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Part III

Department of the Interior

Office of Hearings and Appeals

43 CFR Part 4

**Trust Management Reform: Probate of
Indian Trust Estates; Interim Final Rule**

DEPARTMENT OF THE INTERIOR**Office of Hearings and Appeals****43 CFR Part 4****RIN 1090-AA78****Trust Management Reform: Probate of Indian Trust Estates****AGENCY:** Office of Hearings and Appeals, Office of the Secretary, Interior.**ACTION:** Interim rule with request for comments.

SUMMARY: The Department of the Interior, Office of Hearings and Appeals (OHA), is revising its regulations regarding hearings and appeals involving the probate of property and funds held in trust or restricted status for individual Indians and Alaska Natives. These revisions are meant to further the Secretary's trust responsibility to these individuals. The revisions make OHA's probate regulations consistent with those recently adopted by the Bureau of Indian Affairs (BIA) to accommodate BIA's re-assumption of responsibility for some probate cases. OHA's revisions will ensure that BIA and OHA apply the same standards and criteria for determining heirs and paying claims and coordinate their procedures to expedite the probate process for Indian decedents' estates. Because of this need for consistency, OHA is making the revisions immediately effective, although OHA is also requesting comments on these revisions and will consider them prior to issuing a final rule.

DATES: This rule is effective June 18, 2001. Comments must be submitted in writing and received by us no later than August 17, 2001.

ADDRESSES: Comments should be addressed to Charles E. Breece, Principal Deputy Director, Office of Hearings and Appeals, 4015 Wilson Boulevard, Arlington, Virginia 22203, or by electronic mail to probate_comments@ios.doi.gov. Comments will also be accepted by telefax at the following telephone number: 703-235-9014.

FOR FURTHER INFORMATION CONTACT: Charles E. Breece, Principal Deputy Director, Office of Hearings and Appeals, 4015 Wilson Boulevard, Arlington, Virginia 22203, telephone 703-235-3810.

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I. Background

In an effort to improve the services provided by the Secretary of the Interior to individual Indians and Alaska Natives,¹ and in recognition of its trust responsibility to such individuals, the Department's "Trust Management Improvement Project—High Level Implementation Plan," as revised and updated on February 29, 2000, identified certain changes in the Department's procedures that are necessary in order to eliminate the current backlog in processing Indian probates and to promptly and efficiently process future Indian probates. Addressing the severe backlog in the Department's disposition of Indian decedents' estates was identified as essential to assuring the orderly transfer of Indian trust funds and lands. These revised procedures grew out of the Department's Indian Probate Reinvention Lab (IPRL), which was chartered in 1999. The IPRL examined the Department's Indian probate process from a multi-agency perspective, including the Bureau of Indian Affairs (BIA) and the Office of Hearings and Appeals (OHA). Based on its analysis, which included reviewing reports from previous studies of Indian probate matters, site visits, and interviews of customers and employees, the IPRL recommended numerous changes to the probate process. The Department's High Level Implementation Plan and the reports of the IPRL are available at <http://www.doi.gov/bia/probates/index.htm>.

After the IPRL issued its reports, BIA developed regulations in consultation with OHA and the Office of the Special Trustee for American Indians (OST) to

implementation the IPRL's recommendations and to improve the administration and management of individual Indian trust resources. BIA developed its probate rules through informal consultation with affected tribal governments and Indian individuals. Drafts of the various parts were initially developed through the use of in-house teams within BIA. These teams consisted of federal personnel from headquarters and the field, and included program officers and Departmental attorney's possessing extensive knowledge and experience with the particular subject matter.

BIA then shared these drafts with tribal entities and national tribal organizations for their input and recommendations. In many cases, the draft regulations were further expanded to respond to tribal concerns about clarity and ease of administration. BIA also invited tribal participation by contacting the National Congress of American Indians, which represents a number of tribes. The National Congress of American Indians established a working group to assist in the development of the regulations. BIA also secured input from tribes by requesting that BIA field personnel contact their respective tribes on a regional basis and transmit drafts of the proposed rules to them for discussion and comment. In addition, in accordance with the government-to-government relationship with tribes, BIA scheduled consultations with the tribes during the comment period on the proposed rule to facilitate an informed final rule. The recently adopted regulations at 25 CFR part 15 implementation for BIA procedural aspects of the IPRL's recommendations. OHA is now amending its regulations to make them consistent with BIA's newly adopted regulations governing these probate cases, and to ensure that BIA and OHA are applying the same standards and criteria for determining heirs and paying claims. OHA is requesting comments on its revised procedures and anticipates issuing a final rule in October 2001.

In this interim rule, OHA is making those changes to its regulations that are necessary to avoid inconsistencies in the processing of Indian probate cases between BIA and OHA deciding officials. BIA and OHA are both contemplating further revisions to the probate process, and will ensure that such future changes are coordinated to avoid any gaps or inconsistencies.

II. Section-by-Section Analysis

The purpose of the changes to 43 CFR part 4, subpart D, is to make the policies

¹ Throughout the remainder of this preamble, the term "Indian" will be used as a shorthand to refer to both individual Indians and Alaska Natives.

and procedures that OHA uses to probate an Indian decedent's trust estate consistent with those recently adopted by BIA to ensure uniformity of treatment within the Department. The various provisions of subpart D address the purpose and scope of the Indian probate procedures; the mechanics of initiating the probate process; the disposition of claims against an estate; the ultimate distribution of the decedent's assets to the determined heirs or beneficiaries; and an appeals process to follow should disputes arise during any stage of the probate process. Cross references have been made to the BIA hearings procedures, including the determination of heirs, approval of wills, and the approval of claims.

Authority Citation

The authority citation for 43 CFR part 4, subpart D is revised to add 25 U.S.C. 410.

Cross Reference

The Cross Reference in subpart D is revised to refer to BIA's probate regulations at 25 CFR part 15.

Section 4.201 Definitions

This section is revised to add several new definitions taken from the new BIA regulations in 25 CFR 15.2, including definitions for the terms "attorney decision maker," "BIA," "BIA deciding official," "beneficiary," "day," "decedent," "estate," "heir," "IIM account," "intestate," "OTFM," "probate specialist," "testate," and "will." Other definitions from the existing § 4.201 have been retained, although they have been rearranged in alphabetical order with the added terms.

The definition of "administrative law judge" is revised, for purposes of this subpart only, to include both judges appointed under 5 U.S.C. 3105 and other OHA deciding officials designated by the Director. Although the latter (GS-15 attorney-advisers who serve as probate judges) have not been appointed under 5 U.S.C. 3105 and are therefore not administrative law judges for purposes of the Administrative Procedure Act, they have been delegated the authority to handle the probate of Indian trust estates under this subpart. Rather than revising all of subpart D at this time to substitute the phrase "administrative law judge or other OHA deciding official" wherever the term "administrative law judge" presently appears, the interim rule redefines the term "administrative law judge" for this limited purpose to include other OHA deciding officials. As explained above, OHA is contemplating further revisions to its probate process and will consider

revising all of subpart D in the future to use the longer phrase. As used in the remainder of this preamble, the term "administrative law judge" will carry the same expanded meaning as the revised definition in § 4.201.

The definition of "agency" is revised to include any office of a tribe which has contracted or compacted the BIA probate function under 25 U.S.C. 450f or 458cc. The definition of "Board" is revised to include the non-probate functions of the Interior Board of Indian Appeals, which are also set forth in subpart D. The definition of "Commissioner" is revised to include the Deputy Commissioner and his or her authorized representatives. The definition of "minor" is revised to conform to the definition of the same term in 25 CFR 15.2. The definition of "trust property" is revised to conform more closely to the definition of the term "trust land" in 25 CFR 15.2 and to remove its parenthetical definition of "restricted property"; the latter has been made a separately defined term.

Section 4.202 General Authority of Administrative Law Judges

This section is revised to provide administrative law judges with the authority to review probate decisions issued by BIA deciding officials and to provide that such review is to be conducted de novo.

Section 4.210 Commencement of Probate

This section is revised to incorporate the provisions of BIA's comparable rules at 25 CFR 15.202.

Section 4.234 Witnesses, Interpreters and Fees

Section 4.234 is revised to recognize that it is no longer the Superintendent who actually pays the costs of administration, pursuant to orders of the administrative law judge. Rather, the Superintendent initiates payment by providing appropriate documentation to OST's Office of Trust Fund Management (OTFM) for such payment, as set forth in the BIA rules at 25 CFR 15.312(b). Section 4.234 is further revised to reflect 25 CFR 15.308, under which estates will not be held open to pay claims.

Section 4.241 Rehearing

Under the previous version of § 4.241(a), a petition for rehearing was to be filed with the Superintendent, who then forwarded it to the administrative law judge. Since the petition is asking the administrative law judge to change his or her prior decision in some way, it makes more sense to have the petition go to the

administrative law judge in the first instance, and provide that the administrative law judge will forward a copy to the Superintendent. The interim rule adopts this latter approach.

Section 4.243 Appeals From BIA

A new section 4.243 is added to set forth procedures to be followed when a probate matter is appealed from the decision of a BIA deciding official to an administrative law judge.

Section 4.250 Filing and Proof of Creditor Claims; Limitations

Paragraph (a) of this section is revised to provide that all claims must be filed within 60 days from the date BIA receives verification of the decedent's death, in accordance with 25 CFR 15.303(c). A new paragraph (b) is added to adopt the BIA rule set forth at 25 CFR 15.304(b) that claims will not be paid from trust assets when non-trust assets are available for that purpose.

Section 4.251 Allowance of Administrative Expenses and Claims

This section is revised by adding a new paragraph (a), authorizing the payment of the costs of administering the estate as they arise, and by replacing the existing provisions with provisions comparable to BIA's regulations at 25 CFR 15.305 through 15.309. The BIA regulations do not mention costs of administration, which may potentially include such items as witness or interpreter fees under 43 CFR 4.234 and attorney fees chargeable against the estate under 43 CFR 4.281. Such costs are not expected to arise in the more informal probate proceedings handled by BIA under 25 CFR part 15, but they may arise in some cases under the more formal proceedings handled by administrative law judges under 43 CFR part 4, subpart D.

In adopting the BIA's list of priority claims in 25 CFR 15.305, OHA is adding to its current rules priorities for nursing home or other care facility expenses and for claims reduced to judgment by a court of competent jurisdiction, while removing from its current rules the priority for claims of the United States. OHA specifically invites comments from tribes, other federal agencies, and the public on these changes to the claims priorities set forth in the existing 43 CFR 4.25(a). OHA also invites comments on the potential impact to the Department's efficient administration of Indian probates if OHA were to adopt a different list of priorities from those adopted by BIA and set forth in this interim rule.

Section 4.270 Custody and Control of Trust Estates

Section 4.270 is revised to add a reference to BIA's rules at 25 CFR 15.311, which give the BIA deciding official authority to issue decisions and orders in appropriate probate cases. Section 4.270 is also revised to provide that expenses chargeable against the estate may be paid with the approval of the administrative law judge or BIA deciding official assigned to adjudicate the estate.

Section 4.271 Summary Distribution

This section is removed in its entirety because BIA's new regulations at 25 CFR 15.206 adequately govern this procedure. If a formal hearing before an administrative law judge is requested under 25 CFR 15.206(a), the BIA probate specialist will forward the probate package to the administrative law judge, who will then proceed in accordance with 43 CFR 4.210 *et seq.*

Section 4.273 Distribution of Estates

This section (4.274 in the previous version of these rules) is renumbered and revised to reflect the Superintendent's role of directing his or her staff and providing appropriate documentation to OTFM for the payment of claims and distribution of the estate, in accordance with the final order of the administrative law judge.

Section 4.320 Who May Appeal

Pending the adoption of probate regulations by BIA, OHA had revised its appeal regulation at section 4.320 to add a provision for an appeal to the Board of Indian Appeals from BIA decisions in summary distribution cases. See 65 FR 25449 (May 2, 2000). Now that BIA has adopted regulations providing that appeals in such cases, as well as appeals from all other probate decisions issued by BIA deciding officials, are to be referred to an administrative law judge for de novo review, that addition to the introductory paragraph of section 4.320 can be removed.

III. Public Comments

A. Determination To Issue Interim Rule

The Department has determined that the public notice and comment provisions of the Administrative Procedure Act, 5 U.S.C. 553(b), do not apply to this rulemaking because, for the most part, these regulations are procedural in nature and do not alter the substantive rights of the affected parties. They therefore satisfy the exemption from notice and comment rulemaking in 5 U.S.C. 553(b)(A). To the extent any provisions of the regulation

might alter the substantive rights of affected parties, they would not satisfy that exemption from notice and comment rulemaking. However, the Department believes there is also good cause for dispensing with the notice and comment requirements as unnecessary and contrary to the public interest under 5 U.S.C. 553(b)(B). Notice and comment are unnecessary for these provisions because the substantive changes have already been subject to advance notice and comment during the promulgation of BIA's probate regulations that were published on January 22, 2001, and became effective on March 23, 2001. Requiring the Department to engage in further notice and comment would be contrary to the public interest because BIA and OHA would be operating under inconsistent probate regulatory schemes during the interim period, and this may result in inconsistent adjudication of probate estates.

B. Determination To Make Rule Immediately Effective

Because, for the most part, these revisions do not impact the substance of the regulations, and because of the need to avoid inconsistent adjudication of probate estates, the Department has determined that there is good cause to waive the requirement of publication 30 days in advance of the rule's effective date under 5 U.S.C. 553(d). The Department further concludes that his rule should be effective immediately because it eliminates delays in having certain probate cases adjudicated by BIA decision makers and increases opportunities for the efficient distribution of trust estates. Accordingly, this amendment is issued as an interim rule effective on the date of publication in the **Federal Register** for good cause shown under 5 U.S.C. 553(d)(3).

C. Request for Public Comments

Even though the Department is making these revisions to OHA's probate procedures immediately effective as an interim rule, OHA will consider comments on the revisions for a period of 60 days after the effective date of this rule. The public is invited to offer substantive comments on any of these changes, whether with respect to the organization or substance of the interim rule.

Comments should be submitted in writing to the address indicated in the **ADDRESSES** section of this notice. Comments may also be telefaxed to the following number: 703-235-9014. Electronic mail comments will be accepted at probate_comments@ios.doi.gov. All

comments received will be available for public inspection at the Department of the Interior, Office of Hearings and Appeals, 4015 Wilson Boulevard, Arlington, Virginia 22203. All written comments received by the date indicated in the **DATES** section of this notice and all other relevant information in the record will be carefully assessed and fully considered prior to publication of the final rule. Any information considered to be confidential must be so identified and submitted in writing. We will not consider comment submitted anonymously. However, if you wish us to withhold your name and/or address from public inspection or from disclosure under the Freedom of Information Act, you must state this prominently at the beginning of your comment. Such requests will be honored to the extent allowed by law. The Department reserves the right to determine the confidential status of the information and to treat it according to our determination (see 10 CFR 1004.11).

The Department will hold consultation meetings with interested tribes, individual Indians, and tribal entities as requested to discuss the regulations and receive input from interested persons.

IV. Procedural Requirements

A. Review Under Executive Order 12866 (Regulatory Planning and Review)

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the Department must determine whether a regulatory action is "significant" and therefore subject to OMB review and the requirements of the Executive Order. The Order defines a "significant regulatory action" as one that is likely to result in a rule that may (1) have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

This interim rule describes how the federal government will administer its trust responsibility in probating the trust and restricted property interests of

individual Indians. Thus, the impact of the rule is confined to the federal government and Indian trust beneficiaries and does not impose a compliance burden on the economy generally. Accordingly, it has been determined that this rule is not a "significant regulatory action" from an economic standpoint, and that it does not otherwise create any inconsistencies or budgetary impacts to any other agency or federal program.

B. Review Under Executive Order 12988 (Civil Justice Reform)

With respect to both the review of existing regulations and the promulgation of new regulations, subsection 3(a) of Executive Order 12988, "Civil Justice Reform," 61 FR 4729 (February 7, 1996), imposes on Executive agencies the general duty to adhere to the following requirements: (1) Eliminate drafting errors and ambiguity; (2) write regulations to minimize litigation; and (3) provide a clear legal standard for affected conduct rather than a general standard and promote simplification and burden reduction.

With regard to the review of new regulations, subsection 3(b) of Executive Order 12988 specifically requires that Executive agencies make every reasonable effort to ensure that the regulations (1) clearly specify the preemptive effect, if any; (2) clearly specify any effect on existing Federal law or regulation; (3) provide a clear legal standard for affected conduct while promoting simplification and burden reduction; (4) specify the retroactive effect, if any; (5) adequately define key terms; and (6) address other important issues affecting clarity and general draftsmanship under any guidelines issued by the Attorney General.

Subsection 3(c) of Executive Order 12988 requires agencies to review new regulations in light of applicable standards in section 3(a) and section 3(b) to determine whether they are met or it is unreasonable to meet one or more of them. The Department has determined that this interim rule meets the relevant standards of Executive Order 12988.

C. Review Under the Regulatory Flexibility Act

This interim rule was also reviewed under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, which requires preparation of a regulatory flexibility analysis for any rule which is likely to have significant economic impact on a substantial number of small entities.

This rule streamlines the Department's policies and procedures that apply to certain Indian trust resources. Indian tribes are not small entities under the Regulatory Flexibility Act. Any impacts on identified small entities affected by this rulemaking are minimal, as they would concern a small number of farmers, ranchers, and individuals doing business on Indian lands (e.g., convenience stores, gasoline stations, sundry shops). Accordingly, the Department has determined that this interim rule will not have a significant economic impact on a substantial number of small entities, and, therefore, no regulatory flexibility analysis has been prepared.

D. Review Under the Small Business Regulatory Enforcement Fairness Act of 1996

This interim rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of \$100,000,000 or more. The revised subpart represents programs that are going within the Department, and no new monies are being introduced into the stream of commerce. This rule will not result in a major increase in costs or prices. The effect of this rulemaking will be to streamline ongoing policies, procedures, and management operations of the Department in probating individual Indian trust and/or restricted property. No increase in costs for administration will be realized, and no prices would be affected through these minor revisions to existing practice.

This interim rule will not result in any significant adverse effects on competition, employment, investment, productivity, or innovation, nor on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets. The impact of the rule will be realized primarily by individual Indians having a protected trust resource. These administrative revisions to departmental policy and procedure will not otherwise have a significant impact any small businesses or enterprises.

E. Review Under the Paperwork Reduction Act

This interim rule is exempt from the requirements of the Paperwork Reduction Act, since it applies to the conduct of agency administrative proceedings involving specific individuals and entities. 44 U.S.C. 3518(c); 5 CFR 1320.4(a)(2). An OMB form 83-1 is not required.

F. Review Under Executive Order 13132 (Federalism)

This interim rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. While this rule may be of interest to tribes, there is no Federalism impact on the trust relationship or balance of power between the United States government and the various tribal governments affected by this rulemaking. Therefore, in accordance with executive Order 13132, it is determined that this rule will not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

G. Review Under the National Environmental Policy Act of 1969

This interim rule does not constitute a major Federal action significantly affecting the quality of the human environment. Therefore, neither an Environmental Assessment nor an Environmental Impact Statement is necessary for this rule.

H. Review Under the Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995, Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. Under section 202 of the Act, the Department generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to state, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. This interim rule will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year.

I. Review Under Executive Order 12630 (Takings)

In accordance with Executive Order 12630, this interim rule does not have significant taking implications. This rule does not involve the "taking" of private property interests.

J. Review under Executive Order 13175 (Tribal Consultation)

The Department determined that, because this interim rule may have tribal implications, it would consult with tribal governments on this rulemaking. These consultations are in keeping with Executive Order 13175,

"Consultation and Coordination with Indian Tribal Governments." In promulgating its probate regulations, BIA consulted extensively with tribal governments. Because OHA is effectively incorporating certain BIA regulations into its regulations, tribal governments will already be aware of the substance of these regulations. However, the Department has begun an additional consultation process by providing a draft of this rule to all the tribes and to the National Congress of American Indians and by soliciting their comments. No comments were received from any tribe or tribal organization during this pre-proposal comment period.

In addition, tribal governments will be notified of the substance of this rulemaking through the publication of this rule in the **Federal Register** and through direct mailings to tribal leaders. OHA will also meet with tribes and tribal organizations as requested to discuss the rule. This will enable tribal officials and the affected tribal constituency throughout Indian Country to have meaningful and timely input in the development of the final rule.

K. Review Under Executive Order 13211 (Energy Impacts)

The Department has determined that this interim rule is not a "significant energy action" as defined in Executive Order 13211, "Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 18, 2001), because it is not a significant regulatory action under Executive Order 12866 (as discussed above), nor is it likely to have a significant adverse effect on the supply, distribution, or use of energy.

List of Subjects in 43 CFR Part 4

Administrative practice and procedure, Civil rights, Claims, Estates, Hearing and appeal procedures, Indians Lawyers, Penalties.

Dated: June 11, 2001.

Robert J. Lamb,

Deputy Assistant Secretary—Budget and Finance.

PART 4—[AMENDED]

For the reasons stated in the preamble, the Department of the Interior, Office of Hearings and Appeals, amends 43 CFR part 4, subpart D as follows:

1. Revise the authority citation for part 4, subpart D to read as follows:

Authority: Secs. 1, 2, 36 Stat. 855, as amended, 856, as amended, sec. 1, 38 Stat. 586, 42 Stat. 1185, as amended, secs. 1, 2, 56 Stat. 1021, 1022; R.S. 463, 465; 5 U.S.C. 301; 25 U.S.C. secs. 2, 9, 372, 373, 374, 373a,

373b, 410, 100 Stat. 61, as amended by 101 Stat. 886 and 101 Stat. 1433, 25 U.S.C. 331 note.

2. Revise the Cross Reference following the authority citation to read as follows:

Cross Reference: See 25 CFR part 15 for rules setting forth the responsibilities and practices of the Bureau of Indian Affairs in the probate of Indian estates. See subpart A of this part for the authority, jurisdiction, and membership of the Board of Indian Appeals within the Office of Hearings and Appeals. For general rules applicable to proceeding before the Hearings Division, Board of Indian Appeals, and other Appeals Boards of the office of Hearings and Appeals, see subpart B of this part.

3. Revise § 4.201 to read as follows;

§ 4.201 Definitions.

As used in this subpart:

Administrative law judge means any employee of the Office of Hearings and Appeals appointed pursuant to the Administrative Procedure Act, 5 U.S.C. 3105, or any other OHA deciding official designated by the Director, Office of Hearings and Appeals.

Agency means the agency office or any other designated office in BIA having jurisdiction over trust or restricted property and money. This term also means any office of a tribe which has contracted or compacted the BIA probate function under 25 U.S.C. 450f or 458cc.

Attorney decision maker means an attorney with BIA who reviews a probate package, determines heirs, approves wills and beneficiaries of the will, determines creditors' claims, and issues a written decision to the extent authorized by 25 CFR part 15.

Beneficiary means any individual who receives trust or restricted property or money in a decedent's will.

BIA means the Bureau of Indian Affairs within the Department of the Interior.

BIA deciding official means the official with the delegated authority to make a decision on a probate matter pursuant to 25 CFR part 15, and may include a BIA regional director, agency superintendent, field representative, or attorney decision maker.

Board means the Board of Indian Appeals in the Office of Hearings and Appeals, Office of the Secretary, authorized by the Secretary to hear, consider, and determine finally for the Department appeals taken by aggrieved parties from actions by administrative law judges on petitions for rehearing or reopening, and allowance of attorney fees, and from actions of BIA officials as provided in § 4.1(b)(2).

Child or *children* includes an adopted child or children.

Commissioner includes the Deputy Commissioner of Indian Affairs and his or her authorized representatives.

Day means a calendar day, unless otherwise stated.

Decedent means a person who is deceased.

Department means the Department of the Interior.

Estate means the trust cash assets and restricted or trust property owned by the decedent at the time of his death.

Heir means any individual who receives trust or restricted property or money from a decedent in an intestate proceeding.

IIM account means funds held in an individual Indian monies account by OTFM or a tribe performing this function under a contract or compact.

Intestate means the decedent dies without a will.

Minor means an individual who has not reached the age of majority as defined by the applicable tribal or state law.

OTFM means the Office of Trust Funds Management within the Office of the Special Trustee for American Indians, Department of the Interior, or its authorized representative.

Party in interest means any presumptive or actual heir, any beneficiary under a will, any party asserting a claim against a deceased Indian's estate, and any Tribe having a statutory option to purchase interests of a decedent.

Probate means the legal process by which applicable tribal law, state law, or federal law that affects the distribution of the decedent's estate is applied to:

(1) Determine the heirs,
(2) Approve wills and beneficiaries, and

(3) Transfer any funds or property held in trust by the Secretary for a decedent to their heirs, beneficiaries, or other persons or entities.

Probate specialist means a BIA or tribal employee who is trained in Indian probate matters.

Restricted property means real or personal property held by an Indian which he or she cannot alienate or encumber without the consent of the Secretary or his or her authorized representative. In this subpart, restricted property is treated as if it were trust property. The term "restricted property" as used in this subpart does not include the restricted lands of the Five Civilized Tribes and Osage Tribe of Indians.

Secretary means the Secretary of the Interior or his or her authorized representative.

Solicitor means the Solicitor of the Department of the Interior or his or her authorized representative.

Superintendent means the BIA Superintendent or other BIA officer having jurisdiction over an estate, including area field representatives or one holding equivalent authority.

Testate means the decedent executed a will before his death.

Trust property means real or personal property, or an interest therein, which the United States holds in trust for the benefit of an individual Indian.

Will or last will and testament means a written testamentary document, including any properly executed written changes, called codicils, which was signed by the decedent and was attested by two disinterested adult witnesses, that states who will receive the decedent's trust or restricted property.

4. Revise § 4.202 to read as follows:

§ 4.202 General authority of administrative law judges.

Administrative law judges will, except as otherwise provided in § 4.205(b) and 25 CFR part 15, determine the heirs of Indians who die intestate possessed of trust property; approve or disapprove wills of deceased Indians disposing of trust property; accept or reject full or partial renunciations of interest in both testate and intestate proceedings; allow or disallow creditors' claims against estates of deceased Indians; and decree the distribution of trust property to heirs and devisees, including the partial distribution to known heirs or devisees where one or more potential heirs or devisees are missing but not presumed dead, after attributing to and setting aside for such missing person or persons the share or shares such person or persons would be entitled to if living. Administrative law judges will determine the right of a tribe to take inherited interests and the fair market value of the interests taken in appropriate cases as provided by statute. They will review cases de novo, hold hearings as necessary or appropriate, and issue decisions in matters appealed from decisions of BIA deciding officials. Administrative law judges appointed under 5 U.S.C. 3105 will also hold hearings and issue recommended decisions in matters referred to them by the Board in the Board's consideration of appeals from administrative actions of BIA officials.

5. Revise § 4.210 to read as follows:

§ 4.210 Commencement of probate.

The probate of a trust estate before an administrative law judge will commence when the probate specialist

or BIA deciding official files with the administrative law judge all information shown in the records relative to the family of the deceased and his or her property. The information must include the complete probate package described in 25 CFR 15.202 and any other relevant information. The agency or BIA deciding official must promptly transmit to the administrative law judge any creditor's or other claims that are received after the case is transmitted to the administrative law judge, for a determination of their timeliness, validity, priority, and allowance under §§ 4.250 and 4.251.

6. Revise the final sentence to § 4.234 to read as follows:

§ 4.234 Witnesses, interpreters, and fees.

* * * Upon receipt of such order, the Superintendent must immediately initiate payment of such sums from the estate account, or if such funds are insufficient, then out of funds as they are received in such account prior to closure of the estate, with the proviso that such costs must be paid in full with a later allocation against the interest of a party, if the administrative law judge has so ordered.

7. Revise § 4.241(a) to read as follows:

§ 4.241 Rehearing.

(a) Any person aggrieved by the decision of the administrative law judge may, within 60 days after the date on which notice of the decision is mailed to the interested parties, file with the administrative law judge a written petition for rehearing. Such petition must be under oath and must state specifically and concisely the grounds upon which it is based. If the petition is based on newly-discovered evidence, it must be accompanied by affidavits or declarations of witnesses stating fully what the new testimony is to be. It must also state justifiable reasons for the failure to discover and present that evidence, tendered as new, at the hearings held prior to the issuance of the decision. The administrative law judge, upon receiving a petition for rehearing, must promptly forward copies to the Superintendent. The Superintendent must not initiate payment of claims or distribute the estate while such petition is pending, unless otherwise directed by the administrative law judge.

8. Add § 4.243 under the undesignated center heading "Appeals from Decisions of BIA Deciding Officials" to read as follows: Appeals From Decisions of BIA Deciding Officials

§ 4.243 Appeals from BIA.

Any appeal filed pursuant to 25 CFR part 15, subpart E, will be referred to the administrative law judge pursuant to § 4.210. The administrative law judge will review the merits of the case de novo and conduct a hearing as necessary or appropriate pursuant to the regulations in this subpart. The BIA deciding official must forward to the administrative law judge the entire file upon which the BIA deciding official's decision was based.

9. In § 4.250, redesignate paragraphs (b) through (g) as paragraphs (c) through (h), and revise paragraph (a) and add new paragraph (b) to read as follows:

§ 4.250 Filing and proof of creditor claims; limitations.

(a) All claims against the estate of a deceased Indian held by creditors chargeable with notice of the decedent's death must be filed with the agency within 60 days from the date BIA receives verification of the decedent's death under 25 CFR 15.101.

(b) No claim will be paid from trust or restricted assets when the administrative law judge is aware that the decedent's non-trust estate may be available to pay the claim.

* * * * *

10. Revise § 4.251 to read as follows:

§ 4.251 Allowance of administrative expenses and claims.

(a) Upon motion of the Superintendent or a party in interest, the administrative law judge may authorize payment of the costs of administering the estate as they arise and prior to the allowance of any claims against the estate.

(b) After the costs of administration, the administrative law judge may authorize payment of priority claims as follows:

- (1) Claims for funeral expenses (including the cemetery marker);
- (2) Claims for medical expenses for the last illness;
- (3) Claims for nursing home or other care facility expenses;
- (4) Claims for an Indian tribe; and
- (5) Claims reduced to judgment by a court of competent jurisdiction.

(c) After the priority claims, the administrative law judge may authorize payment of all remaining claims, referred to as general claims.

(d) The administrative law judge has the discretion to decide that part or all of an otherwise valid claim is unreasonable, reduce the claim to a reasonable amount, or disallow the claim in its entirety.

(1) If a claim is reduced, the administrative law judge will order payment only of the reduced amount.

(2) An administrative law judge may reduce or disallow both priority claims and general claims.

(e) If there is not enough money in the IIM account to pay all claims, the administrative law judge will order payment of allowed priority claims first, either in the order identified in paragraph (b) of this section or on a pro rata (reduced) basis.

(f) If less than \$1,000 remains in the IIM account after payment of priority claims is ordered, the general claims may be ordered paid on a pro rata basis or disallowed in their entirety.

(g) The unpaid balance of any claims will not be enforceable against the estate after the estate is closed.

(h) Interest or penalties charged against either priority or general claims after the date of death will not be paid.

11. Revise § 4.270 to read as follows:

§ 4.270 Custody and control of trust estates.

The Superintendent may assume custody or control of all tangible trust personal property of deceased Indian, and he or she may take such action, including sale thereof, as in his or her

judgment is necessary for the benefit of the estate, the heirs, legatees, and devisees, pending entry of the decision provided for in 25 CFR 15.311 or in §§ 4.240, 4.241, or 4.312. All expenses, including expenses of roundup, branding, care, and feeding of livestock, are chargeable against the estate and may be paid from those funds of the deceased that are under the Department's control, or from the proceeds of a sale of the property or a part thereof. If an administrative law judge or BIA deciding official has been assigned to adjudicate the estate, his or her approval is required prior to such payment.

§ 4.271 [Removed and Redesignated]

12. Remove § 4.271 in its entirety and redesignate §§ 4.272 and 4.273 as §§ 4.271 and 4.272, respectively.

13. Redesignate § 4.274 as § 4.273 and revise it to read as follows:

§ 4.273 Distribution of estates.

(a) Unless the Superintendent has received a copy of a petition for rehearing filed pursuant to the requirements of § 4.241(a) or a copy of a notice of appeal filed pursuant to the requirements of § 4.320(b), he or she shall initiate payment of allowed

claims, distribution of the estate, and all other actions required by the administrative law judge's final order.

(b) The Superintendent must not initiate the payment of claims or distribution of the estate during the pendency of proceedings under § 4.241 or § 4.242, unless the administrative law judge orders otherwise in writing. The Board may, at any time, authorize the administrative law judge to issue interim orders for payment of claims or for partial distribution during the pendency of proceeding on appeal.

14. In § 4.320, redesignate paragraphs (a) through (c) as paragraphs (b) through (d), remove the undesignated introductory paragraph, and add new paragraph (a) to read as follows:

§ 4.320 Who may appeal.

(a) A party in interest has a right to appeal to the Board from and order of an administrative law judge on a petition for rehearing, a petition for reopening, or regarding tribal purchase of interests in a deceased Indian's trust estate.

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