

## **INDIAN LAND WORK GROUP'S COMMENTS NEW UNCLAIMED PROPERTY REGULATION**

The Indian Land Working Group opposes the inclusion of unclaimed property regulations into the department's panoply of regulations for three reasons:

1. There is no substantive statute to which the purported regulations attach.
2. A proposed statutory unclaimed property provision in what ultimately became The American Indian Probate Reform Act (AIPRA) of 2004 was deleted by the Senate Indian Affairs Committee staff during the drafting of AIPRA. Regulations implement statutes. They are *procedural* not substantive.

The unclaimed property regulations eliminate property rights. They represent a clear conflict of interest as well as provide a mechanism for side stepping court ordered accounting via elimination of assets by extinguishment through fee burdening of the accounts, a process the ILWG vigorously objected to when the proposed unclaimed property provision was included in the early AIPRA versions.

3. A separate legal basis for ILWG opposition is that the erosion of IIM assets by administrative action violates Judge Royce Lamberth's July 2005 court order that the department was not to take any administrative action or issue pronouncements that have the effect of extinguishing assets that are the subject of the *Cobell v. Norton* litigation.
4. It is the opinion of ILWG that proceeding with the extinguishment of account assets via fee burdening provision styled as an "unclaimed" property provision could *and should* subject departmental personnel to further contempt proceedings.

**INDIAN LAND WORKING GROUP'S COMMENTS**  
**25 CFR PT. 15**

**(To Be Read in *Pari Materia* with ILWG's 43 CFR, Pt. 4 Comments)**

1. In light of the Special Trustee's and Deputy Secretary's April 21, 2005 decision that BIA will discontinue will making for trust or restricted assets, the inclusion of the following provisions in BIA's program function regulations is in appropriate: 15.1 through 15.14. They should be moved.

The 15.3 through 15.11 should be in 43 C.F.R. Pt. 4.

2. The following 15.2 definitions are either incorrect or incompetent:

*Beneficiary*: Means a recipient of assets under a will.

*Legatee*: Does not mean someone who receives "personal land." There is no such thing as "personal land."

*Judge*: Judges do not include 905 job code classification attorney decision makers. Judges are administrative law judges with a 935 job code classification or 905 administrative judges or their equivalent such as Indian probate judges.

*Will*: A last will and testament is an *instrument* not a document. See related discussion of "testate" below. Wills are not approved by judges at the hearing.

*Decision or order*: This definition should add "and attorney decision makers after judge."

*Formal hearing*: The term judge should exclude attorney decision makers. *E.g.* conducted by an administrative law judge or administrative judge to exclude attorney decision makers who render only informal opinions or decisions after meetings using declarations not under oath.

*Heir*: The term is imprecisely defined. Heir at law is a person who is a presumptive heir by intestacy. "Heir" in a general sense can mean both a will beneficiary or heir at law. The former term would be appropriate to the definition provided.

*IIM Account*: IIM accounts indeed include income from land. They may also include proceeds from sale of land, royalties and bonuses or they can include per capita distributions of judgment funds or other federally restricted funds deriving from claims commission proceedings or congressionally mandated

distributions. A suitable definition should be structured to capture all potential sources of funds that flow through IIM accounts.

*Indian Probate Judge:* Change to a licensed attorney employed as an administrative judge by OHA.

*Attorney Decision Maker:* Change to a licensed attorney employed as an informal decision maker by OHA.

*Interested Party:* The definition of interested party in 43 C.F.R. 4.202 is accurate. Use it.

*Probate:* The term probate does not tolerate item (4) within the framework of its definition. Delete it. Presumably this was to wrap in all the transactions that have been grafted onto probate such as forced sales and purchase options. Those transactions are not probate; they in fact interfere with the standard probate process.

*Restricted land:* The definition is not as described. It is land in which the fee title is held by the individual subject to restrictions upon alienation, against encumbrance and against taxation.

*Testate:* The definition imposes an approval requirement therefore making it impossible for the term to be used until probate is concluded. [Note: The definition of “will” also imposes an approval requirement which means that the term will not be legitimately used for a testamentary instrument until after approval by a judge. Change the definitions of both terms.

*Trust financial assets:* Trust personal property is not the same thing as trust personalty. Personalty is movable physical property. *E.g.* San Carlos had trust farming implements including wagons that were trust personalty. By contrast, the Agua Caliente of Palm Springs have trust personal property that are not “funds.” Certain individuals have as a part of their trust holdings trust stock. This definition needs to be changed and enlarged to cover all potential assets that Indian trust or restricted property owners actually possess.

*Trust lands:* The definition in the proposed regulations specifically recognizes only minerals as features of trust land. Does the specific definition therefore exclude growing timber or crops *in situ* and like features? The definition should be generic and all inclusive so as not to create legal problems for landowners whose resources could interpretationally be excluded from trust coverage and services.

*We or Us:* Delete the sentence “*The Secretary may change these designations at any time.*” The secretary cannot by fiat or subjective election change representatives (*i.e.* reorganize) without consultation under Presidential

Executive Orders (*E.g.* E.O. 13175, dated November 6, 2000) with Indians or without promulgation of regulations published in the Federal Register that are subject to public comment and then finalization and issuance. The process that is not unilateral. The cited executive order specifically includes “regulations” within its purview.

The following comments pertain to the balance of Pt. 15:

#### Subpart A

- 15.4(a)(1) Take out the word “tangible” before land. Like the phrase “personal land,” *supra*, this type of nonsensical phraseology subjects regulatory text to professional ridicule while underscoring the lack of basic subject matter knowledge on the part of the drafter(s).
- 15.4(a)(2) Take out the phrase “including sale of the land.” The days of unilateral action by the secretary to divest Indians or their estates of assets without consent of affected parties are long past or should be.

Importantly, such a provision is substantive not procedural and has no place in procedural regulations.

Consistent with this comment, the ILWG strongly opposes and asserts the invalidity of AIPRA’s purchase option in probate of less than 5% interests or, more properly stated, *forced sale* of one individual’s private interests to another individual or entity in their private proprietary capacity. ILWG also opposes the extinguishment of heirs’ expectancies in the estate of the decedent because is a taking from the decedent’s estate without due process not permitted under *Hodel v. Irving* (1987) or *Babbitt v. Youpee* (1997).

#### Subpart B

- 15.105(b)-(c) The ILWG objects, now, as it did in 1999 to the requirement of a certified copy of the death certificate being mandated in ever case given the poverty level in Indian Country, lack of transportation and remoteness of the heirs from county records offices. Unless there is a material issue involving the death or related question, it is an expensive formality that has contributed to the shocking growth of the probate backlog since serial reform processes (HLIP, BITAM and As Is/To Be) began. It is inappropriate for the Indian community upon which it is imposed. From 1970 until after HLIP changed BIA practice to require a certified copy of the death certificate, certified copies of documents were not required except as the circumstances specifically warranted. In such cases, the judge would

request a certified copy of the certificate of death. The cost to the agency and the families of this requirement is enormous and unnecessary. The costs are not just monetary. The requirement of certified copies of documents is also a cardinal factor in the inordinate delays in preparing the probate files for adjudication.

Rework these two provisions with emphasis on the language: “*We reserve the right to obtain a certified copy if a death certificate exists.*”

15.106

The predilection for maximum formalization in what used to be primarily oral proceedings in Indian Country is, as stated above, a significant factor in the growth of the probate backlog. Originals as in the case of wills or court certified copies to successor probate tribunals are required for probate. Certified copies of other documents are discretionary with the trier of fact (judge) or in some cases informal decision maker. It should be left to the latter to determine when and under what circumstances they are required as it was from 1970 until ca. 2000. It was not until HLIP changed the probate system to have multi-level review dragging out the probate process and document certification beyond reason that the probate backlog grew exponentially.

15.107

There is so much wrong with these provisions that ILWG’s basic comment is that the department should prepare to litigate missing persons issues.

Missing does not mean dead. Therefore, commencing a process to adjudicate a death transfer of property without evidence of death with a purposeful eye to terminating property ownership and transferring such property to third parties is shocking. The language “...if we are unable to locate the absent person, we will open a probate case...” is dumbfounding.

Indeed, there is a missing persons provision which purports to authorize playing fast and lose with absent persons in AIPRA placed in the legislation at the request of the department that was seeking to jettison not merely duties but apparently people as well to minimize its burden. The statutory authorization is as infirm as 15.107(c)’s rush to treat “absent” people as dead.”

Subsection (d)’s intent to file a claim in probate to recover costs for locating people is taking advantage of its own negligence and malfeasance. The department’s ownership records are not posted to current status, the probates are in backlog (according to the figure used by

the special trustee at the ILWG conference was 30,000) and they in turn create a further posting backlog.

Were the department's probates up to date and the probates posted so as to be current, the addresses the department has for probate notices and IIM purposes would not be stale. Under no circumstances should the department assess fees and costs for services to landowners or heirs until it has certified that departmental records are current.

The department in many cases is responsible for the absence of contact. In certain cases the department has never told particular individuals they had inherited so they have no reason to know of their need to contact the agency. *E.g.* After 1996, when portions of the Phoenix and Billings jurisdiction were transferred to Salt Lake City OHA, according to BIA field personnel hearings were held in which heirs were included on the data sheet, then listed in the order but they were not added to the notice of decision so that the heirs were never informed of inheritance. The heirs therefore have no reason to know that they have inherited and no reason to contact the agency. Nonetheless, not only does the department seek to treat them as dead but it also wants to charge these individuals for the government's own malfeasance.

A second example is the failure of the department to file copies of the probate record with all affected agencies and land titles and records offices. *E.g.* If a Pawnee heir inherits in a Pima estate, unless a copy of the record was sent not only to Pima Agency and Albuquerque LTRO but also the LTRO for Oklahoma and heir's home agency, there is no effective record of ownership and the heir has no ability to know who he or she is to contact. That a missing heir doesn't keep in contact with family, one of the ingredients for assessing a person as missing, is often a matter of personal choice. It is not a condition sufficient upon which to warrant extinguish of a 5<sup>th</sup> amendment-protected property right.

It is unprincipled and unconscionable for the department to seek to charge such individuals locating fees when it is the department's own bad data that is the most likely root of the inability to locate so-called missing heirs in the first place.

### Subpart C

15.201 These basic restrictions upon distributions in relation to making funeral arrangements for Indians have existed only since 2000 and do not work for the Indian community.

Typical Indian funerals involve family members and friends pooling money funds for the wake or traditional ceremony. Costs include food and expenses for singers and drums. Other expenses include clothing for the decedent and funereal objects. The need for funds is immediate. Under regulations prior to HLIP, there was an effective system between BIA and the judge under 25 CFR Pt. 115 for getting the needs met for the benefit of all concerned.

The limitation upon provision of funds to estates in which there is \$2,500.00 in IIM on the date of death and pre-probate distribution only directly to “service providers” defeats the purpose of having an emergency provision since the funeral home is the near exclusive beneficiary of this provision. The family still has to come up with the money from other sources in order to have the paper work required to get a distribution. Then funds cannot be paid to them but only to the provider who has already been paid.

There is a need for ordinary distributions to cover the costs of the deceased property owners wake or ceremonial expenses in order to have the money available when it is needed.

Small estates with spouses and minor children were protected against general claims. That provision in the pre-HLIP regulations has been parlayed into a general prohibition against distributions when funds are less than \$2,500 that is senseless.

The decedent and family should have first call on the assets to for burial and related expenses which include traditional ceremonies.

15.202

*See Estate of Gilbert Blackmoon* an IBIA decision. Secured creditors have a direct right in and to the assets obligated for repayment of the debt. They do not file in probate. There is no general substantive authorization for deficiency judgments against trust or restricted estates. Deficiency enforcement is therefore is a matter of contract enforceable if at all by the terms of the particular accord. No general provision is warranted.

#### Subpart D

15.302(d) A certified inventory will include *inter alia* identification of interests that represent “less than 5% of the undivided *interest* in a parcel.” Should the italicized word be “interests?”

There is no indication in this provision that there is certification that all interests owned by the decedent have been properly posted.

Given the fact that the overwhelming majority of 2% interest declared invalid under *Hodel v. Irving* (1987) and *Babbitt v. Youpee* (1997) have not been restored, the identification of such interests contains no verification or guarantee that the records are complete or up to date.

Use of such information without verification will cause among other things: clouded title to property and misdirection of the transfer of property in probate.

15.302(e) Add “and showing the balance at the time the probate file is submitted to OHA.”

15.303

These provisions work to shift data development to the adjudication unit which is legally impermissible. Adjudicators do not develop evidence they cause it to be developed. BIA, the program component, is the custodian and data developer. The “that is available” language is obviously designed to provide waffle room. Adjudicators do not and cannot become involved in preparation activities because it compromises their duty of impartiality and jeopardizes the ability to be unbiased.

#### Subpart E

15.401 (a) Drop text after “assignment.” Add a period

(b) Notably excluded from those notified of small fractional interests are the real parties in interest “the heirs” or co-owners. Where is the Land Consolidation Center defined?

15.402 (a) Change “judge” to decisional official since ADMs do not fit the definition of judge.

15.403 30 days is too short a period of time for the majority of Indian Country to receive and respond to the deadline for filing a de novo request for hearing.

There are reservations of millions of acres having no home delivery with only a few mail collection sites. Many reservation residents collect mail once a month or when they are able to find transportation. In the rush to expedite probate, fundamental due process issues are raised. People have to have notice and an opportunity to be heard. A 30-day turnaround is unreasonable in Indian Country.

Inherent in this provision is an apparent assumption that cases or many will be non-Administrative Procedure Act processed as a mainstay of the system.

The Indian Land Working Group unequivocally asserts that Indian property rights are entitled to the same protections in law that are routinely afforded lessees, permittees and licensees on the public domain by the department. Indian land is valuable and entitled to protection in Indian hands not merely when those assets become owned or used by third parties.

A separate question is raised regarding why this provision or portions thereof is in Pt. 15 rather than 43 CFR, Pt. 4. This section needs to be edited to list BIA's duties only leaving ADM duties for description in the hearings regulations.

**INDIAN LAND WORKING GROUP'S COMMENTS  
43 CFR, PT. 4**

(These comments are to be read in *pari materia* with 25 CFR Pt. 15 comments)

**Narrative Conclusions and Recommendations**

It is the position of the Indian Land Working Group that the department has effectively turned gold into lead in its re-writing of the adjudication regulations. 43 CFR, Pt. 4 has gone from succinct and adjudicatively sequential in need, at most, of fine tuning to a non-sequential, incoherent hodge podge that conflates non-APA and APA decision making and decision makers into an differentiated mass. The regulations are confusing due to their flow or lack thereof. BIA's definitions conflict with OHA's better grasp of terminology. They defeat finalization of adjudication while blurring the distinction between distinct post-APA adjudication review processes. They attempt to fast track processes unfairly to the user population to whom a trust responsibility is owed. They promote the layered adjudication model created under the High Level Implementation Plan that has so egregiously contributed to the enormous backlog that the department now faces.

It is the recommendation of the Indian Land Working Group that the regulations be turned over to seasoned adjudicators within the department experienced in APA administrative adjudication in probate for restructuring as to content, semantic coherency and, above all, flow. It is *evident* to the outside observer that unseasoned and unskilled non-adjudicative personnel have been involved in the preparation of many provisions and that such involvement is the source of much of the regulations incoherency.

As written the 43 CFR, Pt. 4 regulations will exacerbate the already profound problems Indian landowners confront under the American Indian Probate Reform Act of 2004.

**Structure of Comments**

Indian Land Working Groups' comments are presented in two sets and three categories. They list the provisions for which no comments are made and separately those about which comments are made. In the latter group, comments are set forth in three categories: organizational, legal and practical:

Set 1: No Comment is regarding the following sections: (1) Recusal of a Judge (4.230-4.238), (2) Consolidation Agreements (4.260-4.261), (3) Tribal Purchase of Interests under Special Statutes (4.290-4.304), (4) Renunciation of Interests (4.310-4.319), (5) Depositions, Discovery and Prehearing Conferences (4.340-4.349)

and (6) Proceedings on Appeal Before the Interior Board of Indian Appeals\*/ [non-probate provisions],

**Set 2: Comments are made concerning the following provisions: (1) Definitions (4.200-4.201), (2) Commencement of Probate (4.210-4.217), (3) Judicial Authority and Duties (4.220-4.225), (4) Claims (4.240-4.250), (5) Purchase at Probate (4.270-4.286), (6) Summary Probate Proceedings (4.320-4.325), (7) Formal Probate Proceedings (4.330-4.339), (8) Decisions in Formal Proceedings (4.364-4.375) (9) Miscellaneous (4.380-4.386) and (10) All IBIA Appeals Provisions that involve or implicate Indian probate whether in the 4.390 et seq. series or 4.410**

\*/ The only comment as to this set of provisions is that there does not appear to be any actual filing deadline contained in the series.

## Set 2

### (1) Definitions:

**Organizational and Legal:** Probate is a continuum. It starts in BIA and shifts to OHA then back to BIA with OST involvement. There should be only one set of definitions. The Pt. 15 definitions are in many places inaccurate and legally incompetent.

**Practical:** The two sets of regulations definitions need to be conformed. There are four different decision makers listed in 43 CFR, Pt. 4. Three are specifically defined: administrative law judge, Indian probate judge and attorney decision maker. One is not: master. The former three are then inappropriately conflated into the category of judge making it impossible for lay users to differentiate among the various decisional officials or get a true sense of the type of proceeding received.

Refer to ILWG's comments for Pt. 15.

Clean up and use accurate descriptors for per stirpes, pretermitted child and spouse omitted from will incorrectly classified as pretermitted. The definition of restricted property is incorrect.

See ILWG's Pt. 15 comments re the terms trust financial assets, trust personalty and will.

### (2) Commencement of Probate:

**Practical:** In 4.211 change term "judge" to decisional official so as not to apply the former term incorrectly. In 4.212, list the contents of a complete probate file as the former 4.210 did rather than cross reference so that parties who do not have access to CFRs will know the content.

4.213 is a source of concern. It appears to state that OHA may not return a file to BIA if it is accompanied by a certification. It appears through the mechanism of subpoena or order appear to assign to OHA the physical duty of evidence procurement and development.

*See* ILWG's Pt. 15 comments concerning the distinct legal adjudicative duties of OHA versus the program/data development duties of BIA.

Making the adjudicator a participant in program duties or functions compromises the integrity and impartiality of the tribunal. ILWG therefore opposes the assignment of physical development duties to the adjudication component.

In 4.314, change "judge" to decisional official. In 4.214(a), make the same change and delete the words "administer and." Adjudicators do not "administer." They adjudicate. Program components administer.

**Practical:** 4.215 is incendiary. While departmental proceedings are generally matters of public record, death proceedings for Indians are intensely personal and private. The casual opening of probate records through indiscriminate classification of the proceedings as public and sanctioning the provision of personal data to third parties by paying copying fees will have serious political ramifications and enrage Indian Country. Especially in light of the fact that landowners have historically been denied access to their own records by departmental personnel and that access to landowners' own records was not voluntary but legislatively forced but by no means universally implemented even today. There are local agency offices that still deny landowners' access to information about property in which they have an interest.

**Legal:** Conform access to probate records to the AIPRA provision (Sec. 207) governing access to landowner information.

**Organizational:** 4.216 and 4.217 come out of left field and disrupt flow and sequence. Put them in the Miscellaneous provisions section.

**Practical.** 4.216 is poorly crafted. It doesn't make sense. Go back to the pre-existing escheat regulations and use them. 4.216(b) is half a loaf. "If 25 U.S.C. 2206(a) does not apply" escheat will be ordered. Add "and there is no applicable tribal code." ILCA 2000 and AIPRA have amended 25 USC 348 and 464 to incorporate use of tribal codes. 4.217 is also poorly crafted. Go back and use the compromise settlement in disputed case provisions that have existed since OHA was created. They are simple and make sense.

### (3) Judicial Authority and Duties:

**Legal:** Because the definitions conflate administrative law judge, Indian probate judge and attorney decision maker into the category of judge, 4.220's provision, many of which come straight out of APA statutory provisions, are made to apply to individuals, attorney decision makers, who are not judges. As a consequence, the conflation improperly enlarges the duties that are assigned to such individuals. Many of these provisions are in the administrative law judges' job descriptions. The job code classification for administrative law judges handling probate cases is 935. It has been since OHA was created in 1970. 905 is the attorney advisor job code classification. 935 is a classification attained through competitive application and testing as well as exhaustive background checks with placement on a formal register by OPM. Administrative judges to which the Indian probate judges are equivalent indeed have a 905 job code series but they are hired in a formal adjudicative capacity in the same vein as the administrative judges on the various OHA appellate boards. Such positions are qualifying experience under 5 U.S.C 3105 administrative law judge classification/selection processes.

**Practical:** The regulations must be written to clarify not muddle who has what authority in which type of cases.

The Indian Land Working Group opposed the creation of the expensive and ineffective attorney decision maker positions in BIA under the High Level Implementation Plan because it opposed and continues to oppose a dominant system of non-APA adjudication of Indian property rights while the department affords lessees, licensees and permittees on the public domain unquestioned access to protected adjudication under the APA. The addition of adjudicators in BIA duplicated functions performed by OHA. It expensively added more adjudication layers with no positive benefit. To the contrary, the probate backlog grew exponentially during the unfortunate experiment that should not have come into being. The hard costs of this failed system should be publicly revealed.

Indian property rights are not an inferior species of right. A beneficiary of the United States' trust responsibility, at a minimum, should be entitled the adjudicative protections in law that the government willingly and unquestioningly provides to those with lesser interests to whom no trust duty is owed. If not then Indian property rights only have value or meaning when someone other than Indians owns them or has use of them.

**Organizational:** It is ILWG’s recommendation that OHA’s Indian probate processing structure operate on a quasi-magistrate model under the umbrella of APA adjudication officials. Having a range of decisional officials, formal, informal or simply fact finders coordinated by a single head of office utilizing a range of processing options: screening cases for on the record decisions, identifying cases with single or few issues to be resolved and carving out those that conspicuously require formal adjudication will provide processing flexibility to cause cases to move through the system faster. The system that has existed with ADMs as separate decision makers created turf wars and resource competition which factors contributed to the growth of probate backlogs while huge sums of money were wasted.

**Legal:** 4.220(a)(8) and (9) need to be reworded. (8) authorizes orders of distribution for persons who are missing but not necessarily dead while “reserving the share(s)” of the individual without saying to whom or how. The language creates a non-sequitur. In (9) change the word “take” to receive.

**Practical and Organization:** 4.221’s use of masters is precisely what ILWG endorses in the recommendation in the penultimate paragraph. To that extent, it believes that attorney decision makers have a valuable role they can play in a flexible probate adjudication system. However the ILWG does not agree that under 4.222(a) APA judges’ hands should be tied as though they were an appellate reviewers whose duty is to determine whether or not a decision is supported by substantial evidence. 4.222(a) mandates adopting a recommended decision if substantial evidence exists to support a decision.

APA judges provide *de novo* review. If they do not, there are not carrying out the mandate of the APA. If a party seeks review, the review by an APA official must be *de novo*. If the department fails to provide such review upon request, it is nullifying the APA. The APA applies to Indian probate proceedings.

We point out that the department has a history of palpable hostility to the application of the APA to Indian probate proceedings. It’s attitude was so well known that it was addressed in one of the ABA Journals. The application of the APA to Indian probate proceedings is statutorily and judicially established.

ILWG is aware of the opinion of the solicitor’s office that the APA does not apply to Indian testate proceedings. That opinion, we submit, should be an embarrassment to the department.

We invite examination of Toonippah v. Hickel (1970) and to the district court and court of appeals proceedings that culminated in the 1970 supreme court decision case applying the APA to Indian testate proceedings.

The department is legally estopped from denying the application of the APA to Indian testate proceedings.

**Organization:** Put 4.223 in the Miscellaneous provisions. A primary reason for the incoherency and seeming out of left field effect of certain of the provisions under “Judicial Authority and Duties” is the fact that as originally presented in 43 C.F.R., the judges’ duties were sequentially enumerated, tersely. 43 C.F.R., Pt. 4’s sophomoric question and answer format disturbs the flow of the regulations and clutters sections with verbiage.

ILWG suggests that duties simply be enumerated and that descriptive text be placed in procedural sections where contextually appropriate and if there is no such section in the Miscellaneous provisions. 4.221 through 4.224 are prime examples of the proposed regulations blending (what should be) enumeration of duties with procedure. It does not work in adjudicative regulations.

**Legal:** 4.224 is an invitation to litigation. “A judge may make a finding that an heir or person for whom a probate case has been opened is dead by reason of unexplained absence... .” Dead and absent are not synonyms. This provision needs serious work.

**Practical:** 4.224(a)(1) and (2) mention “any witness.” This provision looks like a presumption of death provision using clear and convincing evidence then fades into an incomplete analytical framework that requires mere absence and no contact with selected witnesses who are not described except by the phrase “any witness” for whom no selection criteria is listed.

4.225 is another off the wall provision without seeming context in (what should be) a well-described and well-ordered listing of authorities and duties. We repeat the prior recommendation: list the judges’ duties and elsewhere describe the what’s and hows. 4.225 blends a host of disparate concepts: correction of errors and omissions which is a technical function formerly covered by the improperly included and omitted provisions which did not typically require reopening with duties and authorities of judges to determine matters such as the issuance of duplicate patents for allotments, dual allotment issuance to the same individual and accurate issuance of patents for allotments.

**This section needs substantial clean up and organization. Separate the technical from adjudicative issues and delete the assumption that these issues only arise in context of reopening.**

**In connection with 4.225, we cross reference the “buried” rehearing and reopening provisions contained in “Decisions in Formal Proceedings” section of the regulations. The cross reference is made because 4.225 and the quoted section contain reopening references.**

**We submit that a party should be able to see the flow of adjudication, as OHA’s regulations were historically crafted, not only from sequential regulation text but also from the initial description of regulation content. The question and answer format now widely utilized by DOI destroys that capability.**

**Rehearing and reopening proceedings are important post-decision review mechanisms. See existing 43 C.F.R. 4.241 and 4.242, respectively. They have specific and very distinct roles. The rehearing and reopening provisions should be carved out of the “Decisions in Formal Proceedings” section and be individually listed with their criteria so that users can easily find the post decision review processes that are both mechanisms for potential relief from a prior adverse decision and the gateway to appeal.**

**ILWG has additional comments concerning both rehearing and reopening that are set forth in section sequence.**

**Separate treatment should also be afforded provisions for efficiently correcting omitted and improperly included property on estate inventories as it has been in the past without requirement of reopening.**

**(4) Claims:**

**Legal: The ILWG renews its objection to the claims regulations primarily on legal grounds. 4.240(a) and (b) contain no objectively ascertainable date by which a creditor could know when to file a claim. The dates to which filing is tied are matters of internal knowledge within BIA and not publicized. This flaw renders the entire process illusory except to those with ties to the agency such as tribes who are not priority creditors.**

**In our opinion the absolute discretion of the decisional official to adjust expenses untethered to any objective standard is arbitrary and capricious and the structure of the pro rating power essentially nullifies or can be used to nullify dictated priorities.**

**Practical:** The ILWG also objects to the claims regulations on practical grounds. The oddball claim regulations are the product of the High Level Implementation Plan. The primary goal was to close IIM accounts and cut off duties to be performed by short circuiting claims and their payment. The pre-HLIP regulations were clear about when filing must occur (before the conclusion of the first hearing notices of which was posted in 5 conspicuous places within the vicinity of the place of hearing)

The priority for payment did not favor the total payment of the largest claims that would leave little for routine creditors (such as tribes who are the largest individual lenders in Indian Country) or small creditors (friends and family who often pool money to help families pay for immediate funeral and burial expenses).

We recommend that OHA return to a semblance of the pre-HLIP claim regulations both as to filing and priorities and amounts for payment and specifically re-establish the authority or one similar to that which existed between BIA and OHA to permit small pre-probate distributions to families so that they can take care of basic needs for funeral purposes such as clothing for the decedent, food for the wake, costs for traditional ceremonies. There were few problems in the system that existed and many benefits to those affected.

#### (5) Purchase Option in Probate

**Legal:** The ILWG denounces the forced sale of <5% interests without regard to value, income production or benefit from one private individual to another private individual or entity in their proprietary capacity. There is no legal basis for such action in our system of jurisprudence. The only allowed force outs are either condemnation/eminent domain proceedings for a public purposes (not simply for proprietary purposes) or partition actions in which property cannot be equitably divided. However, in such cases, ALL interests are sold including those of the person moving to partition. Targeted force outs are not part of this nation's system of property laws.

We oppose both AIPRA's provision and the regulations that purport to authorize and enforce the forced sale of <5% interests.

Additionally opposed are the contrived lowball values and the system for setting them that the department has concocted

ILWG's position regarding the department's system of using so called market studies arbitrarily and on a monolithic (reservation wide) basis, including for setting lease values, is contained in the testimony of Austin Nunez regarding S. 1439, dated March 28, 2006 attached to these

comments. In its quest to extinguish rights and reduce its burdens, the department is paving the way for future lawsuits.

The ILWG group asserts, based upon departmental case law concerning vesting of rights in probate, that extinguishing heirs' interests or the attempt to extinguish heirs' interests is in fact an extinguishment of assets in the decedent's estate in violation of the 5<sup>th</sup> amendment. *E.g.* If a decedent owns a 20% interest in an allotment and has 5 heirs, the department under 4.274 purports to eliminate the 4% interests of the heirs who do not own anything until the final order is issued and the effective date for the decision has passed. At that time, and not before, the ownership then relates back to the date of death. The department is extinguishing the heirs' expectancy not in succession regulations as sanctioned in *Hodel v. Irving* (1987) but in conveyance regulations *pre-ownership*. Extinguishment before vesting. This is effectively the acquisition of the interest from the decedent's estate without payment to the decedent in contravention of *Hodel v. Irving* and *Babbitt v. Youpee* (1997) And it is being done in violation of AIPRA's forced sale rule which facially requires that the interests be <5%. This decedent's interest is 20%.

If these provisions are not eliminated both from AIPRA and the regulations, it is not whether a lawsuit will be filed but when it will be filed. Litigation is guaranteed by the fact that there is no defense to the taking. Value makes no difference. Income makes no difference. Development or use potential makes no difference. High value commercial property, mineral interest, timber lands can all be taken due to the sole fact of share size. It is a device unique in known law. It would not be tolerated if aimed at non-Indians which is exactly what was said at the time *Lone Wolf v. Hitchcock* (1903), called Dred Scott No. 2, was decided by the United States Supreme Court. Attitudes have changed little in the last 100 years within the department. Extinguishment of rights to Indians assets without consent exists even at this late date.

#### (6) Summary Probate:

**Legal:** The ILWG group opposes the system embodied in these provisions because it effectively nullifies the primacy of APA proceedings for Indian landowners by making summary probates by informal process the apparent norm and APA proceedings the exception. APA proceedings are available in enumerated instances while ADM informal decisions are authorized unless specifically limited in all types of cases.

The ILWG emphasizes that APA protections are for litigants to prevent politicization or other malign factors from influencing outcomes from the shadows. That is why the APA defines what must be provided to

administrative litigants and how it must be done. ILWG again refers the reader to the attached testimony re S. 1439. As departmental pressure accelerates, BIA protections of individual property values has declined. Subordinates who are subjected to performance reviews and sanctions, such as ADMs, do not have the decisional autonomy of ALJs who are insulated from political and similar factors by the APA.

There has never been a time in which the need for decisional autonomy for the benefit of landowners in Indian probate proceedings has been greater. Probate has been highjacked for all manner of transfers: partition, probate purchase options, <5% forced sales, partitions converted to secretarial acquisitions. The integrity of probate adjudication requires that the APA be adhered to. It is not a legal choice:

The 1990 conversion legislation for the probate administrative law judges (which one of ILWG's members initially authored) specifically made intestate proceedings subject to the APA by eliminating the "final and conclusive" language as to secretarial intestate heirship determinations under 25 U.S.C. 372. Prior to that, in 1970, the supreme court specifically found testate proceedings to be subject to judicial review which is the keystone of the APA.

DOI does not have the authority to impair legislation or supreme court case law in procedural regulations.

The summary probate provisions also constrict the time for seeking review to such a short window (30 days), particularly for Indian Country's residents, that an *element of bad faith is strongly suggested*. Especially given the myriad transfer that DOI has grafted onto the now highjacked probate process which transfers interfere with the orderly and timely ascertainment of heirs at law and approval of wills for the benefit of the decedents' families.

Informal decision maker is incorrectly labeled as a judge, a point repeatedly addressed herein.

"Expenses of probate" are mentioned in 4.322(h). There is no explanation of what these expenses are.

#### (7) Formal Probate Proceedings:

**Legal:** We renew and incorporate by reference the preceding comments about the APA. The enumeration of situations in which a formal hearing is warranted makes APA proceedings the exception not the rule in violation of statutes and supreme court case law.

**Practical:** The notice provisions in 4.332 have confused the posting deadline with the mailing deadline. 20 days is not sufficient time in Indian Country to allow delivery and receipt of hearing notices

4.332 allows combining notices for more than one estate hearing in published notices; however, 4.333 which allows costs to be paid from an estate's assets but without prorating or system for prorating.

4.334 and 4.335 need to be explained or squared with the 25 U.S.C. 374 subpoena authority. The need for two sets of provisions doing basically the same thing is not known. It suggests that someone not familiar with ALJ authority or the statute cobbled these provisions together needlessly creating dual rules.

**NOTE:**

In sequence, 4.357 and 4.358 address proof of wills. The ILWG suggests that all will provisions in Pt. 15 and 43 C.F.R., Pt. 4 be placed in a single section in 43 C.F.R., Pt. 4 to facilitate locating all relevant provisions by affected parties or their representatives.

**(8) Decisions in Formal Proceedings:**

**Legal and Practical:** The ILWG objec!s to a 30-day final date for decisions and for filing petitions for rehearing. It is harmful to those impacted for a variety of reasons. It is inappropriate given mail delivery conditions in most of Indian Country. It denies Indians reflective time and time to find competent counsel in an arcane subject matter understood by few practitioners. Probates are not more complicated than ever under AIPRA and its myriad acquisition and transfer provisions.

Separate the rehearing and reopening provisions from this section. Create a section called post-hearing review.

As to reopening, delete the proposed provisions in their entirety and restore the language of 4.242. There are presumptions associated with the certificates of mailing and posting that are critical. They are important deterrents to individuals sitting on their rights until the evidence is stale and witnesses deceased. The lack of notice aspect is well covered in the existing regulations it permits only parties who did not participate and who were not on reservation or within the vicinity of any place of posting to seek reopening within three years. Three years is a appropriate amount of time. One year is not. The manifest injustice rule is codified in existing 4.242. 30 days is insufficient time to file a competent appeal.

(9) Miscellaneous:

**Practical and Organizational:** We reiterate the recommendation that all will provisions be assembled into one section of the regulations for ease of use. This includes the anti-lapse provisions in 4.380 and the disjointed insertion of 4.386 at the end of the Miscellaneous section. The will provisions are so scattered within 43 C.F.R., Pt. 4 and incomplete due to the placement of important provisions in Pt. 15, when BIA no longer makes wills, that even skilled probate practitioners of whom there are few could readily find these provisions.

4.382 is one of the sections that appears to be implicated in 4.225 discussed on page 6. All of the corrective provisions should also be assembled under the same heading after the “Decision in Formal Proceedings” section.

4.403 addresses remands to IBIA in general proceedings but includes a reference to probate matters. A separate provision needs to be inserted in the “Appeals to the Board of Indian Appeals in Probate Matters” section.

(10) Probate Appeals

4.411 is inconsistent with prior provisions allowing on 30 days for appeal. 60 days is appropriate as states in 4.411.

4.412(b) contains a reference (4.320) to the current numbering system that should conformed as appropriate.

**INDIAN LAND WORKING GROUP'S COMMENTS**  
**Fee For Services for Allotted Lands**

The position of the ILWG is that it is inappropriate and ethically bankrupt for the department to undertake the assessment of fees for services for the use of departmental systems and processes that are operate upon the basis of known inaccurate, un-posted and backlogged data. The ethical issues are exacerbated by the department's intentional non-restoration of 2% interests to the true owners under the supreme court decisions in *Hodel v. Irving* (1987) and *Babbitt v. Youpee* (1997) in an Andrew Jacksonian fashion.

*There should be no consideration of fees for services until the department's records are certified as current.*

It is further inappropriate for the department to charge fees for forced transactions. *E.g.* <5% forced sale. This is effectively a repeat of the treaty process by which the government forged policies inimical to Indian wants and interests then foisted the cost of implementing its policy upon the victimized population. The government extracted its treaty-making administrative costs from the proceeds of forced land cession proceeds.

We incorporate by reference our comments pertaining to extinguishment of trust assets by fee burdening in violation of the July 2005 order of the court in *Cobell v. Norton* which are contained in the ILWG's comments regarding unclaimed property

INDIAN LAND WORKING GROUP'S COMMENTS  
REGARDING CERTAIN FEATURES OF PT. 151

The Indian Land Working Group opposes the restriction of taking property in trust to persons already owning an interest in the asset for the following reasons:

1. 25 U.S.C. 465 does not contain such a restriction.
2. AIPRA, while mandating that the secretary shall take fee interests into trust forthwith when an owner of a trust interest in the same property demands it, does not state, suggest or imply that other fee to trust transaction for individuals are precluded.
3. The policy decision is a subversion not only of statutory law (Sec. 465), it is also an arbitrary decision that produces an equal protection violation based upon legal provisions that the U.S. imposed upon Indian landowners.

Until June 21, 2006, state law primarily determined the descent of property by intestacy. Under 25 U.S.C. 348 the U.S. imposed state law standards on Indians. Largely in the 1970s and after, states began changing their probate or succession laws from the common law structure: one-third share to spouse with two-thirds shared by the issue to UPC (Uniform Probate Code) structures that favored spouses over blood line family.

As a result, in UPC states under Sec. 348, a surviving spouse parent of all the children was the sole heir at law. If the spouse was non-Indian, he or she took 100% of the decedent's trust estate causing trust status of the full estate to extinguish effective as of the date of death with no interest passing to the issue. The issue ultimately receive the full interest in fee but are denied the right to restore trust status, a right not denied Indian issue in states with common law systems and structures.

Therefore, under the federal Indian probate system for adjudicating intestate estates, certain Indians are treated unfairly and disparately due to the vagaries of state law which, incongruously, the government has now eliminated entirely from the probate processing system by modifying Sec. 348.

The Indian issue of Indian decedents who are now denied the opportunity to return the ancestral estate to trust status due to the fortuity of where they happened to reside are being treated unequally to their common law brethren. Many of the allotments to which this problem applies are fractionated and have trust property within the fabric of owners. This

makes the denial of restoration of trust status to the descendants in UPC states all the more arbitrary.

The ILWG recommends the correction of this disparity.

**INDIAN LAND WORKING GROUP'S COMMENTS**  
**Part 116 – Trust Fund Accounting and Appeals**

**Subpart A – General Provisions: Purposes and Definitions**

*Section 116.001 Any accounting or fund-related claims must be presented to the Department using the procedures in this part to permit them to be addressed administratively before any claim may be brought in litigation.*

Comments: The Secretary and the Special Trustee do not have the authority to change the law. The law allows IIM and Tribal account holders to file litigation against the Department of the Interior if there is a basis for litigation allowed by the Court of Claims or for a request for an accounting from a Federal District Court. That cannot be unilaterally changed by the Secretary, as much as they may want to make it binding upon the beneficiaries of the trust for whom they are mandated by law to provide trust fund management services. This is just a “wish list” item that the Department wants to see implemented. It cannot and must not be attempted to be forced upon the IIM and Tribal account holders.

*Part 116.002 **Accepting tribe(s)** means a tribe that accepted the reconciliation report by providing an attestation required by Section 304(2)(A) of the Trust Reform Act or a tribe that has otherwise accepted tribal account balances prior to the effective date of this rule through a settlement, administrative action, or judgment.*

Comments: The approximately 42 Tribes that provided the attestations to the Department did so without the benefit of knowledge of the errors and admissions by Department officials noted in various litigation and media reports issued since 1996. The BIA did not provide adequate information to the Tribes to allow them to have known many of the weaknesses of the “*Agreed-Upon Procedures Report*” and related restatements of account that were provided to the Tribes in early 1996. The litany of errors and omissions concerning Departmental mismanagement issues that have been brought out in Court proceedings in the *Cobell* litigation as well as in several of the various Tribal cases in the approximately 24 Tribal trust mismanagement cases filed in either Federal District Court or in the U.S. Federal Court of Claims against the Department of the Interior. The information identified in those cases as well as that described in the various articles published in the press issued since 1996, would cause many, if not all, of the Tribes that submitted those attestations to not sign them today. The Secretary is surely not suggesting that these 10 year old attestations will be enforced on those Tribes as still applicable after all these years. It would certainly seem reasonable to expect that this requirement could not be enforced by the Secretary or the Special Trustee at this late date without additional statutory authority which does not yet exist.

*Part 116.002 **Account Statement** means a written statement provided by the Department to an account holder concerning the account holder's trust funds. Unless otherwise specified, the use of account statement in this part includes statements of performance issued by OST and historical statements of account issued by OHTA.*

Comments: If we were only speaking about Account Statements that were issued over the past 10 years, then the above language would appear to be reasonable, but the Account Statements given to the IIM account holders date back well into the 1930's and Tribes at least back to April 1972. The Tribal "*Summary and Detail of Trust Funds Report*" and the related "*Status of Investments Report*" and the "*MoneyMax Reports*" were all statements presented monthly to Tribes during the period April 1972 through March 1995, after which the SunGuard OmniTrust monthly statements were sent to the Tribes through February 1999, when the current SEI generated TFAS account statements were sent to the Tribes. The IIM account holders had semi-annual account statements sent out to them, with the exception of minors and non-compis mentis account holders, until roughly 1987 when the IIM accounts were sent statements on a monthly basis. These additional report descriptions should be included in the Account Statements sent to Tribes and IIM account holders.

*Part 116.002 **Accounting or funds-related claims** means any material errors in the management of trust funds from the point of their collection (or coming due for collection) through disbursement, which include, but are not limited to, any asserted claims relating to collection of the appropriate amounts under lease, permit or sale agreements or other contracts, proper recording of transactions, timely collection of revenues, proper posting or accrual of interest earned, adequate yield on investments, undocumented changes in fund balance, delays in the posting or accrual of interest, and proper disbursements.*

Comments: Individuals or Tribes with "accounting or funds-related claims" should be able to bring them to the Office of the Special Trustee and have them dealt with in a timely fashion. To restrict the ability to bring a claim to the Department *only* if they are considered "material errors" brings up the question as to just what the Department considers to be "material". The Department may not consider a few hundred dollars worth of claims for an individual Indian to be "material", but it very well may be for the account holder. This is not well defined and should be clearly defined. The Office of the Special Trustee should not be put in the sole position of judging which claims to pursue and which they do not consider worthy of review. This is not the way that a fiduciary who understands their obligation to provide trust services that are to be judged by "the most exacting fiduciary standards" (See *Minominee Tribe v. United States*, 101 Ct. Cl. 10 (1944)) would behave. This looks more like a fiduciary that is trying to get out from under their fiduciary responsibility, or at least as much as they believe they can get away with. The proposed definition of this type of claim should not be allowed to be forced on Indian account holders.

In addition, the requirement that claims should be only allowed from the "point of their collection (or coming due for collection)" appears to be attempting to eliminate the ability of an allottee or Tribe to bring a claim resulting from the Department's failure to properly review and manage leases and assure that the required appraisals have been performed and that fair market value has been obtained for the use of the trust assets being leased or purchased by any third party from the related Tribe or individual allottees. The proposed language in this section appears to be designed to prevent these

types of claims, but it is most certainly the basis for a claim now and should be allowed in the future. If the objective of the Department is to not be liable for the manner in which they manage the trust assets and resulting additional financial compensation that would have been placed into the trust accounts, then the language in this definition of accounting or funds-related claims appears to achieve that goal. The under valuation and resulting underpayment of royalties, pasture rentals, farm lease or other types of lease income has a definite financial impact on the related Tribe or individual Indian allottee involved. These are quantifiable legitimate claims resulting from actions of the Department that occurred prior to the “point of collection” should be allowed as an accounting or fund-related claim. If not, then how can these types of claims be brought to the Department for resolution? This definition should not be allowed to stand as it is written.

*Part 116.002 **Accounting Standards Manual** means the manual, which may be amended from time to time, that OHTA first released on July 2, 2002, to describe, among other things, the key documents to be used to reconcile trust fund transactions.*

Comments: This Manual is being relied upon to provide “...among other things, the key documents to be used to reconcile trust fund transactions.” First of all, what “other things” will this Manual be relied upon to provide? Secondly, it should be pointed out that this Manual is not being provided to the Tribes or allottees who have been asked to evaluate these draft regulations for comments. The Manual should be made available via the internet, by CD or a hard copy to all those Tribes or allottees who request it. This is not unreasonable given the importance of this Manual in the proposed accounting and funds-related claims process.

*Part 116.002 **Administrative record** means the written documents and evidence that support, explain, provide reasons for, or were considered in issuing an account statement or making the decision that is the subject of objection, review, or appeal, but shall not include deliberative process and other privileged materials.*

Comments: Is this considered to carry the same weight as a court proceeding where there will be “privileged” materials that will not be a matter of the Administrative Record? Of course, there are privacy matters that should not be a matter of public record, but they should be documented nonetheless in the Administrative Record of the deliberations between the two parties.

*Part 116.002 **Assurance** means a reasonable level of confidence in the balance reconciled, reached as a result of reconciliation as documented in the administrative record.*

Comments: How can you have a “reasonable level of confidence in the balance” if the accounts were not audited prior to 1988? The auditors certainly could not, and to this day, do not state that they have confidence in those cash and investment balances of the Tribes and allottees with IIM accounts. If they, who have access to all the records that the Department can make available, cannot have confidence in those balances, then how

can the account holders be expected to agree to have a “reasonable level of confidence...” in them? Any balance resulting from a reconciliation documented in the administrative record will be a compromise or, in many, if not most, instances, a negotiated balance. That will result in a balance that the account holder will settle for, but certainly cannot be expected to have a “reasonable level of confidence” in.

*Part 116.002 **Balance reconciled** means an accurate and reliable balance of a tribal trust account established by mutual agreement between the Department and a tribe or as stated in a historical statement of account.*

Comments: This is unacceptable for all the reasons stated above, but this is an even more outrageous statement since it purports to be “an accurate and reliable balance”. What in the world would be the basis for such a statement? Certainly not as the result of a “mutual agreement” between the Department and the Tribe! It cannot meet the test of an “accurate” much less “reliable” balance, since it will have to be, by definition, a balance that will be arrived at by “mutual agreement”. It certainly cannot be depended upon as a result of the procedures detailed in the Accounting Standards Manual, or in any unreconciled, unaudited, and uncertified (see the language in the American Indian Trust Reform Act of 1994) “historical statement of account” presented by the Department to the account holder. Again, since the auditors cannot have faith in the summary level balances that appear at the financial statement level for the accounts, how can the individual Indian or Tribe be expected to accept the balances resulting from some modified partial reconciliation procedures that were not developed with the input from Indian Tribes or allottees or even reviewed by the Government Accounting Office or the Office of the Inspector General? These balances do not meet the intent of the Statute and should not be forced upon the account holders. Congress stated the ground rules for a “reconciliation report” (see Sect. 304 of Public Law 103-412—October 25, 1994) to be provided to the account holders and this certainly does not meet that requirement. In addition, the Trust Reform Act, in Section 303 (b)(2)(A) Monitor Reconciliation of Trust Accounts, states that, “The Special Trustee shall monitor the reconciliation of tribal and Individual Indian Money trust accounts to ensure that the Bureau provides the account holders, with a fair and accurate accounting of all trust accounts.” The proposed definition of “balanced reconciled” does not appear to meet that criteria. We know that Section 303 (2) (C) Ownership and Lease Data, which states that, “The Special Trustee shall ensure that the Bureau establishes policies and practices to maintain complete, accurate, and timely data regarding the ownership and lease of Indian lands” has not been accomplished as yet. The most recent edition of the Quarterly Report to the Court in the *Cobell v. Norton* litigation states that the ownership data is being addressed now as part of the “trust data quality and integrity” section of the Report on pages 26-27, which does not indicate how many more locations need to be reviewed in order to identify the proper ownership of the trust property. It is reasonable to suggest that there are hundreds, if not thousands, of ownership interests not yet resolved across Indian country. This makes it virtually impossible to arrive at an “accurate and reliable balance” of a Tribal trust account.

Section 116.002 **Decision Maker** means either (a) OHTA's Tribal Branch Chief...(b) OHTA's IIM Branch Chief..., or (c) OST's Deputy Special Trustee – Trust Services...”.

Comments: This should be amended to add, “or (d) a Tribal Council or the relevant individuals authorized by Tribal resolution to negotiate on the Tribe’s behalf, or (e) an individual Indian allottee or IIM accountholder or their legal guardian or ????. The federal government is not the only decision maker involved in this process and this should be recorded in the regulations.