



INTERIOR BOARD OF INDIAN APPEALS

Estate of Anita Adakai

61 IBIA 2 (06/04/2015)



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 ANITA ADAKAI) Order Affirming Denial of Rehearing
)
) Docket No. IBIA 13-042
)
) June 4, 2015

Patrick Adakai (Patrick) and Frank Adakai (Frank) (collectively, Appellants) appealed to the Board of Indian Appeals (Board) from an Order Denying Petitions for Rehearing (Order Denying Rehearing) entered on December 6, 2012, by Administrative Law Judge (ALJ) Thomas F. Gordon in the estate of Appellants' sister, Anita Adakai (Decedent).¹ The ALJ denied Appellants' petitions for rehearing from the ALJ's April 5, 2012, Decision, which distributed Decedent's less-than-5% undivided ownership interests in three trust allotments on the Navajo Indian Reservation to the Navajo Nation (Nation) pursuant to the American Indian Probate Reform Act of 2004 (AIPRA), *see* 25 U.S.C. § 2206(a)(2)(D)(iii) (single heir rule). The Decision also denied a request by Patrick to purchase these interests at probate, *see id.* § 2206(o) (purchase option at probate), because the Nation had not consented to a sale.

We affirm the ALJ's denial of rehearing. Appellants have not identified any error in the Order Denying Rehearing, and do not dispute the essential facts on which the ALJ's decision was based. The effect of AIPRA, as applied to the facts of this case, is that Decedent's less-than-5% ownership interests pass to the Nation, and Appellants cannot purchase the interests at probate without the Nation's consent. Because the ALJ was required to apply AIPRA, and the Nation did not consent to a purchase at probate, we affirm.

Background

Decedent died intestate (i.e., without a will) on February 2, 2007. Decision, Apr. 5, 2012, at 2, 4. Decedent never married, and Decedent's parents and her only child preceded her in death. *Id.* at 2. Decedent was survived by 11 siblings, including Appellants. *Id.* at 2,

¹ Decedent was a Navajo. Her probate case is assigned Probate No. P000067625IP in the Department of the Interior's probate tracking system, Pro Trac.

4. Her trust estate includes funds in an Individual Indian Money (IIM) account and undivided fractional interests in three allotments on the Navajo Indian Reservation in New Mexico. *Id.* at 2-3. Specifically, an inventory report for Decedent's trust estate, prepared by the Bureau of Indian Affairs (BIA), shows that she died owning a 1/65 (0.0153846154) interest in Allotment 2072, a 1/260 (0.0038461538) interest in Allotment 2073, and a 1/195 (0.0051282051) interest in Allotment 222664. Inventory of Decedents Report, Mar. 20, 2008 (Administrative Record (AR) at Decision, Doc. B).²

Decedent's probate case was first assigned to a special master for issuance of a recommended decision. On October 29, 2010, Special Master Janet Yazzie held an initial probate hearing for Decedent's trust estate, which was attended by Patrick and a sister-in-law, Darlene Adakai (Darlene). Hearing Transcript, Oct. 29, 2010 (First Hearing Tr.), at 3-5. At the outset, the Special Master explained that, because Decedent died after AIPRA became effective, AIPRA governed the distribution of Decedent's trust estate.³ *Id.* at 8. She advised that, pursuant to AIPRA's provisions governing intestate succession, fractional interests that constitute less than 5% of the entire undivided ownership of trust or restricted property—such as Decedent's interests in Allotments 2072, 2073, and 222664—descend to a single heir to prevent further fractionation of the interests. First Hearing Tr. at 7-10; *see also* 25 U.S.C. § 2206(a)(2)(D)(iii) (single heir rule). The Special Master further advised that, under AIPRA's "single heir rule," such small fractional interests pass, subject to a life estate for a surviving spouse, to the decedent's eldest surviving child, grandchild, or great grandchild—or, if there is no such lineal descendant, to the Indian tribe with jurisdiction over the interests. First Hearing Tr. at 9; *see also* 25 U.S.C. § 2206(a)(2)(D)(iii)(I)-(IV). She concluded that, because Decedent had no surviving spouse or such lineal descendant, Decedent's interests in the allotments pass to the Navajo Nation as the Indian tribe with jurisdiction, pursuant to 25 C.F.R. § 2206(a)(2)(D)(iii)(IV), which is known as the tribal heir rule. First Hearing Tr. at 9. The Special Master summarized: "[U]nder this new law,

² Where applicable, we cite to a document in the administrative record according to the letter of the alphabet that is assigned to the document in the table of contents for the record. Some documents are not assigned letters, and the record contains no tabs to indicate the location of documents within the record.

³ AIPRA's provisions governing intestate succession became effective on June 20, 2006. *See* Secretary's Certification of Notice of AIPRA, 70 Fed. Reg. 37107 (June 28, 2005). Congress enacted AIPRA as a set of amendments to the Indian Land Consolidation Act, 25 U.S.C. § 2201 *et seq.* AIPRA established a uniform Federal probate code for Indian trust estates 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. AIPRA, Pub. L. No. 108-374, § 2, 118 Stat. 1773, 1773-74 (2004).

that's where it cuts off. It doesn't go to the siblings. . . . It goes to the Indian tribe that exercises jurisdiction over the land where these properties are located . . . the Navajo Nation."⁴ *Id.* at 9.

The Special Master advised, however, that Decedent's siblings could request to purchase her interests in the properties at probate. *Id.* at 9-11. Under AIPRA, the trust or restricted interests in a parcel of land in a decedent's estate may be purchased by, among eligible purchasers, persons who own undivided trust interests in the same parcel of land (i.e., co-owners like Decedent's siblings), for not less than fair market value, 25 U.S.C. § 2206(o)(2), but generally only with the consent of the heir, *id.* § 2206(o)(3)(A)(ii). The Special Master explained that, once the Office of Hearings and Appeals (OHA) received a request to purchase from an eligible purchaser, OHA would request an appraisal of the surface and subsurface (mineral) interests. First Hearing Tr. at 17-18. The Special Master apparently did not mention that the consent of the Navajo Nation, as the heir, would be required for a purchase of the interests at probate.

Following the hearing, the Special Master issued the Recommended Decision, finding that Decedent died intestate and without a surviving spouse, child, grandchild, or great grandchild, and that Decedent's fractional allotment interests constituting less than 5% pass to the Nation pursuant to § 2206(A)(2)(D)(iii)(IV). Recommended Decision, Nov. 26, 2010, at 1-2 (AR at Decision, Doc. X). Based on written objections to the hearing and the Recommended Decision, Indian Probate Judge (IPJ) Roberta D. Joe declined to adopt the Recommended Decision. Decision (Order of Hearing *De Novo*), Jan. 14, 2011, at 1-2 (AR at Decision, Doc. Z); *see also* Letter from Patrick to Special Master, Nov. 16, 2010 (AR at Decision, Doc. W). The IPJ explained that, while the Special Master's findings of fact and conclusions of law were supported by evidence in the record and the law, "[d]ue to the parties' responses and confusion regarding the content of the initial hearing, the provisions of [AIPRA], and the option of a purchase at probate pursuant to § 2206(o)," the IPJ would hold another probate hearing to consider the matter *de novo* (i.e., anew). *Id.*

⁴ The Special Master also noted that the probate for the estate of Decedent's father, Fred Adakai (Fred), was pending, and that Decedent was a *potential* heir in his estate. First Hearing Tr. at 6-7. The Special Master stated that it appeared that Fred owned small fractional interests in Allotments 2072, 2073, and 222664 equivalent to Decedent's fractional interests, and therefore—even assuming that Decedent would inherit Fred's shares—Decedent's combined interests in each of those allotments still would not amount to 5% and thus would not avoid application of the single heir rule. *Id.* at 8.

The probate case was subsequently transferred to ALJ Gordon. On March 3, 2011, the ALJ held a second hearing for Decedent's estate, which was attended by Appellants and Darlene. Hearing Tr., Mar. 3, 2011 (Second Hearing Tr.), at 2. The ALJ obtained testimony confirming the family history, as we have described it above, and confirming that Decedent did not leave a will. *See id.* at 46-49. After extensive discussion with the ALJ regarding the purchase option at probate, Patrick indicated that he and his siblings were interested in the possible purchase of Decedent's less-than-5% allotment interests, and he signed a purchase request to that effect. *Id.* at 20-45, 49-56; *see also* Hearing Exhibit A, Mar. 3, 2011 (written request by Patrick) (AR at Decision, Doc. FF). Consequently, the ALJ ordered BIA to obtain appraisals of the surface and mineral interests in Allotments 2072, 2073, and 222664. Order for Appraisal, Mar. 30, 2011 (AR at Decision, Doc. GG). During the hearing, it does not appear that the issue of the Nation's consent to a sale was discussed.

The ALJ subsequently received a reply regarding his Order for Appraisal from the Department of the Interior's Office of Minerals Evaluation (OME), stating that OME could not predict when it would be able to complete the mineral evaluations. Letter from OME to ALJ, Apr. 6, 2011 (AR at Decision, Doc. II). The ALJ then issued an order in which he explained to the interested parties that while it was uncertain when the appraisals would be completed, one issue that could be addressed in the meantime was whether the Nation would consent to Patrick's proposed purchase at probate. Statement of Current Status and Request for Further Information, June 30, 2011, at 1 (AR at Decision, Doc. JJ). The ALJ explained that, as a general rule, AIPRA requires that an heir or devisee must consent to a purchase at probate before the purchase can be authorized, and he concluded that none of the exceptions to the general rule applied in this case. *Id.*; *see also* 25 U.S.C. § 2206(o)(3)(A)(ii), (o)(5). The ALJ requested the Nation to address whether it would consent to a purchase at probate of Decedent's interests in Allotments 2072, 2073, and 222664. Statement of Current Status and Request for Further Information at 2-3. He asked the Nation to respond, or to request an extension of time, within 30 days of the date of his order. *Id.* at 3. The ALJ did not specify how he would treat any non-response by the Nation.

After the 30-day period, the Nation, citing its tribal probate code, responded that it is "required to acquire small fractional interests in allotment lands subject to intestate disposition under 25 U.S.C. § 2206," and that it could not, prior to the probate of Decedent's trust estate, consent to a sale of the subject interests or renounce the acquisition of such interests. Nation's Response to Request for Further Information, Sept. 7, 2011, at 1-2 (AR at Decision, Doc. PP). The Nation also stated that its response was "not dependent upon an appraisal of the fair market value of the subject allotment interests." *Id.* at 2.

On April 5, 2012, the ALJ issued the Decision distributing the funds in Decedent's IIM account (except any post-death allotment income) to Decedent's siblings, and distributing Decedent's ownership interests in Allotments 2072, 2073, and 222664 to the Nation. Decision at 3-4. The ALJ denied Patrick's request to purchase the allotment interests at probate for lack of consent by the Nation. *Id.* at 5-6.

In the Decision, the ALJ also considered and rejected various objections raised by Appellants and other siblings of Decedent concerning the fairness of AIPRA, the sufficiency of the information and assistance provided to them during the probate proceedings, and the adequacy of the probate hearings held for Decedent's trust estate. *Id.* at 6-9. The ALJ responded that Decedent's siblings were given notice of the hearings and an opportunity to appear and be heard, and that, while it was clear that the siblings disagreed with the outcome, the ALJ was required to apply AIPRA and distribute Decedent's interests in the allotments to the Nation. *Id.* at 7-9.

Appellants and a third sibling, Rose Austin, petitioned for rehearing.⁵ On December 6, 2012, the ALJ issued the Order Denying Rehearing, finding that the petitions did not show grounds for holding a third hearing or modifying or reversing the Decision. Order Denying Rehearing at 1-2. The ALJ found that the "essential" facts were not in dispute that Decedent died after AIPRA's effective date, without a surviving spouse and without surviving lineal descendants; the Nation is the tribe with jurisdiction over Decedent's allotment interests, each representing less than 5% of the entire undivided ownership of the respective allotment; and the Nation did not consent to a purchase at probate. *Id.* The ALJ therefore found it unnecessary to hold another hearing to gather additional factual evidence. *Id.* He also noted that, despite complaints by the petitioners that they did not receive adequate information about the rehearing process, they were able to timely file petitions for rehearing. *Id.* The ALJ concluded that, in essence, the petitions amounted to disagreement with AIPRA. *Id.* at 2. And, the ALJ explained that he could not consider the petitioners' argument that AIPRA is unconstitutional or ignore the statute, and thus could not direct Decedent's allotment interests to Decedent's siblings instead of the Nation. *Id.*

Appellants appealed to the Board. In their opening brief, Appellants repeat many of the objections that they previously raised regarding AIPRA's single heir rule and purchase option at probate, their lack of information about AIPRA in general and the purchase option in particular, the ALJ's conduct of the hearing, and the ALJ's failure to obtain appraisals of Decedent's allotment interests before issuing his decision. Opening Brief

⁵ Letter from Patrick to Probate Hearings Division (PHD), Apr. 30, 2012; Letter from Rose Austin to PHD, Apr. 25, 2012; Letter from Frank to PHD, Apr. 16, 2012.

(Br.), June 5, 2013, at 2-5, 7. Appellants argue that the Nation’s response declining to consent to a sale of Decedent’s allotment interests should be “voided and [n]ullified” as untimely and as “not a legal document.” *Id.* at 6.

Following the close of briefing, Appellants filed a letter with the Board contending that Decedent’s interests in two additional allotments on the Navajo Indian Reservation, Allotments 202556 and 222678, were not reflected in the administrative record for this probate case. Letter from Appellants to Board, Sept. 30, 2013, at 1. Enclosed with their letter is the December 21, 2010, initial probate Decision in the estate of Decedent’s father, Fred Adakai, in which IPJ Joe determined that Fred died intestate and that his 5% or greater undivided ownership interests in Allotments 202556 and 222678 pass in equal 1/12 shares to each of his children, including Decedent.⁶ Decision, *Estate of Fred Adakai*, Probate No. P000067624IP, Dec. 21, 2010, at 2-3. Appellants argue that, “[d]ue to this new information,” the administrative record in Decedent’s probate case is “incomplete to . . . make an informed decision.”⁷ Letter from Appellants to Board at 1.

Standard of Review

The Board reviews challenges to factual determinations by the probate judge to determine whether the factual determinations are substantially supported by the record. *Estate of Edward Teddy Heavyrunner*, 59 IBIA 338, 346 (2015). We review questions of law and the sufficiency of the evidence *de novo*. *Id.* The burden lies with Appellants to show error in the Order Denying Rehearing. *See id.* Simple disagreement with or bare assertions concerning a challenged decision are insufficient to carry an appellant’s burden of proof. *Id.*

⁶ Based on BIA’s inventory for Fred’s estate, Fred owned a 1/9 (0.1111111111) undivided interest in Allotment 202556 and an equivalent interest in Allotment 222678. Inventory of Decedents Report, Estate of Fred Adakai, Mar. 20, 2008 (copy from OHA electronic files added to appeal record). Decedent’s 1/12 share, as determined in IPJ Joe’s decision, of each 1/9 interest, would constitute a 1/108 (0.0092592593) interest in each allotment ($1/12 \times 1/9 = 1/108$), or less than 5%.

⁷ IPJ Joe also decreed that Fred’s less-than-5% interests in the three allotments at issue in this appeal—Allotments 2072, 2073, and 222664—pass under the single heir rule to his eldest son, Frank. Decision, *Estate of Fred Adakai*, at 2. Thus, Decedent’s interest in each of these allotments is unaffected by IPJ Joe’s decision, and remains less than 5%.

Analysis

I. The ALJ Correctly Determined That the Nation Is Heir to Decedent's Allotment Interests

Appellants do not dispute that Decedent died after the effective date of AIPRA's provisions governing intestate succession, did not leave a will, and was never married and had no surviving child, grandchild, or great grandchild. Nor do Appellants dispute that the Nation is the tribe with jurisdiction over Decedent's interests in Allotments 2072, 2073, and 222664. On these uncontested facts, the ALJ was correct that, pursuant to AIPRA's single heir rule, 25 U.S.C. § 2206(a)(2)(D)(iii), and more specifically the tribal heir rule, *id.* § 2206(a)(2)(D)(iii)(IV), the Nation is the heir to Decedent's interests in these allotments, which, as we have explained, still constitute less than 5% of the undivided ownership interests after IPJ Joe's decision in the probate of Fred Adakai's estate. *See supra* note 7.

II. The Nation's Consent to a Purchase of Decedent's Interests at Probate Was Required and Was Not Given

Appellants do not challenge the ALJ's conclusion that the consent of the Navajo Nation, as heir, to a purchase at probate, was required under AIPRA. *See* Order Denying Rehearing at 2; Decision at 5-6. Appellants argue, however, that the ALJ erred by asking the Nation to indicate whether it might consent to a sale before he obtained the appraisals that he had ordered from BIA. Opening Br. at 5-6. While we understand that Appellants were unhappy with the ALJ's approach upon learning that the appraisals would take significant time, their argument lacks merit in substance. The ALJ was correct that Appellants could not purchase Decedent's allotment interests without the consent of the Navajo Nation as the heir. *See* 25 U.S.C. § 2206(o)(3)(A)(ii) (requiring the consent of the heir); *cf. id.* § 2206(o)(5)(A) (providing exceptions applicable to the consent of a "person" who is an heir). Thus, consent was a threshold issue and it was reasonable for the ALJ to ask the Nation whether it might consent—despite his having ordered but not yet received the appraisals. *See Estate of Stanford Walker Saupitty*, 60 IBIA 28, 29 (2015) (describing the question of whether the tribe would consent to a purchase at probate as a threshold issue).⁸ Accordingly, the ALJ did not err by proceeding to issue the Decision after receiving notice from the Nation that it did not consent to the proposed purchase, before obtaining the

⁸ We also note that, at the first hearing, Patrick questioned the cost-effectiveness of conducting appraisals in general, First Hearing Tr. at 17, and that, at the second hearing, the ALJ stated that he would not order an appraisal "if it's just going through an exercise," Second Hearing Tr. at 23.

appraisals. In its response to the ALJ, the Nation made clear that its non-consent was “not dependent upon an appraisal of the fair market value of the subject allotment interests.” AR at Decision, Doc. PP at 2.

Appellants’ argument that the Nation’s expression of its non-consent should be disregarded as untimely, Opening Br. at 6, is also unpersuasive. Neither AIPRA nor its implementing regulations contain a deadline after which a tribe’s consent is deemed to have been given.⁹

III. The ALJ Correctly Refused to Consider Appellants’ Direct Challenge to AIPRA

On appeal, Appellants argue that “[t]here should not be a Purchase Option nor estate turned over to the tribe in AIPRA.” Opening Br. at 7. To the extent that Appellants contend, as they argued to the ALJ, that “AIPRA should be deemed unconstitutional,” Letter from Patrick to PHD, Apr. 30, 2012, at 1, we affirm the ALJ’s conclusion that he lacked jurisdiction to declare any part of AIPRA unconstitutional. *See Estate of Roland Dean DeRoche*, 53 IBIA 114, 116 n.5 (2011) (dismissing appeal challenging the constitutionality of AIPRA’s tribal heir rule). As the ALJ recognized, both he and the Board “are bound to follow the laws set down by Congress.” Order Denying Rehearing at 2 (quoting *Estate of Cyprian Buisson*, 53 IBIA 103, 110 (2011)). We may not substitute our judgment, or Appellants’ judgment, for Congress’s judgment. *Estate of Buisson*, 53 IBIA at 110; *see also Estate of Virginia Grijalva Johnson*, 59 IBIA 24, 28 (2014) (explaining that the Board could not accept appellants’ proposal that, instead of applying the tribal heir rule, the decedent’s allotment interests pass in sequence of eldest to youngest cousin for their lifetimes, to keep the land in the family while avoiding further fractionation).¹⁰

⁹ Appellants also suggest that an employee of OHA provided the Nation’s response. Opening Br. at 6. That is incorrect. The principal attorney of the Nation’s Division of Natural Resources responded for the Nation. *See* AR at Decision, Doc. PP at 2 (Nation’s response signed by Robert O. Allan, Esq.). The Nation’s response contained a heading and case caption that Appellants may have mistaken for OHA letterhead. *See id.* at 1.

¹⁰ In expressing their disagreement with AIPRA, Appellants also argue that the Navajo Nation “is not ready to take the lead of the AIPRA’s tail end processing of any estate being turned over to them.” Opening Br. at 6. It is not entirely clear to the Board the nature of Appellants’ objection. The Department of the Interior has jurisdiction over the probate of Decedent’s trust estate, and the Decision distributes Decedent’s interests in Allotments 2072, 2073, and 222664 to the Navajo Nation. *See* Decision at 3. To the extent that Appellants are suggesting the Nation is not prepared to assume ownership of interests that pass to it under AIPRA, that does not change the outcome in this case, in which the ALJ correctly applied AIPRA.

IV. Appellants Have Not Demonstrated That They Were Denied Due Process

As our foregoing discussion shows, many of Appellants' complaints center on their frustration with AIPRA and the information that they have been given, or not given, about the statute and especially the purchase option at probate. *See, e.g.*, Opening Br. at 1-2. Appellants also take issue with the ALJ's conduct of the hearing. *Id.* at 3-5 (contending that the ALJ did not answer their questions, Appellants could not understand the ALJ's use of terminology, and the ALJ made objectionable comments). We have consistently held that "[a]n appellant who contends on appeal that his procedural rights were violated in the proceedings below must show how he was adversely affected by the alleged violation." *Estate of Beverly M. Howard*, 55 IBIA 300, 304 (2012) (citing *Estate of Buisson*, 53 IBIA at 109 (an appellant claimed that he believed that a follow-up hearing would be held, but failed to show how the absence of a second hearing prejudiced him; no offer of evidence or testimony was made, and the appellant thus failed to demonstrate any due process violation)). Appellants attended the ALJ's probate hearing and were given an opportunity to be heard; were given an opportunity to request to purchase Decedent's fractional interests in the allotments at issue in this appeal—Allotments 2072, 2073, and 222664; and were given an opportunity to seek rehearing and review by the Board. Although Appellants are clearly dissatisfied with AIPRA and the probate proceedings, they have not shown how they were prejudiced by a lack of information about AIPRA or the manner in which the ALJ conducted the probate hearing. Appellants do not allege that they were prevented from offering any evidence to contradict the ALJ's factual findings and legal conclusions, and do not offer any such evidence on appeal. Accordingly, we conclude that Appellants fail to demonstrate any procedural violation warranting rehearing.

Because Appellants have not met their burden of establishing that the ALJ erred, we affirm the Order Denying Rehearing.¹¹

¹¹ With respect to Appellants' contention that the inventory for Decedent's estate is incomplete because it does not include Decedent's interests in Allotment Nos. 222678 and 202556, which Decedent inherited from her father's estate through a subsequent probate decision, *see supra* note 6, we decline to consider the issue because it is outside the scope of this appeal from the Order Denying Rehearing. *See* 43 C.F.R. § 4.318 (an appeal will be "limited to those issues that were before the [ALJ] . . . upon the petition for rehearing"). Although a modification order may be necessary to add these interests to the inventory for Decedent's estate, that issue is not ripe for the Board's review, nor is it clear on what basis Appellants would have standing to make a claim regarding what apparently are limited to less-than-5% interests in the respective allotments.

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 ALJ's December 6, 2012, Order Denying Rehearing.

I concur:

// original signed
Thomas A. Blaser
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge