



## INTERIOR BOARD OF INDIAN APPEALS

In re Estate of James Jones, Sr. (Upper Skagit Indian Tribe v. Northwest Regional  
Director, Bureau of Indian Affairs)

60 IBIA 102 (03/16/2015)

Related Board cases:

47 IBIA 36

51 IBIA 132



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
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IN RE ESTATE OF JAMES JONES, SR. ) Order Affirming Decision  
(Upper Skagit Indian Tribe v. )  
Northwest Regional Director, ) Docket No. IBIA 08-066-2  
Bureau of Indian Affairs) )  
) March 16, 2015

The Upper Skagit Indian Tribe (Tribe) appealed to the Board of Indian Appeals (Board) from a March 30, 2012, decision (Decision) of the Northwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA), to resolve an inventory dispute that arose during the probate of the estate of James Jones, Sr. (Jones or Decedent).<sup>1</sup> The Tribe appeals from the portion of the Decision in which the Regional Director confirmed the inventory of Decedent's estate as properly including interests in Allotment Nos. 119-HC3869 (HC3869) and 119-HC3900 (HC3900)<sup>2</sup> that Decedent inherited from his brother, William Jones (William), but which were the subject of two sales agreements executed by the Tribe and Jones approximately 6 years before he died, but never approved by BIA.<sup>3</sup>

We affirm the Decision because the unapproved sales agreements did not, contrary to the contention of the Tribe, constitute an irrevocable obligation for Jones to convey trust

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<sup>1</sup> Decedent was an Upper Skagit Indian. The probate number assigned to the probate of Decedent's Indian trust estate in the Department's probate tracking system, ProTrac, is No. P000000975IP. The Decision was issued after a referral by the Board to the Regional Director pursuant to 43 C.F.R. § 30.128. See *Estate of James Jones, Sr.*, 51 IBIA 132, 135-36 (2010).

<sup>2</sup> HC3869 and HC3900 are Indian public domain allotments located near Burlington in Skagit County, Washington. Decision, March 30, 2012, Exhibit (Ex.) K, Ex. L. HC3869 is referred to as the Skinny Jimmy allotment and HC3900 is referred to as the Bull Jack allotment. *Id.*

<sup>3</sup> In the Decision, the Regional Director also concluded that the estate inventory should be modified to remove an interest in HC3869 that Decedent inherited from the Estates of Solomon Jones and Marion Jones, which was the subject of a separate transaction between Jones and the Tribe in 1993, which was approved by BIA. No appeal has been filed from that portion of the Decision, and all further references to Decedent's interests in HC3869 in the Board's decision refer to the property he inherited from William.

property to the Tribe that must be enforced by BIA after his death. The agreements were unenforceable without BIA approval, and the record does not demonstrate that Jones ever submitted to BIA applications to approve the sales or that he provided BIA with his consent for BIA to convey the interests to the Tribe on his behalf. The fact that the Tribe may have paid adequate consideration, that Jones received the full payment he bargained for, and that there is no evidence of fraud or overreaching, does not change the result. Although BIA may, with the consent of an Indian landowner, convey trust property to a third party, we are not convinced that the facts of this case establish that the necessary consent was granted to BIA.

## Background

### I. Purchase and Sales Agreements for Decedent's Interests in HC3869 and HC3900

On August 27, 1997, Jones and the Tribe executed real estate purchase and sales agreements for trust interests in HC3869 and HC3900 that Jones expected to inherit following the probate of his brother William's estate. Decision at 3-4 & Ex. K (HC3869), Ex. L (HC3900). In the agreements, the Tribe agreed to purchase, and Jones agreed to sell to the Tribe, those interests, and both agreements provided that title "shall be conveyed in U.S. Trust." *See, e.g.*, Decision, Ex. K ¶ 6. The agreements stated that the sales would be closed "not later than 10 days after close of probate, 1997," at the office of the closing agent. *Id.* ¶ 10. The closing agent was the Tribe's attorney. Under the agreements, the Tribe and Jones were required to deposit with the closing agent "all instruments . . . necessary to complete the sale." *Id.* The "date of closing" was defined as "the date upon which all appropriate documents are recorded and proceeds of this sale are available for disbursement to seller." *Id.* ¶ 12. The agreements provided that if either party defaulted on its contractual obligations, the non-defaulting party could seek specific performance. *Id.* ¶ 3. Neither agreement made any mention of BIA as having a role in the transaction.<sup>4</sup>

Also on August 27, 1997, Jones signed two applications, on BIA forms, for approval to sell the interests in HC3869 and HC3900 that he expected to inherit. Decision at 4 & Ex. Q (Application for Patent in Fee or for the Sale of Indian Land, Aug. 27, 1997 (HC3900)); Application for Patent in Fee or for the Sale of Indian Land, Aug. 27, 1997

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<sup>4</sup> In 1993, Jones and the Tribe executed a similar purchase and sales agreement for other interests held by Jones in HC3869 and HC3900. In that case, Jones signed a separate "Acknowledgment of Payment" for the earnest money, which stated that he was "entitled to further payment upon closing and approval of sale by [BIA]." Decision, Ex. F. The record does not contain a similar Acknowledgment of Payment statement for either of the 1997 transactions.

(HC3869) (Documents Associated with Underlying Probate Decision (Probate Administrative Record (AR) Tab 3(B)(3)). Each application was for a “negotiated sale,” and each stated that it was “subject to the Real Est[ate] Agreement as Attachment.” *See, e.g.*, Decision, Ex. Q at 1. The same day, the Tribe issued two checks to Decedent as earnest money for the transactions, one for \$3,307.67 (one-third of the purchase price of Jones’s expected interest in HC3869), and another for \$6,421.33 (one-third of the purchase price of Jones’s expected interest in HC3900). Decision, Ex. M, Ex. N.

On February 17, 1998, Administrative Law Judge William E. Hammett issued an order approving William’s will, which devised all of his real and personal property to Jones. Order Approving Will and Decree of Distribution, Feb. 17, 1998 (Probate AR Tab 9). As devisee, Jones acquired from William’s estate a 4.44% ownership interest in HC3869 and a 26.67% ownership interest in HC3900. *Id.*, Ex. B, Ex. D; Administrative Modification to Add Omitted Property, Oct. 5, 2004 (Probate AR Tab 8).

Subsequently, on April 24, 1998, the Tribe paid Jones the balance of the purchase price provided in the sales agreements. Decision, Ex. O (final payment for HC3869), Ex. P (final payment for HC3900). There is no evidence in the record that Jones executed a deed to convey title to the Tribe. Nor is there evidence in the record that Jones sent or delivered the applications for sale, or the sales agreements, to BIA for approval. The Tribe does not contend that BIA ever approved either the applications for sale or the sales agreements. *See* Decision at 4; *see also* Declaration of Harold Chesnin in Support of Tribe’s Request for Administrative Relief, Oct. 28, 2005, at 1 (Documents Associated with Recommended *Ducheneaux* Decision (*Ducheneaux* AR) Tab 22) (acknowledging that Tribe does not have copies of approved applications for sale).<sup>5</sup>

Jones died on June 10, 2003. There is no evidence in the record that between 1998, when the Tribe paid Jones the balance of the purchase price, and 2003, when he died, the Tribe ever sought to obtain completed deeds from Jones for the interests, or that either of the parties contacted BIA for approval or assistance with respect to the transactions.

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<sup>5</sup> In contrast, for a similar purchase and sales agreement executed by Jones and the Tribe in 1993, the record shows that Jones submitted a signed application to BIA for approval, which the Superintendent approved on January 24, 1994. Decision, Ex. H. Jones executed a deed conveying his interests to the Tribe on June 3, 1994, which BIA approved on August 16, 1994. Decision, Ex. I; Probate AR Tab 3(B)(1) (deed), Tab 3(D) (real estate purchase and sale agreement).

## II. The Tribe's Challenge to the Inventory of Decedent's Estate

After Jones died, BIA prepared an inventory of his trust property. During the probate of Decedent's estate, the Tribe challenged the validity of the inventory because the inventory included the interests in HC3869 and HC3900 that the Tribe contended it had purchased in 1997.<sup>6</sup> On February 15, 2008, Indian Probate Judge (IPJ) Michael Stancampiano issued an Order Determining Heirs in Decedent's estate, finding that Decedent died intestate, and that his heirs were his sons James Jones, Jr., and Maynard M. Jones. Order Determining Heirs, Feb. 15, 2008 (Probate AR Tab 2). Pursuant to the "*Ducheneaux*" procedures that were then in effect for inventory disputes arising during probate,<sup>7</sup> the IPJ also issued a Recommended Decision on the Tribe's challenge to the inventory. Recommended Decision, Feb. 15, 2008 (*Ducheneaux* AR Tab 4). The IPJ recommended that the inventory be confirmed, leaving the interests in HC3869 and HC3900 in the estate inherited by Decedent's sons. *Id.* at 7 (unnumbered).

The Tribe appealed the Recommended Decision to the Board. *See Estate of Jones*, 51 IBIA at 132. The Board subsequently vacated the Recommended Decision on jurisdictional grounds, based on intervening revisions to the probate regulations, and referred the inventory dispute to BIA for a decision on the merits. *Id.* at 140.

The Regional Director rejected the Tribe's arguments that Decedent's interests in HC3869 and HC3900 were improperly included in the inventory of his estate, and that title should be conveyed to the Tribe, based on the sales agreements and the Tribe's payment in full of the purchase price agreed upon. Decision at 6-7. The Regional Director found misplaced the Tribe's reliance on the Board's decision in *Wishkeno v. Deputy Assistant Secretary – Indian Affairs (Operations)*, 11 IBIA 21 (1982), in which the Board held that the Secretary has authority to retroactively approve a conveyance of Indian trust land after the death of the Indian grantor. *Id.* at 6. The Regional Director distinguished the present case from *Wishkeno*, finding that here, unlike the facts in *Wishkeno*, there was no evidence that Decedent ever signed an instrument of conveyance, i.e., a deed, that could be retroactively approved by BIA. *Id.* The Regional Director found that the evidence did not demonstrate that Decedent had ever actually attempted to make a conveyance of his interests to the Tribe. *Id.* The Regional Director concluded that the sales agreements with the Tribe

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<sup>6</sup> Tribe's Response to BIA, Apr. 27, 2007 (*Ducheneaux* AR Tab 5); Tribe's Supplemental Memorandum in Support of its Request for Administrative Relief, Oct. 12, 2006 (*Ducheneaux* AR Tab 14); Tribe's Memorandum in Support of its Request for Administrative Relief, Oct. 4, 2006 (*Ducheneaux* AR Tab 15); Request for Administrative Relief, Dec. 28, 2004 (*Ducheneaux* AR Tab 31).

<sup>7</sup> *See Estate of Douglas Leonard Ducheneaux*, 13 IBIA 169 (1985) (establishing a procedure through which inventory disputes may be considered during a probate proceeding).

executed by Decedent were not sufficient as a substitute for the intentional act of Decedent attempting to convey his interest to the Tribe. *Id.* at 6-7. According to the Regional Director, BIA could not presume that the agreements of sale reflected an irrevocable decision by Decedent to transfer his interests, noting that an Indian landowner would be free to change his or her mind on a conveyance any time prior to BIA's approval of a deed of conveyance. *Id.*

### III. Appeal to the Board

The Tribe appealed the Decision to the Board and filed a statement of reasons in support of the appeal. The Tribe did not file an opening brief and no answer briefs were filed in the appeal.

In its statement of reasons, the Tribe argues that after Decedent obtained title to the interests in HC3869 and HC3900 through the probate of William's estate, the Tribe paid the balance of the purchase price to Decedent in compliance with the sales contracts. Notice of Appeal and Statement of Reasons (SOR), May 2, 2012, at 2 (unnumbered). According to the Tribe, Decedent's acceptance of that payment created an irrevocable obligation to convey the interests. *Id.* The Tribe contends that the Regional Director misconstrued *Wishkeno* to create a "fictional" requirement that a "deed" have been executed by the Indian landowner before BIA may retroactively approve a conveyance transaction. *Id.* at 2-3 (unnumbered). Although the facts of *Wishkeno* did involve a deed that had been executed by the decedent in that case, the Tribe contends that the holding of *Wishkeno* does not require a deed, or require that any particular legal instrument be used in a transaction. *Id.* at 3-4 (unnumbered). Instead, the Tribe construes *Wishkeno* as more broadly recognizing the authority of the Secretary to carry out a transaction after an Indian landowner's death, if the parties are unable to accomplish the intended result. *Id.*

The Tribe argues that under the applicable regulations, Indian trust land may be conveyed by the Secretary with the consent of the Indian landowner. *Id.* at 4 (unnumbered) (citing 25 C.F.R. § 152.17). As applied to this case, the Tribe argues that when Decedent accepted the terms of the sales agreements and received full payment from the Tribe, an "irrevocable contract" was created, which constituted Decedent's consent for BIA to transfer the interests. *Id.* In addition, according to the Tribe, the test under *Wishkeno* for whether BIA should approve the transaction is satisfied here: (1) the consideration was adequate; (2) the grantor received the full consideration bargained for; and (3) there is no evidence of fraud, overreaching, or other illegality. *Id.* at 3-4 (unnumbered). The Tribe argues that because none of the *Wishkeno* factors would justify BIA's disapproval of the transaction, "the contracts must be enforced" and BIA must now issue a deed transferring the interests to the Tribe. *Id.* at 4 (unnumbered).

## Discussion

### I. Standard of Review

The Tribe's contentions, that BIA misconstrued the legal requirements of *Wishkeno* and that BIA is required to issue deeds to the Tribe, raise questions of law, which the Board reviews *de novo*. *Graven v. Western Regional Director*, 59 IBIA 202, 208 (2014) (citing *Seminole Tribe of Florida v. Eastern Regional Director*, 53 IBIA 195, 210 (2011)).

### II. Analysis

Sales and conveyances of trust or restricted Indian land require approval by the Secretary, who has delegated the authority to BIA, and no such sale or conveyance is valid without that approval. *Flynn v. Acting Rocky Mountain Regional Director*, 42 IBIA 206, 210 (2006); *Great Western Casinos, Inc. v. Acting Pacific Regional Director*, 36 IBIA 115, 122 (2001); *see generally* 25 C.F.R. Part 152 (regulations applicable to sales of trust or restricted land). A contract touching on, or a conveyance of, Indian trust land that is not authorized by Congress is "absolutely null and void." 25 U.S.C. § 348.

Section 152.17 of 25 C.F.R. provides that, pursuant to statutes authorizing the sale and conveyance of individually owned Indian trust land, such land may be sold or conveyed "by the Indian owner with the approval of the Secretary or by the Secretary with the consent of the Indian owner." Thus, § 152.17 allows for sales and conveyances to take either of two forms: (1) An Indian landowner may sell or convey his or her trust land with the approval of the Secretary; or (2) The Secretary may sell or convey Indian trust land with the consent of the Indian owner.

In *Wishkeno*, the first form of conveyance was present: The decedent in that case had executed a warranty deed, but the deed was not approved by BIA prior to death. 11 IBIA at 23. The Board held, based on both Departmental and judicial precedent, that the Secretary had authority to retroactively approve the deed, and that the retroactive approval related back to the date the deed was executed, cutting off any intervening claims, including heirship. *Id.* at 28-32. The Board then summarized the factors that the Secretary must consider in determining, as a matter of discretion, whether to approve the deed, and remanded the case for consideration of those factors. *Id.* at 32-33.

In *Bitonti v. Alaska Regional Director*, 43 IBIA 205, 211 (2006), the Board characterized *Wishkeno* as confirming BIA's discretionary authority "to retroactively approve a conveyance after the death of an Indian grantor." And in *Cloud v. Alaska Regional Director*, 50 IBIA 262, 262 (2009), the Board vacated BIA's decision not to approve a purported sale of an allotment by an Indian landowner after the landowner's death, because BIA had not considered "whether to approve the transaction" in light of the *Wishkeno*

factors. In each of those cases, however, the Indian landowner had executed a deed or equivalent instrument of conveyance. See *Bitonti*, 43 IBIA at 205 (quitclaim deed); *Cloud*, 50 IBIA at 265 (handwritten note on original deed, “I am gift deeding this property”); see also *Chee v. Navajo Regional Director*, 57 IBIA 54, 55 (2013) (holding that BIA may reconstruct and retroactively approve a lost but previously executed deed after the grantor’s death as long as the evidence unequivocally demonstrates the existence and contents of the missing, executed deed).

Both the Tribe and the Regional Director rely on *Wishkeno*, but for different reasons. The Regional Director construes *Wishkeno* as standing for the proposition that the Secretary’s authority to retroactively approve a conveyance after an Indian landowner’s death is narrowly limited to those cases in which the Indian landowner executed a deed as the grantor, subject only to the approval of the Secretary. See Decision at 6. The Tribe construes *Wishkeno* as applicable more generally to an “*attempted* conveyance” by an Indian landowner, which according to the Tribe, does not depend on the execution of any particular instrument, and can include the sales transactions to which Jones agreed and for which he accepted full payment. See SOR at 3 (unnumbered). As discussed above, the Tribe argues that this case falls within the second form of conveyance contemplated by the regulations, which does not require an executed deed by an Indian grantor: a conveyance by the Secretary with the consent of the Indian landowner. See 25 C.F.R. § 152.17.

*Wishkeno* is factually distinguishable from the present case. Because *Wishkeno* involved a deed executed by the Indian landowner, the Board did not address, or decide, whether, in the absence of a deed executed by the landowner, the Secretary has authority to complete a conveyance on behalf of an Indian landowner after his or her death based on the landowner’s consent. Thus, *Wishkeno* does not, as the Regional Director implied, *require* such a deed. But neither does *Wishkeno* hold, as the Tribe argues, that any “*attempted* conveyance” by an Indian landowner is sufficient to constitute “consent,” within the meaning of 25 C.F.R. § 152.17, that would permit the Secretary, as trustee, to issue a deed and complete a conveyance on behalf of the landowner.

We conclude that the facts of the present case are not sufficient to demonstrate that Jones granted BIA his consent, pursuant to § 152.17, to complete the sale or conveyance of the interests that were subject to the sales agreements. There is no evidence that Jones contacted BIA regarding the transactions or sought any assistance from BIA in the matter. The sales agreements did not include any language acknowledging a role for BIA in the transaction. And, although Jones filled out applications for the sale of his interests on what appear to be BIA forms, the record does not show that he ever delivered them to BIA. Thus, whether or not one may characterize the sales agreements, as the Tribe does, as an “*attempted* conveyance” by Jones, we are not convinced that Jones’s actions, taken as a

whole, can be construed as constituting his “consent,” within the meaning of 25 C.F.R. § 152.17, for BIA to issue deeds of conveyance on his behalf.<sup>8</sup>

Nor could Jones’s acceptance of payment from the Tribe turn the sales agreements into “irrevocable contracts” that “must be enforced” by conveyance of the allotment interests to the Tribe. SOR at 4 (unnumbered). Absent approval by the Secretary, neither agreement is valid or enforceable. *See* 25 U.S.C. §§ 348, 483; 25 C.F.R. § 152.22. *Wishkeno* does not, as the Tribe suggests, hold that if the equitable factors set out in the case are satisfied, the Secretary is required to approve a conveyance of Indian land retroactively. *See Kent v. Acting Northwest Regional Director*, 45 IBIA 168, 178 (2007). Rather, the *Wishkeno* factors apply to BIA’s exercise of discretion, and only after it has been separately determined that BIA has authority to approve or complete a conveyance. In the present case, the record is insufficient to establish that Jones granted his consent to the Secretary to convey the interests, and thus we are not convinced that BIA has authority to issue deeds on his behalf, or that it would be required to do so, if it had the authority. Jones may have “breached” his agreements with the Tribe by accepting payment without conveying title. But, the agreements were not enforceable as a matter of Federal law, and BIA has no obligation, and no authority following Jones’s death, to retroactively approve the transaction and issue deeds to the Tribe. As the Regional Director recognized, the Tribe’s remedy, if any, lies outside “specific performance” of the unenforceable agreements.

### 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 affirms the Regional Director’s March 30, 2012, decision.

I concur:

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// original signed  
Steven K. Linscheid  
Chief Administrative Judge

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//original signed  
Robert E. Hall  
Administrative Judge

<sup>8</sup> Although not relied on by the Tribe, we note that the agreements each include language stating that they are binding on Jones, “his heirs, successors, and assigns and shall be fully enforceable in the William Jones or any other probate.” *See, e.g.*, Decision, Ex. K (Ex. A to Agreement). We are not convinced that such language was sufficient to constitute Jones’s consent for BIA to complete the transaction posthumously, at least when he never submitted the agreements to BIA or otherwise sought BIA assistance in the transactions.