



INTERIOR BOARD OF INDIAN APPEALS

Barbara E. Guerrero v. Northwest Regional Director, Bureau of Indian Affairs

63 IBIA 346 (09/15/2016)



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

BARBARA E. GUERRERO,)	Order Affirming Decision
Appellant,)	
)	
v.)	
)	Docket No. IBIA 15-075
NORTHWEST REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	September 15, 2016

Barbara E. Guerrero (Guerrero or Appellant) appealed to the Board of Indian Appeals (Board) from a March 16, 2015, Inventory Determination (Decision) by the Northwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA), on an inventory dispute concerning the trust estate of Appellant’s father, Uriah “Red” Alexander (Decedent).¹ The Regional Director determined that a house, which is located on trust property known as Umatilla Allotment 526-A (Allotment 526-A), is not held by the United States in trust and therefore should not be included in BIA’s inventory of Decedent’s trust estate. Appellant argues that the Regional Director violated her due process rights by not affording her an opportunity to present evidence and arguments, and that he erred in concluding that the house is not trust property.

We agree that the Regional Director violated Appellant’s due process rights, but we nevertheless affirm the Regional Director’s decision because this appeal has cured that violation and because Appellant has not shown that the Regional Director’s conclusion was in error. The only evidence that Appellant identifies to support her argument that the house is trust property—a probate order from 1956 and a 2007 appraisal prepared for BIA and the Umatilla Tribe—is insufficient for the Board to reach that conclusion, and Appellant provides no basis for us to remand the matter to BIA for further proceedings and issuance of a new decision.

¹ Decedent was a Umatilla Indian. The probate number assigned to Decedent’s case in the Department of the Interior’s probate tracking system, ProTrac, is No. P000030084IP.

Background

Guerrero is one of five children and heirs of Decedent, who died intestate (i.e., without a will) on December 29, 2004. Order Determining Heirs, Dec. 3, 2010, at 1 (Administrative Record (AR) 30). Among Decedent's trust property at the time of his death was an interest in Allotment 526-A. *See id.* at 2. During the hearing held for the probate of Decedent's trust estate, Guerrero's attorney asserted that the house located on Allotment 526-A is trust property, that the house had fallen into disrepair, and that BIA should pay for the repair costs as trustee. Hearing Transcript, Aug. 17, 2010, at 13 (AR 11).

In the Order Determining Heirs, Administrative Law Judge (ALJ) Richard D. Hines concluded that, because BIA's inventory of the trust estate did not include the house, he lacked authority "to determine property rights associated with said house." Order Determining Heirs at 2. The ALJ then received an earlier-dated letter from Guerrero's attorney asserting that the house was wrongly omitted from BIA's inventory, and asking that the matter be referred to BIA for resolution pursuant to 43 C.F.R. § 30.128(b).² Letter from Morgan to ALJ, Dec. 2, 2010 (AR 27). As support for her position that the house was held in trust, Guerrero cited a "[C]onsultation [R]eport completed at the BIA's request which recommends market rent for the *dwelling*."³ *Id.* (emphasis added); *see* Consul[t]ation Report re: Allotment 526 A, Nov. 7, 2007 (Consultation Report) (AR 32). The ALJ treated the letter as a petition for rehearing and referred the inventory dispute to BIA. Decision on Petition for Rehearing, Jan. 26, 2011, at 1 (unnumbered) (Rehearing Order) (AR 27).

BIA's Umatilla Agency Superintendent (Superintendent) responded that "[a]t the time of the decedent's death, the Department of Interior generally considered permanent improvements to trust property to be part of the trust estate," and therefore "the home of the decedent should be considered part of the trust estate." Memorandum from

² Section 30.128 provides in relevant part that "when, during a probate proceeding, an interested party alleges that the estate inventory prepared by BIA is inaccurate and should be corrected[,] . . . the [probate judge] will refer the matter to BIA for resolution under [BIA's applicable substantive regulations] and [BIA's] appeal procedures at 25 CFR part 2." 43 C.F.R. § 30.128(a)&(b).

³ A cover letter from the appraiser who prepared the Consultation Report states that the report was requested by the Confederated Tribes of the Umatilla Indian Reservation (Tribe). Letter from Nicholson to Tribe, Dec. 2, 2007 (AR 32). The letter further states that Allotment 526-A comprises 17.78 acres and that the "assignment from BIA was to determine the market rent on 1 acre more or less with the 988 square foot dwelling." *Id.*

Superintendent to ALJ, Mar. 7, 2011 (AR 23). The Superintendent's memorandum was addressed only to the ALJ, and did not include a notice of appeal rights for interested parties. The ALJ construed the Superintendent's memorandum as a request to reopen the estate, disseminated it to interested parties, and invited BIA to submit an amended certified inventory "[t]o the extent that the Northwest Region [of BIA] concur[red] with the Superintendent's determination." Order Disseminating Request to Reopen Estate, Mar. 17, 2011 (AR 23).

After 3 months passed without a BIA response, Guerrero informed the ALJ of her "understand[ing] that BIA may be reconsidering its position and therefore has not submitted an amended certified inventory," and she requested that the ALJ again refer the inventory dispute to BIA for resolution. Letter from Morgan to ALJ, June 17, 2011, at 1 (AR 17). The ALJ then ordered BIA to provide a status report within 14 days. Order Requesting Status Update, June 22, 2011 (AR 22). BIA was again nonresponsive. Guerrero requested "an order requiring the BIA to submit the amended inventory immediately and barring the BIA from asserting now or in the future that the home is not trust property." Letter from Morgan to ALJ, July 19, 2011 (AR 17). Additionally, on October 10, 2011, Guerrero requested that the ALJ issue an order modifying the inventory to include the house, and a final order distributing the remaining property in the estate. Request to Issue Order Modifying Inventory and Close Estate at 1-2 (AR 18). As grounds for the requested modification order, Guerrero asserted that the Superintendent had already determined that the house is part of Decedent's trust estate. *Id.* at 1.

The ALJ then reopened the estate and declared that Decedent's trust estate inventory "is modified" to include the house located on Allotment 526-A. Order Reopening, Dec. 5, 2011, at 1-2 (unnumbered) (Reopening Order) (AR 17). The ALJ reasoned that, "[i]n the absence of any response from the Northwest Region, this forum concludes that the Region has no objection to [the Superintendent's] determination that the house at issue is trust property and should be considered a part of the decedent's trust estate." *Id.* at 2 (unnumbered).

BIA appealed the Reopening Order to the Board. We held that the Superintendent's memorandum was not a final BIA decision resolving the inventory dispute; the Northwest Regional Office's failure to respond to the ALJ could not make the Superintendent's memorandum something that it was not; and, to the extent that the Reopening Order could be construed as modifying the inventory on the ALJ's own authority, he lacked jurisdiction to do so. *Estate of Uriah "Red" Alexander*, 59 IBIA 159, 161-62 (2014). We therefore vacated the Reopening Order and referred the matter to BIA's Northwest Regional Director (Regional Director) for issuance of a final decision on the merits of the inventory dispute. *Id.* at 164.

One month after we remanded the matter to BIA, Guerrero submitted a Freedom of Information Act (FOIA) request to the Solicitor's Office for title documents, title status reports, mortgages or deeds of trust, and documentation regarding the construction and ownership of any residence upon Allotment 526-A. *See* Letter from Morgan to King, Nov. 7, 2014 (FOIA Record at 1).⁴

Before providing the responsive FOIA documents to Appellant, and without soliciting additional arguments and evidence from her, the Regional Director issued his Decision. Decision, Mar. 16, 2015 (AR 3). Relying on a record that largely excluded the FOIA documents, the Regional Director found “no factual or legal basis” to include the house in Decedent's trust estate. *Id.* at 4. He explained that the Superintendent's memorandum “was issued inappropriately” and that “BIA does not have a current policy, nor did it have such a policy in either 2004 or 2011, stating that permanent improvements are considered trust property.” *Id.* at 5. He also explained that the Consultation Report on which Appellant relied “simply reflects an appraised rental rate for a dwelling on the parcel. . . . [T]he report did not reflect that title was held in trust by the United States nor could it bestow trust status upon any house.” *Id.* And the Regional Director found that “[t]he United States has not exerted control over, or otherwise evidenced any ownership over the house.” *Id.*

Appellant appealed the Regional Director's decision to the Board. After Appellant received the FOIA documents, she filed an opening brief, arguing that a 1956 probate order “conveyed to” Decedent “his home,” and that numerous leases found in the FOIA production also support her argument that the house is trust property. Opening Brief (Br.), Aug. 21, 2015, at 2. The Regional Director filed an answer brief, Appellant filed a reply brief, and the Regional Director filed a sur-reply brief.

Discussion

The Board reviews legal issues and sufficiency-of-evidence issues *de novo*. *Howe v. Acting Great Plains Regional Director*, 63 IBIA 155, 159 (2016). The determination of whether the house is held in trust is a mixed question of law and fact, and is not a discretionary determination. *See generally Village of Hobart, Wisconsin v. Midwest Regional*

⁴ In this appeal, the Regional Director submitted documentation of Guerrero's FOIA request, and the documents that BIA provided in response to that request on April 22, 2015, on compact disc as Appendix C to BIA's Answer Brief dated January 19, 2016. We refer to the location of these documents as “FOIA Record” and cite to the PDF page number of the referenced document.

Director, 57 IBIA 4, 14 n.15 (2013) (holding that the question of whether BIA had authority to acquire land in trust was a mixed question of law and fact, for which the Board may “review the evidence, the arguments of the parties, and the [r]egional [d]irector’s decision, and determine [the issue] as a matter of law”). It is Appellant’s burden on appeal to prove that the Decision is in error. *See DeFoe v. Acting Midwest Regional Director*, 58 IBIA 1, 7 (2013). That burden is not met with simple disagreement or bare assertions concerning BIA’s decision. *See id.*; 43 C.F.R. § 4.322(a) (“Each appeal must contain a written statement of the errors of fact and law upon which the appeal is based.”).

On appeal, Appellant argues that BIA violated her due process rights and that the Decision should therefore be vacated and the matter remanded to BIA for further proceedings and issuance of a new decision. Opening Br. at 1-2; Reply Br., Feb. 25, 2016, at 5 (unnumbered). Appellant also argues, on the merits, and based on the Regional Director’s record and the additional FOIA documents, that the Regional Director erred in determining that the house is not held in trust and should not be included in Decedent’s estate inventory. Opening Br. at 2-3.

Having reviewed the entire record on appeal, and the arguments presented on appeal by Appellant in support of her contention that the house is trust property, we conclude that Appellant has failed to meet her burden to show that the house is held in trust by BIA, or that further proceedings are warranted. We do agree that BIA violated Appellant’s due process rights by issuing the Decision without considering the documents that Appellant contends are relevant, and without affording Appellant an opportunity to present her arguments. But Appellant has been provided the opportunity to fully present her arguments, and identify all evidence on which she seeks to rely, on appeal, and the Board has reviewed those arguments and that evidence *de novo*. Thus, under the specific circumstances presented here, the Regional Director’s violation of her due process rights was cured through her right of appeal.

I. The Consultation Report Is Insufficient Evidence That the House Is Held in Trust

“A house located on trust land cannot simply be presumed to be trust property.” *Smartlowit v. Northwest Regional Director*, 50 IBIA 98, 108 (2009). In the proceedings before the ALJ, BIA, and the Board, Appellant cited the Consultation Report as evidence that the house is held in trust. *See, e.g.*, Opening Br. at 2-3. The Consultation Report estimates the market rent for the “988 Square Foot dwelling located on Allotment 526 A.” Consultation Report at cover page. The stated “purpose” of the appraisal is for the Tribe and BIA to obtain a current market rent opinion for the dwelling. Consultation Report at 5. The “intended use” of the opinion “is for BIA to use the opinion in their trust property management actions and for their trust obligations to the land owners.” *Id.* Appellant argues that the intended use shows that BIA considered the house to be held in trust, or

that she should at least “have an opportunity to further inquire . . . why the BIA requested an appraisal of the rental value of property which the BIA now maintains is separate from the trust estate.” Opening Br. at 3.

The Regional Director discussed the Consultation Report in his Decision, explaining that while it reflects an appraised rental rate for the house, it does not describe the title to the house as being held in trust “nor could it bestow trust status upon any house.” Decision at 5. The Regional Director maintains that position on appeal. See Answer Br., Jan. 19, 2016, at 6. While BIA’s rationale for obtaining an appraisal of the market rent of the house remains unclear, *see id.*, whatever BIA’s motivation was at the time, we agree that the Consultation Report does not show that the house is trust property. See *Thompson v. Acting Southern Plains Regional Director*, 54 IBIA 125, 131-32 (2011) (vacating and remanding BIA’s assessment of back rent, because, although the assessment was based on an appraisal performed by the Office of Appraisal Services within the Office of Special Trustee for American Indians that included the value of a home, the record did not support a determination that the home itself was trust property).

We have previously instructed that BIA lacks authority to lease non-trust improvements. See *Smartlowit*, 50 IBIA at 106-09 (vacating and remanding BIA’s assessment of rent due for an allotment, because the assessment included the rental value of a home and there was no showing that the home was held in trust).⁵ Accordingly, in *Smartlowit*, we advised that “if the house is not part of the trust estate, then the valuation for purposes of a Homesite lease for the trust property should value the land in the absence of value attributable to the house.” *Id.* at 108 n.13; *see also Grimes v. Acting Pacific Regional Director*, 59 IBIA 251, 256 (2014) (vacating and remanding the regional director’s instructions for the superintendent to obtain an appraisal of the rental value of a house, because the record was not sufficient to determine the ownership of the house or to conclude that BIA had jurisdiction to assess trespass damages for use of the house). Thus, we conclude that even though the Consultation Report was apparently prepared at the direction of BIA, and reflects an appraised rental rate for the house, it would not support a determination that the house is trust property.

⁵ On appeal, Appellant appears to seek a determination that the house is trust property so that she can request that “BIA as trustee administer the residential leasing of the home to produce income for the owners pursuant to 25 C.F.R. Part 162, Subpart C,” because, under *Smartlowit*, “BIA cannot lease the home on behalf of the owners if the home is not trust property.” Reply Br. at 4 (unnumbered).

II. Appellant's Additional Arguments and Evidence on Appeal Would Not Support a Determination That the House Is Held in Trust

On appeal, Appellant argues that BIA violated her due process rights by issuing the Regional Director's decision before providing her with the documents responsive to her FOIA request and without giving her an opportunity to provide additional argument and evidence relevant to the inventory dispute. Opening Br. at 1-2; Reply Br. at 3-5 (unnumbered). We agree. In *Estate of Marie A. Wilkie*, we “strongly encourage[d] BIA to consult directly” with the appellant prior to issuing its inventory determination, “to ensure that BIA fully underst[ood] and therefore c[ould] fully address” the appellant's concerns. 56 IBIA 211, 217-18 (2013). In *Estate of James Jones, Sr.*, we stated that a referral of an inventory dispute to BIA “may require BIA to allow interested parties to submit briefs and any additional evidence they believe must be considered,” and “address[] the arguments and evidence in a decision.” 51 IBIA 132, 137-39 (2010). Here, the obvious purpose of Appellant's FOIA request was to obtain documents that might be relevant to the inventory dispute. Equally obvious should have been her interest in being afforded an opportunity to review those documents and present arguments *before* the Regional Director issued his decision. But because the Board is reviewing the record and argument on appeal *de novo*, the appeal has provided her all the process she is due.

As we have explained, the question of whether the house is trust property is a mixed question of fact and law, and is not a discretionary decision. *See supra* at 349-50. Where, as here, the appellant raises an issue of law and does not challenge a BIA official's exercise of discretion, the Board's *de novo* review of the arguments and evidence may “cure” a violation of the appellant's due process rights. *See South Dakota v. U.S. Dep't of the Interior*, 787 F. Supp. 2d 981, 998 (D.S.D. 2011). Appellant had the opportunity in this appeal to brief the issue and identify all evidence, including the FOIA documents, upon which she relies to argue that the house is held in trust. We have considered her arguments and evidence, thereby curing the alleged prior violation of Appellant's due process rights. Appellant bears the burden on appeal to demonstrate that the Decision is in error, and she fails to do so. *See DeFoe*, 58 IBIA at 7.

On appeal, Appellant cites several FOIA documents as evidence that the house is trust property. Appellant cites a 1956 probate “order approving the decedent's mother's will, which conveyed to decedent Allotment 526-A and his home.” Opening Br. at 2; *see* FOIA Record at 22-25 (Order Approving Will, *Estate of Evelyn Alexander (Hin-hin-quin)*, Probate No. E-135-56, June 18, 1956). She also cites “numerous leases.” Opening Br. at 2. But Appellant does not explain how the probate order, from the estate of Decedent's mother, Evelyn Alexander, or the leases—which she does not specify—would support a determination that the house is held in trust; she states only that they “are relevant to whether decedent's home is part of th[e] trust estate,” and that the Regional Director failed

to consider the documents before issuing the Decision. *Id.*; Reply Br. at 4 (unnumbered). The 1956 probate order appears to simply repeat the terms of Evelyn’s will, which by its terms (and those of the probate order) stated that the house was owned by Uriah Alexander, implying that it was *not* owned by Evelyn and not actually part of her estate, and thus not “conveyed” by the probate order. *See* FOIA Record at 24 (Order Approving Will); FOIA Record at 26 (Last Will and Testament of Evelyn Alexander, June 30, 1954). BIA’s inventory of Evelyn’s estate does not list the house, and there is no evidence that BIA ever understood the probate order as conveying the house. Moreover, the leases are *farming* leases approved by BIA—not leases of Decedent’s house. Appellant’s bare assertions concerning the evidence in the FOIA record are insufficient to satisfy her burden. *See DeFoe*, 58 IBIA at 7. Because we conclude that the documents cited by Appellant are insufficient to support a determination that the house is trust property, we find no basis to remand the matter to BIA for further consideration and issuance of a new decision.

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 Regional Director’s March 16, 2015, decision.

I concur:

// original signed
Thomas A. Blaser
Administrative Judge

//original signed
Steven K. Linscheid
Chief Administrative Judge