INTERIOR BOARD OF INDIAN APPEALS

Estate of Joseph Baumann

43 IBIA 127 (06/20/2006)

Related Board case:
38 IBIA 150

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ARLINGTON, VA 22203

ESTATE OF JOSEPH BAUMANN	:	Order Affirming Decision As Modified
	:	
	:	Docket No. IBIA 04-142
	:	
	:	June 20, 2006

Appellant Paul Selzler seeks review of a July 8, 2004 Order Recommending Entry of Corrective Deeds; Affirming 4/30/2001 Order Determining Heirs, & 1/08/2002 Order Denying Petition for Rehearing (Recommended Decision) issued by Administrative Law Judge Marcel S. Greenia in the estate of Joseph Baumann (Decedent), deceased Sisseton-Wahpeton Sioux, Probate No. IP TC 167-R-97. For the reasons discussed below, the Board of Indian Appeals (Board) affirms Judge Greenia's Recommended Decision, as modified here.

Factual Background

Decedent died on November 2, 1996. In preparation for the probate of his estate, the Bureau of Indian Affairs (BIA) submitted an inventory of Decedent's trust or restricted property to the Office of Hearings and Appeals (OHA). That inventory showed that Decedent owned 55.14 acres of trust or restricted property located within Sisseton-Wahpeton Allotment No. 90641 on the Lake Traverse Reservation in South Dakota. At issue in this appeal is whether this property was properly included as part of Decedent's estate inventory.

The history of this property begins with a trust patent for approximately 152.10 acres issued to John Pipiya on June 10, 1889, who, in turn devised a portion of the property — approximately 72.10 acres — by will to his step granddaughter, Laura

Donnell. 1/ In 1981 and 1984, Donnell conveyed by gift deed portions of her property to two of her daughters, Peggy Johnson and Frances Arndt. 2/ On July 30, 1985, Donnell executed a will in which she devised to Decedent (her son) trust or restricted property described as "SW 641 John Pipiya Est. described as Lot 3 & 4 Sec. 11, T. 125 N., R 53 W., containing 59.84 acres more or less that are left after the Conveyances that I have already given my daughters." Donnell's will was approved on May 29, 1987.

On September 28, 1987, Decedent and his wife, Peggy Sue Baumann, executed a gift deed, conveying the 59.84-acre property to Decedent's sister, Theresa Ann Selzler (Selzler) — an enrolled member of the Sisseton-Wahpeton Tribe and Appellant's mother. The conveyance was for all of Decedent's interests in and to "Lots 3 & 4 Sec. 11, T. 125 N., R. 53 W., Fifth Principal Meridian, containing 59.84 acres more or less. Subject to existing rights of way of record." BIA approved the gift deed on November 9, 1987. Selzler then executed a gift deed conveying her undivided interest in approximately .70 acres

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1/ The trust patent issued to Pipiya was for:

> [t]he southwest quarter of the southwest quarter of section sixteen, the southeast quarter of the southeast quarter of section seventeen in township one hundred and twenty eight north, and the lots numbered three and four of section eleven in township one hundred twenty five north of range fifty three west of the Fifth Principal Meridian in the Territory of Dakota containing one hundred and fifty two acres and ten hundredths of an acre.

In a will executed on October 11, 1939, and approved on June 18, 1948, Pipiya devised Lots 3 and 4 to Laura Donnell.

2/ On December 28, 1981, Donnell conveyed to Peggy Jones Skjonsberg (Peggy Johnson), all of her interest in the "Northeast 10 acres of Lot 4, Sec. 11, T. 125 N., R. 53 W., 5th P.M" by gift deed. The gift deed was approved on March 9, 1982. On August 10, 1984, Donnell conveyed to Frances Arndt her interest in property described as "Starting in the Northeast corner of Lot 4, Sec. 11, T. 125 N., R. 53 W., 5th P.M., South Dakota, thence West 305', thence Southwesterly 315', thence East 494', thence North 250' to the True point of beginning, containing 2.26 acres more or less. Subject to existing rights-of-way of record." That gift deed was approved on September 11, 1984.

of the 59.84-acre parcel to her sister, Frances Arndt, on May 30, 1992. 3/ The gift deed was approved on August 12, 1992.

On January 19, 1994, the Sisseton Agency, BIA, received an application from Selzler, dated January 9, 1994, requesting to gift convey to Appellant Selzler's "whole" interest, except for a life estate, in land she described as "Section 11 township 125 No range 53W in 5th princip[al] meridian *** or house with 5 acres." The application noted that the reason for the gift conveyance was that "[Appellant] has helped [Selzler] fin[anci]ally for yrs." On May 10, 1994, the Superintendent wrote to Appellant to notify him that Selzler's application had been "submitted for processing." The Superintendent's letter stated that upon completion of the gift deed transaction, Appellant would "be provided with the appropriate documents." By letter dated July 14, 1994, the Superintendent informed Selzler that "[her] gift conveyance on Allotment No. 90641 is completed and ready for [her] signature," and asked her to come to BIA at her earliest convenience to sign the necessary documents. The record does not contain a gift deed completing this conveyance, or any evidence that Selzler at any time signed such a deed.

On August 1, 1994, Selzler executed an application for patent in fee of Indian land for property described as:

> Metes and Bounds starting in the NE Corner of Lot 4; thence West 660'; thence South 660' to the true point of beginning, thence South 250'; thence Northwesterly 165'; along gravel road; thence Southeasterly 660' back to the true point of beginning, all in Sec. 11, T. 125 N., R. 53 W., 5th P.M. South Dakota containing 4.00 acres, more or less.

The application stated that Selzler wanted to "make [her] home on this land & give it to [Appellant], who is not enrolled."

On August 29, 1994, however, Selzler executed a deed to restricted Indian land in favor of Decedent for property described as:

3/ The legal description of the property conveyed to Arndt reads: "[s]tarting in the NE corner of Lot 4, Sec. 11, T. 125 N., R. 53 W., thence W. 660'; thence S. 660' to the true point of beginning, thence northwesterly 525'; thence E. 494', thence S. 160' back to the true point of beginning, containing .70 acres, more or less."

> Lot 3 & 4 LESS 12.96 acres and Metes and Bounds, starting in the NE corner of Lot 4; Thence West 660 feet; thence South 660' to the true point of beginning, thence South 250'; thence northwesterly 700'; thence northeasterly 165'; along gravel road; thence southeasterly 660' back to the true point of beginning, containing 4.00 acres, more or less, Sec. 11, T. 125 N., R. 53 W., Fifth Principal Meridian, containing 55.14 acres, more or less. Subject to existing rights of way of record. Reserving a life Estate unto myself. [4/]

The Superintendent approved the deed to Decedent on September 19, 1994. 5/ Three months later, on December 1, 1994, the Superintendent purported to approve Selzler's earlier application for a fee patent, and forwarded it to the Bureau of Land Management (BLM) for issuance of the patent. The record, however, does not contain a fee patent issued to Selzler for this property.

On May 9, 1995, the Acting Area Director approved a deed to restricted Indian land executed by Selzler in favor of Appellant on May 5, 1995. The land was described as:

> Beginning in the Northeast corner of Lot 4, thence West 660'; thence South 660' to the true point of beginning, thence South 250'; thence Northwesterly 165' along gravel road; thence Southeasterly 660' back to the true point of beginning, all in Section 11, T. 125 N., R. 53 W., Fifth Principal Meridian, South Dakota, containing 4.00 acres, more or less. Subject to all valid existing rights of way.

Decedent executed a will on August 7, 1995, in which he devised to his sister, Peggy Johnson, property described as "SW 641 John Pipiya Est. described as Lot 3 & Lot 4 Sec. 11, T. 125 N., R. 53W., all remaining acreage that are left after the conveyances I have already given to my sisters."

4/ The 12.96 acres referred to in the description is the total of: (1) the 10 acres Donnell gift deeded Peggy Johnson, (2) the 2.26 acres Donnell gift deeded to Frances Arndt, and (3) the .70 acres Selzler gift deeded to Frances Arndt.

5/ On September 7, 1995, a corrected deed was recorded that eliminated Selzler's reservation of a life estate. The record includes a handwritten note, apparently signed by Selzler, stating: "I'm sorry for the inconvince (sic) this is causing. But I marked the wrong box. I do not want to keep the life time estate to that propety (sic) I gift deeded to Joseph C. Bauman (sic). Will you please take care of this & let me know." (Emphasis in original.)

After Decedent's death, BIA submitted an inventory of Decedent's trust or restricted property to OHA that showed that Decedent owned 55.14 acres at the time of his death. Administrative Law Judge William Herbert held hearings to probate Decedent's estate on July 7, 1998, July 10, 1998, and September 28, 1998. 6/

At the September 28, 1998 hearing, Appellant argued that the legal description of the property deeded to him by Selzler was incorrect and that the August 29, 1994 gift deed from Selzler to Decedent included approximately .70 acres more than Selzler intended to convey to Decedent. Selzler testified that the description of the land she wanted excluded from her August 29, 1994 gift deed to Decedent was inconsistent with her intent, and that the land had been improperly surveyed. She also stated that Decedent had originally deeded the property to her in order to shelter the property from the Internal Revenue Service and that she willingly executed the gift deed to Decedent to return the property to him. She testified that she intended to give Decedent back everything that he had gift deeded to her in 1987, except the house and four acres, and the .70-acre property she had gift deeded to Frances Arndt. At the same time, however, Selzler testified that she had executed the August 29, 1994 gift deed to Decedent because he had told her "that he wanted the land put back in his name or he'd come back and take care of [Appellant] and [her]." Sept. 28, 1998 Transcript at 59. 7/

6/ On July 10, 1998, Selzler filed a civil action in tribal court against the estate of Decedent to rescind her August 29, 1994 gift deed to Decedent, on the ground that Decedent had threatened her and her son and for "failure to honor the $1.00 & love and affection" consideration for the gift deed. On August 12, 1998, Selzler's counsel and counsel for Johnson, an interested party, stipulated to dismiss the tribal court action, but that Selzler could raise the issue before the ALJ in Decedent's probate case. The stipulation acknowledged that a personal representative had not been appointed for Decedent's estate and that service had not been effected on the estate.

7/ After the September 28, 1998 hearing, BIA discovered that the May 5, 1995 gift deed to Appellant contained an incorrect legal description. On March 10, 1999, Selzler executed a corrected deed, which the Area Director approved on April 1, 1999. The corrected metes and bounds description, with previously omitted language underlined, reads:

> Beginning in the Northeast corner of Lot Four (4); thence West 660 feet; thence South 660 feet to the true point of beginning, thence South 250 feet; thence Northwesterly <u>700 feet; thence Northeasterly</u> 165 feet along gravel road; thence Southeasterly 660 feet back to the true point of beginning, all in Section Eleven (11), Township one-hundred Twenty-five (125) North,

(continued...)

On April 30, 2001, Judge Herbert entered an Order Determining Heirs, Approving Will, and Decree of Distribution. In the order, Judge Herbert determined that under the terms of Decedent's will, all of Decedent's real property, including any income accrued after Decedent's death, would pass to Johnson. Judge Herbert concluded that the land description in the August 29, 1994 gift deed from Selzler to Decedent correctly described the trust or restricted property in Decedent's estate, and thus BIA's inventory, finding that Decedent owned 55.14 acres, was correct. Judge Herbert stated:

> Whereas there is evidence that [Selzler] began action to deed at first 5.00 acres, and then 4.00 acres, to [Appellant] in early 1994, while she owned 59.14 acres, there is no evidence that such transaction was ever concluded. After the August 29, 1994 gift deed back to [Decedent] of 55.14 acres, [Selzler] conveyed her remaining 4.00 acres to [Appellant], and a fee patent was issued to [Appellant] to this 4.00 acres. This 4.00 acres is not in [Decedent's] [e]state and is not within the jurisdiction of this proceeding.

April 30, 2001 Order Determining Heirs at 2 n.2. 8/ Judge Herbert further determined that to the extent the parties disputed the boundaries of Decedent's property, the boundaries were to be determined by survey, using the legal descriptions in the relevant deeds. Judge Herbert also granted one claim filed against Decedent's estate and denied three claims filed against the estate, including a claim filed by Appellant.

7/(...continued)

> Range Fifty-three (53) West, Fifth Principal Meridian, Marshall County, South Dakota, containing 4.00 acres, more or less.

This description of property conveyed to Appellant matched the metes and bounds description of the acreage excluded from Selzler's August 29, 1994 gift deed to Decedent.

8/ For purposes of clarity, we summarize the property transactions as determined by Judge Herbert as follows:

1. Pipiya devises 72.10 acres to Donnell.
2. Donnell conveys 10 acres to Johnson and 2.26 acres to Arndt, leaving 59.84 acres.
3. By will, Donnell conveys 59.84 acres to Decedent.
4. Decedent conveys 59.84 acres to Selzler.
5. Selzler conveys 0.7 acres to Arndt, leaving 59.14 acres.
6. Selzler conveys "55.14 acres, more or less" to Decedent, which is what his estate included at the time of his death.
7. Selzler conveys "4.00 acres, more or less" to Appellant.

In May 2001, BLM commenced a cadastral survey to delineate the boundaries of the property that was conveyed by Selzler to Decedent. A preliminary survey map was completed in June 2001 that showed Appellant's property as comprising 3.04 acres. The full survey was completed on May 22, 2003, and BLM officially filed the plat for the survey and transmitted a report to BIA in February 2004.

Appellant filed a petition for rehearing from Judge Herbert's order, arguing that Selzler's January 9, 1994 application for gift deed conveyed to him 59.14 acres, and that Selzler's August 29, 1994 gift deed to Decedent was therefore invalid. Judge Greenia (to whom the case had been transferred) denied rehearing on January 8, 2002, stating that the issue of BIA's approval of the January 9, 1994 gift deed application from Selzler to Appellant was "a collateral matter and not within the jurisdiction of this body." Order Denying Petition for Rehearing at 1-2. Judge Greenia concluded that Appellant's challenge to the inventory of Decedent's estate did not trigger the procedure outlined in Estate of Leonard Douglas Ducheneaux, 13 IBIA 169 (1985) 9/, because BIA did not approve Selzer's January 9, 1994 gift deed application to Appellant, but did approve Selzler's gift deed to Decedent, and thus, "the land was conveyed to decedent and he owned the land that he devised by Will." Order Denying Petition for Rehearing at 2.

Appellant appealed Judge Greenia's decision to the Board. On October 24, 2002, the Board issued a decision affirming the April 30, 2001 and January 8, 2002 orders, except with respect to the estate inventory issue. Estate of Joseph Baumann, 38 IBIA 150 (2002). The Board concluded that because this case involved a challenge to the estate inventory, Judge Greenia had erred in not following the Ducheneaux procedure. The Board therefore remanded the case to Judge Greenia so that he could conduct a Ducheneaux hearing and issue a recommended decision concerning the estate inventory. 10/

9/ In Ducheneaux, the Board established a procedure under which alleged errors in BIA's estate inventory are to be considered by an Administrative Law Judge (ALJ) during a probate proceeding, rather than separately referring inventory questions to BIA. 13 IBIA at 177-78; see also First v. Rocky Mountain Regional Director, 42 IBIA 76, 77 n.3 (2005). BIA is to be afforded an opportunity to participate as an interested party in the proceedings before the ALJ. In this way, an ALJ may address both probate matters and estate inventory matters in a unified proceeding, subject to the parties' right of appeal to the Board. Estate of Mary Dorcas Gooday, 35 IBIA 79, 80 n.1 (2000).

10/ The Board also strongly urged Judge Greenia to explore with the parties the potential use of alternative dispute resolution. The parties apparently were not interested.

Judge Greenia held a Ducheneaux hearing on October 17, 2003. At the hearing, Appellant asserted first that the January 9, 1994 application for gift deed from Selzler to him admitted into evidence was not the original application, and that the original application specifically provided that Selzler was conveying "five acres and the lake house or all of [Theresa Selzer's 59.14 acre parcel] if [Appellant] didn't get the acreage." Oct. 17, 2003 Transcript at 23. Appellant could not produce the application he alleged was the original application at the hearing, but claimed that Selzler had gift deeded her entire parcel (59.14 acres) to him through her January 9, 1994 gift deed application. 11/ As a result, Appellant argued that Selzler's August 29, 1994 gift deed to Decedent was invalid. In response, Carol Jordan, realty officer for the Sisseton Agency, testified that the January 9, 1994 application admitted into evidence was the original document taken out of Selzler's file, but that the gift deed transaction was never completed because Appellant is not an enrolled member of the Sisseton-Wahpeton Tribe and was therefore ineligible to take the property, except through a fee patent. Judge Greenia allowed Appellant 30 days from the end of the hearing to produce the document he alleged was the original application.

Appellant also asserted at the hearing that even if BIA did not take action on Selzer's January 9, 1994 application, under Federal law, if BIA does not take action on a gift deed application within two years of receiving it, the application is automatically approved. Appellant further argued that there were various infirmities related to the August 29, 1994 gift deed to Decedent that rendered the deed void. First, Appellant argued that because the gift deed contained an incomplete land description, this had the effecting of voiding the deed. Jordan responded by testifying that the legal description was correct and had been based on Selzler's instructions. Second, Appellant argued that the deed was void because Decedent had improperly induced Selzler to sign it.

Appellant next made two arguments, apparently in the alternative, in the event that Decedent's estate inventory was deemed correct. He first argued that he was entitled to an easement over Decedent's property to access his property. Appellant also argued that according to a private survey he had done of his property, the metes and bounds legal description contained in the March 10, 1999 deed from Selzler to him improperly amounted to approximately three acres, and not the "4.00 acres more or less" specified in the deed and to which he is entitled. Thus, Appellant argued that one acre that had been included in Decedent's estate inventory actually belonged to Appellant.

11/ Appellant alleged that because he "had to buy the house separate," the "or" provision of the gift deed took effect, conveying the entire 59.14 acre parcel to him. Oct. 17, 2003 Transcript at 23.

On July 8, 2004, after Appellant and Johnson filed briefs with Judge Greenia reiterating their respective arguments 12/, Judge Greenia issued the Recommended Decision that is the subject of the present appeal. In his Recommended Decision, Judge Greenia determined that Appellant did not receive any interest in Selzler's property on the basis of the January 9, 1994 application for gift deed because the gift deed application was never approved by BIA, as required by law to convey an interest in trust property. Judge Greenia further found that BIA had not approved the gift deed application because Appellant is not a tribal member and thus was, according to testimony, ineligible to receive any interest in trust lands on the Sisseton-Wahpeton reservation. Judge Greenia also rejected Appellant's arguments pertaining to the legal descriptions of the property in the August 29, 1994 and May 5, 1995 gift deeds. 13/ Judge Greenia noted that BLM had officially surveyed the properties, and that the boundaries established by the cadastral survey controlled. Judge Greenia recommended that the case be referred to the Assistant Secretary for Indian Affairs for entry of corrective deeds conforming to BLM's survey.

Appellant appealed Judge Greenia's decision to the Board. Appellant filed only his notice of appeal, and did not file an opening brief. Appellee submitted an answer brief.

12/ Appellant never produced the "original" of the January 9, 1994 gift deed application that he had promised to produce at the Ducheneaux hearing.

13/ In her brief, Johnson argued that Selzler's August 29, 1994 gift deed to Decedent should be interpreted as conveying the four-acre parcel plus the 55.14 acre parcel, for a total of 59.14 acres, rather than conveying only 55.14 acres. Johnson therefore argued that theMay 5, 1995 deed to Appellant was invalid, because Selzler had already conveyed this property to Decedent. Judge Greenia implicitly rejected this argument in his Recommended Decision by finding that Appellant did own the land conveyed in the May 5, 1995 gift deed, and thus it was properly excluded from Decedent's inventory.

Although Johnson did not appeal from Judge Greenia's order, we disagree with her interpretation of the legal description found in the August 29, 1994 gift deed. Although the legal description is hardly a model of clarity, we interpret it to convey what remains of Lots 3 and 4 after subtracting the 12.96 acres previously conveyed to Johnson and to Frances Arndt, and the 4 acres that Selzler subsequently gift deeded to Appellant. Moreover, because the 4 acre parcel is located within Lots 3 and 4, it would have made little sense for Selzler to have separately described it if she intended to convey all of her interests in Lots 3 and 4 to Decedent.

Discussion 14/

In order to successfully challenge an estate inventory, the person seeking correction of a decedent's estate must 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 First, 42 IBIA at 80 (citing Estate of Aaron Francis Walter, 16 IBIA 192, 197 n.6, 198 (1988)). The standard of proof is a preponderance of the evidence. First, 42 IBIA at 80. For the reasons discussed below, the Board concludes that Appellant has not met his burden here.

Appellant first contends that he, and not Decedent, is the rightful owner of the 55.14 acre parcel included in Decedent's estate inventory. Appellant advances two arguments in support of his position: (1) BIA approved Selzler's January 9, 1994 application for gift deed, as demonstrated by the Superintendent's May 10, 1994, and July 14, 1994 letters, and therefore, the January 9, 1994 gift deed application effectively conveyed the property to him; and (2) even if the Superintendent did not approve the January 9, 1994 gift deed application, under federal law, if BIA does not take action on a gift deed application within two years of receipt of the application, the gift deed is automatically approved. Appellant asserts that the August 29, 1994 gift deed from Selzler to Decedent was therefore invalid. Appellant's arguments, however, are without merit.

No conveyance of individually owned trust or restricted land is valid unless approved by the Secretary of the Interior. See 25 C.F.R. § 152.22(a); see also Estate of Clifford Celestine v. Acting Portland Area Director, 26 IBIA 220, 225 (1994). Applications to gift deed trust or restricted property must therefore be approved by the Secretary. See 25 C.F.R. § 152.23.

There is no evidence on the face of the January 9, 1994 gift deed application that the Superintendent ever approved the application. The application's signature lines for the Tribal Committee's and the Superintendent's approval are blank. In addition, the May 10, 1994 letter does not refer to approval of the gift deed application, only that it has been submitted for processing. And the Superintendent's July 14, 1994 letter to Selzler stating that her gift conveyance was "completed and ready for * * * signature" is not

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14/ Arguments made by Appellant but not discussed herein have been considered and rejected.

sufficient, when considered with other evidence, to show actual approval of the January 9, 1994 gift deed application. 15/

Moreover, even assuming Appellant is correct that the Superintendent's letters demonstrate approval of the application for gift deed, it would not have the effect of conveying title. An approved gift deed application itself is insufficient to convey title. Appellant's argument fails to distinguish between an application for gift deed, and an actual instrument of conveyance. There is no evidence in the record that Selzler ever executed a gift deed for the parcel. Appellant argues that Johnson has conceded that this gift deed transaction was approved by BIA. But whether Johnson concedes this point or not, Johnson specifically argues that Selzler never signed a gift deed that "consummated" the transaction. See Appellee's Answer Brief at 5. 16/

15/ As noted above, Judge Greenia concluded, based on testimony of the Sisseton Agency's realty officer, that the Superintendent did not approve the January 9, 1994 gift deed application because Appellant is not an enrolled member of the Sisseton-Wahpeton Tribe and is "thus ineligible under the Sisseton-Wahpeton Act to receive any interest in Trust lands on the Reservation beyond a life estate." Recommended Decision at 7 (citing the Sisseton-Wahpeton Sioux Act of October 19, 1984, Pub. L. No. 98-513, 98 Stat. 2411, § 4(a) & (b)). (Internal footnote omitted.) That Act, however, governs the inheritance of trust or restricted property, and not inter vivos conveyances. It is therefore inapplicable here. It may be that Judge Greenia understood that BIA did not approve the gift deed application because the land could not be conveyed to Appellant and remain in trust. No one, including Judge Greenia, has questioned Selzler's ability to gift deed her interest in four acres of trust or restricted land to Appellant or Appellant's ability to take those four acres in fee, despite his non-member status.

16/ In addition, the language of the January 9, 1994 gift deed application does not convince us that Selzler intended to convey the entire parcel to Appellant under any circumstance. The application purports to convey Selzler's interest in "Section 11 township 125 No range 53 W in 5th princip[al] meridian * * * or house with 5 acres." The house is apparently located within the 59.14-acre parcel. If Selzler intended to gift deed the entire parcel to Appellant, there would have been no need for her to include the phrase "house with 5 acres" in the application because this portion of the parcel would have been included as part of the larger parcel.

Appellant's next argument — that because BIA did not notify Appellant that it had not approved the January 9, 1994 gift deed application within two years, the application was automatically approved — also fails. As support for his position, Appellant relies on 43 U.S.C. §§ 1165 and 1714 and 25 C.F.R §§ 152.2 and 152.5(b). These provisions, however, do not support Appellant's argument. First, sections 1165 and 1714 of Title 43 pertain to public lands and do not apply here. Second, section 152.5(b) governs applications for patents in fee, not applications to gift deed trust land, and thus also does not apply here. Finally, although gift deed applications are included within the scope of section 152.2, that section does not provide for automatic approval when BIA fails to act within two years. Rather, section 152.2 provides that if action is to be withheld on any application, including a gift deed application, which if approved would remove Indian land from restricted or trust status, BIA must advise the applicant — not the potential recipient — that she has the right to appeal the withholding action. The regulations clearly require Secretarial approval of gift conveyances, see 25 C.F.R. § 152.17, and nowhere provide for "automatic" approval if BIA fails to act on an application.

We therefore conclude that Judge Greenia correctly found that Selzler never effectively conveyed the 59.14 acre parcel to Appellant and reject Appellant's contention that he is the rightful owner of the 55.14 acres included in Decedent's estate inventory. 17/

Appellant next argues that even if Selzler's January 9, 1994 application to gift deed the property to him was not approved (either directly by the Superintendent or through BIA's inaction), Selzler's August 29, 1994 gift deed to Decedent is void. Appellant argues that Decedent improperly induced Selzler to sign the August 29, 1994 gift deed by threatening to harm Selzler or Appellant if she did not sign the deed, in violation of 25 C.F.R. § 152.22. 18/ Appellant relies on Selzler's testimony at the September 28, 1998 hearing that Decedent told Selzler that "he wanted the land put back in his name or he'd come back and take care of [Appellant] and [her]." At the Ducheneaux hearing, Appellant testified that his mother, Johnson and Frances Arndt "can testify how my mother was

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17/ Appellant also asserts that BIA's failure to notify him that it was withholding approval of the January 9, 1994 gift deed application amounts to a denial of due process. Because section 152.2 does not require that BIA notify the potential recipient of a gift deed if approval of the application has been withheld, we reject Appellant's due process argument.

18/ In relevant part, section 152.22(a) provides that "inducing an Indian to execute an instrument purporting to convey any trust land or interest therein * * * is prohibited."

hounded" and threatened by Decedent. Oct. 17, 2003 Transcript at 24. Johnson responded "I will not testify [to] that." Id. Neither Judge Herbert nor Judge Greenia specifically addressed this argument.

Although Appellant does not say so, he appears to be arguing that the Board should retroactively void the gift deed from Selzler to Decedent. But Appellant does not have standing to assert Selzler's interest, and Selzler did not appeal Judge Greenia's decision. 19/ Moreover, even assuming, arguendo, that the Board has authority to consider this claim, we would conclude that Appellant has not produced sufficient evidence of undue influence here to support his arguments. On August 29, 1994, the same day she executed the gift deed to Decedent, Selzler signed a statement of understanding, in which she stated that "I * * * do willingly wish to give my entire 1/1 interest in and to the [land description from the gift deed to Decedent]. * * * I have been informed of the Fair Market Value * * * . With this information, I still wish to give this share to my brother." Further, shortly after Selzler testified that Decedent threatened her at the September 28, 1998 hearing, she testified that she intended to gift deed the property to Decedent and she executed the gift deed willingly. The record contains no evidence that Selzler took action to have the August 29, 1994 gift deed rescinded for any reason after she agreed to dismiss her action in tribal court. Considering all of the circumstances, we conclude that Appellant has failed to provide sufficient evidence of improper inducement to justify voiding the August 29, 1994 gift deed to Decedent.

Appellant next argues that the August 29, 1994 gift deed to Decedent is void because the metes and bounds description in the exclusionary clause of the deed "does not have a legal beginning and ending point." Notice of Appeal at 18. We disagree. Appellant does not explain any basis for his assertion that the deed does not have a true beginning and ending point. Further, the description of the land excluded from Selzler's conveyance to Decedent matches the legal description of the land contained in Selzler's March 10, 1999 correction deed to Appellant, and both descriptions appear to have closure, according to both Appellant's private survey map and BLM's preliminary survey map.

19/ We also note that the Board has never decided whether it has authority to void a gift deed that has been approved and recorded by BIA. See Racine v. Rocky Mountain Regional Director, 36 IBIA 274, 279 n.7 (2001); Estate of Clifford Celestine v. Acting Portland Area Director, 29 IBIA 269, 273 (1996); Estate of Clifford Celestine, 26 IBIA at 229.

Appellant then appears to make two alternative arguments, in the event Decedent's estate inventory is deemed correct. First, Appellant contends that the BLM survey of Decedent's tract, which determined that Appellant did not own four acres, but rather only three acres, was not a valid survey. He asserts that Selzler intended to deed him four acres and that once the property passed from Selzler to Appellant in fee status, "the property was no longer in Federal Jurisdiction," and BIA and BLM had no right to survey the property or, later, to correct the deed. Notice of Appeal at 3. He asserts that he had the property surveyed by a private contractor and "submitted the same showing the correct four acres." Id.

Appellant's argument is without merit. BLM is the official surveyor of Indian lands. See 25 U.S.C. § 176; 757 DM (Departmental Manual) 2.3C; 757 DM 2.7B(3); see also Pueblo of Santa Clara v. Acting Southwest Regional Director, 40 IBIA 251, 255 (2005). As such, the Department relies exclusively on BLM surveys to determine property boundaries. In the present case, BLM completed a cadastral survey of portions of Lots 3 and 4, Sec. 11, T. 125 N, R. 53W, 5th P.M., to delineate the boundaries of Decedent's property. Because Appellant's property was bordered on three sides by Decedent's property and represented the acreage excluded from the conveyance from Selzler to Decedent in the metes and bounds legal description, it was necessary for BLM to survey Appellant's property as well. Judge Greenia therefore correctly rejected Appellant's arguments that BLM could not survey his property and that the privately conducted survey of his property that he commissioned should control the boundaries of the property in dispute. In addition, under the circumstances present here, the specific description of the property in the deed controls over the estimated acreage referred to in the deed, which, in any event, was for "4.00 acres, more or less." (Emphasis added.) 20/

Second, Appellant contends that he is entitled to an easement for a road across the property that Selzler conveyed to Decedent through the August 29, 1994 deed that allows Appellant access to his property. According to Appellant, his property is surrounded on three sides by the 55.14-acre parcel, and on the fourth side by a lake, and thus the access

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20/ Appellant similarly argues that the March 10, 1999 correction deed was void, claiming that: (1) BIA "had no rights to issue a corrected deed" because the May 5, 1995 approved deed had taken the lands out of trust, Notice of Appeal at 4; and (2) the correction deed was "wrong" because it did not reflect Selzler's intention of conveying 4 acres to Appellant, id. at 3. We reject these arguments on the same basis that we reject Appellant's identical arguments concerning the original deed.

road across the 55.14-acre parcel is the only way for him to reach his property. He argues that "persons cannot prevent another person from entering their property when there is no other way for that person to access their property." Notice of Appeal at 8. Appellant's argument, however, is misplaced. Part 169 of 25 C.F.R. governs the establishment of rights-of-way over trust or restricted lands, and outlines specific procedures that must be followed. Appellant has not followed the procedures in this case. The Board is not aware of any authority that would permit an Administrative Law Judge in a probate case to establish an easement over trust or restricted land. 21/ Accordingly, we reject this argument.

Finally, Appellant argues that Judge Greenia was "biased" against Appellant, asserting that at the October 17, 2003 hearing, Judge Greenia questioned him in "a manner that was argumentative" about an issue he had raised in his first appeal to the Board — whether Appellant was permitted to cross-examine witnesses at the initial probate hearings. Notice of Appeal at 2. Appellant argues that this issue was unrelated to the Ducheneaux hearing, and thus the questions demonstrate that Judge Greenia "was upset with [Appellant] for filing his appeal," and that Judge Greenia's "demeanor made his bias very apparent." Id.

Appellant's bare assertions that Judge Greenia's questions were argumentative and his demeanor made his bias apparent are insufficient to show bias on Judge Greenia's part. Even assuming Appellant is correct that these questions were outside of the scope of the Ducheneaux hearing, the Board is not persuaded that these questions reflect bias on the part of Judge Greenia against Appellant. Nothing in the transcript or the record shows any bias on Judge Greenia's part. We therefore reject Appellant's claim of bias.

21/ In any event, we note that the regulations do not appear to contemplate easements by prescription or easements by necessity over trust or restricted land, which is what Appellant urges the Board to recognize.

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 Judge Greenia's July 8, 2004 Recommended Decision, as modified in this decision. 22/

I concur:

// original signed
Amy B. Sosin
Acting Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

22/ As noted above, in his July 8, 2004 decision, Judge Greenia recommended that the case be referred to the Assistant Secretary for Indian Affairs for entry of corrective deeds conforming to BLM's survey. The Board declines to refer this matter to the Assistant Secretary, and instead leaves it to BIA to determine in the first instance what action must be taken to make any appropriate adjustments to title records, deeds, or related documents.