INTERIOR BOARD OF INDIAN APPEALS

Michael and Lorraine Howe v. Acting Great Plains Regional Director,
Bureau of Indian Affairs

63 IBIA 155 (06/06/2016)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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MICHAEL AND LORRAINE HOWE, Appellants,	)	Order Affirming Decision
v.	)	Docket No. IBIA 15-076
ACTING GREAT PLAINS REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	)	June 6, 2016

Indian trust land may be sold or conveyed "by the Indian owner with the approval of the [Bureau of Indian Affairs (BIA)] or by [BIA] with the consent of the Indian owner." 25 C.F.R. § 152.17. BIA has the discretionary authority to retroactively approve an attempted inter vivos conveyance after an Indian landowner-grantor has died, but among other requirements, evidence of the grantor's intent to complete the conveyance and understanding of the transaction must be reasonably clear. In 2005, Meredith Dreke Irwin (Irwin) submitted an application to sell 148.61 acres of Fort Berthold Allotment No. 1108A to his son-in-law and daughter, Appellants Michael and Lorraine Howe. Irwin died in 2012. BIA's Acting Great Plains Regional Director (Regional Director) denied a request from Appellants for BIA to retroactively complete the conveyance, finding that BIA lacked authority to do so because Irwin had not executed a deed.[1]

We affirm the Regional Director's decision because the evidence in this case falls far short of what would be necessary to permit BIA to complete a conveyance by Irwin to Appellants. Irwin's application is evidence that he intended to initiate a sale to Appellants, but it does not purport to effectuate an actual conveyance, or grant BIA authority to complete a conveyance on Irwin's behalf. The application is not sufficient evidence that Irwin intended to complete a sale, nor is it evidence of his understanding of the transaction. The record contains no evidence that Irwin and BIA ever discussed the application, and

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[1] Letter from Regional Director to Appellants, Mar. 6, 2015 (Decision) (Administrative Record (AR) at 45).
BIA's administrative record was submitted in electronic form as a single Adobe PDF® document consisting of 435 pages, with a table of contents. We cite to the page number within the PDF document.

Irwin did not execute a deed of conveyance. Whether or not BIA should have "processed" Irwin's application during his lifetime, as Appellants contend, makes no difference to the outcome of this case because the evidence is insufficient to demonstrate that the legal prerequisites were satisfied to have permitted BIA to complete the conveyance.

Background

I. Irwin's Application for a Sale to Appellants

Irwin acquired the surface and mineral interests in Fort Berthold Allotment No. 1108A (Allotment) in 1951. Included in the Allotment were parcels described as Lots 1 & 2, and the E½NW¼, in Section 18, Township 148 North, Range 94 West, Fifth Principal Meridian, North Dakota, which collectively totaled 148.61 acres. The Allotment also included an additional 160 acres, for an overall total of 308.61 acres. *See* Deed to Restricted Indian Land, Feb. 9, 1951 (AR at 434).

In 2001, Irwin sold his surface interest in the 160-acre portion of the Allotment to the Three Affiliated Tribes of the Fort Berthold Reservation (Tribe) for $32,752, reserving the mineral interests. *See* Deed to Restricted Indian Land, July 18, 2001 (AR at 430-31). In 2004, Irwin sold his surface interest in 115.32 of the 148.61-acre portion of the Allotment to the Tribe for $18,100, retaining 33.29 acres in surface ownership and the mineral estate in the full 148.61 acres. *See* Deed to Restricted Indian Land, June 28, 2004 (AR at 426-27). For each sale, the transaction was completed by Irwin's execution of a deed of conveyance and approval by BIA. *See, e.g., id*.

On September 13, 2005, Irwin completed and signed a BIA Application for Patent in Fee or For the Sale of Indian Land (Application), stating that it was for the "sale to" Appellants of "Lots 1 & 2, E2NW4 18-148-94 148.61." AR at 399-400. Appellants witnessed Irwin's filing of the application with BIA, and BIA's acknowledgment of receipt. Affidavit of Michael V. Howe, Oct. 22, 2014 (M. Howe Affidavit (Aff.)), ¶ 5 (AR at 99-100); Affidavit of Lorraine K. Howe, Oct. 22, 2014 (L. Howe Aff.), ¶ 5 (AR at 104-05). Appellants state that they paid Irwin "a sum [of] money as consideration for the sale," and that it was their understanding "that the *Application* would be processed by [BIA] and there was nothing further for [Irwin or Appellants] to do to complete the *Application*." M. Howe Aff. ¶¶ 6, 8; L. Howe Aff. ¶¶ 6, 8.

On the same day that he completed the Application, Irwin completed a second application, to give 5 acres of the Allotment to another daughter, Clarine, for a homesite. AR at 278-79. The record also contains an undated consent form signed by Irwin for a homesite lease to Michaela Howe (Irwin's granddaughter), and a Waiver of Estimate of Value signed by Irwin, dated "5-3-12," for a gift deed to Michaela. AR at 282, 285. No application or gift deed to Michaela was ever produced.

There is no evidence in the record that Irwin ever contacted BIA regarding the Application for a sale to Appellants following his submission of the Application. Nor is there any evidence in the record that BIA and Irwin ever discussed the Application, either when he filed it or afterward.[2] Appellants state that to the best of their knowledge, Irwin's intent was to convey the property described in the Application to them, and his "intent continued until the time of his passing." M. Howe Affidavit ¶ 20; L. Howe Affidavit ¶ 20.

II. The Probate Inventory Challenge, Referral, and BIA's Decision Not to Retroactively Complete the Sale Transaction

Irwin died on September 3, 2012. BIA included in the inventory of his trust estate the mineral interest in 148.61 acres (Lots 1 & 2, and E½NW¼), and surface interest in 33.29 acres (apparently a portion of Lots 1 & 2). During the probate proceedings, family members submitted the Application to the probate judge, along with documents relating to possible gift conveyances to Clarine and Michaela. The probate judge construed the submissions as an inventory challenge, and as required by the probate regulations, referred the dispute to BIA for a decision. *See* 43 C.F.R. § 30.128; Notice of Referral of Inventory Challenge, May 16, 2013 (AR at 277); *see also Estate of Meredith Dreke Irwin*, 58 IBIA 223 (2014) (dismissing "petition for rehearing" filed by Appellants concerning inventory dispute and referring dispute to BIA for a decision).

The Superintendent of the Fort Berthold Agency (Superintendent), BIA, notified interested parties of the inventory dispute, summarized the evidence available to BIA, and provided parties an opportunity to submit additional evidence for consideration. Notice, July 10, 2014 (AR at 125). On August 22, 2014, the Superintendent issued a decision concluding that BIA lacks authority to "effectuate a conveyance of land based only on the application," because the application is not a conveyance and is only evidence of initial intent, not sufficient to demonstrate intent to finalize the conveyance.[3] Letter from Superintendent to Heirs of Meredith Dreke Irwin, Aug. 22, 2014 (Superintendent's Decision) (AR at 246).

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[2] On May 31, 2012, BIA sent a letter to Irwin to determine if he was interested in proceeding with the sale, but Appellants contend that Irwin did not receive the letter. Although there is conflicting evidence in the record whether Irwin had access to his mail during this time period, we assume, for purposes of deciding this appeal, that he did not receive BIA's letter. *See* Letter from Acting Superintendent to Irwin, May 31, 2012 (AR at 425); M. Howe Aff. ¶ 16; L. Howe Aff. ¶ 16.

[3] The Superintendent addressed all three possible conveyances, *see supra* at 156, concluding that BIA had no authority to complete any of them.

Appellants appealed to the Regional Director, and the Regional Director affirmed the Superintendent's decision. Decision, Mar. 6, 2015 (AR at 45).

III. Arguments on Appeal to the Board

Appellants argue that BIA was at fault in not processing Irwin's Application, which, they contend, resulted in the property erroneously being included in the estate inventory. Appellants also argue that BIA improperly "shifted the burden" to Irwin "to renew his application" when, in 2012, BIA attempted to contact Irwin regarding the Application. Appellants ask the Board to approve the conveyance, vacate BIA's decision, and remand with instructions to remove the property described in the Application from the inventory of Irwin's estate, and to prepare and approve a deed to Appellants. Appellants' [Opening] Brief (Br.), July 1, 2015, at 9.

The Regional Director argues that even if BIA committed an error in not processing Irwin's Application during his lifetime, Appellants have not shown that the alleged error was responsible for the transaction not being completed because reasonable doubt exists regarding Irwin's intent. The Regional Director also argues that the Application, standing alone, does not constitute an instrument of conveyance, and that in the absence of a deed executed by Irwin, there is no conveyance that BIA can approve. Appellee's Br., July 31, 2015, at 12-13.

Discussion

I. The Board Does Not Have Authority to Retroactively Approve a Conveyance, Regardless of Whether BIA Erred By Not Processing an Application During an Indian Owner's Lifetime.

As an initial matter, we clarify the scope of our authority and the standard of review that we apply to a regional director's decision in an inventory dispute referred to BIA by a probate judge. Before 2008, inventory disputes that arose during a probate proceeding were addressed by probate judges through a standing order issued by the Board in *Estate of Douglas Leonard Ducheneaux*, 13 IBIA 169 (1985). Under the *Ducheneaux* procedures, probate judges could determine whether an Indian decedent's attempt to convey property should be approved and completed after death, thus removing the property from the estate inventory. BIA was treated as a party to the *Ducheneaux* proceedings, but it was for the probate judge to issue a recommended decision whether or not to complete the transaction. *Id*. at 177-78. Under the *Ducheneaux* procedures, a party seeking "correction" of an estate inventory had to establish that BIA committed an error or omission that was responsible for the property being erroneously omitted from or included in the decedent's estate. *See Estate of Aaron Francis Walter*, 16 IBIA 192, 198 (1988).

In 2008, the *Ducheneaux* procedures were abolished by regulation, and inventory disputes that arise during a probate proceeding must now be referred to BIA for a decision. *See* Final Rule, 73 Fed. Reg. 67256, 67294, Nov. 13, 2008 (codified as amended at 43 C.F.R. § 30.128). BIA's decision is then subject to the administrative appeal procedures in 25 C.F.R. Part 2 (appeals within BIA) and 43 C.F.R. Part 4 (appeals to the Board).

Because the *Ducheneaux* procedures no longer apply, the authority to retroactively approve (or not approve) a conveyance, after an Indian landowner's death, now clearly rests solely with BIA, subject only to the Board's authority to review BIA's decision under the normal administrative appeal process. Thus, to the extent Appellants seek to have this case reviewed under the standard of review applicable to a *Ducheneaux* proceeding, which may have implied that the Board had additional authority, we clarify that the *Ducheneaux* procedures, and the accompanying Board-created standard, do not apply.[4] Whether or not BIA committed an error by failing to process a conveyance request by an Indian landowner, while the landowner is alive, may be a factor for BIA to consider, along with other evidence, in exercising its discretion. But the Board has no authority to directly approve a conveyance.

II. The Standard of Review for Reviewing a BIA Discretionary Decision

Although the Board has recognized that, in certain cases, BIA has the authority to retroactively approve a conveyance of trust or restricted land, after the death of the Indian grantor, *see Wishkeno v. Deputy Assistant Secretary – Indian Affairs (Operations)*, 11 IBIA 21, 32 (1982), that authority is constrained by several legal prerequisites. In determining whether or not to approve a gift deed retroactively, BIA must satisfy itself that the grantor's intent to convey the property and understanding of the conveyance were "reasonably clear." *Willis v. Northwest Regional Director*, 45 IBIA 152, 167 (2007). If there is insufficient evidence in the record to make such a finding, BIA may not complete the conveyance.

The Board reviews sufficiency-of-evidence and legal issues *de novo*.[5] *See generally Barber v. Western Regional Director*, 42 IBIA 264, 266 (2006); *Aloha Lumber Corp. v. Alaska Regional Director*, 41 IBIA 147, 156-57 (2005). The standard for reviewing BIA decisions concerning retroactive posthumous approval of conveyances of trust or restricted land is the same regardless of whether the dispute arises during a probate proceeding and is referred to

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[4] By making this clarification, we do not suggest that the outcome of this case would have been different under the *Ducheneaux* procedures; it would not have been.

[5] Where the evidence is sufficient to permit BIA to retroactively approve a conveyance, as an exercise of discretion, we apply a deferential standard, i.e., we do not substitute our judgment for BIA's.

BIA, or arises outside the probate process. *See Kent v. Acting Northwest Regional Director*, 45 IBIA 168, 174 (2007); *Stevens v. Acting Rocky Mountain Regional Director*, 62 IBIA 286, 291-92 (2016) (quoting *Kent*).

III. The Evidence Was Insufficient in This Case to Permit BIA to Complete the Conveyance.

The Regional Director correctly concluded that the evidence in this case was insufficient to permit BIA to complete the conveyance requested by Appellants. The Application is some evidence of Irwin's initial and *prospective* intent to convey the property through a sale to Appellants upon approval of the Application. But the Application does not contain words of conveyance, nor does it contain language that purports to grant consent to BIA to complete the transaction without further involvement by Irwin. *See Adcox v. Acting Alaska Regional Director*, 61 IBIA 34, 41 (2015) ("[S]imply 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.").

Moreover, the Application, standing alone, did not constitute sufficient evidence to permit BIA to make a finding that Irwin's intent to complete the sale, and his understanding of the proposed transaction, were "reasonably clear." As noted, there is no evidence that Irwin actually discussed the Application with BIA, or that anyone from BIA discussed the Application with Irwin. BIA may have waited nearly 7 years before attempting to contact Irwin regarding the Application, *see* Appellants' Opening Br. at 10, but it is also true that Irwin never pressed BIA to take action on the Application.[6] Appellants contend that they paid Irwin "a sum" of money, but his acceptance of a payment would not have precluded him from changing his mind, e.g., after discussing the sale with BIA, after reviewing an appraisal, or for any other reason. *See, e.g.*, *Adcox*, 61 IBIA at 36 (landowner accepted payment but then changed her mind regarding a sale); *In re Estate of James Jones, Sr.*, 60 IBIA 102, 102-04, 108-09 (2015) (landowner's execution of sales agreement and acceptance of payment insufficient to demonstrate that landowner granted BIA consent to complete a transaction).

In addition, given Appellants' failure to disclose the "sum" they contend they paid for the property, BIA would have had no basis to conclude that the sale was "for not less than the appraised fair market value." *See* 25 C.F.R. § 152.25(a). And if Irwin intended to

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[6] Although BIA's trust duty is to the Indian landowner, and not a prospective grantee, *see Estate of Evan Gillette, Sr.*, 22 IBIA 133, 138 (1992), nothing prevented Appellants from seeking to ascertain the status of the application, or asking Irwin to do so.

sell the property to Appellants for less than fair market value, *see id*. § 152.25(d), he did not complete the required waiver of estimate of value. *See* 25 U.S.C. § 2216(b)(1)(B). Thus, even apart from the threshold deficiencies described above, the lack of evidence of the amount paid and the absence of an appraisal, or a waiver of an estimate of value, further support the Regional Director's finding that BIA lacked authority to complete the sale to Appellants. *See also* Superintendent's Decision at 4 (unnumbered) n.5 (AR at 249) (BIA without authority to waive the appraisal requirement). It is not even clear what property Irwin intended to sell to Appellants, or what they contend they paid for. The 148.61 acres described in the Application included Irwin's ownership of the mineral interest in the entire 148.61-acre portion of the Allotment, but also his surface ownership of 33.29 of those 148.61 acres. If Irwin intended to include surface interests in the sale, he could not have included the full 33.29 acres without creating a conflict with his contemporaneous application to give a 5-acre parcel to Clarine for a homesite.[7]

In their brief to the Regional Director, Appellants asserted that there is "no doubt" as to Irwin's intent to convey the land to Appellants, "as evidenced by the Affidavit of the then-realty officer, Janice Smith." Appellants' Statement of Reasons, Oct. 22, 2014, at 9 (AR at 86, 94). No citation to any such affidavit was provided, nor was an affidavit by Smith attached to Appellants' brief. In their opening brief to the Board, Appellants assert that "BIA Realty Officer, Janice Smith, was aware of [Irwin's] intent and confirms [Irwin's] intent continue[d] until his death." Opening Br. at 10. Again, Appellants provide no citation to any document in the record or to any exhibit to support their assertion. In their reply brief to the Board, Appellants suggest that a "field hearing" would be appropriate "[i]f there are factual questions that would be resolved by testimony from former BIA employee, Janice Smith, the employee who received the *Application*." Appellants' Reply Br., Aug. 18, 2015, at 4. The Board ordinarily does not consider arguments raised for the first time in a reply brief, *see Aloha Lumber*, 41 IBIA at 161, and we see no reason to do so here. In any case, Appellants make no proffer of the substance of any testimony they contend Ms. Smith could offer, even though Appellants aver that they witnessed BIA's acknowledgment of receipt of the application. Even assuming that Ms. Smith assured Irwin and Appellants that BIA "would process" the Application, such evidence would not cure the overall dearth of evidence in this case.

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[7] Appellants' declarations of their "understanding," based on their "information and belief," that Irwin intended to complete the conveyance and that his intent continued to his death, have little if any probative value. No evidentiary foundation for Appellants' understanding, other than the Application itself, is identified. Appellants do not even describe *their own* interactions with Irwin regarding the sale, e.g., as evidence of his intent and understanding of the proposed transaction.

This case is readily distinguishable from the Board's decision in *Chee v. Navajo Regional Director*, 57 IBIA 54 (2013), relied on by Appellants. In *Chee*, it was undisputed that the deceased Indian landowner had executed a deed of conveyance, and the record showed the decedent's "consistent intent, over several years, to convey the land by gift deed." *Id*. at 60. Similarly, although decisions by probate judges are not precedential, the decision in *Estate of Lyle Thomas Smith*, Probate No. P000047576IP, Aug. 21, 2008, is also distinguishable. In *Smith*, as in *Chee*, the decedent had executed a deed.

Appellants also rely on the Board's decision in *Estate of Mary Dorcas Gooday*, 35 IBIA 79 (2000), in which the Board ordered BIA to complete a conveyance by the decedent. In *Gooday*, there was no evidence that the decedent had executed a deed. But there was substantial evidence of interaction between the decedent and BIA, and evidence that she revoked her will based on a specific assurance by BIA that her gift deed application would be approved. *Id*. at 80-81, 83-84. On the specific factual record present in *Gooday*, the Board concluded that the gift deed application and the decedent's testamentary acts were inextricably intertwined, and—applying the former *Ducheneaux* procedures—directed BIA to approve a gift deed. The gulf between the evidentiary foundation in *Gooday* and the evidence in the present case is substantial, and thus *Gooday* does not aid Appellants.

BIA's authority to retroactively approve a conveyance after the death of an Indian landowner-grantor only arises if there is sufficient evidence, as a threshold matter, to permit BIA to make the necessary findings to support such a decision. In this case, the Regional Director correctly concluded that the evidence fell short, and thus BIA lacked authority to complete the conveyance.

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 March 6, 2015, decision.

I concur:

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Steven K. Linscheid	Robert E. Hall
Chief Administrative Judge	Administrative Judge