



## INTERIOR BOARD OF INDIAN APPEALS

Lois Stevens and Jeffrey Stevens v.  
Acting Rocky Mountain Regional Director, Bureau of Indian Affairs

62 IBIA 286 (03/22/2016)



# 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

LOIS STEVENS AND JEFFREY	)	Order Vacating Decision and
STEVENS,	)	Remanding
Appellants,	)	
	)	
v.	)	
	)	Docket No. IBIA 14-113
ACTING ROCKY MOUNTAIN	)	
REGIONAL DIRECTOR, BUREAU	)	
OF INDIAN AFFAIRS,	)	
Appellee.	)	March 22, 2016

Lois Stevens (Lois) and Jeffrey Stevens (Jeffrey) (collectively, Appellants) appealed to the Board of Indian Appeals (Board) from a May 19, 2014, decision (Decision) of the Acting Rocky Mountain Regional Director (Regional Director), Bureau of Indian Affairs (BIA), affirming BIA’s Crow Agency Superintendent’s (Superintendent) retroactive approval of 34 gift conveyances after the death of the grantor, Dominic Orin Stevens, Sr. (Decedent), for trust land on the Crow Reservation, to Donna Stevens Dillon (Donna), Lois, and Dominic Stevens, Jr. (Steve).<sup>1</sup>

We vacate the Decision because neither the Regional Director nor the Superintendent provided sufficient evidence to support their decisions to approve the gift conveyances retroactively under the circumstances. Nor does the administrative record<sup>2</sup>

<sup>1</sup> Steve is now deceased. *See* Linda Stevens’ Response to Appellants, Jan. 7, 2015, at 2.

<sup>2</sup> The Board received an administrative record (AR) in this matter from the Regional Director on July 23, 2014. Because it was apparent that the record submitted was incomplete, the Board ordered the Regional Director to submit the complete record on appeal, in conformance with 43 C.F.R. § 4.335. Notice of Docketing and Order for Regional Director to Complete Submission of the Record, July 29, 2014, at 2. In particular, the Board noted that the record developed by the Indian Probate Judge (IPJ) during the probate of Decedent’s estate included testimony and documents related to the gift conveyances at issue in the instant appeal, along with other matters relevant to Decedent’s trust estate, and was to have been considered by BIA in resolving the estate inventory dispute concerning the gift conveyances. *Id.* (citing *Estate of Dominic Orin*

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provided to the Board indicate that the decisions were informed by review of the record developed by the probate judge in the probate of Decedent's estate, including in particular the record from the hearing on the inventory dispute, as advised by the Board in 2010 when it referred the inventory dispute to BIA for a decision. 51 IBIA 252, 253 & n.4. Neither the Regional Director nor the Superintendent provided a reasonable basis, or indeed any basis, for their determination that Decedent "clearly demonstrated his intent" to convey trust property to three of his four children. Under the circumstances, the Board has no alternative but to vacate the decision and remand this matter to BIA for the issuance of a new decision, supported by sufficient evidence, approving or disapproving the retroactive approval of the gift conveyances in question.

## Background

### I. Gift Deed Applications

On April 27, 28 and 29, 2004, BIA's Crow Agency received gift deed applications, styled Application for Gift Conveyance of Indian Lands, to convey Decedent's interests in 39<sup>3</sup> Crow Allotments to Donna, Lois, and Steve, in equal shares. Supp. AR 11. The

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(...continued)

*Stevens, Sr.*, 51 IBIA 252, 253 (2010) (while BIA was to issue a decision on the inventory dispute based on its own review, it must also include "consideration of the record developed by the IPJ, arguments presented by the parties, and any supplemental record developed by, or evidence presented to, BIA").

The Board also noted that the AR submitted by the Regional Director did not include, *inter alia*, copies of the gift deed applications, title status reports for the affected trust property, or the administrative record relied upon by the Superintendent in forming his decision, which was to have been provided to the Regional Director following appeal of the Superintendent's decision. *Id.* at 2-3 (explaining that the record submitted to the Board "should include a complete and intact copy of the Superintendent's record, as organized by the Superintendent, so that it is clear precisely what record was submitted to the Regional Director by the Superintendent"). The Board received the supplemented administrative record (Supp. AR) on August 29, 2014. The record developed by the IPJ during the probate of Decedent's estate, including the hearing on the inventory dispute, was not submitted.

<sup>3</sup> Although reference is made to 39 applications, apparently only 37 were received by BIA. See Letter from Superintendent to Dominic Stevens, Jr., Oct. 21, 2010, at 1 (unnumbered) (Superintendent's 2010 Decision) (AR 1). Three of the allotments were determined to be owned by Decedent in fee status and therefore not subject to BIA oversight. *Id.* During the probate proceedings for Decedent's estate, a gift deed application for Allotment

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applications apparently bore Decedent's thumbprint,<sup>4</sup> were witnessed and notarized, and were individually executed on April 22 and 23, 2004. *Id.* The applications were accompanied by corresponding Statements of Understanding (waivers of appraisal) for the gift conveyances, also apparently executed by Decedent. *Id.* A Summary of Applications and Statement of Understanding (waiver of appraisal), both dated April 20, 2014, and a Justification Letter, undated, were received by BIA along with the individual gift deed applications. *Id.*

On June 10, 2005, the Crow Agency Realty Officer wrote to Decedent inquiring whether he was still interested in completing the proposed gift conveyance. Letter from Realty Officer to Decedent, June 10, 2005 (Supp. AR 9). On June 28, 2005, BIA received its letter to Decedent, or a copy of its letter, with the following statement typed on its face:

TO B. I. A. ,  
I want to complete all :  
Gift conveyance transaction(s)  
Land Exchange transaction  
Fee Land to Trust Land transaction(s)  
As Soon As Possible Please.  
Dominic Stevens, Sr., by my right thumb mark  
*in the presence of and witnessed by*  
...

The letter bore a thumbprint, the signatures of witnesses Manuel Coversup and Ralph Goodluck, and was dated June 27, 2005. Response from Decedent to BIA (June 27 Letter) (Supp. AR 9).

BIA subsequently received another typewritten letter, dated June 29, 2005, sent by certified mail and apparently from Decedent, which reflected on Decedent's family relations and business interests, and concluded by stating: "Donna O., Lois J., and Dominic O. [Jr.]

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No. 647-A was identified. *See* Indian Probate Judge Albert C. Jones, Decision and Recommended Decision, Aug. 29, 2008, at 21 (Supp. AR 7). The Regional Director concluded that Decedent had not submitted an application for this allotment. Letter from Regional Director to Sara A. Dutschke-Setshwaelo, Aug. 17, 2011, at 2 (Regional Director's 2011 Decision) (AR 3); Applications for Gift Conveyance and Statements of Understanding, Apr. 22-23, 2004 (Supp. AR 11).

<sup>4</sup> Decedent appears to have consistently used his thumbprint as his signature for documents submitted to BIA during the period of relevance to this appeal.

are my eldest children and are my personal representatives to continue successful family business interests. I gift deed them my interest in Lands held in Trust for no monetary consideration.” Letter from Decedent to Crow Agency, June 29, 2005 (Supp. AR 9). This letter was received by BIA on July 15, 2005, 9 days before Decedent’s death. *See id.*

## II. Decedent’s Will and Probate Proceedings

On July 26, 2004, 3 months after submitting the gift deed applications, Decedent visited BIA’s Crow Agency to discuss how he wanted his property distributed after his death. IPJ’s Decision and Recommended Decision at 7; *Estate of Dominic Orin Stevens, Sr.*, 55 IBIA 53, 55 (2012). The following day, on July 27, 2004, Decedent returned to the Crow Agency and, in the presence of the BIA will scrivener, two BIA witnesses, and the BIA will notary, executed his will, *see* Decedent’s 2004 Will (Supp. AR 2), which left Decedent’s entire estate to Lois. IPJ’s Decision and Recommended Decision at 7-9, 19.

Decedent died on July 24, 2005. IPJ’s Decision and Recommended Decision at 1. IPJ Albert C. Jones held hearings to probate Decedent’s estate in 2006, 2007, and 2008. *Id.* Donna and Steve filed an objection to the will, *id.* at 7, and on February 27, 2008, Steve notified the IPJ that Decedent had begun the process of gift deeding multiple tracts of land to Donna, Lois and Steve, prior to his death. *Id.* at 2. As a result, the IPJ requested and received copies of the gift deed applications and other documents from BIA and the parties, and held another hearing in which he took testimony regarding the 2004 will and the gift deed applications. *Id.* at 5-6.

On August 29, 2008, the IPJ issued his Decision, in which he upheld the 2004 will, finding that Donna and Steve had not met their burden of showing that the will was the product of undue influence or that Decedent lacked testamentary capacity. *Id.* at 7-18. On that same day, the IPJ issued a Recommended Decision confirming Decedent’s estate inventory.<sup>5</sup> *Id.* at 25. Addressing the gift deed applications, the IPJ concluded that Donna and Steve failed to show that the Crow Agency personnel committed an error or omission that was responsible for the gift conveyances not being completed during Decedent’s lifetime. *Id.* at 24-25 (citing *Estate of Laura Wetsit Wells*, 42 IBIA 94 (2006)). Noting Decedent’s dementia diagnosis, the IPJ also stated that “there was conflicting testimony with respect to the Decedent’s capability in 2005, right up to the date of the Decedent’s death.” *Id.* at 25. In light of the dementia diagnosis and conflicting testimony, the IPJ concluded that he was “not fully confident that the Decedent would have been capable of executing completed gift deeds in 2005 . . . .” *Id.*

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<sup>5</sup> The Recommended Decision was issued pursuant to a standing order issued by the Board in *Estate of Douglas Leonard Ducheneaux*, 13 IBIA 169 (1985).

Steve and Donna appealed the Recommended Decision to the Board. *See Estate of Stevens*, 51 IBIA 252. While the appeal was pending, revised probate regulations became effective, thereby divesting the Office of Hearings and Appeals of probate jurisdiction over estate inventory disputes that arise during a probate proceeding. 73 Fed. Reg. 67256, 67294 (Nov. 13, 2008); *Estate of Stevens*, 51 IBIA at 252-53. In keeping with the new regulations, the Board dismissed the appeal, and referred the inventory dispute to BIA for resolution. 43 C.F.R. § 30.128(b); *Estate of Stevens*, 51 IBIA at 254.

Steve and Donna also continued to challenge the approval of the 2004 will. After the IPJ denied their petition for rehearing, Steve and Donna, along with Jeffrey, appealed to the Board. *Estate of Stevens*, 55 IBIA at 53. On May 22, 2012, the Board affirmed the IPJ's order denying rehearing, thus leaving in place the IPJ's approval of Decedent's will. *Id.*

### III. BIA Declined, and then Approved, Gift Deed Applications

Following the Board's referral of the inventory dispute to BIA, the Superintendent issued a decision on October 21, 2010, declining to approve the gift deed applications. Superintendent's 2010 Decision. Upon appeal, the Regional Director affirmed the Superintendent's decision not to approve applications for conveyance of the fee allotments, but remanded 34 applications for the Superintendent's further consideration, noting that BIA may approve a gift conveyance of trust or restricted lands retroactively, when a conveyance was pending at the date of death of the grantor. Regional Director's 2011 Decision at 4-5 (citing *Wishkeno v. Deputy Assistant Secretary-Indian Affairs (Operations)*, 11 IBIA 21, 32 (1982)). The Regional Director further discussed the Superintendent's finding of noncompliance with one of BIA's conveyance regulations, and concluded that later-enacted statutes controlled.<sup>6</sup> *Id.* at 5.

Subsequently, on February 20, 2014, the Superintendent approved the 34 gift deed applications, concluding that Decedent "clearly demonstrated his intent to convey his trust property to his children in his response dated June 27, 2005[,] requesting the completion of the transactions." Letter from Superintendent to Dutschke-Setshwaelo, Feb. 20, 2014, at 1 (unnumbered) (Superintendent's 2014 Decision) (AR 4). The Superintendent also noted that Decedent executed waivers of appraisal for the gift deed conveyances, which satisfied the applicable appraisal requirements. *Id.* Appellants appealed the Superintendent's

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<sup>6</sup> The Regional Director also affirmed the Superintendent's decision with regard to four allotments because either no applications were submitted regarding such property or the land was owned in fee simple. *Id.* at 2.

decision to the Regional Director, arguing that: 1) the Superintendent's decision cannot divest Lois of the property she inherited as a result of Decedent's 2004 will; 2) Steve acquired the gift deeds by using threats, duress, and fraud; 3) Decedent did not knowingly or willingly sign the gift deeds; 4) BIA did not reach the decision in a timely manner; and 5) Decedent intended for Jeffrey to receive a share of the gifted property and was convinced otherwise. Statement of Reasons, Apr. 13, 2014, 2 (AR 8).

After finding that Appellants failed to provide any evidence that Decedent was against the gift conveyances, the Regional Director affirmed the Superintendent's approval of the gift deed applications. Decision at 2. This appeal followed. Appellants filed an opening brief, and Donna and Linda Stevens, as the representative of Steve's estate, each filed an answer brief. No other briefs were filed.<sup>7</sup>

## Discussion

### I. Standard of Review

The standard under which the Board reviews BIA decisions concerning retroactive postmortem approval of conveyances of trust or restricted land was set forth in *Kent v. Acting Northwest Regional Director*:

Conveyances of trust or restricted land require Secretarial approval and BIA has promulgated regulations governing such conveyances, including gift conveyances. See 25 C.F.R. §§ 152.17, 152.22(a), 152.23, 152.25(d); see also *Bitonti v. Alaska Regional Director*, 43 IBIA 205, 212-13 (2006); *Estate of Joseph Baumann*, 43 IBIA 127, 136 (2006). BIA has been delegated the authority to approve or deny an application for a proposed conveyance, and that authority involves the exercise of discretion. *Barber v. Western Regional Director*, 42 IBIA 264, 266 (2006). BIA's authority includes the authority to retroactively approve a conveyance after the death of the Indian grantor. *Bitonti*, 43 IBIA at 211; *Wishkeno v. Deputy Assistant Secretary-Indian Affairs (Operations)*, 11 IBIA 21, 32 (1982).

An appellant bears the burden of showing that BIA did not properly exercise its discretion. *Anderson v. Acting Southwest Regional Director*, 44 IBIA 218, 225 (2007). In reviewing such decisions, the Board may not substitute its judgment for that of BIA. *Barber*, 42 IBIA at 266. The Board's

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<sup>7</sup> In addition, after briefing on the merits of the appeal was completed, Appellants filed a motion to compel discovery of Decedent's tax returns, which the Board denied.

role is limited to determining whether BIA's decision is in accordance with the law, is supported by the record, and is adequately explained. *Scrivner v. Eastern Oklahoma Regional Director*, 44 IBIA 147, 150 (2007).

In approving a conveyance of trust land, BIA acts as trustee for the Indian owner. *Estate of Evan Gillette, Sr.*, 22 IBIA 133, 138 (1992). In determining whether or not to approve a gift deed retroactively [after the grantor's death], BIA should satisfy itself that the grantor's intent and understanding were "reasonably clear." *Willis v. Northwest Regional Director*, 45 IBIA 152, 167 (2007).

45 IBIA 168, 174 (2007).

## II. Analysis

On appeal, Appellants contend that the Superintendent has a familial connection with Donna's grandchildren and thus the Superintendent's decision was not impartial and fair. Appellants' Opening Brief (Br.), Mar. 13, 2015, at 6-7. Appellants also argue that Donna and Steve unduly influenced and coerced Decedent into completing the gift deed applications. *Id.* at 7-8. Further, Appellants contend that Decedent was not competent, and under duress, when he signed by thumbprint the June 27 Letter indicating his intent to continue with the gift deed process. *Id.* at 4, 7. In addition, Appellants argue that Decedent's actions at BIA's Crow Agency on July 26 and July 27, 2004, and his 2004 will, reflect his true intentions not to gift deed the property at issue. *Id.* at 8-10.

Because Appellants failed to raise their challenge to the Superintendent's impartiality in their appeal to the Regional Director, we reject this argument as outside the scope of this appeal. While we further conclude that Appellants have failed to meet their burden of showing that Decedent was unduly influenced, coerced, or under duress at times relevant to the gift conveyance documents, we agree that BIA had an obligation to consider and address—not merely assume—Decedent's competence at the relevant times, and to support findings of both competence and intent, prior to approving the conveyances.

The evidence in the record is equivocal at best regarding Decedent's intent to convey his trust property to three of his four living children by gift deed. For example, after executing the gift deed applications, Decedent met with the BIA Superintendent and executed a will leaving his trust estate to Lois. The record does not indicate that Decedent, at any time, met with BIA employees to discuss his intent to gift deed his land to three of his four living children. BIA was aware of uncertainty concerning Decedent's mental capacity in 2005, yet relies on its receipt of a typewritten document bearing a thumbprint and two witness signatures as sufficient evidence that Decedent "clearly demonstrated his

intent to convey his trust property to his children” and wished to complete the gift deed conveyances. Superintendent’s 2014 Decision at 1 (unnumbered). The record does not indicate that BIA sought, or otherwise obtained, affidavits from the witnesses of either the June 27 Letter or the June 29 “gift deed” document, or that it considered the probate record developed by the IPJ or any other evidence to inform its decision. We conclude that the record does not support the Regional Director’s affirmance of the Superintendent’s determination regarding Decedent’s intent to gift deed his trust property and his competence in 2005 to complete the conveyances. We therefore vacate the decision because of the insufficiency of evidence in the record concerning Decedent’s intent and competence, and BIA’s failure to explain adequately the basis for its determination absent such evidence, and remand to BIA for a new decision, supported by the record.

#### A. Superintendent’s Impartiality

For the first time on appeal, Appellants argue that the Superintendent’s impartiality and fairness is compromised, in violation of the Administrative Procedure Act (APA),<sup>8</sup> due to a familial relationship with Donna’s family. Opening Br. at 6-7. According to Appellants, the Superintendent is “the sister of the great-grandmother of Donna Stevens[?] grandchildren; grandchildren whom have been legally adopted by Donna.” *Id.* at 6.

Because Appellants’ argument is outside the scope of this appeal, we decline to consider it. As a general rule, the Board does not consider arguments made or evidence presented by an appellant for the first time on appeal, which could have been made or presented in the proceedings below. 43 C.F.R. § 4.318; *see also Estate of Stevens*, 55 IBIA at 62-63. The Board may exercise its inherent authority to correct a manifest injustice or error where appropriate. 43 C.F.R. § 4.318. But Appellants have not provided any reason for the Board to depart from the normal scope of review. Appellants had the opportunity to raise their challenge to the Superintendent’s impartiality to the Regional Director, but did not do so.<sup>9</sup>

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<sup>8</sup> The APA does not govern the proceedings before the Board. *Shoshone-Bannock Tribes of the Fort Hall Reservation v. Bureau of Indian Affairs*, 61 IBIA 98, 109 (2015). We, however, understand Appellants’ argument to concern whether the Superintendent’s decision was biased, prejudiced, or affected by a conflict of interest.

<sup>9</sup> Even if we were to consider Appellants’ claim, we would find it without merit. Appellants’ identification of a—quite remote—familial relationship does not meet the high standard necessary to show that the Superintendent was biased or prejudiced towards granting the gift deed applications, nor does it show that the Superintendent’s decision would further her personal or financial interests. *Garcia v. Western Regional Director*, 61 IBIA 45, 49-50 (2015); *see also Roberts County v. Acting Great Plains Regional Director*, (continued...)

## B. Decedent's Competence and Intent

As noted above, BIA is authorized to approve posthumous conveyances of trust property under certain circumstances. Early cases involved conveyances that had reached the penultimate stage of the process, where the grantor had completed all acts required of him, including signature of the warranty deed, but died prior to approval of the deed by the Federal authority. See *Wishkeno*, 11 IBIA at 28-31 (citing, *inter alia*, *George Big Knife*, 13 L.D. 511 (1891) (retroactive approval was a “long established practice of the Indian Office and this Department [Interior] . . . where the transaction was fair in all respects”) and *Pickering v. Lomax*, 145 U.S. 310 (1892) (approval by President of deed 13 years after death of grantor related back to date of execution of the deed by grantor)). The courts have also made clear that retroactive approval must be denied where there is evidence of overreaching or fraud, or where the competence of the grantor was in question. See *id.* at 31-32 (citing *Kendall v. Ewert*, 259 U.S. 139 (1922) (legal effect of Secretarial approval of warranty deed denied where there was evidence that grantor was mentally incompetent when he executed the deed)). As relevant to this appeal, BIA has the authority to approve a conveyance if, among other considerations, there is no evidence of fraud, overreaching, or other illegality in the procurement of the conveyance. *Wishkeno*, 11 IBIA at 32. However, the absence of such evidence does not require BIA to approve a gift conveyance retroactively where there is question of the sufficiency of evidence of the grantor's intent or mental competence. *Kent*, 45 IBIA at 178.

Appellants first argue that Decedent was unduly influenced, coerced, and under duress when he executed the June 27 Letter affirming his intent to continue the gift deed process in 2005. Opening Br. at 4-5; 7-8; see also Statement of Reasons, April 13, 2014, at 2 (appeal of Superintendent's 2014 Decision) (AR 8). On appeal to the Board, Appellants allege that Steve and Donna “were in constant contact with [Decedent] prior to his death, on July 24, 2005, and convinced or deceived [Decedent] into signing documents executing the gifting [of] property . . . .” *Id.* at 7. This allegation is not supported by any evidence, and Appellants do not explain the basis for the allegation. Nor did Appellants, in their appeal to the Regional Director from the Superintendent's 2014 Decision provide any evidence to support their claims of undue influence and coercion other than their personal affidavits, which generally recounted events and conversations they claim to have witnessed

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51 IBIA 35, 49 (2009), *aff'd sub nom. South Dakota v. U.S. Dep't of the Interior*, 775 F. Supp. 2d 1129, 1136-37 (D.S.D. 2011), *appeal dismissed*, 665 F.3d 986 (8th Cir. 2012) (a substantial showing is required to overcome the presumption that agency official discharged duties properly).

and their own perceptions of Decedent's state of mind. *See, e.g.*, Jeffrey Stevens Statement of Reasons, Apr. 13, 2014 (AR 8); Lois Stevens Statement of Reasons, Apr. 11, 2014 (AR 8). The simple fact that Steve and Donna had frequent interactions with Decedent, without more, does not show that they exerted influence over him. *Estate of Drucilla (Trucilla) W. Pickard*, 50 IBIA 82, 94 (2009) (rejecting mere "opportunity" to influence as sufficient to demonstrate actual or presumptive undue influence).

Second, Appellants argue that Decedent was not competent when he informed BIA that he wanted to complete the gift deed transactions.<sup>10</sup> Opening Br. at 8-9. In support of their argument, Appellants rely on the IPJ's "rejection" of the June 29, 2005, document that counsel for Donna presented to the IPJ in Decedent's probate proceedings, that purportedly revoked the 2004 will. IPJ's Decision and Recommended Decision at 18-19. The June 29, 2005, document, which states that Decedent was gift deeding his properties to Lois, Donna, and Steve, was not rejected based on a finding of Decedent's incompetency; rather, the IPJ found that the document did not meet the requirements of a valid will. *Id.* at 18 (finding that it did "not actually distribute property, but rather attempts to gift convey property"). The fact that the document did not meet the requirements of a valid will does not mean that it was not relevant to the issue of the gift conveyances. We agree, however, that because the question of Decedent's competence was raised, it was necessary for the Regional Director to address the issue, after considering all relevant evidence, and soliciting additional evidence if appropriate. The Superintendent's Decision, however, does not address the issue of competency and, although Decedent's competence was challenged by Appellant's in their appeal of that decision, it was not addressed by the Regional Director.

In Decedent's probate case, the IPJ highlighted testimony<sup>11</sup> from a relative, Sherry Kirschenmann, stating that Decedent did not recognize her, in the few months before his death, and "was unable to speak beyond 'yes' and 'no' answers." IPJ's Decision and Recommended Decision at 11. On the other hand, the IPJ also recounted testimony from

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<sup>10</sup> Donna suggests that Appellants failed to raise this argument in their appeal to the Regional Director. Donna Stevens Dillon's Opposition to Appellants' Statement of Reasons, Apr. 27, 2015, at 13-14 (Donna's Opposition Br.). We find it sufficiently articulated by Appellants' claim that Decedent did not act "knowingly" when signing the gift deed applications to allow us to consider it on the merits.

<sup>11</sup> Regrettably, the transcripts from the hearings conducted by the IPJ are not in BIA's record, but the IPJ provided information on the testimony in his decision.

four individuals, including Lois and Donna,<sup>12</sup> suggesting that Decedent was competent in July 2005. *Id.* at 12 (Lois denied the condition Kirschenmann described and stated that Decedent “was alert and able to do things on his own”); *id.* at 15 (noting Donna’s testimony that Decedent “was able to make decisions throughout his life” and the testimony of two friends that Decedent “was competent . . . shortly before he died in 2005” and that he seemed “the same as usual” in June 2005). The IPJ observed that because of “conflicting testimony with respect to the Decedent’s capability in 2005 . . . [he] [was] not fully confident that the Decedent would have been capable of executing completed gift deeds in 2005 . . . .” *Id.* at 25. The IPJ’s Recommended Decision does not, of course, preclude the Regional Director making a finding that Decedent was competent in 2005, when he apparently executed two documents regarding the gift conveyances. There is no evidence, however, that the Regional Director considered the issue, or considered the record developed by the IPJ, as we instructed in our referral.

Third, Appellants argue that Decedent’s 2004 will and his related visits to BIA’s Crow Agency express Decedent’s true intention to convey his entire estate to Lois. Opening Br. at 9-10. The fact that Decedent disposed of all of his property to one of his children in his 2004 will, just three months after BIA received the gift deed applications to convey Decedent’s trust property to three of his four living children, gives rise to some ambiguity about whether Decedent wanted to complete the gift deed transactions. Such ambiguity could have been cured if, for example, the record confirmed that Decedent had taken steps to rescind the 2004 will, or had subsequently met with, telephoned, or otherwise indicated personally to a BIA employee, or any other person, that he wished to complete the gift conveyance of his trust land to Donna, Lois, and Steve.

With respect to both the issue of competence and Decedent’s intent, we note that there is no indication in the record before the Board that Decedent at any time discussed the gift deed applications with a BIA employee. While the gift deed applications and waiver of appraisal statements “appear to be properly witnessed and notarized,” as the IPJ noted, IPJ Decision and Recommended Decision at 22, the notary was not a BIA employee and the documents were not notarized at the Crow Agency offices, *id.* at 21. Donna argues in her brief that the statement of BIA employee LaVaune Fitzpatrick during the probate proceedings supported the Regional Director’s and Superintendent’s decisions to approve the gift conveyances. Donna’s Opposition Br. at 12 (citing testimony reported in IPJ’s Decision and Recommended Decision at 24). We are not convinced.

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<sup>12</sup> The IPJ found that both Lois’s and Donna’s testimony was inconsistent at times. *Id.* at 12; 15.

During the probate proceedings, LaVaune testified that she knew “a little bit” about Decedent’s gift deed applications and stated that the Agency was waiting for Certified Title Status Reports before proceeding with processing the gift deed applications, and that the process would have stopped upon Decedent’s death. IPJ’s Decision and Recommended Decision at 24. The IPJ noted that “[w]hen asked whether she thought the Decedent would have signed the deeds, had they been completed, LaVaune said she knew of no reason why he would not have done so . . . .” *Id.* There is no evidence in the record that LaVaune ever met with Decedent or discussed his intentions regarding the gift conveyances with him at any time. While the transcript of the probate proceeding may have provided information to support LaVaune’s supposition, the transcript was not included in the record provided by BIA and, apparently, was not considered by the Superintendent. In fact, neither the Regional Director nor the Superintendent reference LaVaune’s testimony, or any other testimony or evidence presented at the probate proceedings, as support for their decisions.

Nor does the June 27 Letter, which BIA apparently relied upon to establish Decedent’s continued intent to convey his trust property by gift deed, by itself, provide sufficient evidence of Decedent’s competence and intent under the circumstances. The same is true for the June 29 document purporting to “gift deed” the properties. The record submitted to the Board does not include affidavits from the witnesses who signed those documents, or any other statements or evidence that speak to Decedent’s state of mind, independence from influence, or understanding at the time the two documents were executed. There is no evidence in the record that the Superintendent sought to confirm Decedent’s intent, capacity, and freedom from undue influence, coercion or duress prior to making her decision. The Superintendent stated that she had “thoroughly reviewed all documents, appeals, decisions and case law” concerning the gift deed applications submitted by Decedent, but refers only to the June 27 Letter as evidence of Decedent’s intent. Superintendent’s 2014 Decision at 1 (unnumbered) (“The decedent clearly demonstrated his intent to convey his trust property to his children in his response dated June 27, 2005[,], requesting the completion of the transactions.”). The Superintendent also noted that BIA’s appraisal requirements for gift conveyances were satisfied by the “duly executed waivers of appraisal” submitted with the gift deed applications in April 2004. *Id.* The Regional Director’s decision does not refer to the June 27 Letter at all, but appears to rely on the original applications as evidence of Decedent’s intent. Decision at 1 (stating that the Crow Agency received applications for gift conveyances from the Decedent on April 22 and 23,

2004,<sup>13</sup> and that “[Decedent’s] intent was to gift convey to his children [Donna], [Lois] and [Steve].”).

Although the regulations applicable to conveyances by gift deed do not require witness affidavits, *see* 25 C.F.R. § 152.23 and § 152.25, this does not relieve BIA, as trustee, from the obligation to seek some comparable form of assurance where the grantor’s capacity and intent have been called into question, and BIA is asked to approve a gift conveyance posthumously. *See, e.g.*, 25 C.F.R. § 15.8 and § 15.9 (requirements for self-proved will and testator and witness affidavits). In this case, Decedent’s intent and mental competence were called into question both by his own actions in executing the will and by testimony provided during the probate proceedings. In *Willis v. Northwest Regional Director*, the Board clarified that when considering the posthumous approval of a gift conveyance, BIA “need not establish that the deceased grantor’s intent and understanding were ‘unequivocally clear’ or that the record is ‘absolutely clear.’” 45 IBIA at 167. While the Board concluded that BIA should “satisfy itself that the grantor’s intent and understanding were reasonably clear,” *id.*, this determination must still be adequately explained and supported by the record.

### C. Standing

Finally, in her answer brief, Donna argues that Jeffrey lacks standing to contest the approval of the gift conveyances. Donna’s Opposition Br. at 14. An appellant bears the burden to demonstrate that he has standing to bring an appeal. *Crest-Dehesa-Granite Hills-Harbison Canyon Subregional Planning Group v. Acting Pacific Regional Director*, 61 IBIA 208, 213 (2015). Accordingly, an appellant must make the required showings of injury, causation, and redressability, with respect to the BIA decision or action being appealed. *Cantrell v. Eastern Oklahoma Regional Director*, 62 IBIA 61, 67 (2015) (citing *Preservation of Los Olivos v. Pacific Regional Director*, 58 IBIA 278, 296-97 (2014)).

Appellants argue jointly that the Regional Director erred in affirming the approval of the gift conveyances. But even if we were to agree with Appellants’ argument, Lois would still be the sole beneficiary of Decedent’s entire estate. *Estate of Stevens*, 55 IBIA at 53. At least during this appeal, Appellants both appear to endorse this position.<sup>14</sup> Opening Br. at 9-10 (brief signed by Jeffery, stating that the 2004 will reflects Decedent’s intentions). Whether Decedent’s property is distributed solely through his 2004 will or

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<sup>13</sup> The record indicates that the Crow Agency received the gift deed applications on April 27, 28 and 29, and that the gift conveyance documents were executed on April 22 and 23, 2004. Supp. AR 11.

<sup>14</sup> Previously, Jeffrey challenged the approval of the will. *See id.*

through the gift conveyances, Jeffrey would not be a recipient. Thus, we agree that he has not demonstrated any injury resulting from the Decision. To the extent that Jeffrey intended to bring the appeal on his own behalf, we dismiss his claims.

### Conclusion

The Board's role is limited when we review BIA's exercise of discretion in approving, or disapproving, a gift conveyance after the death of the grantor. While we will not substitute our judgment for that of BIA, we must examine whether BIA's decision is in accordance with the law, is supported by the record, and is adequately explained. *Kent*, 45 IBIA at 174 (citing *Scrivener*, 44 IBIA at 150). In the present case, we cannot determine whether BIA considered whether Decedent, who was diagnosed as suffering from dementia, was competent at the time he purportedly signed by thumbprint the document BIA relied on as evidence of his intent to gift convey his trust property. Neither the Regional Director nor the Superintendent explain adequately the basis for their decision that Decedent's intent was clear, or that he was mentally competent, at the time he purported to direct BIA to complete the gift conveyances.

Despite the Board's instruction to consider the record developed by the IPJ in the probate of Decedent's estate, and specifically the transcript of the hearing on the inventory dispute held by the IPJ in April 2008, along with other evidence, in resolving the dispute, *see* 51 IBIA at 253 & n.4, the administrative record submitted to the Board does not include any part of the probate record other than the IPJ's Decision and Recommended Decision. The probate record may have included testimony, affidavits, or other evidence that would support BIA's decision in the matter now before us. We can only conclude from its absence in the record submitted to us that the probate record was not considered by the Superintendent or the Regional Director. Nor does the record we received include other evidence considered by BIA that would support the Regional Director's decision to approve retroactively the gift conveyances under these circumstances.

We vacate the Regional Director's decision affirming the Superintendent's decision to retroactively approve the gift conveyances because (1) the Regional Director does not address the issue of mental capacity that was central to both Appellant's challenge of the Superintendent's decision and to the inventory dispute addressed during the probate of Decedent's estate, nor does the record include evidence that the Regional Director considered the matter but chose not to address it, and (2) the record does not provide sufficient evidence to support the Superintendent's determination that Decedent "clearly intended" to complete the gift deed conveyance process initiated prior to his execution of a will that disposed of his estate in a manner incompatible with the gift deed applications.

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 vacates the Regional Director's May 19, 2014, decision, and remands the matter to the Regional Director to issue a new decision on whether to retroactively approve the gift conveyances.

I concur:

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// original signed  
Robert E. Hall  
Administrative Judge

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//original signed  
Steven K. Linscheid  
Chief Administrative Judge