitlement as heirs of Decedent was initially received by their uncle, Inez (or Enis) Johnson, through the allotment process. Opening Brief (Response to Order to Show Cause (OSC)), June 17, 2014, at 2. Upon the unnatural death of Inez/Enis, his daughter, Decedent, inherited the allotment. *Id.* at 2. Decedent apparently never married or had children, but Appellants assert that she wanted nonetheless to keep the land in her family because it was her heritage. *Id.*

In the initial probate Decision entered on September 11, 2013, the ALJ determined that Decedent died intestate on August 31, 2008, and that, under the intestate succession provisions of AIPRA, *see* 25 U.S.C. § 2206(a), Decedent's half sibling, Richard, was the sole heir. On September 25, 2013, acting on a petition by BIA dated September 17, 2013, the ALJ issued an order to show cause why the Decision should not be modified on the basis that Richard was non-Indian and therefore was not an "eligible heir" to Decedent's trust estate under AIPRA. *See* 25 U.S.C. §§ 2206(a)(2)(B)(iv) (inheritance by surviving siblings "who are eligible heirs"), 2201(9) (defining "eligible heirs" to include "half siblings by blood" *who are* (1) Indian, (2) certain lineal descendants, or (3) co-owners). In letters received by the ALJ on September 17, October 3, and October 8, 2013, Arthur and Theodore also separately petitioned for rehearing on the grounds that Richard was non-

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<sup>4</sup> AIPRA was enacted as a set of amendments to the Indian Land Consolidation Act, 25 U.S.C. § 2201 *et seq.* AIPRA's provisions governing intestate succession became effective on June 20, 2006. *See* Secretary of the Interior's Certification of Notice of AIPRA, 70 Fed. Reg. 37107 (June 28, 2005).

Indian and that, as first cousins of Decedent, Appellants and their sister Eleanor should inherit Decedent's allotment. Having heard no objection to the removal of Richard as the eligible heir, but without responding to Appellants' contention that they are heirs to Decedent's allotment, the ALJ issued the Modification Order substituting the Tribe as the heir to Decedent's trust estate.<sup>5</sup>

Upon receipt of Appellants' notices of appeal, the Board, in a pre-docketing notice and orders issued on May 9, 2014, consolidated the appeals, ordered Arthur to complete service of his notice of appeal and to show cause why his appeal in Docket No. IBIA 14-091 should not be dismissed as untimely, and ordered Arthur and Theodore to show cause why their respective appeals should not be dismissed for lack of standing. Arthur certified completion of service and demonstrated that he timely mailed his notice of appeal to the Board. However, Arthur did not respond to the Board's order to show cause (OSC) regarding standing. Theodore responded to the OSC and in doing so appeared to request that the Board treat his response as a response on behalf of Arthur as well. *See* Response to OSC at 2.

In our OSC, we noted that Appellants asserted in their notices of appeal that each of them is a "potential heir" or "legally an heir" of Decedent. OSC at 4 (citations omitted). We responded to that contention as follows:

In order to have standing (i.e., be permitted to bring an appeal to the Board), an appellant must be an "interested party" whose own interest could be adversely affected by the decision being appealed. *See* 43 C.F.R. §§ 4.201 (definition of "interested party"), 4.320 (Who may appeal).

. . . Potential heirs and legal heirs are included in the definition of "interested parties." *See* 43 C.F.R. §§ 4.201, 30.101. But in petitions for rehearing filed in the proceedings below, Appellants asserted that they are first cousins of Decedent. Cousins are not included among those persons who may inherit under AIPRA, through intestate succession, interests in a trust estate. *See* 25 U.S.C. § 2206(a)(2)(B)(i)-(v); *see also id.* § 2201(9). Thus, accepting Appellants' assertions that they are first cousins of Decedent, it would not

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<sup>5</sup> The Modification Order states that no objections or other responses were filed within the 30-day deadline for responding to the ALJ's September 25, 2013, order to show cause. Although that statement appears to be erroneous, it is harmless error because we conclude that Appellants lack standing to appeal from the Modification Order, and the merits of Appellants' contention are intertwined with the standing issue: whether they are potential or actual heirs of Decedent.

follow, under AIPRA, that Appellants are potential heirs or legal heirs to Decedent's trust estate.

*Id.* (footnotes and parenthetical explanations omitted).

In his response to the OSC, Theodore appears to acknowledge the difficulty of his claim of heirship, but asserts that Decedent's allotment is in a single owner and not fractionated; that Appellants and Eleanor are the only surviving relatives with Indian blood; and that Appellants desire only to keep the allotment in Decedent's family and not to fractionate it. Response to OSC at 4. Theodore suggests that AIPRA may leave some room for argument that Indian blood relatives might inherit if the result is to prevent fractionation of the ownership interest. In this regard, Theodore proposes that the Board allow Appellants and Eleanor each to inherit Decedent's allotment in sequence of eldest to youngest cousin, to keep the land in the family while avoiding fractionation. *Id.*

### Discussion

As we explained in the OSC, in order to appeal to the Board from a probate judge's order, an appellant must be an "interested party." 43 C.F.R. § 4.320. As relevant to this appeal, the term "interested party" is limited, both by the Board's appeal regulations and the probate regulations, to "[a]ny potential or actual heir." 43 C.F.R. §§ 4.201, 30.101. Appellants, as cousins of Decedent, are not in the line of succession to inherit Decedent's allotment under AIPRA's rules of intestate succession. *See* 25 U.S.C. §§ 2206(a)(2)(B)(i-iv) (persons who may inherit), 2206(a)(2)(B)(v) (if no persons who are eligible heirs in the line of succession exist, trust real property descends to "the Indian tribe with jurisdiction over the interests in trust or restricted lands"). Therefore, as cousins of Decedent, Appellants are not potential or actual heirs, are not "interested parties," and thus lack standing to challenge the Modification Order's substitution of the Tribe as the heir, to Decedent's allotment.

In his response to the OSC, Theodore appears to all but concede that Appellants are not heirs to Decedent's allotment under AIPRA, but makes a proposal that he suggests is consistent with the anti-fractionation policy reflected in AIPRA: He states that different provisions of AIPRA apply depending on whether a decedent's ownership interest in a parcel is less than 5% of the total undivided ownership interests, or 5% or greater. Response to OSC at 3; *see* 25 U.S.C. § 2206(a)(2)(D)(iii) ("single heir rule" applicable to interests in trust or restricted land representing less than 5% of the entire undivided ownership of the parcel). As we understand Theodore's argument, AIPRA aims to prevent the further fractionation of undivided interests in trust or restricted lands, and especially further fractionation of ownership interests of less than 5%, in which case only a single heir may inherit the interest through intestate succession. Theodore proposes that, to prevent

fractionation of Decedent's allotment while keeping the land in Decedent's family, Appellants and Eleanor each should be permitted to inherit the land, in sequence of eldest to youngest cousin, each being a "single heir only." Response to OSC at 4.

The Board recognizes that Theodore's proposal may be consistent with AIPRA's underlying anti-fractionation *policy*. But the problem is that the Board cannot elevate the policy to the point of ignoring AIPRA's unambiguous statutory language. AIPRA does not, as relevant to the proposal, include cousins within the class of persons who may inherit, regardless of whether they are of Indian blood. The "single heir rule," and its underlying policy, does not change that fact. And in this case, even if we were able to apply the "single heir rule" to Decedent's allotment, the Tribe, and not Appellants, would be the single heir. *See* 25 U.S.C. § 2206(a)(2)(D)(iii)(IV) (if no persons who are eligible heirs in the line of succession exist, an interest in trust or restricted land representing less than 5% of the entire interest descends to "the Indian tribe with jurisdiction over the interest").

Thus, Appellants have not demonstrated standing to appeal from the Modification Order, because they are not actual or potential heirs under AIPRA.<sup>6</sup>

### 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 dismisses this appeal.

I concur:

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// original signed  
Thomas A. Blaser  
Administrative Judge

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//original signed  
Steven K. Linscheid  
Chief Administrative Judge

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<sup>6</sup> Nothing in our decision precludes Appellants, outside of the probate of Decedent's estate, from requesting the Tribe and BIA to consider their proposal (e.g., as a request for a gift deed of life estates from the Tribe, subject to approval by BIA). Except as relevant to our decision, we express no opinion on the merits of any such request by Appellants.