



INTERIOR BOARD OF INDIAN APPEALS

Estate of Ervin Nelson

61 IBIA 179 (08/17/2015)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF ERVIN NELSON) Order Affirming Decision
)
) Docket No. IBIA 14-015
)
) August 17, 2015

Ivan Nelson (Appellant) appealed to the Board of Indian Appeals (Board) from an Order Denying Rehearing entered on September 5, 2013, by Administrative Law Judge (ALJ) Richard D. Hines in the estate of Appellant's brother, Ervin Nelson (Decedent).¹ The Order Denying Rehearing left in place the ALJ's April 25, 2013, Decision, which denied Appellant's request to purchase Decedent's interest in Ute Mountain (Allen Canyon) Allotment No. 142 because the Ute Mountain Tribe did not consent to the sale. We affirm the Order Denying Rehearing because the American Indian Probate Reform Act (AIPRA) does not permit Appellant to purchase Decedent's interest without the consent of the Tribe as the heir to the interest. Whether or not an earlier version of the Department of the Interior's (Department's) probate regulations, relied on by Appellant, would have created uncertainty on the issue, the law is clear that the Tribe's consent is required, and has been clear at all times relevant to this case.

Background

Decedent died intestate (i.e., without a will) on February 20, 2010, owning a 1/24 (0.0416667) interest in Ute Mountain (Allen Canyon) Allotment No. 142 (Allotment). Data for Heirship Finding and Family History, Aug. 8, 2012, at 1-3. On January 30, 2013, Carolyn Wilson, who was appointed Master for the probate case, issued a Recommended Decision, in which she determined that Decedent's interest in the Allotment was inherited by the Ute Mountain Tribe (Tribe) as the tribe with jurisdiction over the Allotment. Recommended Decision at 2; *see* 25 U.S.C. § 2206(a)(2)(D)(iii)(IV) (tribal inheritance of less-than-5% interests under single heir rule).

The Master also found that Decedent's interest in the Allotment was subject to the purchase-at-probate provisions of AIPRA, and that Appellant had submitted a request to

¹ Decedent was a San Juan Southern Paiute, and was also known as Irvin Nelson, Irvin Neilson, and Ervin Neilson. His probate case was assigned Probate No. P000091071IP in the Department of the Interior's probate tracking system, ProTrac.

purchase the interest. Recommended Decision at 2; *see* 25 U.S.C. § 2206(o). It is undisputed that Appellant submitted a timely request to purchase the interest, and that because Appellant already owns an undivided trust interest in the Allotment, he qualifies as an eligible purchaser. *See* 25 U.S.C. § 2206(o)(2)(B).

The issue in this case, however, is whether the Tribe's consent, as the heir to the interest, is required before Appellant can purchase it at probate. The Tribe did not respond to an order from the ALJ directing it to respond if it was willing to consent, or conditionally consent, and an affidavit submitted by Appellant in this appeal indicates that the Tribe is unwilling to consent to the sale. *See* Notice of Appeal, Oct. 4, 2013, Ex. 9 (Affidavit of Appellant).

In the absence of consent from the Tribe, the ALJ denied Appellant's request to purchase the interest, and subsequently denied Appellant's request for rehearing. *See* Decision at 1; Order Denying Rehearing at 1. Appellant appealed to the Board and argues that the ALJ erred in concluding that the Tribe's consent is required.² In support of his argument, Appellant relies on a provision in the Department's probate regulations, as promulgated in November 2008, implementing AIPRA's purchase-at-probate provisions. *See* Notice of Appeal, Ex. 7 (attaching copy of 43 C.F.R. §§ 30.160–.164 (2009)). Appellant contends that under the language of those regulations, consent of the Tribal heir is not required for him to purchase the interest. *Id.* at 6-7.

Discussion

I. Standard of Review

The dispositive issue in this appeal—whether Appellant may purchase the interest in the Allotment without the Tribe's consent—is a question of law, which we review *de novo*. *See Estate of Celestine S. White*, 47 IBIA 73, 80 (2008).

II. Analysis

AIPRA, as enacted in 2004, authorized the Secretary of the Interior to sell, and eligible purchasers to purchase, interests in trust or restricted land that are in the estate of a deceased individual, subject to certain consent requirements. *See* Pub. L. No. 108-374

² Appellant also challenges the ALJ's reliance on a purported absence of prejudice—the ALJ suggested (with no citation of authority) that if Appellant could not purchase the interest at probate, he could still purchase it from the Tribe outside of probate—and Appellant argues that it would be inequitable to relegate him to post-probate procedures in light of the Tribe's unwillingness to consent to the sale. We conclude that the requirement of tribal consent is dispositive and thus we need not address Appellant's additional arguments.

(AIPRA 2004), § 6, 118 Stat. 1773, 1797 (Oct. 27, 2004) (amending 25 U.S.C. § 2206 by adding a subsection governing Purchase at Probate). AIPRA provides that “[t]he trust or restricted interests in a parcel of land in the decedent’s estate may be purchased at probate in accordance with the provisions of this subsection.” 25 U.S.C. § 2206(o)(1). AIPRA further provides that “[n]o sale of an interest in probate shall occur under this subsection unless— . . . except as provided in paragraph (5), the heirs . . . of such interest, . . . consent to the sale.” *Id.* § 2206(o)(3)(A)(ii).³

Thus, unless a sale falls within the exception provided in “paragraph (5),” consent of the heir to the interest to be purchased—in this case the Tribe—is required. Paragraph 5, as amended in December 2008, provides in relevant part as follows:

(5) Small undivided interests in Indian lands

(A) In general

. . . the consent of a person who is an heir . . . otherwise required under paragraph (3)(A)(ii) shall not be required for the sale of an interest at probate under this subsection if—

(i) the interest is passing by intestate succession;

(ii) prior to the sale the Secretary determines in the probate proceeding that, at the time of death of the applicable decedent, the interest of the decedent in the land represented less than 5 percent of the entire undivided ownership of the parcel of land as evidenced by the Secretary’s records as of the time the determination is made; *and*

(iii)(I) the Secretary is purchasing the interest . . . ; or

(II) . . . the Indian tribe with jurisdiction over the interest is proposing to purchase the interest

Id. § 2206(o)(5) (as amended by Act of Dec. 2, 2008, Pub. L. No. 110-453, § 207(c)(7), 122 Stat. 5027, 5032) (emphasis added).

By its terms, the exception to the consent requirement for a purchase at probate does not apply to Appellant’s proposal to purchase Decedent interest in the Allotment. First, the provision only creates an exception to the consent requirement as applied to “a person who is an heir.” In this case, the heir of Decedent’s interest in the Allotment is the Tribe, the Tribe does not fall within the definition of “person,” *see* 25 U.S.C. § 2201(8) (“person” means “a natural person”), and thus paragraph 5 does not create an exception to the

³ The purchase-at-probate provisions in AIPRA were originally codified in 25 U.S.C. § 2206(p), which was redesignated § 2206(o) in the Act of Dec. 30, 2005, Pub. L. No. 109-157, § 4, 119 Stat. 2949, 2950.

requirement of consent by the (Tribal) heir.⁴ Second, regardless of the definition of “person,” there are three cumulative elements that must be met for the exception to apply, and the third element—either the Secretary is purchasing the interest or the Tribe is proposing to purchase the interest—is not satisfied. *See id.* § 2206(o)(5)(A)(i) [intestate], (ii) [less than 5%], *and* (iii) [Secretary or Tribe is purchasing].

Looking at the regulations as promulgated in November 2008—the version relied on by Appellant—it is understandable why Appellant believes that the ALJ erred in finding that the Tribe’s consent is required. In that version of the regulations, 25 C.F.R. § 30.163 (2009) identifies two conditions as determining when consent is required, and neither is present in this case. But regardless of how we might have interpreted the previous version of the regulations provided by Appellant, *see supra* at 180, AIPRA had been amended by the time Decedent died and by the time Appellant sought to purchase Decedent’s interest in the Allotment at probate. The Board has held that where there are discrepancies between a regulation and a later-enacted statute, the later statute controls. *Maynard and Florine Bernard v. Acting Great Plains Regional Director*, 46 IBIA 28, 42 (2007), and cases cited therein. The same principle applies to an intervening amendment to a statute. Whatever the effect of the previous regulations, the statute, and now the conforming regulations, are now equally clear that tribal consent is required in the context of Appellant’s attempted purchase at probate of Decedent’s interest in the Allotment. *See* 25 U.S.C. § 2206(o)(5); 43 C.F.R. § 30.163 (2014).

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 September 5, 2013, Order Denying Rehearing.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

//original signed
Thomas A. Blaser
Administrative Judge

⁴ The language framing the exception with reference to “a *person* who is an heir” was in AIPRA as originally enacted. *See* AIPRA 2004, Pub. L. No. 108-374, § 6, 118 Stat. 1773, 1798.