



## INTERIOR BOARD OF INDIAN APPEALS

Ethel Adcox v. Acting Alaska Regional Director, Bureau of Indian Affairs

61 IBIA 34 (06/17/2015)

Related Board case:  
56 IBIA 184



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
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SUITE 300  
ARLINGTON, VA 22203

ETHEL ADCOX,	)	Order Affirming Decision
Appellant,	)	
	)	
v.	)	
	)	Docket No. IBIA 13-060
ACTING ALASKA REGIONAL	)	
DIRECTOR, BUREAU OF INDIAN	)	
AFFAIRS,	)	
Appellee.	)	June 17, 2015

Ethel Adcox (Appellant) appealed to the Board of Indian Appeals (Board) from a January 25, 2013, decision (Decision) of the Acting Alaska Regional Director (Regional Director), Bureau of Indian Affairs (BIA), denying Appellant’s request for BIA to retroactively approve, and then implement, an agreement between Appellant and Elena Tretikoff (Tretikoff), deceased, for Tretikoff to convey a 5-acre portion of Tretikoff’s Alaska Native allotment to Appellant in exchange for Appellant’s fishing permit and other consideration. We affirm the Decision because Tretikoff never signed a deed to convey any acreage to Appellant, nor did she grant BIA authority to convey her restricted fee title to any acreage. Contrary to Appellant’s contentions in this appeal, neither the Department of the Interior’s (Department) probate regulations nor BIA’s authority in certain cases to retroactively approve a conveyance after the Indian grantor’s death, give BIA the open-ended authority Appellant seeks to invoke here to approve the agreement and convey title to Appellant.

## Background

The facts relevant to deciding this appeal are not in dispute. Tretikoff and her two siblings inherited an Alaska Native allotment located on the Newhalen River, approximately 5 miles north of the Alaska Peninsula community of Iliamna, and thereafter initiated the process of partitioning the allotment, pursuant to 25 C.F.R. § 152.33(b) (Application for partition). *See* Petition for Partition of Inherited Native Restricted Land (Administrative Record (AR) Tab 227).<sup>1</sup> A partition of trust or restricted Indian or Alaska Native land

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<sup>1</sup> Under the proposed partition, Tretikoff was to receive, and eventually did receive, approximately 48.4 acres. *See* Petition for Partition of Inherited Native Restricted Land (AR Tab 161); Deed to Restricted Land, Approved Oct. 20, 2008 (AR Tab 161).

requires BIA approval, and because title to Alaska Native allotments is held by the owners in restricted fee, the partition required an exchange of deeds among the landowners. *See* 25 C.F.R. § 152.33(b) (if an allotment is held in restricted fee title, “partition may be accomplished by the heirs executing deeds approved by the Secretary, to the other heirs for their respective portions”).<sup>2</sup>

In 1999, Appellant and Tretikoff signed a document that apparently reflected an agreement between the two at the time for Tretikoff to transfer 5 acres to Appellant, from the portion of the allotment that she anticipated receiving upon completion of the partition, in exchange for Appellant’s fishing permit and other consideration. *See* Letter from Adcox and Tretikoff to State of Alaska Commercial Fisheries Entry Comm’n, June 28, 1999 (Exchange Agreement) (AR Tab 213). The Exchange Agreement does not identify the specific acreage to be transferred. According to Appellant, before entering into the agreement, the parties met with BIA staff to discuss the proposed exchange, and apparently were advised that exchanging restricted land for commercial fishing property was legal as long as the property given for the land was at least of equal value. *See* Affidavit of Ethel Adcox, July 8, 2011, at 1, ¶ 4 (AR Tab 40). Appellant sent a copy of the Exchange Agreement to BIA in 2000.

Notwithstanding the absence of an approved agreement and a deed of conveyance, Appellant proceeded to transfer her fishing permit and apparently other personal property associated with a fishing site to Tretikoff. *See* Affidavit of Ethel Adcox, May 21, 2007, ¶ 2 (AR Tab 168); Decision at 6-8. Subsequently, Tretikoff and Adcox signed another document identifying a 2.7-acre tract and a 2.3-acre tract within the allotment as the 5 acres to be conveyed to Appellant. Transfer of Site & Permit Agreement, Feb. 20, 2002 (AR Tab 196).

The partition process took longer than anticipated, apparently in part because of delay associated with procuring the signature of one of Tretikoff’s siblings on the deeds of conveyance among the siblings. The partition was finally completed in late 2008. Deed to Restricted Land, Approved Oct. 20, 2008 (AR Tab 161).

In November 2008, a BIA realty specialist wrote to Appellant, informing her that the partitioning process had been completed, and that the transaction between Appellant and Tretikoff could now move forward. Letter from White to Appellant, Nov. 20, 2008 (AR Tab 158). The realty specialist advised Appellant that Tretikoff had come to BIA and filled out the papers “for the sale of the lot she is selling to you,” but that there was a

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<sup>2</sup> In contrast, when title is held in trust by the United States, a partition of Indian land may be accomplished by BIA without requiring the landowners to execute deeds.

discrepancy in “how many acres she wants to sell.” *Id.* According to the realty specialist, contrary to the previous documents for 5 acres signed by Appellant and Tretikoff, Tretikoff had informed BIA that she was going to sell Appellant 1.5 acres. *Id.* The realty specialist stated that she had informed Tretikoff that there was no 1.5-acre parcel on the subdivision plat, and that Tretikoff had said that Appellant would have to survey the 1.5 acres. *Id.* The realty specialist closed by stating that the parcel to be exchanged with Tretikoff for Appellant’s fishing permit would have to be appraised, and advised Appellant to contact Tretikoff to clarify the parcel to be received so that BIA could start requesting the necessary documents.<sup>3</sup> *Id.*

The record contains an Application for the Negotiated Sale of Restricted Native Land, dated November 14, 2008, identifying Tretikoff as the allottee and apparently initialed by Tretikoff. AR Tab 160. The space provided on the application form for describing the land and quantifying the acreage intended for the proposed sale is blank, and no intended purchaser or grantee is identified. The space provided for signature by a notary public (or postmaster) is also blank, as is the space for a BIA official to certify that the effect of the application was explained to and understood by the applicant.

In 2009, BIA interviewed Tretikoff several times, apparently in connection both with the proposed sale to Appellant and a separate proposed conveyance. During those meetings, BIA came to understand that Tretikoff wanted to sell only 1 acre, or possibly slightly more, to Appellant, but that Tretikoff had not identified the specific location of the acreage within the allotment. Decision at 3 (Appellant “was only to get one acre”); *see* Email from Williams to Halterman, Jan. 24, 2013 (AR Tab 9) (Tretikoff first said 5 acres, then 1 acre); Email from Williams to Halterman, Sept. 24, 2012 (AR Tab 17) (same); Notes on Office Visit, July 7, 2009 (AR Tab 120) (“[Tretikoff] said [Appellant] should get 1.3 acres.”).

Tretikoff died on October 10, 2010, without having executed a deed of conveyance to Appellant. Subsequently, Appellant asked BIA “to adjudicate and retroactively approve” the Exchange Agreement “and convey the 5 acres” to Appellant under the authority recognized in *Wishkeno v. Deputy Assistant Secretary – Indian Affairs (Operations)*, 11 IBIA 21 (1982). Letter from Vollintine to Regional Director, July 9, 2011, at 1 (AR Tab 37).<sup>4</sup> In *Wishkeno*, the Board recognized BIA’s authority to “retroactively approve” a deed

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<sup>3</sup> According to Appellant, this was the first time she learned that Tretikoff “wanted to convey less than 5 acres.” Opening Brief (Br.) at 7.

<sup>4</sup> Appellant asked BIA to convey to Appellant the 2.3-acre and 2.7-acre parcels identified by Appellant and Tretikoff in 2002. *Id.*

executed by an Indian grantor, after the grantor's death, such that the conveyance was made effective and related back to the date of the deed. *Wishkeno*, 11 IBIA at 32. The Board identified several factors that BIA must consider in deciding whether or not to approve such a conveyance, including whether the consideration for the conveyance was adequate and whether there was any evidence of fraud, overreaching, or other misconduct on the part of the grantee. *Id.*

In asking BIA to complete the 5-acre conveyance, Appellant contended that "BIA's failure to timely accept the application and conveyance documents" from Tretikoff in 1999 and 2002, instead "requir[ing] her" to wait for completion of the partition, precluded BIA from relying on the absence of such documents to deny retroactive approval. AR Tab 37 at 5. Appellant argued that but for BIA's failure to "accept" the necessary documents, and BIA's "unreasonable delay" in completing the partition, Tretikoff "would have conveyed the 5 acres to [Appellant]." *Id.* According to Appellant, BIA was thus "legally estopped" from declining to approve the exchange agreement based on Tretikoff's "later fail[ure] to cooperate," and her "bad faith" and "breach of contract" as evidenced by Tretikoff's statements to BIA in 2009 disavowing an intent to convey 5 acres to Appellant. *Id.* at 5, 7.

The Regional Director denied Appellant's request, concluding that the absence of a deed signed by Tretikoff was dispositive. Letter from Regional Director to Appellant, Jan. 25, 2013, at 3, 8 (Decision) (AR Tab 8). Even assuming that she were to treat the Exchange Agreement as an application from Tretikoff to convey 5 acres to Appellant, the Regional Director construed Board decisions as making a critical distinction between an application, which even if approved does not constitute a conveyance, and an actual deed of conveyance. Decision at 3 (citing *Estate of Joseph Baumann*, 43 IBIA 127 (2006)). As requested by Appellant, the Regional Director considered the potential relevance of a Board decision involving an Alaska Native allotment and the issue of retroactive approval, but found it distinguishable because in that case the grantor had executed a conveyance instrument reflecting the grantor's efforts to carry out a present transfer of title. *Id.* at 4 (discussing *Cloud v. Alaska Regional Director*, 50 IBIA 262 (2009)). The Regional Director also concluded that even if BIA had authority to retroactively approve and complete the transaction, it was unclear, in the present case, whether BIA's approval as an exercise of discretion would be justified. *Id.* at 6-8.

Appellant appealed the Decision to the Board. Appellant filed an opening brief, the Regional Director filed an answer brief, and Appellant filed a reply brief.

## Standard of Review

As relevant to our disposition of this appeal, the Board reviews issues of law *de novo*. *In re Estate of James Jones, Sr.*, 60 IBIA 102, 107 (2015).<sup>5</sup>

## Discussion

### I. Introduction

Appellant argues that the absence of a deed executed by Tretikoff is not dispositive because BIA has authority to retroactively approve the Exchange Agreement as Tretikoff's application for the conveyance. Appellant argues that the Department's probate regulations, as revised in 2008, *see* 43 C.F.R. § 30.128, granted the Department substantive authority to complete the conveyance based solely on BIA's approval of Tretikoff's application, without the necessity of a deed executed by Tretikoff. Opening Br. at 15-22. Appellant also contends that BIA has the authority to approve and complete the transaction under *Wishkeno*, even in the absence of § 30.128. Reply Br. at 4-8. According to Appellant, once Tretikoff received "adequate, bargained-for consideration," she was not free "to change her mind and revoke her consent," and in any event she "continued to agree to convey between 1 and 5 acres" to Appellant. Opening Br. at 14.

We affirm the Decision because neither the Department's probate regulations nor *Wishkeno* provide BIA with authority to execute a deed to convey restricted fee land when the landowner has not granted BIA such authority. Even assuming that at the time of her death, Tretikoff was still willing to convey at least some acreage to Appellant, she never granted BIA authority to execute a deed to her restricted land on her behalf.<sup>6</sup> BIA does not have the open-ended, equitable authority that Appellant seeks to invoke to obtain

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<sup>5</sup> In her opening brief, Appellant requests a hearing on disputed material factual issues. We find that there are no disputed material factual issues that are relevant to the grounds upon which we resolve the appeal.

<sup>6</sup> Appellant's assertion that Tretikoff's acceptance of consideration from Appellant rendered the agreement to convey her restricted land to Appellant irrevocable is entirely without foundation. *See In re Estate of James Jones, Sr.*, 60 IBIA 102, 109 (2015) (acceptance of consideration did not render an unapproved sales agreement irrevocable). It is well-established that an Indian or Alaska Native landowner is free to change his or her mind about a conveyance any time before it is approved by BIA. *Fleury v. Alaska Regional Director*, 54 IBIA 83, 84 (2011), and cases cited therein. We assume, solely for purposes of this appeal, that Tretikoff continued to be willing to convey at least some acreage, e.g., at least 1 acre, to Appellant, and thus we need not decide whether Tretikoff's actions constituted complete revocation of the Exchange Agreement.

posthumous relief against Tretikoff based on Appellant’s performance on an agreement between the two concerning Tretikoff’s restricted fee property.

II. Section 30.128 of the Probate Regulations is a Jurisdictional Provision, Not an Expansion of BIA’s Substantive Authority Over Conveyances of Indian and Alaska Native Trust and Restricted Land

Appellant contends that the Department’s probate regulations, as revised in 2008, provide substantive authority to BIA to approve an Alaska Native decedent’s application to convey property, and thereafter to complete the conveyance, even in the absence of an executed deed. In 2008, the Department promulgated a regulation to supplant the former “*Ducheneaux*”<sup>7</sup> procedure for resolving inventory disputes that arise during probate proceedings, and to require such disputes to be referred to BIA for resolution. *See Estate of Frances Marie Ortega*, 50 IBIA 322, 322, 325-26 (2009).

As relevant to Appellant’s argument in this appeal, those regulations provide:

**§ 30.128 What happens if an error in BIA’s estate inventory is alleged?**

This section applies when, during a probate proceeding, an interested party alleges that the estate inventory prepared by BIA is inaccurate and should be corrected.

(a) Alleged inaccuracies may include, but are not limited to, the following:

(1) Trust property interests should be removed from the inventory because the decedent executed a gift deed *or gift deed application* during the decedent’s lifetime, and BIA had not, as of the time of death, determined whether to approve the gift deed *or gift deed application*;

• • • •

(b) When an error in the estate inventory is alleged, the OHA<sup>[8]</sup> deciding official will refer the matter to BIA for resolution under 25 CFR parts 150,<sup>[9]</sup> 151,<sup>[10]</sup> or 152<sup>[11]</sup> and the appeal procedures at 25 CFR part 2.

43 C.F.R. § 30.128 (emphases added).

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

<sup>8</sup> Office of Hearings and Appeals.

<sup>9</sup> Regulations governing land records and title documents.

<sup>10</sup> Regulations governing land acquisitions.

<sup>11</sup> Regulations governing the issuance of patents in fee, certificates of competency, removal of restrictions, and sale of certain Indian lands.

Appellant argues that the language in § 30.128 concerning BIA’s approval of a “gift deed application” was intended to grant BIA and the Department substantive authority to complete a conveyance of trust or restricted fee property posthumously based solely on BIA’s retroactive approval of an application for a conveyance. According to Appellant, § 30.128(a)(1) “impliedly authorizes the Department to convey title to the [Appellant],” Opening Br. at 18, even though Tretikoff did not execute a deed.

We disagree. Section 30.128 is both a procedural and jurisdictional provision, but it is not an expansion of underlying substantive authority regarding conveyances of Indian or Alaska Native trust or restricted land. Section 30.128 requires OHA deciding officials to refer inventory disputes that arise during probate to BIA “for resolution under 25 CFR parts 150, 151 or 152 and the appeal procedures at 25 CFR part 2.” 25 C.F.R. § 30.128(b). It is Parts 150, 151, and 152, that provide the underlying substantive authority for BIA in resolving such disputes. Whether or not BIA’s retroactive approval of a gift deed application might be an appropriate action in some circumstances in completing a conveyance of trust or restricted property, we are not convinced that the mere reference to approval of a “gift deed application” in § 30.128 was intended to expand the substantive authority that BIA possesses under parts 150, 151, and 152, or to grant probate judges residual authority to complete a transaction that BIA itself lacks authority to complete.<sup>12</sup>

### III. In the Absence of a Grant of Authority by the Owner of Restricted Fee Property, BIA Does Not Have Authority to Issue a Deed to Restricted Fee Land

Appellant also contends that BIA has authority under *Wishkeno* to approve the Exchange Agreement and complete the conveyance. We recently rejected a similar argument in *Jones*, 60 IBIA 102. That case also involved a sales agreement, the payment of consideration by the intended grantee, and the grantor’s death prior to executing a deed of conveyance. In that case, the intended grantee, the Skagit Tribe, argued that 25 C.F.R. § 152.17 granted BIA authority to complete the conveyance in the absence of a deed signed by the grantor. Although § 152.17 refers to the Secretary making a conveyance “with the consent of” the Indian grantor, we concluded in *Jones* that no such consent had been granted.

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<sup>12</sup> Appellant suggests that if BIA is not authorized to execute a deed of conveyance, it need only approve the decedent’s application for a conveyance, and then seek an order from the probate judge as the instrument of conveyance. We find no support in § 30.128 for that proposition, which runs counter to the purpose of having inventory disputes that arise during probate—particularly those involving BIA’s exercise of discretion—fully and finally resolved in administrative proceedings outside of probate.

The present case differs from *Jones* because here, unlike in that case, the parties discussed with BIA the proposed exchange that would involve the conveyance of a portion of Tretikoff's land to Appellant. But simply discussing a proposed conveyance with BIA, or even submitting an application, does not constitute consent by an Indian or Alaska Native landowner for BIA to take action on her behalf, i.e., by executing a deed. In the present case, Tretikoff never executed a deed and never granted her consent to BIA to execute a deed on her behalf to convey her restricted fee title to Appellant. At most, it appears that the parties contemplated BIA's eventual approval of a deed to be executed by Tretikoff, not unlike BIA's approval of the deeds exchanged by Tretikoff and her siblings to complete the partition.

### Conclusion

In giving consideration to Tretikoff before the transaction was approved and the necessary paperwork and deed prepared and executed, Appellant assumed the risk that the transaction would never be completed. Whether or not Appellant might have had a remedy in another forum against Tretikoff, e.g., for restitution, when she realized that Tretikoff had changed her mind about the transaction after receiving consideration, *see supra* note 3, the Regional Director correctly concluded that BIA lacks authority to grant specific performance by conveying acreage to Appellant, even assuming as a matter of discretion that the Exchange Agreement could be approved.

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 January 25, 2013, 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