

**DEPARTMENT OF THE INTERIOR**

**Bureau of Indian Affairs**

**25 CFR Part 15**

**Office of the Secretary**

**43 CFR Part 4**

**RIN 1094-AA50**

**Probate of Indian Trust Estates**

**AGENCY:** Bureau of Indian Affairs; Office of the Secretary, Interior.

**ACTION:** Final rule.

**SUMMARY:** The Bureau of Indian Affairs (BIA) and the Office of Hearings and Appeals (OHA), Department of the Interior (the Department), are revising their regulations dealing with the probate of Indian trust estates to reflect an organizational change. The Department is consolidating the probate adjudication functions previously handled by attorney decision makers in BIA and by administrative law judges and Indian probate judges in OHA into a new Probate Hearings Division within OHA. As a result, this rule transfers various regulatory provisions dealing with attorney decision makers from BIA's regulations to OHA's.

**DATES:** *Effective Date:* March 9, 2005.

**FOR FURTHER INFORMATION CONTACT:** Robert S. More, Director, Office of Hearings and Appeals, U.S. Department of the Interior, 801 N. Quincy Street, Suite 300, Arlington, VA 22203, 703-235-3810.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

In 2001, BIA and OHA published final rules making numerous changes to the Department's procedures for processing and adjudicating Indian probate cases. BIA published a new 25 CFR part 15 in January, 66 FR 7089 (Jan. 22, 2001), and OHA made conforming changes to its regulations in 43 CFR part 4, subpart D, in June and December, 66 FR 32888 (June 18, 2001), 67656 (Dec. 31, 2001). Among the most significant of the various changes was the creation of the position of attorney decision maker in BIA to handle probate cases that do not require an evidentiary hearing.

Under the 2001 BIA regulations, once a probate case had been prepared for adjudication, a probate specialist would review the case and, applying criteria set forth in the regulations, determine whether the case should be referred to an attorney decision maker in BIA or an administrative law judge (ALJ) or Indian probate judge in OHA. The probable

heirs and beneficiaries were notified of the probate specialist's determination, and if the case was deemed appropriate for an attorney decision maker, they were given an opportunity to request a formal hearing before an ALJ or Indian probate judge. Over the last 4 years, thousands of Indian probate cases have been decided by attorney decision makers in BIA, and thousands more by ALJs and Indian probate judges in OHA.

Beginning in 2002, the Department has worked diligently to redesign its business processes to build a highly effective fiduciary trust services organization. The "To-Be" model of that organization—now known as the Fiduciary Trust Model—is the outcome of a 3-year effort guided by the Department's *Comprehensive Trust Management Plan*.

The redesign covered eight trust business process areas, including probate, that were identified for study and reengineering. By early 2003, the Department had detailed the existing ("As-Is") process for each area and set about developing recommendations for an improved ("To-Be") process. In the probate area, the chief recommendations to emerge from the "To-Be" Trust Business Model were to consolidate in a single organization the probate adjudication functions being handled separately by BIA and OHA deciding officials, and to give the attorney decision makers additional authority to adjudicate Indian probates.

Consolidation was seen as leading to increased efficiency, improved service to beneficiaries, and greater consistency in probate decisions. And extending the authority of the attorney decision makers was seen as leading to greater flexibility in their use as deciding officials.

During the last quarter of 2003 and the first quarter of 2004, the Department held a series of consultation sessions with tribes and other stakeholders around the country regarding the "To-Be" Trust Business Model recommendations. The tribes' general reaction to the recommendations concerning probate adjudication was favorable.

In August 2004, the Department approved the consolidation recommendation and assigned the consolidated organization to OHA. The recommendation to extend the authority of the attorney decision makers was referred to OHA to evaluate following the consolidation, with a goal of making the best use of all the available adjudicatory resources.

Consequently, OHA has created a Probate Hearings Division to bring together the attorney decision makers

and their support staff from BIA and the probate ALJs, Indian probate judges, attorneys, and their support staff from OHA.

This rule is critical to the initial implementation of the Fiduciary Trust Model recommendations regarding probate. With the transfer of the attorney decision makers from BIA to OHA, the regulatory provisions governing their authority and procedures must likewise be transferred from BIA's regulations in 25 CFR part 15 to OHA's regulations in 43 CFR part 4, subpart D. Other minor changes to BIA's and OHA's procedures are being made as well, as described below.

While these minor procedural and editorial changes do not require public notice and comment, OHA recognizes that more substantial changes to its probate regulations will be necessary to fully implement both the Fiduciary Trust Model and the newly enacted American Indian Probate Reform Act of 2004, Pub. L. 108-374. OHA therefore anticipates engaging in notice-and-comment rulemaking in 2005 to address a number of issues that are beyond the scope of this rule.

**II. Section-by-Section Analysis**

*A. 25 CFR Part 15*

As noted in the Summary above, this rule transfers various regulatory provisions dealing with attorney decision makers from BIA's regulations in 25 CFR part 15 to OHA's regulations in 43 CFR part 4. These changes result in a partial restructuring of the part 15 regulations. Sections 15.1 through 15.108 and 15.201 retain their current numbering and content, although the language has been simplified, and other minor textual changes have been made in places as noted below. But the remainder of part 15 has been restructured. The following table lists the affected sections from the 2001 version of part 15 and their corresponding provisions in the revised regulations (if any).

2001 rule	This rule
25 CFR 15.109 .....	43 CFR 4.208.
25 CFR 15.202 .....	25 CFR 15.203.
25 CFR 15.203 .....	25 CFR 15.301; 43 CFR 4.211.
25 CFR 15.204 .....	43 CFR 4.202.
25 CFR 15.205 .....	43 CFR 4.202.
25 CFR 15.206 .....	43 CFR 4.212.
25 CFR 15.301 .....	43 CFR 4.213.
25 CFR 15.302 .....	(None).
25 CFR 15.303 .....	25 CFR 15.202.
25 CFR 15.304 .....	43 CFR 4.250.
25 CFR 15.305 .....	43 CFR 4.251.
25 CFR 15.306 .....	43 CFR 4.251.
25 CFR 15.307 .....	43 CFR 4.251.
25 CFR 15.308 .....	43 CFR 4.251.

2001 rule	This rule
25 CFR 15.309 .....	43 CFR 4.251.
25 CFR 15.310 .....	43 CFR 4.213.
25 CFR 15.311 .....	43 CFR 4.214.
25 CFR 15.312 .....	25 CFR 15.303.
25 CFR 15.401 .....	43 CFR 4.215.
25 CFR 15.402 .....	43 CFR 4.215.
25 CFR 15.403 .....	43 CFR 4.215.
25 CFR 15.404 .....	43 CFR 4.215.
25 CFR 15.405 .....	43 CFR 4.215.
25 CFR 15.501 .....	25 CFR 15.401.
25 CFR 15.502 .....	25 CFR 15.401.
25 CFR 15.503 .....	25 CFR 15.402.
25 CFR 15.504 .....	25 CFR 15.403.

As the table indicates, section 15.302 from the 2001 rule has been removed. It stated that, "Unless otherwise provided by federal law or a tribal inheritance code approved by the Secretary, the law of the state where the decedent was domiciled will determine the distribution of the estate." This regulation had proved unhelpful in practice and potentially misleading since, in the majority of cases, federal law "otherwise provided."

Where trust lands are involved, intestate succession has generally been determined by the law of the state where such lands are located (*see* 25 U.S.C. 348), which is not necessarily where the decedent was domiciled. In some instances, tribal probate codes govern. Moreover, state law does not determine the distribution of estates in testate cases; federal law does. *E.g., Estate of Reuben Mesteth*, 16 IBIA 148 (1988). "[T]he law of the state where the decedent was domiciled" has generally governed the distribution of trust personal property in intestate cases, but even that rule will change under the new American Indian Probate Reform Act of 2004, which contains a federal intestate succession code.

The paragraphs below describe other changes from the 2001 rule, following the numbering scheme used in this new rule.

#### Section 15.2 What Terms Do I Need To Know?

The definition of "deciding official" has been changed to include only the Departmental officials who have been given the authority to decide Indian probate matters. At the time of the 2001 rule, various BIA officials could handle summary cases, including a regional director, agency superintendent, field representative, or attorney decision maker. Shortly thereafter, BIA assigned this responsibility to its attorney decision makers exclusively. Now that the attorney decision makers are joining the ALJs and Indian probate judges in OHA, the term "deciding official" has

been defined to mean only those officials.

The definitions of "ALJ" and "attorney decision maker" have been revised and a definition of "Indian probate judge" has been added to more clearly distinguish the three types of deciding officials. ALJs and Indian probate judges have the same authority to conduct formal probate hearings and render probate decisions, but their positions are governed by different provisions of Title 5, U.S. Code. Attorney decision makers are authorized to conduct informal probate hearings and render probate decisions in cases that do not require a formal hearing.

Definitions have been added for "formal hearing" and "informal hearing" to further clarify the roles of the three deciding officials.

Other minor changes have been made to a few of the definitions in this section. For example, a sentence has been added to the definition of "beneficiary" to clarify that it includes both a devisee (someone who receives real property in a will) and a legatee (someone who receives personal property in a will). And the term "codicil" is now a separately defined term, rather than being included in the definition of "will" as in the 2001 rule. Because the Office of Trust Funds Management no longer exists as a separate entity within the Office of the Special Trustee, the definition of "OTFM" has been replaced with a definition of "OST."

#### Section 15.4 How Does the Probate Process Work?

Under the 2001 rule, BIA prepared the probate package in each case and then determined whether the case should be referred to a deciding official in BIA or a deciding official in OHA for further processing. With the consolidation of the deciding officials in OHA, BIA will now refer all completed probate packages to OHA, and OHA will make the case assignments. Paragraph (c) has been revised to reflect this change.

#### Section 15.101 How Do I Begin the Probate Process?

This section has been revised to conform to existing practice and simplify the requirements for initiating the probate process. Under both the 2001 rule and this rule, a person who wants BIA to initiate a probate process must provide a certified copy of the death certificate if one exists. If a death certificate does not exist, the 2001 rule required some other evidence of the death, such as a newspaper obituary notice or a church or court record, with a supporting affidavit from the tribe

with whom the decedent was associated or someone who knows about the decedent's death.

In practice, BIA and OHA found that, if a death certificate does not exist, other documentary evidence of the death is often lacking as well. In such cases, an affidavit from someone who knows of the death has been accepted. The revised regulation adopts this approach by requiring an affidavit where there is no death certificate. Any supporting documentation should be provided if it is available, but it is not essential to initiating the probate process.

#### Section 15.203 What Must the Complete Probate Package Contain?

Paragraph (b) has been revised to specify that BIA will provide the enrollment or other identifying number for each prospective heir or beneficiary, if such number has been assigned. BIA provides this information in most instances already, but the requirement has been added to the regulations because of the important role these numbers play in correctly identifying interested parties and in processing the probate.

#### Section 15.301 What Happens After BIA Prepares the Probate Package?

This section, renumbered from former section 15.203, has been revised to reflect the change discussed above in connection with section 15.4. The assignment of a probate case to an attorney decision maker for an informal hearing or to an ALJ or Indian probate judge for a formal hearing will be made by OHA, not by the probate specialist. However, the probate specialist will continue to provide interested parties with the notice described in former section 15.203(c), (e), including notice of the right of the probable heirs or beneficiaries to request a formal hearing.

#### Section 15.302 What Happens After the Probate Package Is Referred to OHA?

This section is new. It states that, after OHA receives the probate package from BIA, it will assign the case to a deciding official for further proceedings in accordance with 43 CFR part 4.

#### Section 15.303 What Happens After the Probate Decision Is Made?

This section is renumbered from former section 15.312 and incorporates provisions from former section 15.404 as well as from former 43 CFR 4.241(a). The references to "appeal" in former sections 15.312 and 15.404 have been expanded to include a request for de novo review following an attorney decision maker's decision under 43 CFR 4.215, a request for rehearing under 43

CFR 4.241, or an appeal under 43 CFR 4.320 *et seq.*

Under former section 15.401 *et seq.*, a request for review following an attorney decision maker's decision was termed an "appeal," but that was arguably a misnomer, since the review by an ALJ or Indian probate judge was *de novo*. This rule uses the term "request for *de novo* review" to distinguish this review process from an appeal that can be taken from certain decisions by an ALJ or Indian probate judge to the Interior Board of Indian Appeals.

**B. 43 CFR Part 4**

Transfer of the regulatory provisions dealing with attorney decision makers from BIA's regulations in 25 CFR part 15 to OHA's regulations in 43 CFR part 4 requires minimal restructuring of the part 4, subpart D regulations. Sections 4.200 through 4.210, 4.220 through 4.242, and 4.250 through 4.357 retain their current numbering and content, although the language has been simplified, several sections have been divided (or further divided) into paragraphs and subparagraphs for ease of reference, and as noted below, other minor textual changes have been made in places. The following table lists the sections from the 2001 version of part 4 that are affected by the restructuring and their corresponding provisions in the revised regulations.

2001 rule	This rule
43 CFR 4.211 .....	43 CFR 4.216.
43 CFR 4.212 .....	43 CFR 4.217.
43 CFR 4.243 .....	43 CFR 4.215.

This rule incorporates new sections 4.211 through 4.215, based on corresponding provisions from 25 CFR part 15, as described below. The paragraphs below describe other changes from the 2001 rule, following the numbering scheme used in this new rule. OHA is also changing one portion of its general rules in 43 CFR part 4, subpart B, as explained in the following paragraph.

**Section 4.27 Standards of Conduct**

Paragraph (c) of this section deals with the disqualification of an administrative law judge or appeals board member. The paragraph has been revised to cover all OHA deciding officials, including attorney decision makers and Indian probate judges.

**Section 4.200 Scope of Regulations**

This section has been converted to a table for ease of reference, and the provisions in paragraphs (a)(2)(i) through (iii) have been added to clarify which portions of the part 4, subpart D

regulations apply to different types of probate proceedings. Paragraph (a)(5) has been added to cover proceedings under the White Earth Reservation Land Settlement Act.

**Section 4.201 Definitions**

A number of definitions have been revised or added to make this section consistent with 25 CFR 15.2. See the discussion above regarding "administrative law judge" ("ALJ" in section 15.2), "attorney decision maker," "beneficiary," "codicil," "formal hearing," "Indian probate judge," and "informal hearing." Other conforming changes include the addition of definitions for "LTRO," "OHA," and "decision or order," and replacing the term "party in interest" with "interested party."

A definition of "de novo review" has been added to go with the new section 4.215 (see discussion above under section 15.303). Definitions have also been added for a few other terms used in part 4, subpart D: "bequeath," "bequest," and "devise."

**Section 4.202 General Authority of Deciding Officials**

This revised section is a combination of former 43 CFR 4.202, which dealt with the authority of ALJs and Indian probate judges, and former 25 CFR 15.204-.205, which set forth criteria for cases that could not be handled by an attorney decision maker. Paragraph (a) provides that an attorney decision maker may conduct an informal hearing and render a decision in any probate case that does not require a formal hearing and a decision by an ALJ or Indian probate judge. Paragraph (b) then sets forth the criteria for cases that require a formal hearing and a decision by an ALJ or Indian probate judge.

One criterion from former section 15.205 has been omitted in new section 4.202(b). Under former sections 15.109 and 15.205(c)(8), a disclaimer from a non-Indian probable heir or beneficiary could be accepted by any deciding official, while a disclaimer from an Indian probable heir or beneficiary could be accepted only by an ALJ or Indian probate judge. There does not appear to be any basis for this distinction, which has caused numerous practical problems for interested parties and deciding officials. There is also no need for the distinction, since under section 4.202(b)(1) a probable heir or beneficiary can request a formal hearing before an ALJ or Indian probate judge if he or she prefers.

Two new criteria have been added to section 4.202(b) to cover issues that are handled only by ALJs and Indian

probate judges: determinations of nationality, citizenship, or status affecting the character of land titles under section 4.206(a)(2), and tribal purchases of a decedent's interest under section 4.300 *et seq.*

**Section 4.206 Determinations of Nationality or Citizenship and Status Affecting Character of Land Titles**

This section has been divided into paragraphs to distinguish determinations of Indian or non-Indian status from determinations of nationality or citizenship. Determinations of Indian or non-Indian status can be made by any deciding official, including an attorney decision maker, *see* former 25 CFR 15.311(4). Determinations of nationality or citizenship affecting the character of land titles, however, are more likely to turn on factual issues requiring an evidentiary hearing. Such cases have therefore been handled by an ALJ or Indian probate judge.

**Section 4.211 Assignment to Deciding Official**

This section is based on former 25 CFR 15.203; a table has been used for ease of reference. As noted previously, with the consolidation of attorney decision makers, ALJs, and Indian probate judges in OHA, BIA will be referring all completed probate packages to OHA, which will make the case assignments to particular deciding officials. Consistent with current practice, the cases will be divided into three categories: (a) Those that qualify for summary processing, (b) those that do not qualify for summary processing but do not require a formal hearing, and (c) those that require a formal hearing. Cases that fall into either of the first two categories will be assigned to an attorney decision maker, while cases that fall into the third category will be assigned to an ALJ or Indian probate judge.

Paragraph (d) has been added to provide flexibility in the event an attorney decision maker is not available to handle a case falling into either of the first two categories. In such event, the case could be assigned to an ALJ or Indian probate judge.

**Section 4.212 Summary Process for Estate Containing Only Cash Assets of Less Than \$5,000**

This section is based on former 25 CFR 15.206. It provides for an expedited, informal process for estates that contain only trust cash assets of less than \$5,000 and that do not require a formal hearing under section 4.202(b).

#### Section 4.213 Informal Process for Cases That Do Not Require a Formal Hearing

This section is based on former 25 CFR 15.301. It provides for an informal process for estates that contain trust cash assets of \$5,000 or more or other trust property and that do not require a formal hearing under section 4.202(b).

#### Section 4.214 Written Decision of Attorney Decision Maker

This section is based on former 25 CFR 15.311. It specifies what the written decision of an attorney decision maker must contain, following an informal hearing held under section 4.212 or 4.213.

#### Section 4.215 De Novo Review Following Decision of Attorney Decision Maker

This section is based on former 25 CFR 15.401–.405 and former 43 CFR 4.243. As noted previously in connection with 25 CFR 15.303, this rule uses the term “request for de novo review” rather than “appeal” (as in the former regulations) to refer to a proceeding by an ALJ or Indian probate judge to review a probate case following the issuance of an attorney decision maker’s decision under section 4.214.

#### Section 4.300 Authority and Scope

Paragraph (a) of this section has been converted to a table for ease of reference.

### III. Procedural Requirements

#### A. Determination To Issue Direct Final 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 the revisions being adopted pertain solely to matters of agency organization, procedure, and practice. They therefore satisfy the exemption from notice and comment rulemaking in 5 U.S.C. 553(b)(A). This rule merely transfers regulatory provisions governing the processing of certain Indian probate cases from 25 CFR part 15 to 43 CFR part 4, to reflect the consolidation of Indian probate adjudication in OHA, and makes other minor changes to the Department’s procedural regulations to assure consistency and efficiency in adjudications after the consolidation.

#### B. Determination To Make Rule Immediately Effective

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). Consolidating the Indian probate adjudication function in one organization will lead to increased efficiency, improved service to Indian heirs and beneficiaries, and greater consistency in probate decisions. Delaying the consolidation for 30 days until the rule became effective would hamper the administrative process while providing no benefit to the public. And implementing the consolidation while waiting for the rule to become effective in 30 days would result in a regulatory gap during which the attorney decision makers, having been transferred to OHA, would have no authority to process their cases. Accordingly, this rule is being made effective on the date of publication in the **Federal Register** for good cause shown under 5 U.S.C. 553(d)(3).

#### C. 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 rule merely transfers regulatory provisions governing the processing of certain Indian probate cases from 25 CFR part 15 to 43 CFR part 4, to reflect the consolidation of Indian probate adjudication in OHA, and makes other minor changes to the Department’s procedural regulations. 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 on any other agency or federal program.

#### D. 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 Office of the Solicitor has determined that this rule meets the relevant standards of Executive Order 12988.

#### E. Review Under the Regulatory Flexibility Act

This 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 merely transfers regulatory provisions governing the processing of certain Indian probate cases from 25 CFR part 15 to 43 CFR part 4, to reflect the consolidation of Indian probate adjudication in OHA, and makes other minor changes to the Department’s procedural regulations. Accordingly, the Department has determined that this rule will not have a significant economic impact on a substantial number of small entities, and no

regulatory flexibility analysis is required.

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

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996:

(1) It will not have an annual effect on the economy of \$100 million or more. The rule reflects the consolidation of existing probate adjudication functions in a single organization, which will increase administrative efficiency but will not affect the overall economy.

(2) This rule will not result in a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions. The transfer of regulatory provisions governing the processing of certain Indian probate cases from 25 CFR part 15 to 43 CFR part 4 and the other minor procedural changes made by the rule will not result in any increase in costs or prices.

(3) This 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 rule is limited to matters of agency organization, procedure, and practice.

*G. Review Under the Paperwork Reduction Act*

This 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.

*H. Review Under Executive Order 13132 (Federalism)*

This 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 tribal governments. Therefore, in accordance with Executive Order 13132, the Department has determined that this rule will not have sufficient federalism

implications to warrant the preparation of a Federalism Assessment.

*I. Review Under the National Environmental Policy Act of 1969*

This 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.

*J. Review Under the Unfunded Mandates Reform Act of 1995*

This rule does not impose an unfunded mandate on State, local, and tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local, or tribal governments or the private sector. This rule merely transfers regulatory provisions governing the processing of certain Indian probate cases from 25 CFR part 15 to 43 CFR part 4, to reflect the consolidation of Indian probate adjudication in OHA, and makes other minor changes to the Department's procedural regulations. A statement containing the information required by the Unfunded Mandates Reform Act, 2 U.S.C. 1531 *et seq.*, is not required.

*K. Review Under Executive Order 12630 (Takings)*

In accordance with Executive Order 12630, this rule does not have significant takings implications. This rule does not involve the taking of private property interests, and no takings implication assessment has been prepared.

*L. Review Under Executive Order 13175 (Tribal Consultation)*

During the period from November 2003 to March 2004, the Department held a series of consultation sessions with tribes around the country concerning its "To-Be" Trust Business Model, including the recommendation that all probate adjudication be consolidated in a single organization. The tribes were notified during the consultation sessions that the Department's Indian probate regulations in 25 CFR part 15 and 43 CFR part 4 would need to be revised to effectuate the consolidation. The general reaction to the recommendation, which this rule implements, was favorable. The Department has met its tribal consultation obligations under E.O. 13175.

*M. Review Under Executive Order 13211 (Energy Impacts)*

The Department has determined that this rule is not a "significant energy action" as defined in Executive Order 13211 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**

*25 CFR Part 15*

Estates, Indians-law.

*43 CFR Part 4*

Administrative practice and procedure, Estates, Hearing and appeal procedures, Indians-law.

Dated: February 11, 2005.

**David W. Anderson,**  
*Assistant Secretary—Indian Affairs.*

Dated: February 17, 2005.

**P. Lynn Scarlett,**  
*Assistant Secretary—Policy, Management and Budget.*

■ For the reasons set forth in the preamble, 25 CFR part 15 and 43 CFR part 4 are amended as follows:

**TITLE 25—INDIAN AFFAIRS**

**PART 15—PROBATE OF INDIAN ESTATES, EXCEPT FOR MEMBERS OF THE FIVE CIVILIZED TRIBES**

■ 1. Revise part 15 of title 25 of the Code of Federal Regulations to read as follows:

**PART 15—PROBATE OF INDIAN ESTATES, EXCEPT FOR MEMBERS OF THE FIVE CIVILIZED TRIBES**

**Subpart A—Introduction**

Sec.

- 15.1 What is the purpose of this part?  
15.2 What terms do I need to know?  
15.3 Will the Secretary probate all the property in Indian estates?  
15.4 How does the probate process work?

**Subpart B—Starting the Probate Process**

- 15.101 How do I begin the BIA probate process?  
15.102 May I notify BIA of a death if I am not related to the decedent?  
15.103 When should BIA be notified of a death?  
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15.107 Who prepares an Indian probate package?  
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more than one tribe, who prepares the package?

#### Subpart C—Preparing the Probate Package

- 15.201 What will BIA do with the documents that I provide?  
 15.202 If the decedent owed me money, how do I file a claim against the estate?  
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#### Subpart D—Probate Processing and Distributions

- 15.301 What happens after BIA prepares the probate package?  
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#### Subpart E—Information and Records

- 15.401 How can I find out the status of a probate?  
 15.402 Who owns the records associated with this part?  
 15.403 How must records associated with this part be preserved?

**Authority:** 5 U.S.C. 301; 25 U.S.C. 2, 9, 372–74, 410; 44 U.S.C. 3101 *et seq.*

**Cross Reference:** For special rules applying to proceedings in Indian Probate (Determination of Heirs and Approval of Wills, Except for Members of the Five Civilized Tribes and Osage Indians), including hearings and appeals within the jurisdiction of the Office of Hearings and Appeals, see Title 43, Code of Federal Regulations, Part 4, Subpart D; Funds of deceased Indians other than the Five Civilized Tribes, see Title 25 Code of Federal Regulations, Part 115.

#### Subpart A—Introduction

##### § 15.1 What is the purpose of this part?

This part contains the procedures that the Secretary follows to initiate the probate of the trust estate of a deceased individual Indian who owned trust or restricted property. This part tells you how to file the necessary documents to probate the trust estate. This part also describes how probates will be processed by BIA, and how probates will be sent to the OHA for disposition.

##### § 15.2 What terms do I need to know?

**Agency** means the Bureau of Indian Affairs (BIA) 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 that has contracted or compacted the BIA probate function under 25 U.S.C. 450f or 458cc.

**ALJ** means an administrative law judge with the Office of Hearings and Appeals (OHA) appointed pursuant to the Administrative Procedure Act, 5 U.S.C. 3105.

**Attorney decision maker** means an attorney with OHA who conducts an

informal hearing and renders a decision in any probate case that does not require a formal hearing and a decision by an ALJ or Indian probate judge.

**Beneficiary** means any individual who is designated in a decedent's will to receive trust or restricted property or money. The term includes both a devisee (someone who receives real property in a will) and a legatee (someone who receives personal property in a will).

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

**Codicil** means a supplement or addition to a will, executed with the same formalities as a will. It may explain, modify, add to, or revoke provisions in an existing will.

**Creditor** means any individual or entity that submits a claim for payment from a decedent's estate.

**Day** means a calendar day, unless otherwise stated.

**Decedent** means a person who is deceased.

**Deciding official** means an ALJ, Indian probate judge, or attorney decision maker.

**Decision or order** means a written document issued by a deciding official making determinations as to heirs, wills, beneficiaries, and creditors' claims, and ordering distribution of property and money.

**Estate** means the trust cash assets, restricted or trust lands, and other trust property owned by the decedent at the time of his or her death.

**Form OHA-7** means a form used by OHA (or an automated database equivalent) to record data for heirship and family history and to provide information on any wills, trust and restricted property, adoptions, and names and addresses of all interested parties.

**Formal hearing** means a trial-type proceeding, conducted by an ALJ or Indian probate judge, in which evidence is obtained through the testimony of witnesses and the introduction of relevant documents.

**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 money (IIM) account by the Office of the Special Trustee for American Indians (OST) or by a tribe performing this function under a contract or compact.

**Indian probate judge** means an employee of OHA, other than an administrative law judge or attorney decision maker, to whom the Secretary has delegated authority to conduct

hearings in probate cases in accordance with 43 CFR part 4, subpart D.

**Informal hearing** means a meeting convened by an attorney decision maker in which interested parties are asked to present relevant information on uncontested issues.

**Interested party** means any probable 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 the trust or restricted property interest of a decedent.

**Intestate** means the decedent died without a valid will.

**LTRO** means the Land Titles and Records Office within BIA.

**OHA** means the Office of Hearings and Appeals, Department of the Interior.

**OST** means the Office of the Special Trustee for American Indians, Department of the Interior.

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

- (1) Determine the heirs;
- (2) Determine the validity of wills and determine beneficiaries;

(3) Determine whether claims against the estate will be paid from trust funds; and

(4) Transfer any funds or property held in trust by the Secretary for a decedent, or any restricted property of the decedent, to the heirs, beneficiaries, or other persons or entities entitled by law to receive it.

**Probate clerk** means a BIA or tribal employee who is responsible for preparing a probate package.

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

**Restricted land** means land the title to which is held by an individual Indian or a tribe and which can be alienated or encumbered by the owner only with the approval of the Secretary because of limitations contained in the conveyance instrument pursuant to federal law.

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

**Testate** means the decedent executed a valid will before his or her death.

**Trust cash assets** means the funds held in an IIM account that had accumulated or were due and owing to the decedent as of the date of death.

**Trust land** means the land, or an interest therein, for which the United States holds fee title in trust for the benefit of an individual Indian.

**We or us** means either an official of BIA or a tribe performing probate functions under a BIA contract or compact.

*Will* means a written testamentary document that was signed by the decedent and attested to by two disinterested adult witnesses, and that states who will receive the decedent's trust or restricted property.

*You or I* means an interested party, as defined herein, with an interest in the decedent's trust estate unless a specific section says otherwise.

**§ 15.3 Will the Secretary probate all the property in Indian estates?**

(a) No. We will probate only the trust or restricted property in the estate of an Indian decedent.

(b) We will not probate:

(1) Real or personal property in an estate of an Indian decedent that is not trust or restricted property;

(2) Restricted property derived from allotments in the estates of members of the Five Civilized Tribes (Cherokee, Choctaw, Chickasaw, Creek and Seminole) in Oklahoma; and

(3) Restricted interests derived from allotments made to Osage Indians in Oklahoma (Osage Nation) and Osage headright interests.

(c) We will probate the estate of a deceased member of the Five Civilized Tribes or Osage Nation who owns an interest in land derived from an individual Indian other than the Five Civilized Tribes or Osage Nation.

**§ 15.4 How does the probate process work?**

The basic steps of the probate process are:

(a) We find out about a person's death (*see* subpart B of this part for details);

(b) We prepare a probate package that includes documents you send us (*see* subpart C of this part for details);

(c) We refer the completed probate package to OHA for assignment to a deciding official (*see* subpart D of this part for details); and

(d) The deciding official decides how to distribute the property and/or funds deposited in an IIM account and we make the distribution (*see* subpart D of this part for details).

**Subpart B—Starting the Probate Process**

**§ 15.101 How do I begin the BIA probate process?**

As soon as possible you should contact the nearest BIA agency or regional office where the decedent was enrolled to inform us of the decedent's death.

(a) You should provide a certified copy of the death certificate, if one exists.

(b) If a death certificate does not exist, you should provide an affidavit of death

prepared by the tribe with whom the decedent was associated or someone who knows about the decedent's death that specifies what is known about the date and cause of the decedent's death. A copy of any supporting documents that may be available, such as an obituary or death notice or a church or court record, should be provided along with the affidavit.

**§ 15.102 May I notify BIA of a death if I am not related to the decedent?**

Yes. You do not need to be related to the decedent in order to notify us of the death. You can be a friend, neighbor, or any other interested party.

**§ 15.103 When should BIA be notified of a death?**

There is no deadline for notifying us of a death. However, you should notify us of a death as soon as possible after the person dies.

**§ 15.104 What other documents does BIA need to prepare a probate package?**

(a) You should provide us with the following documents and information before we can begin to process the probate package:

(1) Social Security number of the decedent;

(2) The birth certificate or other record of birth of the decedent, if available;

(3) The death certificate or other reliable evidence of death as required by § 15.101;

(4) A list of known creditors against the estate and their addresses;

(5) Current names and addresses of potential heirs and beneficiaries;

(6) Any statements renouncing an interest in the estate;

(7) Documents from a court of competent jurisdiction, including but not limited to:

(i) All marriage licenses of the decedent;

(ii) All divorce decrees of the decedent;

(iii) Adoption and guardianship records relevant to the decedent;

(iv) Any sworn statements regarding the decedent's family, including any statements of paternity or maternity;

(v) Any name changes; and

(vi) Any order requiring payment of child support;

(8) All originals or copies of wills and codicils, and any revocations; and

(9) Any additional documents you provide or that we request.

(b) You must inform us if any of the documents or information identified in this part are not available.

**§ 15.105 Will BIA wait to begin the probate process until it is notified of the decedent's death?**

No, we will not wait to begin the probate process until we are notified of the decedent's death. If we find out about the death of a person, and if the decedent meets the criteria in § 15.3, we will initiate the process to collect the necessary documentation. You should not assume that we will find out about a death. To assure timely distribution of the estate, you should notify us as provided in § 15.101.

**§ 15.106 Can I get emergency assistance for funeral services from the decedent's IIM account?**

(a) You may ask BIA for up to \$1,000 from the decedent's IIM account if:

(1) You are responsible for making the funeral arrangements on behalf of the family of a decedent who had an IIM account;

(2) You have an immediate need to pay for funeral arrangements before burial; and

(3) The decedent's IIM account contains more than \$2,500 on the date of death.

(b) You must apply for assistance under paragraph (a) of this section and submit to BIA an original itemized estimate of the cost of the service to be rendered and the identification of the service provider.

(c) We may approve reasonable costs up to \$1,000 that are necessary for the burial services, taking into consideration:

(1) The total amount in the account;

(2) The number of probable heirs or beneficiaries of whom we are aware;

(3) The amount of any claims against the account of which we are aware; and

(4) The availability of non-trust funds, and any other relevant factor.

(d) We will make payments directly to the providers of the services.

**§ 15.107 Who prepares an Indian probate package?**

The probate specialist or probate clerk at the agency or tribe where the decedent is an enrolled member will prepare the probate package in consultation with the probable heirs or beneficiaries who can be located.

**§ 15.108 If the decedent was not an enrolled member of a tribe or was a member of more than one tribe, who prepares the probate package?**

Unless otherwise provided by Federal law, the BIA agency that has jurisdiction over the tribe with the strongest association with the decedent will serve as the home agency and will prepare the probate package if the decedent either:

(a) Was not an enrolled member of a tribe, but owns interests in trust or restricted property; or

(b) Was a member of more than one tribe.

### Subpart C—Preparing the Probate Package

#### § 15.201 What will BIA do with the documents that I provide?

Once we receive the documents that you provide us under § 15.104, the probate specialist or probate clerk will:

(a) Use the documents to prepare a probate package; and

(b) Consult with you and any other sources to obtain any additional information needed for a complete package.

#### § 15.202 If the decedent owed me money, how do I file a claim against the estate?

(a) If you wish to make a claim against the estate of a decedent, you must submit to us an original and two copies of an itemized statement of the debt. The statement must show the amount of the original debt and the remaining balance on the date of the decedent's death.

(b) The itemized statement must state whether you have filed a claim against the decedent's non-trust assets.

(c) We must receive your claim within 60 days from the date we received the verification of the decedent's death in § 15.101 to include the claim as part of the probate package.

#### § 15.203 What must the complete probate package contain?

The complete probate package must contain all of the following:

(a) A certified copy of the death certificate, or if one does not exist, some other reliable evidence of death as required by § 15.101;

(b) A completed Form OHA-7, "Data for Heirship Findings and Family History," certified by BIA, with the enrollment or other identifying number shown for each potential heir or beneficiary, if such number has been assigned;

(c) A certified inventory of trust or restricted real property;

(d) A statement describing all income generating activity;

(e) A copy of the decedent's IIM account ledger showing the balance of the account at the date of death and the balance of the account at the date of probate package submission;

(f) All original or certified copies of wills, codicils, and any revocations of wills or codicils;

(g) Any statements renouncing interest that have been submitted to the agency;

(h) Claims of creditors against the estate, date stamped to show when the agency received them;

(i) All documentation of payment of claims before the probate proceeding;

(j) All other documents required in § 15.104;

(k) Tribal options to purchase interests of a decedent;

(l) Affidavit of the probate clerk or probate specialist describing what efforts have been made to locate any missing probable heirs and beneficiaries; and

(m) Any other documentation that may be required at the time of probate proceedings.

### Subpart D—Probate Processing and Distributions

#### § 15.301 What happens after BIA prepares the probate package?

(a) After we have assembled all the documents required by § 15.203, a probate specialist will refer the case to OHA for assignment to a deciding official.

(b) At the same time the probate specialist refers the case to OHA, we will notify all interested parties of:

(1) The right of the probable heirs or beneficiaries to request a formal hearing before an ALJ or Indian probate judge;

(2) The identification of the probable legal heirs or the submission of an original or certified copy of a will or revocation and listed beneficiaries;

(3) Any known claims against the estate; and

(4) The address of the OHA office where the probate package has been sent.

(c) We will send the notice described in paragraph (b) of this section by regular mail. It will inform the probable heirs or beneficiaries that:

(1) They may ask OHA for an in-person hearing at a site convenient to most of the parties, a video conference or teleconference hearing (if available), or a decision based on documents in the probate package; and

(2) If they do not request a formal hearing, the probate case may be assigned to an attorney decision maker, who will convene an in-person informal hearing at a site convenient to most of the parties.

#### § 15.302 What happens after the probate package is referred to OHA?

After OHA receives the probate package, it will assign the case to a deciding official, who will conduct the probate proceeding and issue a written decision or order in accordance with 43 CFR part 4, subpart D.

#### § 15.303 What happens after the probate decision is made?

(a) We will not pay claims, transfer title to land, or distribute trust cash assets for 75 days after the final OHA decision or order is mailed to the interested parties.

(b) If an interested party files a timely request for de novo review, a request for rehearing, or an appeal in accordance with 43 CFR part 4, subpart D, we will not pay claims, transfer title to land, or distribute trust cash assets until the request or appeal is resolved.

(c) After 75 days, if no request for de novo review, request for rehearing, or appeal has been filed, or after any request or appeal has been resolved, the following actions will take place:

(1) The LTRO will change its land title records for the trust and restricted property in accordance with the final decision or order; and

(2) OST will pay claims and distribute the IIM account in accordance with the final decision or order.

### Subpart E—Information and Records

#### § 15.401 How can I find out the status of a probate?

You may request information about the status of an Indian probate from any BIA agency or regional office.

#### § 15.402 Who owns the records associated with this part?

(a) Records are the property of the United States if they:

(1) Are made or received by a tribe or tribal organization in the conduct of a federal trust function under this part, including the operation of a trust program pursuant to Public Law 93-638 as amended; and

(2) Evidence the organization, functions, policies, decisions, procedures, operations, or other activities undertaken in the performance of a federal trust function under this part.

(b) Records are the property of the tribe if they are:

(1) Not covered by paragraph (a) of this section; and

(2) Are made or received by a tribe or tribal organization in the conduct of business with the Department of the Interior under this part.

#### § 15.403 How must records associated with this part be preserved?

(a) Any organization, including tribes and tribal organizations, that has records identified in § 15.402(a):

(1) Must preserve the records in accordance with approved Departmental records retention procedures under the Federal Records Act, 44 U.S.C. Chapters 29, 31 and 33; and

(2) Is subject to inspection by the Secretary and the Archivist of the United States with respect to these records and related records management practices and safeguards required under the Federal Records Act.

(b) A tribe or tribal organization should preserve the records identified in § 15.402(b) for the period authorized by the Archivist of the United States for similar Department of the Interior records under 44 U.S.C. Chapter 33. If a tribe or tribal organization does not do so, it may be unable to adequately document essential transactions or furnish information necessary to protect its legal and financial rights or those of persons affected by its activities.

**TITLE 43—PUBLIC LANDS: INTERIOR**

**PART 4—DEPARTMENT HEARINGS AND APPEALS PROCEDURES**

■ 2. Revise the authority citation to part 4 to read as follows:

**Authority:** 5 U.S.C. 301; 43 U.S.C. 1201.

■ 3. Revise paragraph (c) of § 4.27 to read as follows:

**§ 4.27 Standards of conduct.**

\* \* \* \* \*

(c) *Disqualification.* (1) An Office of Hearings and Appeals deciding official must withdraw from a case if circumstances exist that would disqualify a judge in such circumstances under the recognized canons of judicial ethics.

(2) A party may file a motion seeking the disqualification of a deciding official, setting forth in detail the circumstances that the party believes require disqualification. Any supporting facts must be established by affidavit or other sufficient evidence. A copy of the motion should be sent to the Director.

(3) The head of the appropriate unit within the Office or the Director may decide whether disqualification is required if the deciding official does not withdraw under paragraph (c)(1) of this

section or in response to a motion under paragraph (c)(2) of this section.

(4) For purposes of this section, “deciding official” includes an attorney decision maker or Indian probate judge as defined in § 4.201, an administrative law judge, an administrative judge, or a member of any Board.

**Subpart D—Rules Applicable in Indian Affairs Hearings and Appeals**

■ 4. Revise the authority citation for subpart D to read as follows:

**Authority:** 5 U.S.C. 301; 25 U.S.C. 2, 9, 372–74, 410; Pub. L. 99–264, 100 Stat. 61, as amended.

■ 5. Revise §§ 4.200 and the undesignated center heading to read as follows:

**Scope of Subpart; Definitions**

**§ 4.200 How to use this subpart.**

(a) The following table is a guide to the contents of this subpart by subject matter.

For provisions relating to . . .	consult . . .
(1) All proceedings in subpart D .....	§§ 4.200 and 4.201.
(2) The probate of trust estates of Indians who die possessed of trust property.	§§ 4.202 through 4.282 and 4.310 through 4.323.
(i) Probate matters generally .....	§§ 4.202, 4.206, 4.208, 4.210, 4.211, 4.250 through 4.270, 4.273 through 4.282, and 4.310 through 4.323.
(ii) Informal probate proceedings before an attorney decision maker .....	§§ 4.212 through 4.215.
(iii) Formal probate proceedings before an administrative law judge or Indian probate judge.	§§ 4.203 through 4.205, 4.207, 4.216 through 4.242, 4.271, and 4.272.
(3) Tribal purchase of certain property interests of decedents under special laws applicable to particular tribes.	§§ 4.300 through 4.308.
(4) Appeals to the Board of Indian Appeals from actions or decisions of BIA.	§§ 4.330 through 4.340.
(5) Determinations under the White Earth Reservation Land Settlement Act.	§§ 4.350 through 4.357.

(b)(1) Except as provided in paragraph (b)(2) of this section, the regulations referred to in paragraph (a)(2) of this section do not apply to the restricted property of deceased Indians of the Five Civilized Tribes, deceased Osage Indians, and members of any tribe organized under 25 U.S.C. 476, to the extent that the constitution, by-laws or charter of such tribe may be inconsistent with this subpart.

(2) The regulations referred to in paragraph (a)(2) of this section do apply to trust or restricted property inherited by such deceased Indian or member of such tribe from someone who was a member of a tribe not included in paragraph (b)(1) of this section.

(c) Except as limited by the provisions in this subpart, the rules in subparts A and B of this part apply to these proceedings.

■ 6. Revise §§ 4.201, 4.202, 4.203, 4.204, 4.205, 4.206, 4.207, and 4.208 to read as follows:

**§ 4.201 Definitions.**

*Administrative law judge* means an administrative law judge with the Office of Hearings and Appeals (OHA) appointed pursuant to the Administrative Procedure Act, 5 U.S.C. 3105.

*Agency* means the Bureau of Indian Affairs (BIA) 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 that has contracted or compacted BIA probate function under 25 U.S.C. 450f or 458cc.

*Attorney decision maker* means an attorney with OHA who conducts an informal hearing and renders a decision in any probate case that does not require a formal hearing and a decision by an

administrative law judge or Indian probate judge.

*Beneficiary* means any individual who is designated in a decedent’s will to receive trust or restricted property or money. The term includes both a devisee (someone who receives real property in a will) and a legatee (someone who receives personal property in a will).

*Bequeath* means to give personal property to someone in a will.

*Bequest* (or *legacy*) means a gift of personal property in a will.

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

*Board* means the Board of Indian Appeals within OHA, authorized by the Secretary to hear, consider, and determine finally for the Department appeals taken by aggrieved parties from actions by OHA deciding officials 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 any child adopted by the decedent.

*Codicil* means a supplement or addition to a will, executed with the same formalities as a will. It may explain, modify, add to, or revoke provisions in an existing will.

*Creditor* means any individual or entity that submits a claim for payment from a decedent's estate.

*Day* means a calendar day, unless otherwise stated.

*Decedent* means a person who is deceased.

*Deciding official* means an administrative law judge, Indian probate judge, or attorney decision maker.

*Decision or order* means a written document issued by a deciding official making determinations as to heirs, wills, beneficiaries, and creditors' claims, and ordering distribution of property and money.

*De novo review* means a process in which an administrative law judge or Indian probate judge will, without regard to the decision previously issued in the case by an attorney decision maker:

- (1) Take a fresh look at a probate case;
- (2) Conduct a formal hearing as necessary or appropriate; and
- (3) Issue a decision.

*Department* means the Department of the Interior.

*Devise* when used as a verb means to give real property to someone in a will. When used as a noun, it means a gift of real property in a will.

*Estate* means the trust cash assets, restricted or trust lands, and other trust property owned by the decedent at the time of his or her death.

*Formal hearing* means a trial-type proceeding, conducted by an administrative law judge or Indian probate judge, in which interested parties present evidence through the testimony of witnesses and the introduction of relevant documents.

*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 money (IIM) account by the Office of the Special Trustee for American Indians (OST) or by a tribe performing this function under a contract or compact.

*Indian probate judge* means an employee of OHA, other than an administrative law judge or attorney decision maker, to whom the Secretary has delegated authority to conduct hearings in probate cases.

*Informal hearing* means a meeting convened by an attorney decision maker in which interested parties present relevant information on uncontested issues.

*Interested party* means:

- (1) Any probable or actual heir;
- (2) Any beneficiary under a will;
- (3) Any party asserting a claim against a deceased Indian's estate; and
- (4) Any tribe having a statutory option to purchase the trust or restricted property interest of a decedent.

*Intestate* means the decedent died without a valid will.

*LTRO* means the Land Titles and Records Office within BIA.

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

*OHA* means the Office of Hearings and Appeals, Department of the Interior.

*OST* means the Office of the Special Trustee for American Indians, Department of the Interior.

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

- (1) Determine the heirs;
- (2) Determine the validity of wills and determine beneficiaries;
- (3) Determine whether claims against the estate will be paid from trust funds; and
- (4) Transfer any funds or property held in trust by the Secretary for a decedent, or any restricted property of the decedent, to the heirs, beneficiaries, or other persons or entities entitled by law to receive it.

*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 that he or she cannot alienate or encumber without the consent of the Secretary. In this subpart, restricted property is treated as if it were trust property. Except with respect to § 4.200(b)(1), the term "restricted property" as used in this subpart does not include the restricted lands of the Five Civilized Tribes or Osage Tribe of Indians.

*Secretary* means the Secretary of the Interior or an authorized representative.

*Solicitor* means the Solicitor of the Department of the Interior or an authorized representative.

*Superintendent* means a BIA Superintendent or other BIA official having jurisdiction over an estate, including an area field representative or one holding equivalent authority.

*Testate* means the decedent executed a valid will before his or her death.

*Trust cash assets* means the funds held in an IIM account that had accumulated or were due and owing to the decedent as of the date of 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 that was signed by the decedent and attested to by two disinterested adult witnesses, and that states who will receive the decedent's trust or restricted property.

### **Determination of Heirs; Approval of Wills; Settlement of Indian Trust Estates**

#### **§ 4.202 General authority of deciding officials.**

(a) An attorney decision maker may conduct an informal hearing and render a decision in any probate case that does not require a formal hearing and a decision by an administrative law judge or Indian probate judge.

(b) Cases that require a formal hearing and a decision by an administrative law judge or Indian probate judge are those that meet one or more of the following criteria:

- (1) A probable heir or beneficiary requests a formal hearing at any time before the attorney decision maker renders a decision;
- (2) A will exists that is complex, ambiguous, of questionable validity, or contested;
- (3) An interested party contests a claim from a creditor or family member;
- (4) Questions exist about family relationships, including questions about adoption of an heir or paternity;
- (5) The case involves a minor heir whose rights might be jeopardized;
- (6) Prior probate orders conflict on an issue relevant to the case;
- (7) The jurisdiction of any court that issued an order that has been used as a supporting document in the case is challenged;
- (8) Questions exist concerning the decedent's domicile;
- (9) There are other problems with the case requiring an evidentiary hearing;
- (10) The case requires a determination as to a nonexistent person or other allotment irregularity under § 4.203;
- (11) The case involves a presumption of death under § 4.204;
- (12) The case requires a determination of escheat under § 4.205;
- (13) The case requires a determination of nationality, citizenship, or status affecting the character of land titles under § 4.206(a)(2);
- (14) The interested parties reach a settlement agreement under § 4.207; or

(15) The case involves a tribal purchase of a decedent's interest under § 4.300 *et seq.*

(c) For probate cases within their respective jurisdictions, deciding officials will:

(1) Determine the heirs of any Indian who dies intestate possessed of trust property;

(2) Approve or disapprove the will of a deceased Indian disposing of trust property;

(3) Accept or reject any full or partial renunciation of interest in both testate and intestate proceedings;

(4) Allow or disallow creditors' claims against the estate of a deceased Indian; and

(5) Decree the distribution of trust property to heirs and beneficiaries.

(d) "Distribution" under paragraph (c)(5) of this section includes partial distribution to known heirs or beneficiaries where one or more potential heirs or beneficiaries are missing but not presumed dead. In these cases, the deciding official will first attribute to and set aside for the missing person or persons the share or shares that the missing person or persons would be entitled to if living.

(e) In any case in which de novo review is sought following a decision by an attorney decision maker under § 4.215, an administrative law judge or Indian probate judge will review the case de novo, hold hearings as necessary or appropriate, and issue a decision.

**§ 4.203 Determination as to nonexistent persons and other irregularities of allotments.**

(a) An administrative law judge or Indian probate judge will hear and determine:

(1) Whether trust patents covering allotments of land were issued to nonexistent persons; and

(2) Whether more than one trust patent covering allotments of land had been issued to the same person under different names and numbers or through other errors in identification.

(b) The administrative law judge or Indian probate judge will proceed as provided in § 4.202(c) if he or she determines under paragraph (a) of this section that:

(1) A trust patent was issued to an existing person, or separate persons received the allotments under consideration; and

(2) Any such person is deceased without having had his or her estate probated.

(c) The administrative law judge or Indian probate judge will issue a decision setting forth his or her determination, and will provide notice

thereof to interested parties under § 4.240(b), if he or she determines under paragraph (a) of this section that either:

(1) A person did not exist; or

(2) More than one allotment was issued to the same person.

**§ 4.204 Presumption of death.**

(a) An administrative law judge or Indian probate judge will receive evidence on and determine the issue of whether any person, by reason of unexplained absence, is to be presumed dead.

(b) If an administrative law judge or Indian probate judge determines that an Indian person possessed of trust property is to be presumed dead, the administrative law judge or Indian probate judge will proceed as provided in § 4.202(c).

**§ 4.205 Escheat.**

An administrative law judge or Indian probate judge will determine whether any Indian holder of trust property died intestate without heirs and—

(a) With respect to trust property other than on the public domain, order the escheat of such property in accordance with 25 U.S.C. 373a; or

(b) With respect to trust property on the public domain, submit to the Board of Indian Appeals the records thereon, together with recommendations as to the disposition of said property under 25 U.S.C. 373b.

**§ 4.206 Determinations of nationality, citizenship, or status affecting character of land titles.**

(a) In cases where the right and duty of the Government to hold property in trust depends thereon:

(1) A deciding official will determine the Indian or non-Indian status of heirs or beneficiaries; and

(2) An administrative law judge or Indian probate judge will determine the nationality or citizenship of heirs or beneficiaries, or whether Indian heirs or beneficiaries of U.S. citizenship are of a class as to whose property the Government's supervision and trusteeship have been terminated.

(b) Determinations under paragraph (a) of this section will be made either in current probate proceedings or in completed estates after reopening such estates under, but without regard to the 3-year limit in, § 4.242.

**§ 4.207 Settlement agreement.**

(a) An administrative law judge or Indian probate judge may approve a settlement agreement between interested parties resolving any issue in the probate proceeding if he or she finds that:

(1) All parties to the agreement are fully advised as to all material facts;

(2) All parties to the agreement are fully cognizant of the effect of the agreement on their rights; and

(3) It is in the best interest of the parties to settle rather than to continue litigation.

(b) In considering the proposed settlement agreement, the administrative law judge or Indian probate judge may take and receive evidence as to the respective values of specific items of property. Superintendents and irrigation project engineers must supply all necessary information concerning any liability or lien for payment of irrigation construction and of irrigation operation and maintenance charges.

(c) If the administrative law judge or Indian probate judge approves the settlement agreement under paragraph (a) of this section, he or she will issue a final order approving the settlement agreement and distributing the estate in accordance with its provisions. This order will be construed as any other order of distribution establishing title in heirs and beneficiaries and will not be construed as a partition or sale transaction within the provisions of 25 CFR part 152.

(1) If land titles are to be transferred, the necessary deeds must be prepared and executed at the earliest possible date.

(2) Upon failure or refusal of any interested party to execute and deliver any deed necessary to accomplish the settlement, the administrative law judge or Indian probate judge will settle the issues and enter an order as if no agreement had been attempted.

(d) Administrative law judges or Indian probate judges are authorized to approve all deeds or conveyances necessary to accomplish a settlement under this section.

**§ 4.208 Renunciation of interest.**

(a) Any probable heir or beneficiary, not a minor, may wholly or partially renounce intestate succession or a devise or bequest of trust or restricted property, including the retention of a life estate. To do this, the probable heir or beneficiary must file a signed and acknowledged declaration of renunciation with the deciding official before entry of the final order.

(b) No interest in property renounced under paragraph (a) of this section is considered to have vested in the heir or beneficiary, and the renunciation is not considered a transfer by gift of the property renounced. Rather, the renounced property passes as if the

person renouncing the interest had predeceased the decedent.

(c) A renunciation filed in accordance with this section will be considered accepted when implemented in an order by a deciding official and will be irrevocable thereafter.

(d) All disclaimers or renunciations previously filed with and implemented in an order by a deciding official are hereby ratified as valid and effective.

■ 7. Revise §§ 4.210 and 4.211 to read as follows:

**Commencement of Probate Proceedings**

**§ 4.210 Commencement of probate.**

(a) The probate of a trust estate before a deciding official will commence when the probate specialist files with OHA all information shown in the records relative to the family of the deceased and his or her property.

(1) The information must include the complete probate package described in 25 CFR 15.203 and any other relevant information.

(2) If OHA determines that the probate package is not complete, it may request the missing information from BIA or

return the case to BIA for further processing.

(b) The agency must promptly transmit to the deciding official any creditor's or other claims that are received after the case is transmitted to OHA, for a determination of their timeliness, validity, priority, and allowance under §§ 4.250 and 4.251.

**§ 4.211 Assignment to deciding official.**

Within 30 days after OHA receives the complete probate package, OHA will assign the case to an attorney decision maker, administrative law judge, or Indian probate judge, as shown in the following table:

The case will be assigned to . . .	for . . .	if . . .	and if . . .
(a) An attorney decision maker . . . .	summary processing under §§ 4.212 and 4.214.	as of the date of the decedent's death, the estate contained only trust cash assets of less than \$5,000.	the case meets the other criteria in § 4.212(a).
(b) An attorney decision maker . . . .	an informal hearing and decision under §§ 4.213 and 4.214.	as of the date of the decedent's death, the estate contained trust cash assets of \$5,000 or more or other trust property.	the case meets the other criteria in § 4.213(a).
(c) An administrative law judge or Indian probate judge.	a formal hearing and decision under §§ 4.216 through 4.240.	the case does not meet the criteria in paragraphs (a) or (b) of this section.	
(d) An administrative law judge or Indian probate judge.	Summary or informal processing under §§ 4.212 through 4.214.	no attorney decision maker is available to handle a case under paragraphs (a) or (b) of this section.	

■ 8. Revise § 4.212 and add an undesignated center heading to read as follows:

**Summary and Informal Probate Proceedings**

**§ 4.212 Summary process for estates containing only trust cash estates of less than \$5,000.**

(a) A decedent's estate may be processed summarily by an attorney decision maker if:

(1) The estate contained only trust cash assets of less than \$5,000 as of the date of the decedent's death;

(2) The case does not meet the criteria in § 4.202(b);

(3) Federal law or a tribal inheritance code approved by the Secretary does not provide otherwise.

(b) Any interested party may request a formal hearing before an administrative law judge or Indian probate judge to determine the proper distribution of the trust cash assets. This request for a formal hearing, if desired, must be made before the attorney decision maker renders a decision. Upon receiving a request for a formal hearing, OHA will assign or transfer the case to an administrative law judge or Indian probate judge.

(c) Within 60 days after OHA receives the complete probate package, if no interested party has requested a formal hearing before an administrative law judge or Indian probate judge, the attorney decision maker to whom the case has been assigned will:

(1) Provide notice equivalent to that required for a formal hearing under §§ 4.216–4.217;

(2) Assemble the probable heirs and beneficiaries; and

(3) Hold an informal hearing to determine the distribution of the trust cash assets.

(d) The attorney decision maker may schedule a supplemental informal hearing as necessary, in accordance with § 4.235.

(e) Within 30 days after the informal hearing, if no interested party has requested a formal hearing before an administrative law judge or Indian probate judge, the attorney decision maker will issue a written order in accordance with § 4.214.

(f) Any interested party may seek de novo review of the case following the decision of the attorney decision maker in accordance with § 4.215.

(g) If de novo review has not been sought within 60 days of the date of the

written order, the attorney decision maker must submit:

(1) The complete original record to the LTRO;

(2) A complete duplicate copy of the record to the agency that prepared the probate package; and

(3) A copy of any relevant portions of the record to any other affected agency.

■ 9. Add §§ 4.213, 4.214, and 4.215 to read as follows:

**§ 4.213 Informal process for cases that do not require a formal hearing.**

(a) A decedent's estate may be processed informally by an attorney decision maker if:

(1) The estate contained trust cash assets of \$5,000 or more as of the date of the decedent's death or contained other trust property;

(2) The case does not meet the criteria in § 4.202(b);

(3) Federal law or a tribal inheritance code approved by the Secretary does not provide otherwise.

(b) Any interested party may request a formal hearing before an administrative law judge or Indian probate judge to determine the proper distribution of the estate. This request for a formal hearing, if desired, must be made before the attorney decision maker

renders a decision. Upon receiving a request for a formal hearing, OHA will assign or transfer the case to an administrative law judge or Indian probate judge.

(c) Within 120 days after OHA receives the complete probate package, if no interested party has requested a formal hearing before an administrative law judge or Indian probate judge, the attorney decision maker to whom the case has been assigned will:

(1) Provide notice equivalent to that required for a formal hearing under §§ 4.216–4.217;

(2) Assemble the probable heirs and beneficiaries; and

(3) Hold an informal hearing to determine the distribution of the trust assets.

(d) The attorney decision maker may schedule a supplemental informal hearing as necessary, in accordance with § 4.235.

(e) Within 60 days after the informal hearing, if no interested party has requested a formal hearing before an administrative law judge or Indian probate judge, the attorney decision maker will issue a written order in accordance with § 4.214.

(f) Any interested party may seek de novo review of the case following the decision of the attorney decision maker in accordance with § 4.215.

(g) If de novo review has not been sought within 60 days of the date of the written order, the attorney decision maker must submit:

(1) The complete original record to the LTRO;

(2) A complete duplicate copy of the record to the agency that prepared the probate package; and

(3) A copy of any relevant portions of the record to any other affected agency.

#### **§ 4.214 Written decision of attorney decision maker.**

Following the informal hearing in § 4.212 or 4.213, the attorney decision maker will issue a written decision that:

(a) In all cases, lists the names, identifying numbers as assigned by BIA, birth dates, relationships to the decedent, and shares of the heirs, or finds that the decedent died leaving no legal heirs, and provides citations to the law of descent and distribution in accordance with which the decision is made;

(b) In testate cases, approves or disapproves a will, interprets provisions of the approved will, provides the names, identifying numbers as assigned by BIA, and relationships to the beneficiaries to the decedent, and describes the property each beneficiary is to receive;

(c) Allows or disallows claims against the estate in accordance with §§ 4.250–4.251, and orders the amount of payment for all approved claims;

(d) States whether the heirs or beneficiaries are Indian or non-Indian;

(e) Determines any rights of dower, curtesy, or homestead that may constitute a burden upon the interest of the heirs;

(f) Attaches a certified copy of the inventory of trust or restricted lands, if any; and

(g) Advises all interested parties of their right to seek de novo review in accordance with § 4.215, and that, if they fail to do so, the decision of the attorney decision maker will become final upon expiration of the 60-day period provided in § 4.215(c).

#### **§ 4.215 De novo review following decision of attorney decision maker.**

(a) Any interested party who is adversely affected by a written decision of an attorney decision maker under § 4.214 may seek de novo review of the case by an administrative law judge or Indian probate judge by filing a request with the attorney decision maker.

(b) The request for de novo review must be in writing and signed, and must contain the following information:

(1) The name of the decedent;

(2) A description of the appellant's relationship to the decedent;

(3) An explanation of how the appellant is adversely affected by the decision of the attorney decision maker; and

(4) An explanation of what errors the appellant believes the attorney decision maker made.

(c) The request for de novo review by an administrative law judge or Indian probate judge must be sent or delivered to the attorney decision maker within 60 days after the date that appears on the decision. If the request is mailed, it must be postmarked within 60 days after the date of the decision.

(d) After the 60-day period has expired, an interested party who is adversely affected by a written decision of an attorney decision maker under § 4.214 may file with the attorney decision maker a request for de novo review by an administrative law judge or Indian probate judge for one or more of the following reasons:

(1) The party did not receive notice of the probate;

(2) The party obtained new evidence or information after the decision was made; or

(3) The party has evidence that was known at the time of the probate proceeding but was not included in the probate package.

(e) Within 10 days of receiving the request for de novo review, the attorney decision maker will notify the Superintendent and all other interested parties of the request, and OHA will assign the case to an administrative law judge or Indian probate judge.

(f) The administrative law judge or Indian probate judge will review the merits of the case de novo, conduct a formal hearing as necessary or appropriate pursuant to the regulations in this subpart, and issue a new decision in accordance with § 4.240.

■ 10. Add § 4.216 and two undesignated center headings to read as follows:

### **Formal Probate Proceedings**

#### **Notice**

##### **§ 4.216 Notice.**

(a) Before conducting a formal hearing to determine the heirs of a deceased Indian or probate his or her will, the administrative law judge or Indian probate judge must cause notice of the time and place of the hearing to be posted.

(1) The notice must be posted at least 20 days before the hearing date in five or more conspicuous places in the vicinity of the designated place of hearing.

(2) The administrative law judge or Indian probate judge may cause postings in such other places and reservations as he or she deems appropriate.

(3) A certificate showing the date and place of posting must be signed by the person or official who performs the act.

(b) The administrative law judge or Indian probate judge must serve or cause to be served a copy of the notice on each interested party known to the administrative law judge or Indian probate judge and on each attesting witness if a will is offered:

(1) By personal service in sufficient time in advance of the date of the hearing to enable the person served to attend the hearing; or

(2) By mail, addressed to the person at his or her last known address, in sufficient time in advance of the date of the hearing to enable the addressee served to attend the hearing. The administrative law judge or Indian probate judge must cause a certificate, as to the date and manner of the mailing, to be made on the record copy of the notice.

(c) All interested parties, known and unknown, including creditors, will be bound by the decision based on the hearing if they lived near any place of posting during the posting period, whether or not they had actual notice of the hearing. With respect to interested parties not living near the place of

posting, a rebuttable presumption of actual notice will arise upon the mailing of the notice at a reasonable time before the hearing, unless the notice is returned by the postal service to the office of the administrative law judge or Indian probate judge unclaimed by the addressee.

(d) When a record reveals that a tribe has a statutory option to purchase interests of a decedent:

(1) The administrative law judge or Indian probate judge must notify the tribe of the pendency of a proceeding; and

(2) The certificate of mailing of notice of probate hearing or of a final decision in probate to the tribe at its record address will be conclusive evidence that the tribe had notice of the decedent's death and of the probate proceedings.

■ 11. Add § 4.217 to read as follows:

**§ 4.217 Contents of notice.**

(a) In the notice of a formal hearing, the administrative law judge or Indian probate judge must:

(1) Specify that, at the stated time and place, the administrative law judge or Indian probate judge will take testimony to determine the heirs of the decedent (naming him or her) and, if a will is offered for probate, testimony as to the validity of the will (describing it by date);

(2) Name all known probable heirs of the decedent, and, if a will is offered for probate, the beneficiaries under the will and the attesting witnesses to the will;

(3) Cite this subpart as the authority and jurisdiction for holding the hearing;

(4) Inform all persons having an interest in the estate of the decedent, including persons having claims against the estate, to be present at the hearing or their rights may be lost by default; and

(5) State that the hearing may be continued to another time and place.

(b) A continuance may be announced either at the original hearing by the administrative law judge or Indian probate judge or by an appropriate notice posted at the announced place of hearing on or before the announced hearing date and hour.

■ 12. Revise §§ 4.220, 4.221, 4.222, 4.223, 4.224, and 4.225 to read as follows:

**Depositions, Discovery, and Prehearing Conference**

**§ 4.220 Production of documents for inspection and copying.**

(a) An interested party may make a written demand to produce documents for inspection and copying or photographing. This demand:

(1) May be made at any stage of the proceeding before the conclusion of the formal hearing;

(2) May be made upon any other party to the proceeding or upon a custodian of records on Indians or their trust property;

(3) Must be made in writing, and a copy must be filed with the administrative law judge or Indian probate judge; and

(4) May demand any documents, papers, records, letters, photographs, or other tangible things that are:

(i) Relevant to the issues;

(ii) In the other party's or custodian's possession, custody, or control; and

(iii) Not privileged.

(b) Upon failure of prompt compliance, the administrative law judge or Indian probate judge may issue an appropriate order upon a petition filed by the requesting party.

(c) On his or her own motion, the administrative law judge or Indian probate judge may issue an order to any interested party or custodian of records for the production of material or information that is relevant to the issues and not privileged. The administrative law judge or Indian probate judge may do this after notifying all parties at any time before closing the record.

(d) Custodians of official records will furnish and reproduce documents, or permit their reproduction, in accordance with the rules governing the custody and control of such records.

**§ 4.221 Depositions.**

(a) *Stipulation.* Depositions in connection with a formal hearing may be taken upon stipulation of the parties. Failing an agreement therefor, depositions may be ordered under paragraphs (b) and (c) of this section.

(b) *Application for taking deposition.* When an interested party files a written application, the administrative law judge or Indian probate judge may at any time thereafter order the taking of the sworn testimony of any person by deposition upon oral examination for the purpose of discovery or for use as evidence at a formal hearing. The application must be in writing and must set forth:

(1) The name and address of the proposed deponent;

(2) The name and address of the person, qualified under paragraph (d) of this section to take depositions, before whom the proposed examination is to be made;

(3) The proposed time and place of the examination, which must be at least 20 days after the date of the filing of the application; and

(4) The reasons why the deposition should be taken.

(c) *Order for taking deposition.* If after examination of the application, the administrative law judge or Indian probate judge determines that the deposition should be taken, he or she will order its taking. The order must be served upon all interested parties and must state:

(1) The name of the deponent;

(2) The time and place of the examination, which must be at least 15 days after the date of the order except as stipulated otherwise; and

(3) The name and address of the officer before whom the examination is to be made. The officer and the time and place need not be the same as those requested in the application.

(d) *Qualifications of officer.* The deponent must appear before the administrative law judge or Indian probate judge or before an officer authorized to administer oaths by the law of the United States or by the law of the place of the examination.

(e) *Procedure on examination.* The deponent must be examined under oath or affirmation and must be subject to cross-examination. The deponent's testimony must be recorded by the officer or someone in the officer's presence. An applicant who requests the taking of a person's deposition must make his or her own arrangements for payment of any costs incurred.

(f) *Submission to witness; changes; signing.* (1) When the testimony is fully transcribed, the deposition must be submitted to the deponent for examination and must be read to or by him or her, unless examination and reading are waived by the deponent or by all other interested parties.

(2) Any changes in form or substance that the deponent desires to make must be entered upon the deposition by the officer with a statement of the reasons given by the deponent for making them.

(3) The deposition must then be signed by the deponent, unless the interested parties by stipulation waive the signing, or the witness is ill or cannot be found or refuses to sign.

(4) If the deposition is not signed by the deponent, the officer must sign it and state on the record the fact of the waiver, the illness or absence of the deponent, or the refusal to sign together with the reason, if any, given therefore. The deposition may then be used as fully as though signed, unless the administrative law judge or Indian probate judge holds that the reason given for refusal to sign requires rejection of the deposition in whole or in part.

(g) *Certificates by officer.* The officer must certify on the deposition that the deponent was duly sworn by the officer

and that the deposition is a true record of the deponent's testimony. The officer must then securely seal the deposition, together with two copies thereof, in an envelope and must personally deliver or mail the same by certified or registered mail to the administrative law judge or Indian probate judge.

(h) *Use of depositions.* (1) A deposition ordered and taken in accordance with the provisions of this section may be used in a hearing if the administrative law judge or Indian probate judge finds that:

- (i) The witness is absent;
- (ii) The witness's presence cannot be readily obtained;
- (iii) The evidence is otherwise admissible; and
- (iv) Circumstances make it desirable in the interest of fairness to allow the deposition to be used.

(2) If the interested party on whose application a deposition was taken refuses to offer the deposition, or any part thereof, in evidence, any other interested party or the administrative law judge or Indian probate judge may introduce the deposition or any portion thereof on which he or she wishes to rely.

**§ 4.222 Written interrogatories; admission of facts and documents.**

(a) An interested party may serve upon any other interested party written interrogatories and requests for admission of facts and documents. The interested party may do this only if:

- (1) The interrogatories and requests are served in sufficient time to permit answers to be filed before the hearing;
- (2) A copy of the interrogatories and requests is filed with the administrative law judge or Indian probate judge; and
- (3) The interrogatories and requests are drawn with the purpose of defining the issues in dispute between the parties and facilitating the presentation of evidence at the hearing.

(b) A party receiving interrogatories or requests served under paragraph (a) of this section must:

- (1) Serve answers upon the requesting party within 30 days from the date of service of the interrogatories or requests, or within another deadline agreed upon by the parties or prescribed by the administrative law judge or Indian probate judge; and
- (2) File a copy of the answers with the administrative law judge or Indian probate judge.
- (c) Within 10 days after written interrogatories are served upon a party, that party may serve cross-interrogatories for answer by the witness to be interrogated.

**§ 4.223 Objections to and limitations on production of documents, depositions, and interrogatories.**

The administrative law judge or Indian probate judge may limit the time, place, and scope of discovery under §§ 4.220, 4.221, and 4.222. The administrative law judge or Indian probate judge may do this:

- (a) Upon timely motion by any interested party, if that party also gives proper notice and shows good cause; or
- (b) Upon his or her own motion if a party's dilatory tactics or unreasonable demands will delay the orderly progress of the proceeding or cause unacceptable hardship to a party or witness.

**§ 4.224 Failure to comply with discovery.**

(a) If a party fails to comply with discovery under §§ 4.220 through 4.223, without showing a satisfactory excuse or explanation, the administrative law judge or Indian probate judge may:

- (1) Decide the fact or issue relating to the material requested to be produced, or the subject matter of the probable testimony, in accordance with the claims of the other interested party or in accordance with other evidence available to the administrative law judge or Indian probate judge; or
- (2) Make such other ruling as the administrative law judge or Indian probate judge determines just and proper.

(b) For purposes of paragraph (a) of this section, failure to comply with discovery includes failure to:

- (1) Comply with a request for the production of a document under § 4.220;
- (2) Appear for examination under § 4.221;
- (3) Respond to interrogatories or requests for admissions under § 4.222; or
- (4) Comply with an order of the administrative law judge or Indian probate judge issued under § 4.223.

**§ 4.225 Prehearing conference.**

Before a formal hearing, the administrative law judge or Indian probate judge may, upon his or her own motion or upon the request of any interested party, call upon the parties to appear for a conference to:

- (a) Simplify or clarify the issues;
- (b) Obtain stipulations, admissions, agreements on documents, understandings on matters already of record, or similar agreements that will avoid unnecessary proof;
- (c) Limit the number of expert or other witnesses to avoid excessively cumulative evidence;
- (d) Effect possible agreement disposing of all or any of the issues in dispute; and

(e) Resolve such other matters as may simplify and shorten the hearing.

■ 13. Revise § 4.230 and the undesignated center heading to read as follows:

**Formal Hearings**

**§ 4.230 Authority and duties of the administrative law judge or Indian probate judge.**

(a) The authority of the administrative law judge or Indian probate judge in all formal hearings in probate proceedings includes, but is not limited to authority:

- (1) To administer oaths and affirmations;
- (2) To issue subpoenas under the provisions of 25 U.S.C. 374 upon his or her own initiative or within his or her discretion upon the request of any interested party, to any person whose testimony he or she believes to be material to a hearing;
- (3) To permit any interested party to cross-examine any witness;
- (4) To appoint a guardian ad litem to represent any minor or incompetent interested party at hearings;
- (5) To rule upon offers of proof and receive evidence;
- (6) To take and cause depositions to be taken and to determine their scope; and
- (7) To otherwise regulate the course of the hearing and the conduct of witnesses, interested parties, and attorneys at law appearing therein.

(b) Upon the failure or refusal of any person upon whom a subpoena has been served to appear at a hearing or to testify, the administrative law judge or Indian probate judge may file a petition in the appropriate U.S. District Court for the issuance of an order requiring the appearance and testimony of the witness.

■ 14. Revise §§ 4.231, 4.232, 4.233, 4.234, 4.235, and 4.236 to read as follows:

**§ 4.231 Formal hearings.**

(a) All testimony in formal Indian probate hearings must be under oath and must be taken in public, except in circumstances that, in the opinion of the administrative law judge or Indian probate judge, justify all but interested parties to be excluded from the hearing.

(b) The proceedings of hearings must be recorded verbatim.

(c) The record must include a showing of the names of all interested parties and attorneys who attended such hearing.

**§ 4.232 Evidence; form and admissibility.**

(a) Interested parties may offer at a formal hearing such relevant evidence as they deem appropriate under the

generally accepted rules of evidence of the State in which the evidence is taken, subject to the administrative law judge's or Indian probate judge's supervision as to the extent and manner of presentation of such evidence.

(b) The administrative law judge or Indian probate judge may admit letters or copies thereof, affidavits, or other evidence not ordinarily admissible under the generally accepted rules of evidence. The weight to be attached to evidence presented in any particular form is within the discretion of the administrative law judge or Indian probate judge, taking into consideration all the circumstances of the particular case.

(c) Stipulations of fact and stipulations of testimony that would be given by witnesses were such witnesses present, agreed upon by the interested parties, may be used as evidence at the hearing.

(d) The administrative law judge or Indian probate judge may in any case require evidence in addition to that offered by the interested parties.

#### § 4.233 Proof of wills, codicils, and revocations.

(a) *Self-proved wills.* A will executed as provided in § 4.260 may, at the time of its execution, be made self-proved, and testimony of the witnesses in the probate thereof may be made unnecessary by the affidavits of the testator and attesting witnesses.

(1) These affidavits must be made before an officer authorized to administer oaths, must be attached to the will, and must be in substantially the following form and content:

State of \_\_\_\_\_

County of \_\_\_\_\_ ss.

I, \_\_\_\_\_, being first duly sworn, on oath, depose and say: That I am an \_\_\_\_\_ (enrolled or unenrolled) member of the \_\_\_\_\_ Tribe of Indians in the State of \_\_\_\_\_; that on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_/20\_\_\_\_, I requested \_\_\_\_\_ to prepare a will for me; that the attached will was prepared; that I requested \_\_\_\_\_ and \_\_\_\_\_ to act as witnesses thereto; that I declared to said witnesses that said instrument was my last will and testament; that I signed said will in the presence of both witnesses; that they signed the same as witnesses in my presence and in the presence of each other; that said will was read and explained to me (or read by me), after being prepared and before I signed it, and it clearly and accurately expresses my wishes; and that I willingly made and executed said will as my free and voluntary act and deed for the purposes therein expressed.

Testator/Testatrix

We, \_\_\_\_\_ and \_\_\_\_\_, each being first duly sworn, on oath, depose and state: That on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_/20\_\_\_\_, \_\_\_\_\_, a member of the \_\_\_\_\_ Tribe of Indians of the State of \_\_\_\_\_, published and declared the attached instrument to be his/her last will and testament, signed the same in the presence of both of us, and requested both of us to sign the same as witnesses; that we, in compliance with his/her request, signed the same as witnesses in his/her presence and in the presence of each other; that said testator/testatrix was not acting under duress, menace, fraud, or undue influence of any person, so far as we could ascertain, and in our opinion was mentally capable of disposing of all his/her estate by will.

Witness

Witness

Subscribed and sworn to before me this \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_/20\_\_\_\_, by \_\_\_\_\_ testator/testatrix, and by \_\_\_\_\_ and \_\_\_\_\_, attesting witnesses.

(Title)

(2) If uncontested, a self-proved will may be approved and distribution may be ordered thereunder with or without the testimony of any attesting witness.

(b) *Self-proved codicils and revocations.* A codicil to, or a revocation of, a will may be made self-proved in the same manner as provided in paragraph (a) of this section with respect to a will.

(c) *Will contest.* If the approval of a will, codicil thereto, or revocation thereof is contested, the attesting witnesses who are in the reasonable vicinity of the place of hearing and who are of sound mind must be produced and examined.

(1) If none of the attesting witnesses resides near the place of hearing at the time appointed for proving the will, the administrative law judge or Indian probate judge may:

(i) Admit the testimony of other witnesses to prove the testamentary capacity of the testator and the execution of the will; and

(ii) As evidence of the execution, admit proof of the handwriting of the testator and of the attesting witnesses, or of any of them.

(2) The provisions of § 4.232 are applicable with respect to remaining issues.

#### § 4.234 Witnesses, interpreters, and fees.

(a) Interested parties who desire a witness to testify or an interpreter to serve at a formal hearing must make their own financial and other arrangements therefor, and subpoenas will be issued where necessary and proper.

(b) The administrative law judge or Indian probate judge may call witness and interpreters and order payment out of the estate assets of per diem, mileage, and subsistence at a rate not to exceed that allowed to witnesses called in the U.S. District Courts.

(c) In hardship situations, the administrative law judge or Indian probate judge may order payment of per diem and mileage for indispensable witnesses and interpreters called for the parties. In the order for payment, the administrative law judge or Indian probate judge must specify whether such costs are to be allocated and charged against the interest of the party calling the witness or against the estate generally.

(d) Costs of administration allowed against the estate under paragraphs (b) or (c) of this section will have a priority for payment greater than that for any creditor claims allowed. Upon receiving an order, the Superintendent must immediately initiate payment of these sums from the estate account, or if funds are insufficient, then out of funds as they are received in the estate account before closure of the estate, with the proviso that these costs must be paid in full with a later allocation against the interest of a party, if the administrative law judge or Indian probate judge has so ordered.

#### § 4.235 Supplemental hearings.

After the matter has been submitted but before the time the deciding official has rendered his or her decision, the deciding official may upon his or her own motion or upon motion of any interested party schedule a supplemental hearing if he or she deems it necessary. The notice must set forth the purpose of the supplemental hearing and must be served upon all interested parties in the manner provided in § 4.216. Where the need for such supplemental hearing becomes apparent during any hearing, the deciding official may announce the time and place for such supplemental hearing to all those present and no further notice need be given. In that event, the records must clearly show who was present at the time of the announcement.

#### § 4.236 Record.

(a) After the completion of the formal hearing, the administrative law judge or

Indian probate judge will make up the official record containing:

(1) A copy of the posted public notice of hearing showing the posting certifications;

(2) A copy of each notice served on interested parties with proof of mailing;

(3) The record of the evidence received at the hearing, including any transcript made of the testimony;

(4) Claims filed against the estate;

(5) Will and codicils, if any;

(6) Inventories and valuations of the estate;

(7) Pleadings and briefs filed;

(8) Special or interim orders;

(9) Data for heirship findings and family history;

(10) The decision and the notices thereof; and

(11) Any other material or documents deemed material by the administrative law judge or Indian probate judge.

(b) The administrative law judge or Indian probate judge must lodge the original record with the designated LTRO in accordance with 25 CFR part 150. A duplicate copy must be lodged with the Superintendent originating the probate. A partial record must also be furnished to the Superintendents of other affected agencies. When a hearing transcript has not been prepared:

(1) The verbatim recording of the hearing must be retained in the office of the administrative law judge or Indian probate judge issuing the decision until the time allowed for rehearing or appeal has expired; and

(2) The original record returned to the LTRO must contain a statement indicating that no transcript was prepared.

■ 15. Revise the undesignated center heading and § 4.240 to read as follows:

#### **Decisions in Formal Proceedings**

##### **§ 4.240 Decision of the administrative law judge or Indian probate judge and notice thereof.**

(a) The administrative law judge or Indian probate judge must decide the issues of fact and law involved in any formal proceedings and must incorporate the following in his or her decision:

(1) In all cases, the names, identifying numbers as assigned by BIA, birth dates, relationships to the decedent, and shares of heirs, with citations to the law of descent and distribution in accordance with which the decision is made, or the fact that the decedent died leaving no legal heirs;

(2) In testate cases, approval or disapproval of the will with construction of its provisions, and the names, identifying numbers as assigned

by BIA, and relationships to the testator of all beneficiaries and a description of the property which each is to receive;

(3) Allowance or disallowance of claims against the estate;

(4) Whether heirs or beneficiaries are non-Indian, exclusively alien Indians, or Indians whose property is not subject to Federal supervision; and

(5) A determination of any rights of dower, curtesy, or homestead that may constitute a burden upon the interest of the heirs.

(b) When the administrative law judge or Indian probate judge issues a decision, he or she must:

(1) Issue a notice of the decision to all parties who have or claim any interest in the estate; and

(2) Must mail a copy of the notice, together with a copy of the decision, to the Superintendent and to each interested party simultaneously.

(c) The decision will not become final and no distribution may be made thereunder until the expiration of the 60 days allowed for the filing of a petition for rehearing by aggrieved parties as provided in § 4.241.

■ 16. Revise §§ 4.241 and 4.242 to read as follows:

##### **§ 4.241 Rehearing.**

(a) Any person aggrieved by the decision of the administrative law judge or Indian probate 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 or Indian probate judge a written petition for rehearing.

(1) The petition must:

(i) Be under oath; and

(ii) State specifically and concisely the grounds on which it is based.

(2) If the petition is based on newly-discovered evidence, it must:

(i) Be accompanied by affidavits or declarations of witnesses stating fully what the new testimony is to be; and

(ii) State justifiable reasons for the failure to discover and present that evidence, tendered as new, at the formal hearings held before the issuance of the decision.

(b) The administrative law judge or Indian probate judge, upon receiving a petition for rehearing, must promptly forward a copy 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 or Indian probate judge.

(c) If proper grounds are not shown, or if the petition is not filed within the time prescribed in paragraph (a) of this section, the administrative law judge or Indian probate judge will:

(1) Issue an order denying the petition and setting forth his or her reasons therefor; and

(2) Furnish copies of the order to the petitioner, the Superintendent, and the interested parties.

(d) If the petition appears to show merit, the administrative law judge or Indian probate judge must:

(1) Cause copies of the petition and supporting papers to be served on those persons whose interest in the estate might be adversely affected by the granting of the petition;

(2) Allow all persons served a reasonable, specified time in which to submit answers or legal briefs in opposition to the petition; and

(3) Reconsider, with or without a hearing as he or she may determine, the issues raised in the petition; he or she may adhere to the former decision, modify or vacate it, or make such further order as is warranted.

(e) Upon entry of a final order, the administrative law judge or Indian probate judge must lodge the complete record relating to the petition with the designated LTRO under § 4.236(b), and furnish a duplicate record thereof to the Superintendent.

(f) Successive petitions for rehearing are not permitted, and except for the issuance of necessary orders nunc pro tunc to correct clerical errors in the decision, the jurisdiction of the administrative law judge or Indian probate judge terminates upon the issuance of a decision finally disposing of a petition for rehearing. Nothing herein prevents the Board from remanding a case for further hearing or rehearing after appeal.

(g) At the time the final decision is entered following the filing of a petition for rehearing, the administrative law judge or Indian probate judge must direct a notice of such action with a copy of the decision to the Superintendent and to the interested parties and must mail the same by regular mail to the said parties at their addresses of record.

(h) No distribution may be made under such order for a period of 75 days following the mailing of a notice of decision pending the filing of a notice of appeal by an aggrieved party as provided in this subpart.

##### **§ 4.242 Reopening.**

(a) A person claiming an interest in an estate may file a petition in writing for reopening of the case if he or she:

(1) Had no actual notice of the original proceedings;

(2) Was not on the reservation or otherwise in the vicinity at any time

while the public notices of the hearing were posted; and

(3) Files the petition within 3 years after the date of a final decision issued by an administrative law judge, Indian probate judge, or the Board, except as provided in §§ 4.203 and 4.206 and paragraph (i) of this section.

(b) The petition must be addressed to the administrative law judge or Indian probate judge and filed at his or her office. The petitioner must also furnish a copy of the petition to the Superintendent. All grounds for the reopening must be set forth fully. If based on alleged errors of fact, all such allegations must be under oath and supported by affidavits.

(c) If the administrative law judge or Indian probate judge finds that proper grounds are not shown, he or she will issue an order denying the petition and giving the reasons for the denial. Copies of the administrative law judge's or Indian probate judge's decision must be mailed to the petitioner, the Superintendent, and to those persons who share in the estate.

(d) If the petition appears to show merit, the administrative law judge or Indian probate judge must cause copies of the petition and all papers filed by the petitioner to be served on those persons whose interest in the estate might be adversely affected by the granting of the petition.

(1) These persons may resist the petition by filing answers, cross-petitions, or briefs. The filings must be made within the time periods set by the administrative law judge or Indian probate judge.

(2) The administrative law judge or Indian probate judge will then reconsider, with or without a hearing as he or she may determine, prior actions taken in the case and may either adhere to, modify, or vacate the original decision.

(3) Copies of the administrative law judge's or Indian probate judge's decision must be mailed to the petitioner, to all persons who received copies of the petition, and to the Superintendent.

(e) To prevent manifest error, an administrative law judge or Indian probate judge may reopen a case within 3 years from the date of the final decision, after due notice on his or her own motion, or on petition of a BIA officer. Copies of the administrative law judge's or Indian probate judge's decision must be mailed to all interested parties and to the Superintendent.

(f) The administrative law judge or Indian probate judge may suspend distribution of the estate or the income therefrom during the pendency of

reopening proceedings by order directed to the Superintendent.

(g) The administrative law judge or Indian probate judge must lodge the record made in disposing of a reopening petition with the designated LTRO under § 4.236(b) and must furnish a duplicate record thereof to the Superintendent.

(h) No distribution may be made under a decision issued under paragraph (c), (d), or (e) of this section for 75 days following the mailing of the copy of the decision as therein provided, pending the filing of a notice of appeal by an aggrieved party.

(i) A petition for reopening filed more than 3 years after the entry of a final decision in a probate proceeding will be allowed only upon a showing that:

- (1) A manifest injustice will occur;
- (2) A reasonable possibility exists for correction of the error;
- (3) The petitioner had no actual notice of the original proceedings; and
- (4) The petitioner was not on the reservation or otherwise in the vicinity at any time while the public notices were posted.

(j) The administrative law judge or Indian probate judge may deny a petition filed under paragraph (i) of this section on the basis of the petition and available BIA records. No such petition will be granted unless the administrative law judge or Indian probate judge:

- (1) Has caused copies of the petition and all other papers filed by the petitioner to be served on those persons whose interest in the estate might be adversely affected by the granting of the petition; and
- (2) Has allowed those persons an opportunity to resist the petition by filing answers, cross petitions, or briefs as provided in paragraph (d) of this section.

#### **§ 4.243 [Removed]**

- 17. Remove § 4.243 and the undesignated center heading.
- 18. Revise §§ 4.250, 4.251, and 4.252 to read as follows:

#### **Claims**

##### **§ 4.250 Filing and proof of creditor claims; limitations.**

(a) All claims against the estate of a deceased Indian must be filed with the agency:

- (1) Within 60 days from the date BIA receives a certified copy of the death certificate or other verification of the decedent's death under 25 CFR 15.101; or
- (2) Within 20 days from the date the creditor is chargeable with notice of the

decedent's death, whichever of these dates is later, unless all of the heirs and/or beneficiaries agree to waive the applicable time limit and allow a late claim to be filed.

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

(c) All claims must be filed in triplicate, itemized in detail as to dates and amounts of charges for purchases or services and dates and amounts of payments on account.

(1) Each claim must show the names and addresses of all parties in addition to the decedent from whom payment might be sought.

(2) Each claim must be supplemented by an affidavit, in triplicate, of the claimant or someone on his or her behalf that:

(i) The amount claimed is justly due from the decedent;

(ii) No payments have been made on the account which are not credited thereon as shown by the itemized statement; and

(iii) There are no offsets to the knowledge of the claimant.

(d) Claims for care may not be allowed except upon clear and convincing evidence that the care was given on a promise of compensation and that compensation was expected.

(e) A claim based on a written or oral contract, express or implied, where the claim for relief has existed for such a period as to be barred by the State laws at date of decedent's death, cannot be allowed.

(f) Claims sounding in tort not reduced to judgment in a court of competent jurisdiction, and other unliquidated claims not properly within the jurisdiction of a probate forum, may be barred from consideration by an interim order from the deciding official.

(g) Claims of a State or any of its political subdivisions on account of social security or old-age assistance payments will not be allowed.

#### **§ 4.251 Priority of claims.**

(a) Upon motion of the Superintendent or an interested party, the deciding official may authorize payment of the costs of administering the estate as they arise and before the allowance of any claims against the estate.

(b) After the costs of administration, the deciding official 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 of an Indian tribe; and

(5) Claims reduced to judgment by a court of competent jurisdiction.

(c) After the priority claims, the deciding official may authorize payment of all remaining claims, referred to as general claims.

(d) The deciding official 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 deciding official will order payment only of the reduced amount.

(2) A deciding official may reduce or disallow both priority claims and general claims.

(e) If, as of the date of the initial informal or formal hearing, there is not enough money in the IIM account to pay all claims, the deciding official 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, as of the date of the initial informal or formal hearing, 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.

#### § 4.252 Property subject to claims.

Claims are payable from income from the lands remaining in trust. Further, except as prohibited by law, all trust moneys of the deceased on hand or accrued at time of death, including bonds, unpaid judgments, and accounts receivable, may be used for the payment of claims, whether the right, title, or interest that is taken by an heir or beneficiary remains in or passes out of trust.

■ 19. Revise §§ 4.260, 4.261, and 4.262 to read as follows:

#### Wills

##### § 4.260 Making of a will; review as to form; revocation.

(a) An Indian 18 years of age or over and of testamentary capacity, who has any right, title, or interest in trust property, may dispose of this property by a will executed in writing and attested by two disinterested adult witnesses.

(b) When an Indian executes a will and submits it to the Superintendent, the Superintendent must forward it to the Office of the Solicitor for examination as to adequacy of form, and for submission by the Office of the Solicitor to the Superintendent of any appropriate comments. The will, codicil, or any replacement or copy thereof, may be retained by the Superintendent at the request of the testator or testatrix for safekeeping. A will must be held in absolute confidence, and no person other than the testator may admit its existence or divulge its contents before the death of the testator.

(c) The testator may, at any time during his or her lifetime, revoke his or her will by a subsequent will or other writing executed with the same formalities as are required in the case of the execution of a will, or by physically destroying the will with the intention of revoking it. No will that is subject to the regulations of this subpart will be deemed to be revoked by operation of the law of any State.

(d) A will, codicil, or revocation may be made self-proved in the manner provided in § 4.233(a)–(b).

##### § 4.261 Anti-lapse provisions.

(a) This section applies when:

(1) An Indian testator devises or bequeaths trust property to any of his or her grandparents or to the lineal descendant of a grandparent; and

(2) The beneficiary dies before the testator leaving lineal descendants.

(b) The lineal descendants referred to in paragraph (a)(2) of this section take the right, title, or interest so given by the will per stirpes.

(c) Relationship by adoption is equivalent to relationship by blood.

##### § 4.262 Felonious taking of testator's life.

No person who has been finally convicted of feloniously causing the death or taking the life of, or procuring another person to take the life of, the testator, may take directly or indirectly any devise or bequest under deceased's will. All right, title, and interest existing in such a situation will vest and be determined as if the person convicted never existed, notwithstanding § 4.261.

■ 20. Revise §§ 4.270, 4.271, 4.272, and 4.273 to read as follows:

#### Custody and Distribution of Estates

##### § 4.270 Custody and control of trust estates.

(a) The Superintendent may:

(1) Assume custody or control of all tangible trust personal property of a deceased Indian; and

(2) Take such action, including sale of the property, as in his or her judgment is necessary for the benefit of the estate, the heirs, and the beneficiaries, pending entry of the decision provided for in §§ 4.214, 4.240, 4.241, or 4.312.

(b) All expenses, including expenses of roundup, branding, care, and feeding of livestock, are chargeable against the estate and may be paid from:

(1) Those funds of the deceased that are under the Department's control; or

(2) The proceeds of a sale of the property or a part thereof.

(c) If a deciding official has been assigned to adjudicate the estate, his or her approval is required before payment can be made under paragraph (b)(2) of this section.

##### § 4.271 Omitted property.

(a) This section applies when, after issuance of a decision under §§ 4.214, 4.240, or 4.312, it is found that trust property or interest therein belonging to a decedent has not been included in the inventory.

(1) The inventory can be modified to include the omitted property for distribution under the original decision.

(2) Modification may be made either administratively by BIA or by a modification order prepared by him or her for the approval and signature of a deciding official.

(3) Copies of all modifications must be furnished to the Superintendent and to all those persons who share in the estate.

(b) When the property to be included takes a different line of descent from that shown in the original decision, BIA must notify the deciding official, who will proceed to hold an informal or formal hearing if necessary and issue a decision under §§ 4.214 or 4.240. The record of any such proceeding must be lodged with the designated LTRO under § 4.236(b).

##### § 4.272 Improperly included property.

(a) When, after a decision under §§ 4.214, 4.240, or 4.312, it is found that property has been improperly included in the inventory of an estate, the inventory must be modified to eliminate such property. A petition for modification may be filed by the Superintendent of the agency where the property is located, or by any interested party.

(b) An administrative law judge or Indian probate judge will review the record of the title upon which the modification is to be based and enter an appropriate decision. If the decision is entered without a formal hearing, the administrative law judge or Indian probate judge must give notice of his or

her action to all parties whose rights are adversely affected, allowing them 60 days in which to show cause why the decision should not then become final.

(c) Where appropriate, the administrative law judge or Indian probate judge may conduct a formal hearing at any stage of the modification proceeding. The hearing must be scheduled and conducted in accordance with the rules of this subpart. The administrative law judge or Indian probate judge will enter a final decision based on his or her findings, modifying or refusing to modify the property inventory. His or her decision will become final at the end of 60 days from the date it is mailed, unless an aggrieved party files a notice of appeal within such period. Notice of entry of the decision must be given in accordance with § 4.240(b).

(d) A party aggrieved by the deciding official's decision may appeal to the Board under §§ 4.310 through 4.323.

(e) The record of all proceedings must be lodged with the designated LTRO under § 4.236(b).

**§ 4.273 Distribution of estates.**

(a) The Superintendent must initiate payment of allowed claims, distribution of the estate, and all other actions required by the deciding official's final order 75 days after a final order has been issued, unless he or she has received:

(1) A copy of a request for de novo review filed under § 4.215;

(2) A copy of a petition for rehearing filed under § 4.241(a); or

(3) A copy of a notice of appeal filed under § 4.320(b).

(b) The Superintendent must not initiate the payment of claims or distribution of the estate during the pendency of proceedings under §§ 4.215, 4.241, or 4.242, unless the administrative law judge or Indian probate judge orders otherwise in writing. The Board may, at any time, authorize the administrative law judge or Indian probate judge to issue interim orders for payment of claims or for partial distribution during the pendency of proceedings on appeal.

■ 21. Revise §§ 4.281 and 4.282 to read as follows:

**Miscellaneous**

**§ 4.281 Claims for attorney fees.**

(a) The deciding official may allow fees for attorneys representing Indians in proceedings under this part.

(1) At the discretion of the deciding official, these fees may be chargeable against the interests of the party represented or may be taxed as a cost of administration.

(2) Petitions for allowance of fees must be filed before the close of the last hearing and must be supported by

whatever proof the deciding official requires.

(3) In determining attorney fees, consideration must be given to the fact that the property of the decedent is restricted or held in trust and that it is the duty of the Department to protect the rights of all interested parties.

(b) Nothing in this section prevents an attorney from petitioning for additional fees to be considered at the disposition of a petition for rehearing and again after an appeal on the merits. An order allowing attorney fees is subject to a petition for rehearing and to an appeal.

**§ 4.282 Guardians for incompetents.**

Minors and other legal incompetents who are interested parties must be represented at all hearings by legally appointed guardians, or by guardians ad litem appointed by the deciding official.

■ 22. Revise §§ 4.300, 4.301, 4.302, 4.303, 4.304, 4.305, 4.306, 4.307, and 4.308 to read as follows:

**Tribal Purchase of Interests Under Special Statutes**

**§ 4.300 Authority and scope.**

(a) Sections 4.300 through 4.308 apply to formal proceedings in Indian probate that relate to the tribal purchase of a decedent's interests in the trust and restricted land shown in the following table.

Location of trust or restricted land	Legislation governing purchase
(1) Yakima Reservation or within the area ceded by the Treaty of June 9, 1855 (12 Stat. 1951).	The Act of December 31, 1970 (Pub. L. 91-627; 84 Stat. 1874; 25 U.S.C. 607 (1976)), amending section 7 of the Act of August 9, 1946 (60 Stat. 968).
(2) Warm Springs Reservation or within the area ceded by the Treaty of June 25, 1855 (12 Stat. 37).	The Act of August 10, 1972 (Pub. L. 92-377; 86 Stat. 530).
(3) Nez Perce Indian Reservation or within the area ceded by the Treaty of June 11, 1855 (12 Stat. 957).	The Act of September 29, 1972 (Pub. L. 92-443; 86 Stat. 744).

(b) In the exercise of probate authority, an administrative law judge or Indian probate judge will determine—

(1) The entitlement of a tribe to purchase a decedent's interests in trust or restricted land under the statutes;

(2) The entitlement of a surviving spouse to reserve a life estate in one-half of the surviving spouse's interests that have been purchased by a tribe; and

(3) The fair market value of such interests, including the value of any life estate reserved by a surviving spouse.

(c) In making a determination under paragraph (b)(1) of this section, the following issues will be determined by the official tribal roll, which is binding upon the administrative law judge or Indian probate judge:

(1) Enrollment or refusal of the tribe to enroll a specific individual; and

(2) Specification of blood quantum, where pertinent.

(d) For good cause shown, the administrative law judge or Indian probate judge may stay the probate proceeding to permit an aggrieved party to pursue an enrollment application, grievance, or appeal through the established procedures applicable to the tribe.

**§ 4.301 Valuation report.**

(a) In all probates, at the earliest possible stage of the proceeding before issuance of a probate decision, BIA must furnish a valuation of the decedent's interests when the record reveals to the Superintendent:

(1) That the decedent owned interests in land located on one or more of the reservations designated in § 4.300; and

(2) That one or more of the probable heirs or beneficiaries who may receive the interests either:

(i) Is not enrolled in the tribe of the reservation where the land is located; or

(ii) Does not have the required blood quantum in the tribe to hold the interests against a claim made by the tribe.

(b) If there is a surviving spouse whose interests may be subject to the tribal option, the valuation must include the value of a life estate based on the life of the surviving spouse in one-half of such interests. The valuation must be made on the basis of the fair market value of the property, including fixed

improvements, as of the date of decedent's death.

(c) BIA must include the valuation report in the probate package submitted to OHA. Interested parties may examine and copy, at their expense, the valuation report at the office of the Superintendent or the administrative law judge or Indian probate judge.

**§ 4.302 Conclusion of probate and tribal exercise of statutory option.**

(a) *Conclusion of probate; findings in the probate decision.* (1) When a decedent is shown to have owned land interests in any one or more of the reservations designated in § 4.300, the probate proceeding relative to the determination of heirs, approval or disapproval of a will, and the claims of creditors will first be concluded as final for the Department in accordance with §§ 4.216 through 4.282 and §§ 4.310 through 4.323. This decision is referred to in this section as the "probate decision."

(2) At the formal probate hearing, a finding must be made on the record showing those interests in land, if any, that are subject to the tribal option.

(i) The finding must be included in the probate decision setting forth the apparent rights of the tribe as against affected heirs or beneficiaries and the right of a surviving spouse whose interests are subject to the tribal option to reserve a life estate in one-half of such interests.

(ii) If the finding is that there are no interests subject to the tribal option, the decision must so state.

(iii) A copy of the probate decision, to which must be attached a copy of the valuation report, must be distributed to all interested parties in accordance with § 4.240.

(b) *Tribal exercise of statutory option.* (1) A tribe may purchase all or a part of the available interests specified in the probate decision within 60 days of the probate decision unless a petition for rehearing or a demand for hearing has been filed under §§ 4.304 or 4.305.

(2) If a petition for rehearing or a demand for hearing has been filed, a tribe may purchase all or a part of the available interests specified in the probate decision within 20 days from the date of the decision on rehearing or hearing, whichever is applicable. A tribe may not, however, claim an interest less than the decedent's total interest in any one individual tract.

(3) The tribe must file a written notice of purchase with the Superintendent, together with the tribe's certification that copies have been mailed on the same date to the administrative law judge or Indian probate judge and to the

affected heirs or beneficiaries. Upon failure to timely file a notice of purchase, the right to distribution of all unclaimed interests will accrue to the heirs or beneficiaries.

**§ 4.303 Notice by surviving spouse to reserve a life estate.**

When the heir or beneficiary whose interests are subject to the tribal option is a surviving spouse, the spouse may reserve a life estate in one-half of such interests. The spouse must file a written notice to reserve with the Superintendent within 30 days after the tribe has exercised its option to purchase the interest in question, together with a certification that copies thereof have been mailed on the same date to the administrative law judge or Indian probate judge and the tribe. Failure to timely file a notice to reserve a life estate will constitute a waiver thereof.

**§ 4.304 Rehearing.**

Any interested party aggrieved by the probate decision may, within 60 days from the date of the probate decision, file with the administrative law judge or Indian probate judge a written petition for rehearing in accordance with § 4.241.

**§ 4.305 Hearing on tribal option to purchase interests.**

(a) *Demand for hearing.* Any interested party aggrieved by the exercise of the tribal option to purchase the interests in question or the valuation of the interests as set forth in the valuation report may file with the administrative law judge or Indian probate judge a written demand for hearing. The demand must:

(1) Be filed within 60 days from the date of the probate decision or 60 days from the date of the decision on rehearing, or within 20 days from the date the tribe exercises its option to purchase available interests, whichever is applicable;

(2) Include a certification that copies of the demand have been mailed on the same date to the Superintendent and to each interested party; and

(3) State specifically and concisely the grounds upon which it is based.

(b) *Notice of hearing.* The administrative law judge or Indian probate judge must, upon receiving a demand for hearing:

(1) Set a time and place for the hearing after expiration of the 60-day period fixed for the filing of the demand for hearing as provided in § 4.305(a); and

(2) Mail a notice of the hearing to all interested parties not less than 30 days in advance.

(c) *Burden of proof at the hearing.* At the hearing, each party challenging the tribe's claim to purchase the interests in question or the valuation of the interests as set forth in the valuation report will have the burden of proving his or her position.

(d) *Decision after hearing; appeal.* (1) Upon conclusion of the hearing, the administrative law judge or Indian probate judge will issue a decision that determines all of the issues including, but not limited to:

(i) The fair market value of the interests purchased by the tribe; and

(ii) Any adjustment of the fair market value made necessary by the surviving spouse's decision to reserve a life estate in one-half of the interests.

(2) The decision must specify the right of appeal to the Board of Indian Appeals within 60 days from the date of the decision in accordance with §§ 4.310 through 4.323.

(3) The administrative law judge or Indian probate judge must lodge the complete record relating to the demand for hearing with the LTRO as provided in § 4.236(b), furnish a duplicate record thereof to the Superintendent, and mail a notice of such action together with a copy of the decision to each interested party.

**§ 4.306 Time for payment.**

A tribe must pay the full fair market value of the interests purchased, as set forth in the valuation report or as determined after hearing in accordance with § 4.305, whichever is applicable. Payment must be made within 2 years from the date of decedent's death or within 1 year from the date of notice of purchase, whichever is later.

**§ 4.307 Title.**

(a) Upon payment by the tribe of the interests purchased, the Superintendent must:

(1) Issue a certificate to the administrative law judge or Indian probate judge that payment has been made; and

(2) File with the certificate all supporting documents required by the administrative law judge or Indian probate judge.

(b) After receiving the certificate and supporting documents, the administrative law judge or Indian probate judge will:

(1) Issue an order that the United States holds title to the interests in trust for the tribe;

(2) File the complete record, including the decision, with the LTRO as provided in § 4.236(b);

(3) Furnish a duplicate copy of the record to the Superintendent; and

(4) Mail a notice of the action together with a copy of the decision to each interested party.

#### § 4.308 Disposition of income.

During the pendency of the probate and up to the date of transfer of title to the United States in trust for the tribe in accordance with § 4.307, all income received or accrued from the land interests purchased by the tribe will be credited to the estate.

Cross Reference: See 25 CFR part 2 for procedures for appeals to Area Directors and to the Director of the Bureau of Indian Affairs.

■ 23. Revise §§ 4.310, 4.311, 4.312, 4.313, 4.314, 4.315, 4.316, 4.317, and 4.318 to read as follows:

### General Rules Applicable to Proceedings on Appeal Before the Interior Board of Indian Appeals

#### § 4.310 Documents.

(a) *Filing.* The effective date for filing a notice of appeal or other document with the Board during the course of an appeal is:

(1) For most documents, the date of mailing or the date of personal delivery; or

(2) For a motion for the Board to assume jurisdiction over an appeal under 25 CFR 2.20(e), the date that the Board receives the motion.

(b) *Serving notices of appeal and pleadings.* Any party filing a notice of appeal or pleading before the Board must serve copies on all interested parties in the proceeding. Service must be accomplished by personal delivery or mailing.

(1) Where a party is represented in an appeal by an attorney or other representative authorized under 43 CFR 1.3, service of any document on the attorney or representative is service on the party.

(2) Where a party is represented by more than one attorney, service on any one attorney is sufficient.

(3) The certificate of service on an attorney or representative must include the name of the party whom the attorney or representative represents and indicate that service was made on the attorney or representative.

(c) *Computation of time for filing and service.* Except as otherwise provided by law, in computing any period of time prescribed for filing and serving a document:

(1) The day upon which the decision or document to be appealed or answered was served or the day of any other event after which a designated period of time begins to run is not to be included;

(2) The last day of the period is to be included, unless it is a nonbusiness day

(e.g., Saturday, Sunday, or Federal holiday), in which event the period runs until the end of the next business day; and

(3) When the time prescribed or allowed is 7 days or less, intermediate Saturdays, Sundays, Federal holidays, and other nonbusiness days are excluded from the computation.

(d) *Extensions of time.* (1) The Board may extend the time for filing or serving any document except a notice of appeal.

(2) A request to the Board for an extension of time must be filed within the time originally allowed for filing.

(3) For good cause the Board may grant an extension of time on its own initiative.

(e) *Retention of documents.* All documents received in evidence at a hearing or submitted for the record in any proceeding before the Board will be retained with the official record of the proceeding. The Board, in its discretion, may permit the withdrawal of original documents while a case is pending or after a decision becomes final upon conditions as required by the Board.

#### § 4.311 Briefs on appeal.

(a) The appellant may file an opening brief within 30 days after receiving the notice of docketing. The appellant must serve copies of the opening brief upon all interested parties or counsel and file a certificate with the Board showing service upon the named parties.

Opposing parties or counsel will have 30 days from receiving the appellant's brief to file answer briefs, copies of which must be served upon the appellant or counsel and all other interested parties. A certificate showing service of the answer brief upon all parties or counsel must be attached to the answer filed with the Board.

(b) The appellant may reply to an answering brief within 15 days from its receipt. A certificate showing service of the reply brief upon all parties or counsel must be attached to the reply filed with the Board. Except by special permission of the Board, no other briefs will be allowed on appeal.

(c) BIA is considered an interested party in any proceeding before the Board. The Board may request that BIA submit a brief in any case before the Board.

(d) An original only of each document should be filed with the Board. Documents should not be bound along the side.

(e) The Board may also specify a date on or before which a brief is due. Unless expedited briefing has been granted, such date may not be less than the appropriate period of time established in this section.

#### § 4.312 Board decisions.

Decisions of the Board will be made in writing and will set forth findings of fact and conclusions of law. The decision may adopt, modify, reverse, or set aside any proposed finding, conclusion, or order of an administrative law judge, Indian probate judge, or BIA official. Distribution of decisions must be made by the Board to all parties concerned. Unless otherwise stated in the decision, rulings by the Board are final for the Department and must be given immediate effect.

#### § 4.313 Amicus curiae; intervention; joinder motions.

(a) Any interested person or Indian tribe desiring to intervene, to join other parties, to appear as amicus curiae, or to obtain an order in an appeal before the Board must apply in writing to the Board stating the grounds for the action sought. The Board may grant the permission or relief requested for specified purposes and subject to limitations it established. This section will be liberally construed.

(b) Motions to intervene, to appear as amicus curiae, to join additional parties, or to obtain an order in an appeal pending before the Board must be served in the same manner as appeal briefs.

#### § 4.314 Exhaustion of administrative remedies.

(a) No decision of an administrative law judge, Indian probate judge, or BIA official that at the time of its rendition is subject to appeal to the Board, will be considered final so as to constitute agency action subject to judicial review under 5 U.S.C. 704, unless it has been made effective pending a decision on appeal by order of the Board.

(b) No further appeal will lie within the Department from a decision of the Board.

(c) The filing of a petition for reconsideration is not required to exhaust administrative remedies.

#### § 4.315 Reconsideration of a Board decision.

(a) Reconsideration of a decision of the Board will be granted only in extraordinary circumstances. Any party to the decision may petition for reconsideration. The petition must be filed with the Board within 30 days from the date of the decision and must contain a detailed statement of the reasons why reconsideration should be granted.

(b) A party may file only one petition for reconsideration.

(c) The filing of a petition will not stay the effect of any decision or order

and will not affect the finality of any decision or order for purposes of judicial review, unless so ordered by the Board.

**§ 4.316 Remands from courts.**

Whenever any matter is remanded from any Federal court to the Board for further proceedings, the Board will remand the matter to an administrative law judge, an Indian probate judge, or BIA. In the alternative, to the extent the court's directive and time limitations permit, the parties will be allowed an opportunity to submit to the Board a report recommending procedures for it to follow to comply with the court's order. The Board will enter special orders governing matters on remand.

**§ 4.317 Standards of conduct.**

(a) *Inquiries about cases.* All inquiries about any matter pending before the Board must be made to the Chief Administrative Judge of the Board or the administrative judge assigned the matter.

(b) *Disqualification.* An administrative judge may withdraw from a case in accordance with standards found in the recognized canons of judicial ethics if the judge deems this action appropriate. If, before a decision of the Board, a party files an affidavit of personal bias or disqualification with substantiating facts, and the administrative judge concerned does not withdraw, the OHA Director will determine the matter of disqualification.

**§ 4.318 Scope of review.**

An appeal will be limited to those issues that were before the administrative law judge or Indian probate judge upon the petition for rehearing, reopening, or regarding tribal purchase of interests, or before the BIA official on review. However, except as specifically limited in this part or in title 25 of the Code of Federal Regulations, the Board will not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate.

**Appeals to the Board of Indian Appeals in Probate Matters**

**§ 4.320 Who may appeal.**

(a) *Right of appeal.* An interested party has a right to appeal to the Board from an order of an administrative law judge or Indian probate judge on a petition for rehearing or petition for reopening or regarding tribal purchase of interests in a deceased Indian's trust estate.

(b) *Notice of appeal.* Within 60 days from the date of the decision, an appellant must file a written notice of appeal signed by the appellant, the appellant's attorney, or other qualified representative as provided in 43 CFR 1.3, with the Board of Indian Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203.

(1) A statement of the errors of fact and law upon which the appeal is based must be included in either the notice of appeal or in any brief filed.

(2) The notice of appeal must include the names and addresses of parties served.

(3) A notice of appeal not timely filed will be dismissed for lack of jurisdiction.

(c) *Service of copies of notice of appeal.* The appellant must personally deliver or mail the original notice of appeal to the Board of Indian Appeals.

(1) A copy must be served upon the administrative law judge or Indian probate judge whose decision is appealed as well as all interested parties.

(2) The notice of appeal filed with the Board must include a certification that service was made as required by this section.

(d) *Action by the administrative law judge or Indian probate judge; record inspection.* The administrative law judge or Indian probate judge, upon receiving a copy of the notice of appeal, must notify the Superintendent concerned to return the duplicate record filed under §§ 4.236(b), 4.241(d), or 4.242(f) to the LTRO designated under

§ 4.236(b). The duplicate record must be conformed to the original by the LTRO and will thereafter be available for inspection either at the LTRO or at the office of the Superintendent. If a transcript of the hearing was not prepared, the administrative law judge or Indian probate judge will have a transcript prepared that must be forwarded to the Board within 30 days from receiving a copy of the notice of appeal.

**§ 4.321 Notice of transmittal of record on appeal.**

The original record on appeal must be forwarded by the LTRO to the Board by certified mail. Any objection to the record as constituted must be filed with the Board within 15 days of receiving the notice of docketing issued under § 4.332.

**§ 4.322 Docketing.**

The appeal will be docketed by the Board upon receiving the administrative record from the LTRO. All interested parties as shown by the record on appeal must be notified of the docketing. The docketing notice must specify the time within which briefs may be filed and must cite the procedural regulations governing the appeal.

**§ 4.323 Disposition of the record.**

(a) After the Board makes a decision other than a remand, it must forward to the LTRO designated under § 4.236(b):

(1) The record filed with the Board; and

(2) All documents added during the appeal proceedings, including any transcripts prepared because of the appeal and the Board's decision.

(b) The LTRO must conform the duplicate record required by § 4.320(d) to the original sent under paragraph (a)(1) of this section and forward the conformed record to the Superintendent concerned.

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