



INTERIOR BOARD OF INDIAN APPEALS

Arrow Weinberger v. Rocky Mountain Regional Director, Bureau of Indian Affairs

46 IBIA 167 (01/11/2008)



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

ARROW WEINBERGER,)	Order Affirming Decision
Appellant,)	
)	
v.)	
)	Docket No. IBIA 05-106-A
ROCKY MOUNTAIN REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	January 11, 2008

Appellant Arrow Weinberger appeals from an August 24, 2005, decision by the Rocky Mountain Regional Director (Regional Director), Bureau of Indian Affairs (BIA), affirming the December 9, 2004, letter of the Fort Peck Agency Superintendent (Agency; Superintendent), BIA, in which the Superintendent advised Appellant that his interest in a 40-acre portion of Fort Peck Allotment No. 956 (40-acre parcel),¹ located in Montana, was sold in May 1975 to Florence Mae Weinberger King (King). On appeal, Appellant also seeks to challenge the probate decision issued in the estate of Good Cloud Eagle Bear (Eagle Bear) with respect to the inheritance or devise of the 40-acre parcel. We affirm the Regional Director's decision not to set aside the sale of the 40-acre parcel, but we do so on the grounds that Appellant's challenge comes too late. In addition, we dismiss Appellant's challenge to the probate decision entered in Eagle Bear's trust estate both because it is raised for the first time on appeal to the Board of Indian Appeals (Board) and because, even if it had been raised before BIA, BIA would lack jurisdiction.

¹ According to the probate records of the original allottee, Allotment No. 956 originally consisted of two parcels, one containing 320 acres, and another, which is the subject of this appeal, containing 40 acres. The status of the 320-acre parcel is not entirely clear and not relevant to this appeal. To avoid confusion, we will refer in this decision to the 40-acre portion of the allotment as the "40-acre parcel," rather than "Allotment No. 956."

History

In 1938, Appellant was born to Isabelle Weinberger Youpee (Youpee) and then legally adopted by Youpee's mother, Ida Turning Bear Weinberger Walker (Walker). Eagle Bear, the original allottee of the 40-acre parcel, was Walker's mother and Youpee's grandmother. When Eagle Bear's estate was probated following her death in 1943, her last will was approved and her estate descended to her designated devisees. *Estate of Good Cloud Eagle Bear*, Probate Nos. 22218-43 and 6530-45. Relevant to Appellant's appeal, Youpee, King,² and Walker were among Good Eagle's devisees and each inherited a 1/10 interest in the 40-acre parcel.³ Appellant was not mentioned in Eagle Bear's will and, therefore, did not inherit an interest in the 40-acre parcel from her.

When Walker's Indian trust estate was probated in 1954, Appellant, King, and Youpee each inherited a 1/7 interest in Walker's 1/10 interest in the 40-acre parcel. *Estate of Ida Turning Bear Weinberger Walker*, Probate No. C-158-54. Therefore, Appellant, King, and Youpee each inherited a 1/70 interest from Walker in the parcel. Because Youpee and King had also inherited a 1/10 interest in the parcel as one of Good Eagle's devisees, they each then owned a 4/35 interest in the 40-acre parcel ($1/70 + 1/10 = 8/70$ or $4/35$).

In 1974, Youpee's Indian trust estate was probated. Youpee's widower inherited 1/3 of her estate while their 13 biological children, including Appellant, shared equally in the remainder. *Estate of Isabelle Weinberger Youpee*, Probate No. IP BI 223C 74. Relevant to the 40-acre parcel, Appellant inherited a 2/39 interest in Youpee's 4/35 interest in the parcel, i.e., an 8/1365 interest. The combination of Appellant's inherited interests in the 40-acre parcel from Walker (1/70) and Youpee (8/1365) gave Appellant a total of 550/27300 interest in the 40-acre parcel.

Sometime prior to January 11, 1974, the Superintendent received a request from one of the heirs of the 40-acre parcel, James Turning Bear, to sell the parcel.⁴ The Superintendent sent notice of the proposed sale by letter dated January 11, 1974, and

² King is Appellant's biological aunt and his sister by adoption, i.e., King was Youpee's sister, Walker's daughter, and Good Eagle's granddaughter.

³ Milton L. Bets His Medicine also was a devisee of Eagle Bear. Eagle Bear's will identified Milton as a great-grandson.

⁴ It appears that James Turning Bear was one of Eagle Bear's grandsons. He inherited a 1/10 interest in the 40-acre parcel under Eagle Bear's approved will.

addressed to Appellant in Noble, Oklahoma. The record also contains a later letter, dated October 31, 1974, sent to Appellant to advise him of the appraised fair market value of the 40-acre parcel. This letter, too, was addressed to Appellant in Noble, Oklahoma. In November 1974, the Postal Service returned the October 31 letter to BIA. The envelope was marked “[m]oved, not forwardable.” Subsequently and based on a determination that one of the owners of the 40-acre parcel was incompetent, the Superintendent approved an order for the sale to King of 19855/27300 interest in the 40-acre parcel, including Appellant’s 550/27300 interest, pursuant to 25 U.S.C. § 372 and 25 C.F.R. § 121.20 (1975) (presently codified at 25 C.F.R. § 152.20).⁵ In May 1975, Appellant received \$149.12 for his 550/27300 interest through a deposit into his Individual Indian Money (IIM) account.

Nearly 30 years later, in 2004, Appellant contacted BIA concerning his ownership in the 40-acre parcel. The Superintendent responded by letter dated December 9, 2004, and explained that Appellant’s surface interest was sold in 1975 to King. There is no indication in the record that Appellant inquired about the 40-acre parcel or his interest in it prior to 2004.

Appellant appealed the Superintendent’s letter to the Regional Director. Appellant raised several claims: (1) he never received notice of the sale of his interest in the 40-acre parcel because he moved to Florida in 1966; (2) his ownership interest in the 40-acre parcel was inaccurately calculated or misrecorded;⁶ and (3) lessors and lessees had caused damage to the 40-acre parcel that must be ameliorated and repaired, including the restoration of a right-of-way. In a letter dated August 24, 2005, the Regional Director explained the history of the interests inherited from Eagle Bear and the sale of those interests in 1975 to King. He explained that BIA attempted to notify Appellant of the proposed sale, but at least one of the notices was returned. The Regional Director did not set aside the sale, recalculate Appellant’s interest, or restore Appellant’s interest in the 40-acre parcel.

Appellant then appealed to the Board. Appellant provided the Board with a detailed Statement of Reasons as well as an opening brief, each with exhibits. The record also

⁵ Mineral rights on the 40-acre parcel were not included in the sale. Therefore, references in this decision to the sale of the 40-acre parcel refer only to the surface rights as the sale was exclusive of the mineral rights therein.

⁶ Appellant claimed that he inherited a 1/7 interest in the 40-acre parcel from Walker, rather than a 1/70 interest.

contains copies of several letters sent by Appellant during the pendency of this appeal to various BIA officials and to the Assistant Secretary – Indian Affairs.

Discussion

On appeal to the Board, Appellant seeks to reverse the Regional Director's determinations on the following grounds. First, Appellant claims that he never consented to the 1975 sale of his interest in the 40-acre parcel, that the authority cited by the Regional Director for the sale of his interest was declared unconstitutional by the U.S. Supreme Court, and that the Regional Director's determinations are not supported by the record. We conclude that Appellant's challenges to the sale of his interest and his attempt to have BIA set aside the sale or restore his interest are untimely. Therefore, we affirm the Regional Director's decision on this ground.

Second, Appellant claims that the Regional Director erred because he failed to investigate evidence of "fraud" related to the probate of Eagle Bear's estate. Appellant argues that a will executed in April 1943 by Eagle Bear improperly was deemed revoked in favor of a later will, which was approved by the Examiner of Inheritance.⁷ Appellant maintains that the second will was fraudulently created. Appellant also argues, alternatively, that his name was wrongly omitted from the second (approved) will. We conclude that Appellant's claims regarding Eagle Bear's will are outside the scope of Appellant's appeal, that the Regional Director would not, in any event, have had jurisdiction over such claims, and, therefore, we dismiss Appellant's probate claim.

A. Appellant's Challenge to the Sale of his Interests in the 40-Acre Parcel

Appellant claims that he first became aware in September 2004 that his interest in the 40-acre parcel may have been sold. He claims that he never received any notice in or around 1974 that a proposal had been made for the sale of the interests in the parcel, including his own interest, to King. We conclude that Appellant is too late with his challenge to BIA's sale of his interest in the 40-acre parcel for fair market value.

We begin with the authority for the sale. According to the record, Turning Bear requested that BIA sell the parcel. Thereafter, BIA determined that one of the owners was

⁷ The position of "examiner of inheritance" changed to "administrative law judge" in 1972. 38 Fed. Reg. 10939 (May 3, 1973).

incompetent and, pursuant to the authority in 25 U.S.C. § 372,⁸ proceeded to notify the owners of the proposed sale and, subsequently, consummated the sale to King of an undivided 19855/27300 interest (including Appellant's 550/27300 interest) in the 40-acre parcel for fair market value. Thirty years later, Appellant argued to BIA — and now argues to the Board — that because he was not informed of the proposed or actual sale, it should be set aside or his interest in the 40-acre parcel returned to him. We conclude that Appellant waited too long to challenge the sale.

The Board has repeatedly held that appellants must be diligent in the pursuit of their rights. *Estate of Albert Angus, Sr.*, 46 IBIA 90, 98 (2007). Where appellants have slept on their rights, they may find that a right they may once have had to challenge or correct Departmental actions concerning land titles has expired or been forfeited. See *Estate of Angus*, 46 IBIA at 98 (challenge to a gift deed); *Baker v. Anadarko Area Director*, 17 IBIA 218, 221 (1989) (challenge to a quitclaim deed). In the absence of countervailing Federal law, there is a need for finality in property matters to enable owners to exercise their ownership rights “without fear of a challenge to their title.” *Estate of Angus*, 46 IBIA at 98. Moreover, with the passage of time, witnesses and documentary evidence needed to defend against a challenge to title may not be available or dependable. *Id.*

We conclude that Appellant's attempt to have BIA reopen the sale of the 40-acre parcel and set it aside comes far too late to warrant consideration. First, there is no indication in the record that the fact that BIA did not have Appellant's correct address in 1974 was the fault of BIA. Correspondence concerning the sale of the 40-acre parcel was sent to Appellant in Noble, Oklahoma. Appellant concedes that he once resided in Noble, but states that he left in 1966 for Florida, and did not return. His assertion is supported by the record: The appraisal notice for the 40-acre parcel sent to Appellant in Oklahoma was returned to BIA in November 1974 marked “moved, not forwardable.” Thus, we accept Appellant's assertion that he did not receive notice prior to the sale. However, we conclude that BIA attempted to notify Appellant and is not at fault for Appellant's lack of notice.

In addition, as the Regional Director pointed out in his Decision, Appellant received \$149.12 in his IIM account in May 1975 as his share of the proceeds from the sale based on the fair appraised value of the property. Appellant does not contest receipt of this payment. Receipt of the payment reasonably should have triggered an inquiry at that time by Appellant as to the source of the payment. Again, there is no indication that Appellant

⁸ At the time of the sale in 1975, section 372 provided in relevant part, “[i]f [the Secretary of the Interior] shall decide one or more of the heirs to be incompetent, he may, in his discretion, cause such lands to be sold.”

made any such inquiry.⁹ All told, the record reflects that Appellant let 38 years pass — from the time he moved to Florida in 1966 until 2004 when he contacted BIA about the property — without any inquiry concerning his interest in the 40-acre parcel or notification to BIA of a change in his address. In that time, Appellant claims that King has died and that ownership of the 40 acres will be conveyed to her heirs. Therefore, one witness to the sale transaction — King — is no longer available to explain events relating to the transaction. Moreover, King’s heirs are entitled to rely on their ownership in the property, including any income that may accrue from the lease of the land, without fear of challenges to their title that should have been made many years before they inherited the land.

Appellant contends that the sale of the 40-acre parcel is void, based on the Supreme Court’s decision in *Babbitt v. Youpee*, 519 U.S. 234 (1997). Appellant errs. In *Youpee*,¹⁰ the Supreme Court struck down as unconstitutional an amended provision of the Indian Land Consolidation Act (ILCA), 25 U.S.C. § 2206(a) (1994), that allowed certain interests in Indian trust lands to escheat to tribes on the death of an Indian landowner.¹¹ 519 U.S. at 243-45. Neither the decision in *Youpee* nor any part of ILCA had any impact on the sale of the 40-acre parcel: The sale took place *prior* to the enactment of ILCA by Congress in 1983 and the decision in *Youpee*. Moreover, the 40-acre parcel was sold for fair market value and did not escheat to the tribe. Therefore, the escheat provision held to be unconstitutional and the decision in *Youpee* are both irrelevant to the sale of the 40-acre parcel.

For the reasons stated above, we conclude that Appellant’s challenge to the sale of his interest in the 40-acre parcel was untimely and we affirm the Regional Director’s decision on this ground.

⁹ Appellant also claims that the 40-acre parcel is leased. The record does not reflect how long the property has been leased or whether Appellant was ever aware, prior to 2004, that it was being leased. If he knew that the property were leased but he was not receiving any lease payments, an inquiry to BIA would have revealed that he was no longer an owner of the parcel. Similarly, if Appellant had been receiving lease payments prior to the sale in 1975 and thereafter received none, he should have inquired into the cessation of the lease payments.

¹⁰ The plaintiffs in *Youpee* were the heirs of Appellant’s biological father, William Youpee.

¹¹ In *Hodel v. Irving*, 481 U.S. 704 (1987), the Supreme Court had struck down the original escheat provision in ILCA. While *Irving* was pending before the Eighth Circuit Court of Appeals prior to reaching the Supreme Court, Congress amended ILCA’s escheat provision in 1984. The amended provision was then held to be unconstitutional in *Youpee*.

B. Jurisdiction Over Will Challenges

Appellant claims for the first time on appeal that Eagle Bear's approved will is fraudulent and that her estate should have passed in accordance with her previous will, in which Eagle Bear had left half of her estate to Walker instead of 1/10. Alternatively, Appellant claims that he was fraudulently omitted from Eagle Bear's approved will.¹² If Appellant were correct in either of his arguments, his share of the 40-acre parcel would be greater: Appellant would have inherited a greater interest in the 40-acre parcel from Walker because Walker would have been entitled to a greater interest under Eagle Bear's prior will or, under his second argument, Appellant would have inherited directly from Eagle Bear in addition to inheriting from Walker and Youpee. We decline to decide these claims because they are not properly before the Board. They are raised for the first time on appeal to the Board and, even assuming they were raised before the Regional Director, the Regional Director does not have authority to decide appeals from the decisions of examiners of inheritance. Therefore, we dismiss these claims.

As a general matter, the Board does not consider claims raised for the first time before the Board. *Edwards v. Pacific Regional Director*, 45 IBIA 42, 54 n.18 (2007); *Estate of Donald E. Blevins*, 44 IBIA 33, 34 (2006). One of the purposes of requiring appellants to exhaust their administrative remedies is to enable the parties to develop a complete record, including the resolution of any factual disputes. *See, e.g., Joint Board of Control for the Flathead, Mission and Jocko Irrigation Districts v. Portland Area Director*, 19 IBIA 31, 33 (1990). We see no reason to depart from that rule here.

Moreover, such claims would not properly be brought before BIA in the first instance. BIA does not have jurisdiction to decide appeals from Indian probate decisions, including challenges to approved wills. *See* 43 C.F.R. §§ 4.200 *et seq.*; *see also, James v. Rocky Mountain Regional Director*, 35 IBIA 220 (2000) (BIA has no jurisdiction over appeals challenging the distribution of assets in accordance with an order entered by an administrative law judge). Instead, responsibility for probating the trust assets of Indians, including appeals therefrom, is delegated within the Department of the Interior to the Office of Hearings and Appeals. *See* 43 C.F.R. §§ 4.200 *et seq.* For this additional reason,

¹² Eagle Bear's approved will also named Milton L. Bets His Medicine as a devisee. Although it is not entirely clear, it appears that Appellant contends that Bets His Medicine is unrelated to Eagle Bear and that Eagle Bear intended to name Appellant, not Bets His Medicine, as a devisee.

Appellant's challenges to Eagle Bear's will and the probate of her estate are not properly before the Board.¹³

Appellant argues that the Board has broad discretion, pursuant to 43 C.F.R. § 4.318, to review the merits of his challenges to the estates. Appellant errs. Jurisdiction to avoid manifest injustice and correct manifest errors arises only where jurisdiction otherwise exists, which it does not here. *See Hoopa Valley Tribe v. Special Trustee for American Indians*, 44 IBIA 247, 251 (2007). As we explained in *Hoopa Valley Tribe*, section 4.318 does not provide the Board with an independent source of jurisdiction. *Id.*

Because Appellant raises these challenges for the first time on appeal, and because BIA would not, in any event, have had authority to consider his challenges to the probate of Good Eagle's estate, the Board dismisses these claims.¹⁴

Conclusion

We affirm the Regional Director's decision with respect to Appellant's challenge to the sale of the 40-acre parcel because it was untimely, and we decline to consider his challenges to the probate decisions entered in the estate of Good Eagle.¹⁵

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 on other grounds the August 24, 2005, decision of the Rocky Mountain Regional Director.

I concur:

// original signed
Debora G. Luther
Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

¹³ According to the record, Appellant apparently contacted Indian Probate Judge P. Diane Johnson to obtain information for challenging the decision in the probate of Eagle Bear's estate.

¹⁴ The present appeal, of course, arises from a BIA administrative decision. We express no opinion concerning remedies, if any, Appellant may have under the Department of the Interior's probate regulations, 43 C.F.R. §§ 4.200 *et seq.*

¹⁵ Appellant also demands that an investigation be launched into Indian land transactions. The Board lacks authority to order any such investigations.