



INTERIOR BOARD OF INDIAN APPEALS

Estate of Irene Leona McKinley

61 IBIA 218 (08/21/2015)

We conclude that the ALJ erred in denying the petitions for reopening. The record shows that the ALJ and the Tribe understood, or should have understood, that BIA was seeking review of whether the Tribe was entitled to receive the Allotment as the tribe with jurisdiction. And, while the ALJ questioned whether BIA's petitions contained adequate arguments and evidence to demonstrate that the Tribe lacks jurisdiction over the Allotment, he did not consider the sufficiency of the record to support the original Decision, which contains no reasoning or evidence to support the determination that the Tribe has jurisdiction. Under the circumstances, it was improper for the ALJ to let the Decision stand without reaching the merits of the issue or requiring further development of the record to enable a determination. In our review of BIA's petitions, the pleadings on appeal, and the evidence in the record, we find no basis to conclude that the Tribe has jurisdiction over the Allotment, and we therefore reverse the Order Denying Reopening.

Background

Decedent died intestate (i.e., without a will) on July 31, 2007. OHA-7 Form, Aug. 13, 2009, at 1 (Administrative Record (AR)).² Decedent was never married and was survived by three sisters. *Id.* at 1-2.

In her January 8, 2010, Decision, IPJ Daniel concluded that the distribution of Decedent's trust or restricted estate was governed by the American Indian Probate Reform Act (AIPRA).³ Decision at 1-2 (AR). AIPRA establishes different rules for intestate descent of ownership interests in trust or restricted real property constituting at least 5% of the entire undivided ownership of the parcel, as compared to ownership interests constituting less than 5%. With respect to Decedent's less-than-5% interest at issue in this appeal, AIPRA provides that where, as in this case, there is no surviving spouse or lineal descendant (i.e., a child, grandchild, or great-grandchild), the decedent's less-than-5% interest passes to the "Indian tribe with jurisdiction over the interest." 25 U.S.C. § 2206(a)(2)(D)(iii)(IV). If there is no such Indian tribe to inherit the property, the less-than-5% interest will be divided equally among co-owners of trust or restricted interests in the parcel. *Id.* § 2206(a)(2)(D)(iii)(V).

² The administrative record received from BIA's Southwest Region Land Titles and Records Office contains no numbered or lettered dividers between documents, making it difficult for the Board to locate, and to cite the location of, documents in the record. We cite to documents in the record according to their title or description, without specific reference to their location in the record.

³ In 2004, Congress enacted AIPRA, 25 U.S.C. § 2206, as a set of amendments to the Indian Land Consolidation Act, 25 U.S.C. § 2201 *et seq.*

At the probate hearing held for Decedent's estate, the IPJ stated that the Quechan Tribe would receive all of Decedent's less-than-5% interests in trust or restricted real property, without discussing whether or on what basis the Tribe had jurisdiction over the Allotment. Hearing Transcript, Dec. 2, 2009, at 12, 14 (AR). In the Decision, the IPJ distributed to the Tribe "any trust lands of less than 5% of the entire tract over which the tribe has jurisdiction."⁴ Decision at 2. The IPJ attached to the Decision an inventory report showing that Decedent owned a 1/210 (0.0047619048) interest in the Allotment. Inventory of Decedents Report, Nov. 28, 2007, at 1 (unnumbered) (AR). The inventory also included interests in eight additional allotments, which are identified as Fort Yuma Reservation allotments. *Id.* at 3-7, 9-11 (unnumbered). The IPJ described the Tribe, without qualification, as the "Tribe with jurisdiction," Decision at 2, and she provided for no different distribution of any lands in which Decedent owned less than a 5% interest, *see id.*

On February 2, 2012, the Superintendent filed a petition for reopening under 43 C.F.R. § 30.243. Superintendent's Petition for Reopening at 1 (AR). The Superintendent requested "clarification" of the distribution of Decedent's interest in the Allotment. *Id.* The Superintendent attached historical documents regarding Fort Yuma Homestead allotments, the Constitutions of the Quechan Tribe and the Cocopah Tribe, and BIA correspondence discussing whether either tribe had jurisdiction over the Homestead allotments. On February 6, 2012, the Regional Director submitted her own petition, joining the Superintendent's petition and apparently attaching additional BIA correspondence and a title status report listing the co-owners of the Allotment.⁵ Regional Director's Petition for Reopening at 1 (AR). The Regional Director requested that the ALJ reopen Decedent's probate "to clarify the distribution of land included in the [Fort] Yuma Homestead area." *Id.* (capitalization omitted). While each petition sought clarification, and attached documentation, neither petition articulated any arguments in support of reopening to correct an error of fact or law in the Decision.

The ALJ issued a notice to interested parties, including the Tribe, that BIA was seeking to reopen the estate "*to correct the distribution* of Decedent's interest in [the Allotment]." Notice of Petition for Reopening, Order to Perfect Petition, and Order to Show Cause, Nov. 28, 2012, at 1 (OSC) (emphasis added) (AR). The ALJ advised that "it

⁴ The Decision distributed to each of Decedent's three sisters a 1/3 share of any trust personalty, and a 1/3 share of Decedent's ownership interests in trust or restricted lands constituting 5% or greater. Decision at 2.

⁵ It appears that BIA did not organize documents and attachments in the record according to how they were originally submitted to the ALJ, making it difficult for the Board to understand what was submitted to the ALJ, by whom, and at what time.

does not appear that [the Tribe], or any other federally recognized Indian tribe, has jurisdiction over [the Allotment],” and that “the property should therefore have been distributed to the co-owners of the property pursuant to 25 U.S.C. § 2206(a)(2)(D)(iii)(V).” *Id.* The ALJ ordered BIA to “[p]erfect” its petitions either by submitting a “list of the co-owners of the [Allotment]”; by submitting a “statement of any facts or evidence which would tend to establish the jurisdiction of any federally recognized Indian tribe over [the Allotment]”; or by showing cause why its petitions should not be denied for failure to provide the information. *Id.* at 2. In response, BIA submitted another title status report listing the co-owners of the Allotment.⁶ *See* Opening Brief (Br.), Sept. 3, 2013, at 6.

The ALJ denied BIA’s petitions on the grounds that it only sought “clarification” and did not demonstrate why reopening was warranted. Order Denying Reopening, May 17, 2013, at 1-2 (AR). He found that the “Decision requires no clarification because it explicitly provides that all trust real property in which Decedent owned less than 5% of the parcel is to be distributed to the Quechan Tribe,” and that this result “necessarily rests upon the implicit conclusion that the Quechan Tribe is the ‘Indian tribe with jurisdiction over the [Allotment].’” *Id.* at 2 (quoting 25 U.S.C. § 2206(a)(2)(D)(iii)(IV)). The ALJ also found that, to the extent BIA was seeking to alter the distribution, BIA failed to explicitly challenge the conclusion that the Tribe has jurisdiction over the Allotment, and thus the Tribe was not given adequate notice and an opportunity to respond. *Id.* And, the ALJ stated that, even were he to reach the issue of whether the Tribe has jurisdiction over the Allotment, he doubted whether the estate could be reopened based on the record before him. *Id.* He explained that the information BIA provided “does not resolve the issue of tribal jurisdiction,” neither the Superintendent nor the Regional Director had actually expressed a position on the issue, and BIA had provided no judicial or administrative decisions regarding the issue of tribal jurisdiction over the Fort Yuma Homestead allotments. *Id.*

BIA appealed to the Board and filed an opening brief. Days later, BIA filed a supplemental brief citing new authority. Supplement to Opening Br., Sept. 10, 2013. The Board received no filings from the Tribe or any other interested party.

⁶ It is unclear whether BIA served its response on the Tribe.

Discussion

I. Standard of Review

As the appellant, BIA bears the burden of showing error in the Order Denying Reopening. *See Estate of George Umtuch, Jr.*, 58 IBIA 205, 207 (2014). The Board reviews challenges to factual determinations by the probate judge to determine whether the factual determinations are supported by substantial evidence. *Estate of Samuel Johnson (John) Aimsback (Aims Back)*, 45 IBIA 298, 303 (2007). We review questions of law and the sufficiency of the evidence *de novo*. *Estate of Dominic Orin Stevens, Sr.*, 55 IBIA 53, 62 (2012).

II. Analysis

A. It was Error for the ALJ to Deny the Petitions Without Reaching the Merits

Regardless of whether BIA's petitions were sufficient to warrant reopening, the ALJ understood that BIA was seeking to alter the distribution of the Allotment on the basis that the Tribe lacks jurisdiction over the Allotment. And, while BIA presented the ALJ with at least some basis to conclude that the Tribe lacks jurisdiction, the record contained no reasoning or evidence to sustain the "implicit" conclusion in the Decision that the Tribe has jurisdiction.⁷ Under the circumstances, the ALJ erred in letting the Decision stand without reaching the merits of the petitions for reopening. To the extent the ALJ believed that BIA had not conclusively demonstrated the Tribe's *lack of jurisdiction*, his OSC did not impose such a requirement, and the absence of any evidence to support the Decision clearly warranted reopening.

⁷ As a threshold issue, it is unclear to the Board whether IPJ Daniel intentionally directed the distribution of Decedent's interest in the Allotment to the Tribe as the tribe with jurisdiction. It appears plausible that the IPJ only intended to order that the Tribe receive "any" less-than-5% interest "over which the tribe has jurisdiction," Decision at 2, without determining whether the Tribe has jurisdiction over the Allotment. That interpretation would be consistent with the lack of any discussion or evidence in the record to support a finding of tribal jurisdiction over the Allotment. But, considering that the Decision only provided for distribution of Decedent's less-than-5% interests to the Tribe, ALJ Yellowtail found that a jurisdictional determination was necessary to, and implicit in, the Decision, and on appeal BIA agrees. Ultimately, we need not determine whether the error lies in the Decision itself or in the ALJ's interpretation of the Decision, because, in either case, the result is the same that the Order Denying Reopening must be reversed.

Further, the ALJ served the Quechan Tribe with notice that BIA was petitioning to correct the distribution, and that, because it initially appeared to the ALJ that no tribe had jurisdiction over the Allotment, the property should have been distributed to the co-owners. OSC at 1. Thus, the Tribe received notice that BIA sought to reopen the case based on lack of tribal jurisdiction over the Allotment.⁸ The fact that the Tribe has not appeared and asserted jurisdiction over the Allotment, despite the Tribe's knowledge of the proceedings, supports our conclusion, to which we now turn, that the record cannot sustain a finding that the Tribe has jurisdiction over the Allotment.

B. Tribal Jurisdiction Over the Allotment

On appeal, BIA, through Departmental counsel, explains that it did not respond to the ALJ's order to provide a "statement . . . or evidence . . . to establish the jurisdiction of any federally recognized Indian tribe," OSC at 2, because BIA's position was that "no Indian Tribe has jurisdiction over the [Allotment]," Opening Br. at 5-6. BIA argues that, because the Allotment is "held by the United States in trust for the individual owners, independent of any Indian tribe," and "[b]ecause the [Allotment] is located on public land outside the exterior boundaries of the Cocopah and Fort Yuma Indian reservations, neither the Cocopah Indian Tribe nor the Quechan Indian Tribe exercises jurisdiction over the [Allotment]."⁹ Opening Br. at 6.

We find no evidence in the record to support a conclusion that any tribe holds jurisdiction over the Allotment, which as BIA argues was allotted from public lands and

⁸ To the extent the ALJ was concerned that the Tribe did not receive due process during the ALJ's consideration of the petitions for reopening, the ALJ could have taken whatever steps he thought necessary to remedy that concern before ruling on the petitions. Regardless of any prior due process concern, the Tribe has received adequate notice and opportunity to participate in this appeal proceeding, and has not done so.

⁹ Apparently for these reasons, BIA, and possibly the Quechan and Cocopah Tribes, seems to have previously assumed that neither tribe had jurisdiction over the Fort Yuma Homestead allotments. *See* Superintendent's Petition for Reopening, Attachments (Memorandum from Cantou to Austin, Oct. 2, 2000, and Attachment; Email from Austin to Cantou, Sept. 27, 2000) (describing an inquiry into dumping on the allotments, during which environmental and law enforcement personnel from the Quechan and Cocopah Tribes sought BIA's views on whether either tribe had jurisdiction).

placed into trust for individual Indians rather than any tribe.¹⁰ On May 13, 1918, the United States, through Patent 630212 (Patent), agreed to hold the 40-acre Allotment “for the period of twenty-five years, in trust for the sole use and benefit of the said Widow and Heirs of Flacco, according to the laws of the state where such land is located” Superintendent’s Petition for Reopening, Attachment (Patent 630212) (AR). The Patent states that the authority to take the land into trust derived from the Indian Homestead Act of 1884, *see id.*, which provided that “Indians . . . located on public lands . . . may avail themselves of the provisions of the homestead laws . . . to the same extent as . . . citizens of the United States” 23 Stat. 76, 96 (July 4, 1884). The law thus allowed Indians, although not legally deemed citizens at the time, to homestead on the public lands as though they were citizens, without reference to and unrelated to any land base set aside for a particular tribe or its members. But because of the Federal wardship of Indians, the law provided that “the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian.” *Id.* Subsequent legislation and executive orders extended the original 25-year trust period to the present day. *See generally*, 25 U.S.C. §§ 391, 462. Decedent’s interest in the Allotment was derived from this public land homestead law.

The Indian Homestead Act of 1884 neither required nor provided that allotments taken into trust for Indians fall under the jurisdiction of an Indian tribe, and the Patent contains no suggestion that any tribe has jurisdiction over the Allotment. The Fort Yuma Homestead allotments are located on public land, not within the boundaries of the Tribe’s reservation. *See* Opening Br., Exhibit 2 (Map of Fort Yuma Homesteads vicinity).

For the foregoing reasons, we conclude that the record does not support a finding that the Tribe has jurisdiction over the Allotment, and the Order Denying Reopening must be reversed.¹¹

¹⁰ A tribe is presumed to exercise jurisdiction over land held in trust for the tribe, even though not formally proclaimed a new reservation or added to the existing reservation. *Aitkin County, Minnesota v. Acting Midwest Regional Director*, 47 IBIA 99, 104-07 (2008).

¹¹ Our decision accords with other decisions of the Probate Hearings Division (PHD), which are attached to or cited in BIA’s briefs on appeal. A 1989 decision concluded that the Quechan Tribe does not exercise jurisdiction over the off-reservation Fort Yuma Homestead allotments. Opening Br., Attachment 3 (*Estate of Havchats Pete AKA Lila Dugan*, Probate No. IP PH 164I 88 (Order Approving Will and Decree of Distribution Mar. 31, 1989)). A second decision, issued during briefing for this appeal, distributed a less-than-5% interest in the same Allotment at issue in this appeal to the co-owners under 25 U.S.C. § 2206(a)(2)(D)(iii)(V), and not to any tribe. *Estate of Patricia Ellen Quahlupe*, Probate No. P000108697IP (Decision Sept. 5, 2013) (copy added to appeal record); *see* (continued...)

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 reverses the ALJ's May 17, 2013, Order Denying Reopening and remands the matter for further proceedings consistent with this decision.

I concur:

// original signed
Thomas A. Blaser
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge

(...continued)
also, Estate of Quahlupe, Probate No. 000108697IP (Modification Order Apr. 4, 2014)
(correcting determination of the shares received by each co-owner) (copy added to appeal record).