

DEPARTMENT OF THE INTERIOR

Office of Hearings and Appeals

43 CFR Part 4

RIN 1090-AA78

Trust Management Reform: Probate of Indian Trust Estates

AGENCY: Office of Hearings and Appeals, Office of the Secretary, Interior.

ACTION: Final rule.

SUMMARY: The Department of the Interior, Office of Hearings and Appeals (OHA), is revising its regulations regarding hearings and appeals involving the probate of property and funds held in trust or restricted status for individual Indians and Alaska Natives. The revisions make OHA's probate regulations consistent with those published on January 22, 2001, by the Bureau of Indian Affairs (BIA) to accommodate BIA's re-assumption of responsibility for some probate cases. OHA's revisions will ensure that BIA and OHA apply the same standards and criteria for determining heirs and paying claims, and that they coordinate their procedures to expedite the probate process for Indian decedents' estates. This final rule reflects comments OHA received on the interim rule it published on June 18, 2001.

DATES: This rule is effective January 30, 2002.

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

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I. Background

On June 18, 2001, the Office of Hearings and Appeals (OHA) published an interim rule amending several sections of its Indian probate regulations at 43 CFR part 4, subpart D. 66 FR 32884; see also 66 FR 33740 (June 25, 2001) (corrections). These regulatory changes, which were made immediately effective, were designed to make OHA's regulations consistent with the new 25 CFR part 15 that had been published by the Bureau of Indian Affairs (BIA) on January 22, 2001. 66 FR 7068 (effective March 23, 2001). Additional information concerning the background of the present rulemaking is found in the preamble to OHA's interim rule.

OHA requested comments on its interim rule, and several comments were received during the comment period that ended August 17, 2001. Commenters included the Office of Personnel Management (OPM), the Governmental Affairs Office of the American Bar Association (ABA), the Federal Administrative Law Judges Conference (FALJC), the FORUM of United States Administrative Law Judges (FORUM), and a number of individuals. On September 17, 2001, OHA officials met with Raymond Limon, Acting Deputy Assistant Director of OPM's Office of Administrative Law Judges, who requested the meeting to reiterate the concerns expressed in OPM's written comments. This final rule makes additional changes to 43 CFR part 4, subpart D in response to the comments OHA received. A discussion of the specific comments received and OHA's response thereto is included in the Section-by-Section Analysis below.

As explained in the interim rule, OHA is using the current rulemaking process (including the interim and final rules) to adopt those changes to its previous regulations that are necessary to avoid inconsistencies in the processing of Indian probate cases between BIA and OHA deciding officials. However, these changes are not intended to serve as the Department's final word on the Indian probate process. BIA and OHA are both contemplating further revisions to improve the probate process and make the regulations easier to understand, and the two organizations will work together on such changes over the coming months.

II. Section-by-Section Analysis and Response to Comments

As explained above, the purpose of the changes to 43 CFR part 4, subpart D, is to make the policies and procedures

that OHA uses to probate an Indian decedent's trust estate consistent with those adopted by BIA earlier this year, to ensure uniformity of treatment within the Department. The various provisions of subpart D address the purpose and scope of the Indian probate procedures; the mechanics of initiating the probate process; the disposition of claims against an estate; the ultimate distribution of the decedent's assets to the determined heirs or beneficiaries; and an appeals process to follow should disputes arise during any stage of the probate process. For reasons explained below, this final rule repromulgates all provisions of 43 CFR part 4, subpart D dealing with the Indian probate process, including the provisions revised in the interim rule.

The interim rule was effective upon publication, on June 18, 2001. One commenter requested clarification as to whether the effective date meant that the new provisions of the rule applied to all pending cases or only to new cases. The commenter noted that, to the extent any new provisions of the interim or final rule might alter the substantive rights of affected parties, applying those provisions to pending cases could raise concerns over retroactivity, which the law generally disfavors. See *Landgraf v. USI Film Products*, 511 U.S. 244 (1994); *Bowen v. Georgetown University Hospital*, 488 U.S. 408 (1988). To avoid such concerns, OHA will apply any new substantive provisions of either the interim or final rule only to cases arising after their respective effective dates, i.e., to cases in which the decedent died after the effective date of the rule.

Section 4.200 Scope of Regulations

By way of a technical amendment, this section is revised to clarify that the probate procedures in subpart D do not apply to the restricted property of deceased members of the Five Civilized Tribes and deceased Osage Indians. The probate procedures do apply, however, to any funds or property that may be held in trust for such decedents. This revision makes § 4.200 consistent with BIA's regulations at 25 CFR 15.3.

Section 4.201 Definitions

This section is revised from the interim rule to delete the definition of "administrative law judge" and to add a definition of "OHA deciding official." Within OHA, Indian probate cases are handled either by administrative law judges, who are appointed under 5 U.S.C. 3105, or by Indian probate judges, who are senior attorney-advisers appointed pursuant to specific congressional authority to handle these cases. See Pub. L. 106-113, App. C, Sec.

124, 113 Stat. 1501A–160 (Nov. 29, 1999); Pub. L. 106–291, Sec. 117, 114 Stat. 943 (Oct. 11, 2000).

In the interim rule, OHA was revising only 12 out of 63 sections within subpart D dealing with the Indian probate process, since only those 12 sections had provisions that potentially conflicted with the new BIA regulations at 25 CFR part 15. However, all of the relevant sections within subpart D referred to the OHA deciding official for probate cases as “the administrative law judge.” Rather than revise all of subpart D in the interim rule to add references to Indian probate judges, OHA decided to revise its definition of “administrative law judge,” for purposes of subpart D only, to include both judges appointed under 5 U.S.C. 3105 and other OHA deciding officials designated by the Director. OHA explained in the preamble that it would consider revising all of subpart D in the future to use a longer phrase such as “administrative law judge or other OHA deciding official” wherever the term “administrative law judge” appeared in subpart D.

OPM, ABA, FALJC, and FORUM all submitted comments objecting to the revised definition of “administrative law judge” in the interim rule. As explained by these commenters, the term “administrative law judge” is a term of art used in the Administrative Procedure Act and other statutes and regulations, where its meaning is limited to judges appointed under 5 U.S.C. 3105. OHA’s inclusion of Indian probate judges in the subpart D definition of “administrative law judge,” the commenters argued, could confuse the public as to the identity of the OHA deciding official handling any particular case, i.e., whether he or she had been selected through OPM’s competitive process for hiring administrative law judges and was covered by the statutory and regulatory protections designed to ensure the independence of administrative law judges.

In response to these comments, OHA has decided to delete the expanded definition of “administrative law judge” in the interim rule and instead use the phrase “OHA deciding official” wherever the regulations previously used the phrase “administrative law judge.” Other options that were considered included “administrative law judge or other OHA deciding official” and “administrative law judge or Indian probate judge,” but OHA chose “OHA deciding official” as shorter and less awkward than those alternatives. “OHA deciding official” is also more consistent with the usage

adopted by BIA in its probate rule. In this final rule, a definition of “OHA deciding official” has been added to include both administrative law judges and Indian probate judges.

In addition to revising § 4.201, this final rule repromulgates all provisions of 43 CFR part 4, subpart D dealing with the Indian probate process, to substitute the phrase “OHA deciding official” for the previous term “administrative law judge.”¹

Section 4.201 has also been revised to clarify the treatment of restricted property in the definitions of “probate” and “restricted property,” consistent with the change to § 4.200 discussed above.

Section 4.210 Commencement of Probate

One commenter suggested that OHA add a reference to 25 CFR 15.104 in the second sentence of this section, along with the current reference to 25 CFR 15.202, to more fully describe the documents that must be included in the probate package referred to OHA. OHA agrees with the commenter and has added the suggested reference.

The commenter also suggested that OHA restore certain provisions from its previous version of 43 CFR 4.210, namely former paragraphs (b)(3) and (c), to cover documents that may be useful in the probate process but that are not specifically listed in 25 CFR 15.104 and 15.202. The commenter recommended that BIA should likewise add these provisions to its regulations. OHA believes the new version of 43 CFR 4.210 in this final rule is adequate to cover these documents, given the reference to “any other relevant information”; but OHA will consult with BIA on whether the information covered by former 4.210(b)(3) and (c) should be added specifically to BIA’s regulations in a subsequent rulemaking.

Section 4.243 Appeals From BIA

The interim rule added a new section 4.243 to set forth procedures to be followed when a probate matter is appealed from the decision of a BIA deciding official to an OHA deciding official. The last sentence of the section provided that the BIA deciding official “must forward [to OHA] the entire file upon which the BIA deciding official’s decision was based.” One commenter

suggested that the phrase “the entire file” be changed to “all documents or other evidence” upon which the BIA deciding official’s decision was based, since “the entire file” may contain unnecessary documents such as cover memorandums, status notes, and driving directions. OHA has accepted the suggestion, but has used the slightly different phrase “all documents and other evidence” in place of “the entire file.”

Section 4.250 Filing and Proof of Creditor Claims; Limitations

The interim rule revised paragraph (a) of this section to provide that all claims against the estate of a deceased Indian held by creditors chargeable with notice of the decedent’s death must be filed within 60 days from the date BIA receives verification of the decedent’s death, in accordance with 25 CFR 15.303(c). The previous rule had provided that claims had to be filed prior to the conclusion of the first hearing, typically within 20 days of the notice provided under § 4.211. Commenters raised two issues concerning this revision to § 4.250(a).

The first issue raised by the commenters is what happens if a creditor is not chargeable with notice of the decedent’s death until near the end of or after the expiration of the 60-day period from the date BIA received verification of the death. The commenters pointed out that the only provision in the regulations for notice to creditors is § 4.211, which requires the posting of notice of the hearing at least 20 days in advance thereof and service on known parties in interest. By the time the hearing is set and notice is provided, the commenters observed, the 60-day period from the date BIA received verification of the death is likely to be long over.

OHA agrees that there is likely to be a significant hiatus between the end of the 60-day period in 25 CFR 15.303(c) and the posting and service of the hearing notice under § 4.211. However, many if not most creditors will have notice of the decedent’s death when it occurs or shortly thereafter. Such creditors would typically include any relatives and friends of the decedent who may have claims against the estate; the tribe; anyone with claims for medical expenses of the last illness, nursing home or other care facility expenses, or funeral expenses; and other creditors in the decedent’s community. Many of these creditors will have notice of the death even before BIA receives any verification of the death.

In addition, BIA has informed OHA that it intends to provide public notice,

¹ These provisions of subpart D have also been revised to be more inclusive in their use of personal pronouns. Thus “he” has become “he or she”; “him” has become “him or her”; and “his” has become “his or her.” Minor other editorial changes have also been made for improved clarity, such as changing some plural subjects and verbs to singular and changing the auxiliary verb “shall” to “must,” “will,” or “may,” depending on the context.

comparable to that required by § 4.211, when BIA has received verification of the death. Thus other creditors may also be chargeable with notice much sooner than the posting and service of the hearing notice. In many if not most instances, therefore, application of the 60-day provision of § 4.250(a) will not work any hardship on the creditors.

The commenters may still be right, however, that at least some creditors will not be chargeable with notice until near the end of or after the expiration of the 60-day period from the date BIA received verification of the death. Because the intent of the previous OHA rule was to give creditors at least 20 days from the date of actual or constructive notice of the death to submit their claims, this final rule further revises § 4.250(a) to provide that all claims must be filed with the agency (i) 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 (ii) within 20 days from the date the creditor is chargeable with notice of the decedent's death, whichever of these dates is later.

Determination of the date on which a creditor was chargeable with notice will have to be made on a case-by-case basis by the OHA deciding official. BIA and OHA are considering adopting a regulation requiring BIA to publish a notice once BIA has verified the decedent's death, and requiring creditors to file all claims within 60 days from the date of publication. This approach would provide a uniform filing deadline for all creditors' claims and would simplify the determination required of the OHA deciding official. Because this proposal is beyond the scope of the interim rule, it will be considered in connection with a future rulemaking by BIA and OHA.

The second issue noted by the commenters is a potential conflict between the 60-day limitation in § 4.250(a) and the provisions of § 4.250(d), which provided that individual Indians could present claims against the estate by oral evidence at the hearing.

As explained previously in this preamble and more fully in the preamble to the interim rule, the intent of this rulemaking is to harmonize OHA's Indian probate rules with BIA's, which were the product of a lengthy process of analysis within the Department and consultation with tribes and tribal organizations. One of the policy decisions that resulted from that process was a decision to set certain limits on the filing and allowance of claims so as to preserve more of the

trust estate for the benefit of the decedent's heirs or beneficiaries. In deference to this policy decision, this final rule deletes § 4.250(d). As a result, individual Indians chargeable with notice of the decedent's death must file any claims they may have against the estate within the applicable 60- or 20-day period provided in § 4.250(a), as revised.

Paragraph (c) of this section has also been revised so that the procedural requirements for filing claims are applicable to all claimants, since the alternative procedures previously available to individual Indian claimants under former paragraph (d) have been eliminated.

Section 4.251 Priority of Claims

One commenter observed that revised § 4.251 does not specifically mention the claims of federal agencies, such as those of the Farm Services Agency, the Social Security Administration, and the Internal Revenue Service. The commenter asked if such agencies would need to file their claims in tribal court before the claims could be allowed against the estate. Under § 4.251(b)-(c), federal agency claims that have been reduced to judgment by a court of competent jurisdiction would be entitled to priority, while federal agency claims that have not been reduced to judgment would be treated as general claims.

The commenter also asked what would happen to BIA-approved mortgages against trust property and any assignment of income the decedent had executed with the mortgage. These regulations do not affect the mortgage interest held by the lending agency, which would have a range of options available to it, including filing a claim against the trust estate for the unpaid loan balance, foreclosing on the mortgage, and/or making some arrangement for repayment with the decedent's heirs or beneficiaries. This final rule does not make any substantive changes to this section.

In addition to these comments, questions have been raised concerning § 4.251(e)-(f), specifically, at what point in time the OHA deciding official is to determine the amount of money in the decedent's individual Indian money (IIM) account. Section 4.252 provides that "all trust moneys of the deceased on hand or accrued at the time of death * * * may be used for the payment of claims," which may indicate that the time of death should be used to determine the amount in the IIM account for purposes of § 4.251(e)-(f). On the other hand, § 4.251(g) provides that "claims will not be enforceable

against the estate after the estate is closed," which indicates that funds deposited in the IIM account after the date of death are available to pay claims, up until the time the estate is closed.

Section 4.252 is unchanged from the previous version of the OHA probate regulations, published in 1971. Under § 4.251(d) of those regulations, estates could be held open for up to 7 years to allow the payment of some claims. Thus it is clear that § 4.252 was never intended to limit the funds available for the payment of claims to those accrued at the time of the decedent's death. In the interim rule, OHA revised § 4.251 to be consistent with the new BIA rules at 25 CFR 15.305-15.309, and deleted the provision allowing estates to remain open for up to 7 years for the payment of claims. But consistent with 25 CFR 15.308, funds deposited in the IIM account during the probate process itself are available to pay claims.

Section 4.251(e)-(f) both refer to the order issued by the OHA deciding official governing the payment of claims. That order is based on the record made at the hearing, and it is that order that BIA and OTFM will follow in distributing the estate under § 4.273. It appears from these provisions, therefore, that the OHA deciding official should determine the amount of money available in the IIM account as of the date of the hearing, and base his or her determinations under § 4.251(e)-(f) on that amount. This final rule revises § 4.251(e) and (f) to clarify this point.

Section 4.273 Distribution of Estates

The interim rule renumbered and revised this section to provide that, unless the Superintendent has received a copy of a petition for rehearing filed pursuant to § 4.241(a) or a copy of a notice of appeal filed pursuant to § 4.320(b), he or she must initiate the payment of claims, distribution of the estate, and other actions required by the final order of the OHA deciding official. One commenter suggested adding a reference to the 60-day period allowed for filing a petition for rehearing or a notice of appeal. That suggestion has been adopted in this final rule, although the time period has been set at 75 days to reflect the additional 15-day grace period provided in 25 CFR 15.312.

Section 4.301 Valuation Report

By way of a technical amendment, § 4.301 is revised to change the term "appraisal" to "valuation." Depending upon the circumstances, BIA uses various approaches or methodologies to determine the appropriate value of property. A formal appraisal is one of these approaches, but is not required in

every case. Therefore, the more general term "valuation" is substituted for "appraisal" in § 4.301. The same change has been made to §§ 4.236, 4.302, 4.305, and 4.306.

III. Procedural Requirements

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

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

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

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

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

promote simplification and burden reduction.

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

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

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

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

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of \$100,000,000 or more. The revised subpart represents programs that

are ongoing within the Department, and no new monies are being introduced into the stream of commerce. This rule will not result in a major increase in costs or prices. The effect of this rulemaking will be to streamline ongoing policies, procedures, and management operations of the Department in probating individual Indian trust and/or restricted property. No increase in costs for administration will be realized, and no prices would be affected through these minor revisions to existing practice.

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

E. Review Under the Paperwork Reduction Act

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

F. Review Under Executive Order 13132 (Federalism)

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

G. Review Under the National Environmental Policy Act of 1969

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. Therefore, neither an Environmental Assessment nor an Environmental

Impact Statement is necessary for this rule.

H. Review Under the Unfunded Mandates Reform Act of 1995

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

I. Review Under Executive Order 12630 (Takings)

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

J. Review Under Executive Order 13175 (Tribal Consultation)

The Department determined that, because revisions to 43 CFR part 4, subpart D could have tribal implications, it would consult with tribal governments on this rulemaking. These consultations were in keeping with Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments." In promulgating its own probate regulations, BIA had consulted extensively with tribal governments. Because OHA was effectively incorporating certain BIA regulations into its regulations, tribal governments were aware of the substance of the OHA regulations even prior to publication of the interim rule. However, the Department undertook an additional consultation process by providing a draft of the interim rule to all the tribes and to the National Congress of American Indians and by soliciting their comments. No comments were received from any tribe or tribal organization during this pre-proposal comment period.

In addition, tribal governments were notified of the substance of this rulemaking through the publication of the interim rule in the **Federal Register** and through a direct mailing to tribal leaders. These steps enabled tribal officials and the affected tribal

constituency throughout Indian Country to have meaningful and timely input in the development of the final rule.

K. Review Under Executive Order 13211 (Energy Impacts)

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

List of Subjects in 43 CFR Part 4, Subpart D

Administrative practice and procedure, Estates, Hearing and appeal procedures, Indians, Probate.

Dated: December 17, 2001.

P. Lynn Scarlett,

Assistant Secretary—Policy, Management and Budget.

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

1. The authority citation for part 4, subpart D continues to read as follows:

Authority: Secs. 1, 2, 36 Stat. 855, as amended, 856, as amended, sec. 1, 38 Stat. 586, 42 Stat. 1185, as amended, secs. 1, 2, 56 Stat. 1021, 1022; R.S. 463, 465; 5 U.S.C. 301; 25 U.S.C. secs. 2, 9, 372, 373, 374, 373a, 373b, 410; 100 Stat. 61, as amended by 101 Stat. 886 and 101 Stat. 1433, 25 U.S.C. 331 note.

2. Revise §§ 4.200 through 4.323 to read as follows:

Scope of Regulations; Definitions; General Authority of OHA Deciding Officials

§ 4.200 Scope of regulations.

Included in §§ 4.200 through 4.202 are general rules applicable to all proceedings in subpart D of this part. Included in §§ 4.203 through 4.282 and §§ 4.310 through 4.323 are procedural rules applicable to the settlement of trust estates of deceased Indians who die possessed of trust property; however, these rules 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 each tribe may be inconsistent with this subpart. Included within §§ 4.300 through 4.308 are supplemental procedural rules applicable to

determinations as to tribal purchase of certain property interests of decedents under special laws applicable to particular tribes. Included within §§ 4.330 through 4.340 are procedural rules applicable to appeals to the Board of Indian Appeals from administrative actions or decisions issued by the Bureau of Indian Affairs as set forth in § 4.330. Except as limited by the provisions herein, the rules in subparts A and B of this part apply to these proceedings.

§ 4.201 Definitions.

As used in this subpart:

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

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

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

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

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

Board means the Board of Indian Appeals in the Office of Hearings and Appeals, Office of the Secretary, authorized by the Secretary to hear, consider, and determine finally for the Department appeals taken by aggrieved parties from actions by 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 an adopted child or children.

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

Day means a calendar day, unless otherwise stated.

Decedent means a person who is deceased.

Department means the Department of the Interior.

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

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

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

Intestate means the decedent died without a will.

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

OHA deciding official means an employee of the Office of Hearings and Appeals with the authority to make a decision on a probate matter pursuant to this subpart. The OHA deciding official may be either an administrative law judge appointed pursuant to the Administrative Procedure Act, 5 U.S.C. 3105, or an Indian probate judge.

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

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

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

- (1) Determine the heirs,
- (2) Approve wills and determine beneficiaries, and
- (3) 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.

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

Restricted property means real or personal property held by an Indian which he or she cannot alienate or encumber without the consent of the Secretary or his or her authorized representative. In this subpart, restricted property is treated as if it were trust property. Except with respect to § 4.200, 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 his or her authorized representative.

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

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

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

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

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

§ 4.202 General authority of OHA deciding officials.

An OHA deciding official will, except as otherwise provided in § 4.205(b) and 25 CFR 15.203 and 15.206, determine the heirs of any Indian who dies intestate possessed of trust property; approve or disapprove the will of a deceased Indian disposing of trust property; accept or reject any full or partial renunciation of interest in both testate and intestate proceedings; allow or disallow creditors' claims against the estate of a deceased Indian; and decree the distribution of trust property to heirs and devisees, including the partial distribution to known heirs or devisees where one or more potential heirs or devisees are missing but not presumed dead, after attributing to and setting aside for such missing person or persons the share or shares such person or persons would be entitled to if living.

An OHA deciding official will determine the right of a tribe to take any inherited interest and the fair market value of the interest taken in appropriate cases as provided by statute. He or she will review each case de novo, hold hearings as necessary or appropriate, and issue decisions in matters appealed from decisions of BIA deciding officials. Administrative law judges will also hold hearings and issue recommended decisions in matters referred to them by the Board in the Board's consideration of appeals from administrative actions of BIA officials.

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

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

(a) An OHA deciding official will hear and determine whether trust patents covering allotments of land were issued to nonexistent persons, and 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) If an OHA deciding official determines under paragraph (a) of this section that a trust patent issued to an existing person and/or that separate persons received the allotments under consideration and any one of them is deceased, without having had his or her estate probated, the OHA deciding official must proceed as provided in § 4.202.

(c) If an OHA deciding official determines under paragraph (a) of this section that a person did not exist or that more than one allotment was issued to the same person, the OHA deciding official must issue a decision to that effect, giving notice thereof to parties in interest as provided in § 4.240(b).

§ 4.204 Presumption of death.

(a) An OHA deciding official 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 OHA deciding official determines that an Indian person possessed of trust property is to be presumed dead, the OHA deciding official must proceed as provided in § 4.202.

§ 4.205 Escheat.

An OHA deciding official 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.

(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 or citizenship and status affecting character of land titles.

In cases where the right and duty of the Government to hold property in trust depends thereon, an OHA deciding official will determine the nationality or citizenship, or the Indian or non-Indian status, of heirs or devisees, or whether Indian heirs or devisees of U.S. citizenship are of a class as to whose property the Government's supervision and trusteeship have been terminated in current probate proceedings or in completed estates after reopening such estates under, but without regard to the 3-year limit set forth in § 4.242.

§ 4.207 Compromise settlement.

(a) If during the course of the probate of an estate it develops that an issue between contending parties is of such nature as to be substantial, and it further appears that such issue may be settled by agreement preferably in writing by the parties in interest to their advantage and to the advantage of the United States, such an agreement may be approved by the OHA deciding official upon findings that:

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

(2) All parties to the compromise are fully cognizant of the effect of the compromise upon 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, the OHA deciding official 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) Upon an affirmative determination as to all three points specified, the OHA deciding official will issue such final order of distribution in the settlement of the estate as is necessary to approve the same and to accomplish the purpose and spirit of the settlement. Such order will be construed as any other order of distribution establishing title in heirs and devisees and will not be construed as a partition or sale transaction within the provisions of 25 CFR part 152. If land titles are to be transferred, the necessary deeds must be prepared and executed at the earliest possible date. Upon failure or refusal of any party in interest to execute and deliver any deed necessary to accomplish the settlement, the OHA deciding official will settle the issues and enter an order as if no agreement had been attempted.

(d) OHA deciding officials are authorized to approve all deeds or conveyances necessary to accomplish a settlement under this section.

§ 4.208 Renunciation of interest.

Any person 21 years or older, whether of Indian descent or not, may renounce intestate succession or devise of trust or restricted property, wholly or partially (including the retention of a life estate), by filing a signed and acknowledged declaration of such renunciation with the OHA deciding official prior to entry of the final order by the OHA deciding official. No interest in the property so renounced is considered to have vested in the heir or devisee and the

renunciation is not considered a transfer by gift of the property renounced, but the property so renounced passes as if the person renouncing the interest has predeceased the decedent. A renunciation filed in accordance herewith will be considered accepted when implemented in an order by an OHA deciding official and will be irrevocable thereafter. All disclaimers or renunciations heretofore filed with and implemented in an order by an OHA deciding official are hereby ratified as valid and effective.

Commencement of Probate Proceedings**§ 4.210 Commencement of probate.**

The probate of a trust estate before an OHA deciding official will commence when the probate specialist or BIA deciding official files with the OHA deciding official all information shown in the records relative to the family of the deceased and his or her property. The information must include the complete probate package described in 25 CFR 15.104 and 15.202 and any other relevant information. The agency or BIA deciding official must promptly transmit to the OHA deciding official any creditor's or other claims that are received after the case is transmitted to the OHA deciding official, for a determination of their timeliness, validity, priority, and allowance under §§ 4.250 and 4.251.

§ 4.211 Notice.

(a) An OHA deciding official may receive and hear evidence at a hearing to determine the heirs of a deceased Indian or probate his or her will only after the OHA deciding official has caused notice of the time and place of the hearing to be posted at least 20 days prior to the hearing date in five or more conspicuous places in the vicinity of the designated place of hearing, and the OHA deciding official may cause postings in such other places and reservations as he or she deems appropriate. A certificate showing the date and place of posting must be signed by the person or official who performs the act.

(b) The OHA deciding official must serve or cause to be served a copy of the notice on each party in interest known to the OHA deciding official 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 OHA deciding official must cause a certificate, as to the date and manner of such mailing, to be made on the record copy of the notice.

(c) All parties in interest, known and unknown, including creditors, will be bound by the decision based on such hearing if they lived within the vicinity of any place of posting during the posting period, whether they had actual notice of the hearing or not. As to those not within the vicinity of the place of posting, a rebuttable presumption of actual notice will arise upon the mailing of such notice at a reasonable time prior to the hearing, unless the said notice is returned by the postal service to the office of the OHA deciding official unclaimed by the addressee.

(d) Tribes to be charged with notice of death and probate. When a record reveals that a Tribe has a statutory option to purchase interests of a decedent, such Tribe must be notified of the pendency of a proceeding by the OHA deciding official having probate jurisdiction in such proceeding, and 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 for all purposes that the Tribe had notice of decedent's death and notice of the pendency of the probate proceedings.

§ 4.212 Contents of notice.

(a) In the notice of hearing, the OHA deciding official must specify that at the stated time and place the OHA deciding official will take testimony to determine the heirs of the deceased person (naming him or her) and, if a will is offered for probate, testimony as to the validity of the will describing it by date. The notice must name all known presumptive heirs of the decedent, and, if a will is offered for probate, the beneficiaries under such will and the attesting witnesses to the will. The notice must cite this subpart as the authority and jurisdiction for holding the hearing, and must inform all persons having an interest in the estate of the decedent, including persons having claims or accounts against the estate, to be present at the hearing or their rights may be lost by default.

(b) The notice must state further that the hearing may be continued to another time and place. A continuance may be announced either at the original hearing by the OHA deciding official or by an appropriate notice posted at the announced place of hearing on or prior to the announced hearing date and hour.

Depositions, Discovery, and Prehearing Conference**§ 4.220 Production of documents for inspection and copying.**

(a) At any stage of the proceeding prior to the conclusion of the hearing, a party in interest may make a written demand, a copy to be filed with the OHA deciding official, upon any other party to the proceeding or upon a custodian of records on Indians or their trust property, to produce for inspection and copying or photographing, any documents, papers, records, letters, photographs, or other tangible things not privileged, relevant to the issues which are in the other party's or custodian's possession, custody, or control. Upon failure of prompt compliance, the OHA deciding official may issue an appropriate order upon a petition filed by the requesting party. At any time prior to closing the record, the OHA deciding official upon his or her own motion, after notice to all parties, may issue an order to any party in interest or custodian of records for the production of material or information not privileged, and relevant to the issues.

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

§ 4.221 Depositions.

(a) *Stipulation.* Depositions 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 a party in interest files a written application, the OHA deciding official 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 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 that 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 such deposition should be taken.

(c) *Order for taking deposition.* If after examination of the application the OHA deciding official determines that the

deposition should be taken, he or she will order its taking. The order must be served upon all parties in interest and must state:

(1) The name of the deponent;

(2) The time and place of the examination which must not be less than 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 OHA deciding official 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 testimony of the deponent 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.* 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 such examination and reading are waived by the deponent or by all other parties in interest. Any changes in form or substance which 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. The deposition must then be signed by the deponent, unless the parties in interest by stipulation waive the signing, or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the deponent, the officer must sign it and state on the record the fact of the waiver, or of the illness or absence of the deponent or the fact of the refusal to sign together with the reason, if any, given therefor; the deposition may then be used as fully as though signed, unless the OHA deciding official 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 OHA deciding official.

(h) *Use of depositions.* A deposition ordered and taken in accord with the provisions of this section may be used in a hearing if the OHA deciding official finds that the witness is absent and that his or her presence cannot be readily obtained, that the evidence is otherwise admissible, and that circumstances exist that make it desirable in the interest of fairness to allow the deposition to be used. If a deposition has been taken, and the party in interest on whose application it was taken refuses to offer the deposition, or any part thereof, in evidence, any other party in interest or the OHA deciding official 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.

At any time prior to a hearing and in sufficient time to permit answers to be filed before the hearing, a party in interest may serve upon any other party in interest written interrogatories and requests for admission of facts and documents. A copy of such interrogatories and requests must be filed with the OHA deciding official. Such interrogatories and requests for admission must be drawn with the purpose of defining the issues in dispute between the parties and facilitating the presentation of evidence at the hearing. Answers must be served upon the party propounding the written interrogatories or requesting the admission of facts and documents within 30 days from the date of service of such interrogatories or requests, or within such other period of time as may be agreed upon by the parties or prescribed by the OHA deciding official. A copy of the answer must be filed with the OHA deciding official. 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 OHA deciding official, upon motion timely made by any party in interest, proper notice, and good cause shown, may direct that proceedings under §§ 4.220, 4.221, and 4.222 may be conducted only under, and in accordance with, such limitation as he or she deems necessary and appropriate as to documents, time, place, and scope. The OHA deciding official may act on his or her own motion only if undue delay, dilatory tactics, and unreasonable

demands are made so as to delay the orderly progress of the proceeding or cause unacceptable hardship upon a party or witness.

§ 4.224 Failure to comply with orders.

In the event of the failure of a party to comply with a request for the production of a document under § 4.220; or on the failure of a party to appear for examination under § 4.221 or on the failure of a party to respond to interrogatories or requests for admissions under § 4.222; or on the failure of a party to comply with an order of the OHA deciding official issued under § 4.223 without, in any of such events, showing an excuse or explanation satisfactory to the OHA deciding official for such failure, the OHA deciding official may:

(a) 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 party in interest or in accordance with other evidence available to the OHA deciding official; or

(b) Make such other ruling as the OHA deciding official determines just and proper.

§ 4.225 Prehearing conference.

The OHA deciding official may, upon his or her own motion or upon the request of any party in interest, 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 which will avoid unnecessary proof;
- (c) Limit the number of expert or other witnesses in avoidance of 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.

Hearings

§ 4.230 Authority and duties of the OHA deciding official.

The authority of the OHA deciding official in all hearings in estate proceedings includes, but is not limited to authority:

- (a) To administer oaths and affirmations;
- (b) 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 party in interest, to any person whose testimony he or she believes to be

material to a hearing. Upon the failure or refusal of any person upon whom a subpoena has been served to appear at a hearing or to testify, the OHA deciding official 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:

- (c) To permit any party in interest to cross-examine any witness;
- (d) To appoint a guardian ad litem to represent any minor or incompetent party in interest at hearings;
- (e) To rule upon offers of proof and receive evidence;
- (f) To take and cause depositions to be taken and to determine their scope; and
- (g) To otherwise regulate the course of the hearing and the conduct of witnesses, parties in interest, and attorneys at law appearing therein.

§ 4.231 Hearings.

(a) All testimony in Indian probate hearings must be under oath and must be taken in public except in those circumstances which in the opinion of the OHA deciding official justify all but parties in interest 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 parties in interest and of attorneys who attended such hearing.

§ 4.232 Evidence; form and admissibility.

(a) Parties in interest may offer at a 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 OHA deciding official's supervision as to the extent and manner of presentation of such evidence.

(b) The OHA deciding official 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 being within the discretion of the OHA deciding official, 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 parties in interest, may be used as evidence at the hearing.

(d) The OHA deciding official may in any case require evidence in addition to that offered by the parties in interest.

§ 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, made before an officer authorized to administer oaths, such affidavits to be attached to such will and to be in form and contents substantially as follows: 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____, I requested _____ to prepare a will for me; that the attached will was prepared and 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 and 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____, _____ 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____, by _____ testator/testatrix, and by

_____ and _____; attesting witnesses.

(Title)

If uncontested, a self-proved will may be approved and distribution 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. If none of the attesting witnesses resides in the reasonable vicinity of the place of hearing at the time appointed for proving the will, the OHA deciding official may admit the testimony of other witnesses to prove the testamentary capacity of the testator and the execution of the will and, as evidence of the execution, the OHA deciding official may admit proof of the handwriting of the testator and of the attesting witnesses, or of any of them. The provisions of § 4.232 are applicable with respect to remaining issues.

§ 4.234 Witnesses, interpreters, and fees.

Parties in interest who desire a witness to testify or an interpreter to serve at a hearing must make their own financial and other arrangements therefor, and subpoenas will be issued where necessary and proper. The OHA deciding official 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. In hardship situations, the OHA deciding official may order payment of per diem and mileage for indispensable witnesses and interpreters called for the parties. In the order for payment he or she 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. Costs of administration so allowed will have a priority for payment greater than that for any creditor claims allowed. Upon receipt of such order, the Superintendent must immediately initiate payment of such sums from the estate account, or if such funds are insufficient, then out of funds as they are received in such account prior to closure of the estate, with the proviso that such costs must be paid in full with

a later allocation against the interest of a party, if the OHA deciding official has so ordered.

§ 4.235 Supplemental hearings.

After the matter has been submitted but prior to the time the OHA deciding official has rendered his or her decision, the OHA deciding official may upon his or her own motion or upon motion of any party in interest 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 parties in interest in the manner provided in § 4.211. Where the need for such supplemental hearing becomes apparent during any hearing, the OHA 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 hearing, the OHA deciding official 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 finding and family history;
- (10) The decision and the notices thereof; and
- (11) Any other material or documents deemed material by the OHA deciding official.

(b) The OHA deciding official must lodge the original record with the designated Land Titles and Records Office in accordance with 25 CFR part 150. A duplicate copy must be lodged with the Superintendent originating the probate. A partial record may also be furnished to the Superintendents of other affected agencies. In those cases in which a hearing transcript has not been prepared, the verbatim recording of the hearing must be retained in the office of the OHA deciding official issuing the decision until the time allowed for rehearing or appeal has expired. In cases in which a transcript is not prepared, the original record returned to the Land Titles and Records Office must contain

a statement indicating no transcript was prepared.

Decisions

§ 4.240 Decision of the OHA deciding official and notice thereof.

(a) The OHA deciding official must decide the issues of fact and law involved in the proceedings and must incorporate the following in his or her decision:

(1) In all cases, the names, 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, (i) approval or disapproval of the will with construction of its provisions, (ii) the names and relationship 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 devisees are non-Indian, exclusively alien Indians, or Indians whose property is not subject to Federal supervision.

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

(b) When the OHA deciding official issues a decision, he or she must issue a notice thereof to all parties who have or claim any interest in the estate and must mail a copy of said notice, together with a copy of the decision to the Superintendent and to each party in interest simultaneously. 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.

§ 4.241 Rehearing.

(a) Any person aggrieved by the decision of the OHA deciding official may, within 60 days after the date on which notice of the decision is mailed to the interested parties, file with the OHA deciding official a written petition for rehearing. Such petition must be under oath and must state specifically and concisely the grounds upon which it is based. If the petition is based on newly-discovered evidence, it must be accompanied by affidavits or declarations of witnesses stating fully what the new testimony is to be. It must also state justifiable reasons for the failure to discover and present that evidence, tendered as new, at the hearings held prior to the issuance of the decision. The OHA deciding official,

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 OHA deciding official.

(b) If proper grounds are not shown, or if the petition is not filed within the time prescribed in paragraph (a) of this section, the OHA deciding official will issue an order denying the petition and must set forth therein his or her reasons therefor. The OHA deciding official must furnish copies of such order to the petitioner, the Superintendent, and the parties in interest.

(c) If the petition appears to show merit, the OHA deciding official must 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. The OHA deciding official must allow all persons served a reasonable, specified time in which to submit answers or legal briefs in opposition to the petition. The OHA deciding official will then reconsider, with or without 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.

(d) Upon entry of a final order the OHA deciding official must lodge the complete record relating to the petition with the title plant designated under § 4.236(b), and furnish a duplicate record thereof to the Superintendent.

(e) 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 OHA deciding official terminates upon the issuance of a decision finally disposing of a petition for rehearing. Nothing herein will be construed as a bar to the remand of a case by the Board for further hearing or rehearing after appeal.

(f) At the time the final decision is entered following the filing of a petition for rehearing, the OHA deciding official must direct a notice of such action with a copy of the decision to the Superintendent and to the parties in interest and must mail the same by regular mail to the said parties at their addresses of record.

(g) No distribution may be made under such order for a period of 60 days following the mailing of a notice of decision pending the filing of a notice of appeal by an aggrieved party as herein provided.

§ 4.242 Reopening.

(a) Within a period of 3 years from the date of a final decision issued by an OHA deciding official or by the Board but not thereafter except as provided in §§ 4.203 and 4.206, any person claiming an interest in the estate who had no actual notice of the original proceedings and who was not on the reservation or otherwise in the vicinity at any time while the public notices of the hearing were posted may file a petition in writing for reopening of the case. Any such petition must be addressed to the OHA deciding official and filed at his or her office. A copy of such petition must be furnished also by the petitioner 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.

(b) If the OHA deciding official finds that proper grounds are not shown, he or she will issue an order denying the petition and setting forth the reasons for such denial. Copies of the OHA deciding official's decision must be mailed to the petitioner, the Superintendent, and to those persons who share in the estate.

(c) If the petition appears to show merit, the OHA deciding official 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. Such persons may resist such petition by filing answers, cross-petitions, or briefs. Such filings must be made within such reasonable time periods as the OHA deciding official specifies. The OHA deciding official will then reconsider, with or without hearing as he or she may determine, prior actions taken in the case and may either adhere to, modify, or vacate the original decision. Copies of the OHA deciding official's decision must be mailed to the petitioner, to all persons who received copies of the petition, and to the Superintendent.

(d) To prevent manifest error an OHA deciding official may reopen a case within a period of 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 OHA deciding official's decision must be mailed to all parties in interest and to the Superintendent.

(e) The OHA deciding official may suspend distribution of the estate or the income therefrom during the pendency of reopening proceedings by order directed to the Superintendent.

(f) The OHA deciding official must lodge the record made in disposing of a

reopening petition with the title plant designated under § 4.236(b) and must furnish a duplicate record thereof to the Superintendent.

(g) No distribution may be made under a decision issued pursuant to paragraph (b), (c), or (d) of this section for a period of 60 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.

(h) If a petition for reopening is filed more than 3 years after the entry of a final decision in a probate, it will be allowed only upon a showing that a manifest injustice will occur; that a reasonable possibility exists for correction of the error; that the petitioner had no actual notice of the original proceedings; and that petitioner was not on the reservation or otherwise in the vicinity at any time while the public notices were posted. A denial of such petition may be made by the OHA deciding official on the basis of the petition and available BIA records. No such petition will be granted, however, unless the OHA deciding official 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 after allowing such persons an opportunity to resist such petition by filing answers, cross petitions or briefs as provided in paragraph (c) of this section.

Appeals From Decisions of BIA Deciding Officials

§ 4.243 Appeals from BIA.

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

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

(i) 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

(ii) Within 20 days from the date the creditor is chargeable with notice of the

decedent's death, whichever of these dates is later.

(b) No claim will be paid from trust or restricted assets when the OHA 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. Such claims must show the names and addresses of all parties in addition to the decedent from whom payment might be sought. Each claim must be supplemented by an affidavit, in triplicate, of the claimant or someone in his or her behalf that the amount claimed is justly due from the decedent, that no payments have been made on the account which are not credited thereon as shown by the itemized statement, and that 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 OHA 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 a party in interest, the OHA deciding official may authorize payment of the costs of administering the estate as they arise and prior to the allowance of any claims against the estate.

(b) After the costs of administration, the OHA 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 OHA deciding official may authorize payment of all remaining claims, referred to as general claims.

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

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

(e) If, as of the date of the hearing, there is not enough money in the IIM account to pay all claims, the OHA 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 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, devisee, or legatee remains in or passes out of trust.

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 such property by a will executed in writing and attested by two disinterested adult witnesses.

(b) When an Indian executes a will and submits the same 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 prior to 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.

§ 4.261 Anti-lapse provisions.

When an Indian testator devises or bequeaths trust property to any of his or her grandparents or to the lineal descendant of a grandparent, and the devisee or legatee dies before the testator leaving lineal descendants, such descendants will take the right, title, or interest so given by the will per stirpes. 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 legacy 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.

Custody and Distribution of Estates

§ 4.270 Custody and control of trust estates.

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

§ 4.271 Omitted property.

(a) When, subsequent to the issuance of a decision under § 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, the inventory can be modified to include such omitted property for distribution pursuant to the original decision. Such modification may be made either administratively by the Commissioner or by a modification order prepared by him or her for the approval and signature of the OHA deciding official. Copies of such 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, the Commissioner must notify the OHA deciding official who will proceed to hold a hearing if necessary and will issue a decision under § 4.240. The record of any such proceeding must be lodged with the title plant designated under § 4.236(b).

§ 4.272 Improperly included property.

(a) When, subsequent to a decision under § 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 party in interest.

(b) The OHA deciding official 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 hearing, the OHA deciding official 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 OHA deciding official may conduct a hearing at any stage of the modification proceeding. Any such hearing must be scheduled and conducted in accordance with the rules of this subpart. The OHA deciding official will enter a final decision based on his or her findings, modifying or refusing to modify the property inventory, and his or her decision will become final at the end of 60 days from the date it is mailed unless a notice of appeal is filed by an aggrieved party within such period. Notice of entry of the decision must be given in accordance with § 4.240(b).

(d) A party aggrieved by the OHA deciding official's decision may appeal

to the Board pursuant to the procedures in §§ 4.310 through 4.323.

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

§ 4.273 Distribution of estates.

(a) Seventy-five days after a final order has been issued, unless the Superintendent has received a copy of a petition for rehearing filed pursuant to the requirements of § 4.241(a) or a copy of a notice of appeal filed pursuant to the requirements of § 4.320(b), he or she must initiate payment of allowed claims, distribution of the estate, and all other actions required by the OHA deciding official's final order.

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

Miscellaneous**§ 4.281 Claims for attorney fees.**

(a) Attorneys representing Indians in proceedings under these regulations may be allowed fees therefor by the OHA deciding official. At the discretion of the OHA deciding official, such fees may be chargeable against the interests of the party thus represented, or where appropriate, they may be taxed as a cost of administration. Petitions for allowance of fees must be filed prior to the close of the last hearing and must be supported by such proof as is required by the OHA deciding official. 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 parties in interest.

(b) Nothing herein 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 an attorney's fees is subject to a petition for rehearing and to an appeal.

§ 4.282 Guardians for incompetents.

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

Tribal Purchase of Interests Under Special Statutes**§ 4.300 Authority and scope.**

(a) The rules and procedures set forth in §§ 4.300 through 4.308 apply only to proceedings in Indian probate which relate to the tribal purchase of a decedent's interests in trust and restricted land as provided by:

(1) 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), with respect to trust or restricted land within the Yakima Reservation or within the area ceded by the Treaty of June 9, 1855 (12 Stat. 1951);

(2) The Act of August 10, 1972 (Pub. L. 92-377; 86 Stat. 530), with respect to trust or restricted land within the Warm Springs Reservation or within the area ceded by the Treaty of June 25, 1855 (12 Stat. 37); and

(3) The Act of September 29, 1972 (Pub. L. 92-443; 86 Stat. 744), with respect to trust or restricted land within the Nez Perce Indian Reservation or within the area ceded by the Treaty of June 11, 1855 (12 Stat. 957).

(b)(1) In the exercise of probate authority, an OHA deciding official will determine:

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

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

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

(2) In the determination under paragraph (b)(1) of this section of the entitlement of a tribe to purchase the interests of an heir or devisee, the issues of

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

(ii) Specification of blood quantum, where pertinent, will be determined by the official tribal roll which is binding upon the OHA deciding official. For good cause shown, the OHA deciding official 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, the 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 those reservations designated in § 4.300 and

(2) That any one or more of the probable heirs or devisees, who may become a distributee of such interests upon completion of the probate proceeding, is not enrolled in or does not have the required blood quantum in the tribe of the reservation where the land is located to hold such interests against a claim thereto made by the tribe. 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.

(b) BIA must submit the valuation report in the probate package submitted to the OHA deciding official. Interested parties may examine and copy, at their expense, the valuation report at the office of the Superintendent or the OHA deciding official.

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

(a) Conclusion of probate; findings in the probate decision. When a decedent is shown to have owned land interests in any one or more of the reservations mentioned in the statutes enumerated 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 §§ 4.200 through 4.282 and §§ 4.310 through 4.323. This decision will be referred to herein as the "probate decision." At the probate hearing a finding must be made on the record showing those interests in land, if any, which are subject to the tribal option. The finding must be reduced to writing in the probate decision setting forth the apparent rights of the tribe as against affected heirs or devisees 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. If the finding is that there are no interests subject to the tribal option, the decision must so state. A copy of the probate decision, to which must be attached a copy of the valuation report, must be distributed to all parties in interest in accordance with §§ 4.201 and 4.240.

(b) Tribal exercise of statutory option. A tribe may purchase all or a part of the available interests specified in the probate decision within 60 days from the date of the probate decision unless

a petition for rehearing or a demand for hearing has been filed in accordance with § 4.304 or 4.305. 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. The tribe must file a written notice of purchase with the Superintendent, together with the tribe's certification that copies thereof have been mailed on the same date to the OHA deciding official and to the affected heirs or devisees. Upon failure to timely file a notice of purchase, the right to distribution of all unclaimed interests will accrue to the heirs or devisees.

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

When the heir or devisee 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 OHA deciding official and the tribe. Failure to timely file a notice to reserve a life estate will constitute a waiver thereof.

§ 4.304 Rehearing.

Any party in interest aggrieved by the probate decision may, within 60 days from the date of the probate decision, file with the OHA deciding official a written petition for rehearing in accordance with § 4.241.

§ 4.305 Hearing.

(a) *Demand for hearing.* Any party in interest 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, within 60 days from the date of the probate decision or 60 days from the date of the decision on rehearing, whichever is applicable, file with the OHA deciding official a written demand for hearing, together with a certification that copies thereof have been mailed on the same date to the Superintendent and to each party in interest; provided, however, that an aggrieved party will have at least 20 days from the date the tribe exercises its option to purchase available interests to file such a

demand. The demand must state specifically and concisely the grounds upon which it is based.

(b) *Notice; burden of proof.* The OHA deciding official will, upon receipt of a demand for hearing, set a time and place therefor and must mail notice thereof to all parties in interest not less than 30 days in advance; provided, however, that such date must be set after the expiration of the 60-day period fixed for the filing of the demand for hearing as provided in § 4.305(a). 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.

(c) *Decision after hearing; appeal.* Upon conclusion of the hearing, the OHA deciding official will issue a decision which determines all of the issues including, but not limited to, a judgment establishing the fair market value of the interests purchased by the tribe, including any adjustment thereof made necessary by the surviving spouse's decision to reserve a life estate in one-half of the interests. 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. The OHA deciding official must lodge the complete record relating to the demand for hearing with the title plant 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 party in interest.

§ 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, within 2 years from the date of decedent's death or within 1 year from the date of notice of purchase, whichever comes later.

§ 4.307 Title.

Upon payment by the tribe of the interests purchased, the Superintendent must issue a certificate to the OHA deciding official that this has been done and file therewith such documents in support thereof as the OHA deciding official may require. The OHA deciding official will then issue an order that the United States holds title to such interests in trust for the tribe, lodge the complete record, including the decision, with the title plant 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 party in interest.

§ 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.

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 the date of mailing or the date of personal delivery, except that a motion for the Board to assume jurisdiction over an appeal under 25 CFR 2.20(e) will be effective the date it is received by the Board.

(b) *Service.* Notices of appeal and pleadings must be served on all parties in interest in any proceeding before the Interior Board of Indian Appeals by the party filing the notice or pleading with the Board. Service must be accomplished upon personal delivery or mailing. 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. Where a party is represented by more than one attorney, service on any one attorney is sufficient. 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, 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. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, Federal legal holiday, or other nonbusiness day, in which event the period runs until the end of the next day which is not a Saturday, Sunday, Federal legal holiday, or other nonbusiness day. When the time prescribed or allowed is 7 days or less, intermediate Saturdays, Sundays, Federal legal holidays, and other nonbusiness days are excluded in the computation.

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

(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 receipt of the notice of docketing. 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 receipt of appellant's brief to file answer briefs, copies of which must be served upon the appellant or counsel and all other parties in interest. A certificate showing service of the answer brief upon all parties or counsel must be attached to the answer filed with the Board.

(b) 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) The BIA is considered an interested party in any proceeding before the Board. The Board may request that the 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 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 a BIA official or

an OHA deciding 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 or to join other parties or 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. Permission to intervene, to join parties, to appear, or for other relief, may be granted for purposes and subject to limitations established by the Board. 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 OHA deciding official or a BIA official, which 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 made effective pending 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.

(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

either remand the matter to an OHA deciding official or to the BIA, or to the extent the court's directive and time limitations will 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 with respect to 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 such action appropriate. If, prior to 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 Director of the Office of Hearings and Appeals will determine the matter of disqualification.

§ 4.318 Scope of review.

An appeal will be limited to those issues which were before the OHA deciding official 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) A party in interest has a right to appeal to the Board from an order of an OHA deciding official on a petition for rehearing, a 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 appellant, 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, 4015 Wilson Boulevard, Arlington, Virginia 22203. 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. The notice of appeal must include the names and addresses of parties served. 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. A copy must be served upon the OHA deciding official whose decision is appealed as well as all interested parties. 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 OHA deciding official; record inspection. The OHA deciding official, upon receiving a copy of the notice of appeal, must notify the Superintendent concerned to return the duplicate record filed under §§ 4.236(b) and 4.241(d), or under § 4.242(f) of this part, to the Land Titles and Records Office designated under § 4.236(b) of this part. The duplicate record must be conformed to the original by the Land Titles and Records Office and will thereafter be available for inspection

either at the Land Titles and Records Office or at the office of the Superintendent. In those cases in which a transcript of the hearing was not prepared, the OHA deciding official will have a transcript prepared which must be forwarded to the Board within 30 days from receipt of 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 Land Titles and Records Office to the Board by certified mail. Any objection to the record as constituted must be filed with the Board within 15 days of receipt of the notice of docketing issued under § 4.332 of this part.

§ 4.322 Docketing.

The appeal will be docketed by the Board upon receipt of the administrative record from the Land Titles and Records Office. 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.

Subsequent to a decision of the Board, other than remands, the record filed with the Board and all documents added during the appeal proceedings, including any transcripts prepared because of the appeal and the Board's decision, must be forwarded by the Board to the Land Titles and Records Office designated under § 4.236(b) of this part. Upon receipt of the record by the Land Titles and Records Office, the duplicate record required by § 4.320(c) of this part must be conformed to the original and forwarded to the Superintendent concerned.

[FR Doc. 01-32051 Filed 12-28-01; 8:45 am]

BILLING CODE 4310-79-P