

TO: *Cobell* Trust Commission – Law School Dean & Professor, Stacy Leeds, Chairman.

FROM: Ange Aunko Hamilton, landowner & former ADM (e-mail address: aaaunko@yahoo.com)

DATE: 10/14/2013

RE: Probate Process

In 2000 I was selected as one of the Attorney Decision-Makers (ADM) to adjudicate Indian probates within the Bureau of Indian Affairs (BIA) system under the authority already held by the Agency Superintendents who at that time and in the past had authority to determine heirship not already adjudicated elsewhere. (*RS 2478, as amended, 43 USC §1201, 43 CFR §4.271, Solicitors Opinion of November 30, 1999 – Establishment of Attorney Decision-makers Position in the Bureau of Indian Affairs*).

Briefly, at that time there were approximately 46 different steps that the BIA probate personnel and the Office of Hearings and Appeals (OHA) hearing process had to go thru from the time of the death of a tribal land owner to a final probate order distributing the estate. In addition, OHA ALJs traveled to different parts of Indian Country only during good weather, thus sometimes going to certain agencies once every two years. As a result, a tremendous backlog was building. In 2000, the ADM's were told at our initial training (August 2000) that approximately 13,000 probate case were backlogged in the system. Thus the need for an alternative process to expedite probate, especially cases, which for example had 60 cents in the IIM or had land shares of 550/4000 (highly fractionated).

The ADM's were used to adjudicate only "Summary Judgment" type cases, no issues of law or fact; and which were simple: wherein survivors were a mother with two kids, etc. In subsequent regulations of 2002 - 03, the ADM regulations were changed to include uncontested wills, land issues, creditor's claims. If a controversy arose, at the hearing, i.e. paternity issues, will contest, land dispute, the case was then transferred to the OHA ALJ servicing that region for a full trial on the merits.

Also, to expedite the probate process, the ADM, with a staff of 1 paralegal & 1 or 2 legal assistants, was located in the BIA Regional Office to provide easier and quicker access to hold the informal hearings at the satellite agencies.

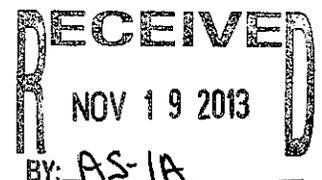
As you will see in my submission of the BIA's "Indian Probate Reinvention Lab" Final Report (which I will mail, but which you may already have), a 46 step probate process was whittled down to the current 19 step probate process.

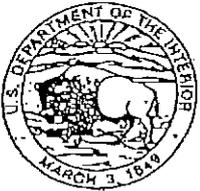
One OHA ALJ hearing can cost an enormous amount of federal dollars (one guestimate included ALJ/staff man hours, offices expenses, travel costs to remote area; and possible need for subsequent hearings). Each hearing cost outweighing the benefit for incalculable highly-fractionated land cases and miniscule IIM accounts cases.

In summary, I believe that new ways of thinking regarding highly fractionated land issues need to be forthcoming – "out of the box" thinking. The dire need is now, but let us not wait until a critical juncture occurs or the money runs out to do these probates and it is forced upon our Indian people without notice and input.

I commend the Trust Commission for its work and hope that our *Cobell* funds can be used for the resolution of this issue for the future of our tribal populations.

- Respectfully submitted. *A.A.H.*





United States Department of the Interior

OFFICE OF THE SOLICITOR

Washington, D.C. 20240

NOV 30 1999

Memorandum

To: Assistant Secretary - Indian Affairs

From: Karen Sprecher Keating, Associate Solicitor, Division of General Law *per* *Samuel S. Elliott* 200

Re: Establishment of Attorney Decision-maker Positions in the Bureau of Indian Affairs

Your request of August 30, 1999, discussed the proposal to hire attorneys as examiners/decision-makers in Indian probate cases ("Proposal"). These attorney decision-makers would determine the heirs of a decedent without a hearing, although any interested party could obtain a hearing at any point in the process. This proposal was one of the re-invention proposals designed to streamline the disposition of Indian probate cases. We conclude that 25 U.S.C. § 372 does allow the use of attorney decision-makers, as proposed, rather than administrative law judges ("ALJs") to determine the heirs of decedents in simple cases, and that the process will not violate the due process rights of any potential heirs. We do not address whether ALJs must hold the hearing if one is requested, since that question was outside the scope of your request.

Issues Presented

There are two issues raised by this Proposal. The first issue is whether 25 U.S.C. § 372 requires the Bureau of Indian Affairs ("BIA") to use a hearing to determine the heirs, and involves an examination of 25 U.S.C. § 372, the implementing regulations and the formal hearing requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. § 554(a). The second issue is whether a potential heir's due process rights will be abrogated by the elimination of a hearing.

The Proposal for Attorney Decision-makers

As described in your memo, the Bureau of Indian Affairs would establish a procedure for the probate of cases without any factual disputes and without any major legal complexities. Attorney decision-makers would issue written decisions based on the record submitted by BIA probate specialists. No hearing would be held. The BIA would provide a notice to all identified potential heirs, and place notices in the local newspapers and other locations to notify potential unidentified heirs. The notices would inform the parties of the new process and inform them of their right to request a hearing before an administrative law judge at any time before the attorney decision-maker issues a decision. In addition, any party aggrieved by the decision would have the right to appeal the decision to an administrative law judge. It is unclear if the Proposal would require an aggrieved party to appeal to an administrative law judge before judicial review, or if the decision from the attorney decision-maker could be appealed in court directly.

The History of the Indian Probate Hearings Examiners

The determination of heirs has been regarded as a judicial or quasi-judicial function, which was performed by the courts prior to an Act of Congress in 1910 conferring this function upon the Department of the Interior. Between 1947 and 1954, hearings examiners¹ performing Indian probate work were recruited, examined and certified pursuant to the provisions of the APA. From 1954 to 1967, at the request of the Department, Congress granted a yearly exemption from the APA requirements for hearing officers². The exemption removed the hearing officers from the qualification and experience standards for ALJs set out in the APA. This made the positions easier to fill, which reduced the backlog of unprobated cases. In 1967, Congress permanently exempted the Indian probate hearing officers from the requirements of the APA. In 1990, Congress repealed the exemption, and, by law, "grandfathered" into the ALJ corps all Indian probate hearing officers who met the ALJ requirements. Pub. L. 101-301 § 12(b), 104 Stat. 211 (1990).

Does 25 U.S.C. § 372 Require a Formal, Oral Hearing for All Indian Probate Cases?

The Statute and Regulations Addressing Indian Probate Cases: Section 372 addresses the ascertainment of heirs of Indian estates and the settlement of the estates involving trust lands. It addresses the determination of heirs, stating that "... the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decisions shall be subject to judicial review. . . ." 25 U.S.C. § 372 (1999 Supp.).

There are two interpretations of the 1990 amendments that grandfathered the hearings examiners into the ALJ corps. Arguably, the repeal of the exemption allowing persons other than ALJs to decide Indian probate issues indicates Congress' desire to have all Indian probate cases decided by ALJs. On the other hand, a good argument can be made that while Congress decided to grant ALJ status to the hearings examiners, Congress did not state that only ALJs could make the determinations of heirs and in fact stated that the Secretary could prescribe rules to guide the determination. We subscribe to this argument; therefore, we interpret the statute as meaning all interested parties should have a fair chance to present their views but the statute does not govern the precise manner in which that should happen.

The 1990 amendments also changed the second part of the sentence in 5 U.S.C. § 372 which requires the Secretary to ascertain heirs, to clarify that the decision of the Secretary determining the legal heirs is subject to judicial review. At the same time Congress could have amended the

¹The title "hearing examiner," used by the APA, was changed to ALJ in 1978. Pub. L. 95-251, § 3.

²Congress seemed to have used the term "hearing officer" as synonymous with "hearing examiners".

first part of the sentence to make clear that all decisions concerning the heirs of Indian decedents must be made by an ALJ, but did not. Another indication that Congress did not intend that ALJs make all determinations of heirs is that a number of other important determinations in the Indian probate process do not require formal hearings. For example, the section following 25 U.S.C. § 372 concerns the distribution of Indian property by will. It does not mention a hearing at all, much less one on the record. 25 U.S.C. § 373.

The regulations governing Indian hearings and appeals address the procedural rules for settlement of trust estates of Indians who die possessed of trust property. 43 C.F.R. §§ 4.200-4.357. One function of the ALJs is to determine the heirs of Indians who die intestate and own trust property. The regulations state that the ALJs "shall" determine the heirs, 43 C.F.R. § 4.202, 4.240. If the Proposal is adopted, this regulation would have to be changed. The regulations grant the ALJs the same powers generally conferred by the APA, such as authority to administer oaths, issue subpoenas, take and cause depositions to be taken, etc., 43 CFR § 4.230 *et seq.* However, there is an exception to the regulatory requirement that an ALJ determine the heirs. Section 4.271 allows the Superintendent to assemble the heirs, hold an informal hearing, and make decisions on the distribution of property when an Indian dies intestate and the value of the trust personal property is less than \$1000. 43 C.F.R. section 4.271. The regulation has recently been amended to increase the value to \$5000 and clarify that any interested party has the right to appeal the Superintendent's decision to the Board of Indian Appeals. This regulation allowing a non-ALJ to make determinations of heirs for distribution of personal property has been in place since 1971.

From our reading of the statute, our view is that while Indian probate cases can be decided by the ALJs, the process envisioned by the Proposal is also valid if the regulations are amended. The Proposal constitutes a voluntary, alternative process that does not eliminate the need for the ALJs but is parallel to the ALJ process that will be used on the more complex cases and cases in which parties desire a hearing.

The APA: The APA is relevant to this proposed process. Sections 553 (c) and 554(a) of the APA address certain hearings and the procedures the agency must follow in conducting those hearings. 5 U.S.C. § 553(c), 554(a). Section 553 addresses rulemaking and section 554 addresses adjudications. When adjudications or rules are required by statute "to be determined on the record after opportunity for an agency hearing," 5 U.S.C. § 553(c), 554(a), then the APA provisions on formal hearings apply. The APA provisions on formal hearings provide that the presiding officer shall be an ALJ and require evidentiary hearings that include the right of parties to present evidence, conduct cross-examination and rebut evidence. 5 U.S.C. §§ 557-558.

A line of APA cases addresses the applicability of formal hearings to rulemaking and can be extended by analogy to adjudications, assuming, for the sake of argument, that there are not due process concerns (which are addressed in the next section). The courts have consistently held that the formal hearing provisions apply only when the statutes requiring promulgation of rules used the exact language of "on the record after opportunity for an agency hearing." In United

States v. Florida East Coast Railway Company, 410 U.S. 224, 240-241 (1973), the Supreme Court held that the Interstate Commerce Act, § 1(14)(a), requirement authorizing the Commission to act "after hearing" was not the same as a requirement that a rule be made "on the record after opportunity for an agency hearing," since the Interstate Commerce Act provision had been amended after the enactment of the APA and the statute did not suggest that the informal rulemaking requirements in the APA § 553 were not adequate. Therefore the Supreme Court held that reference to the APA to determine the meaning of a provision for a hearing in another statute was reasonable since the APA deals with questions such as the nature and scope of hearings. In the Florida East Coast Railway Company case, interested parties were given notice and the opportunity to comment, object, submit, or make other written recommendations. In addition, the Commission was willing to consider proposals for modification of the rules after experience had been gained with them. Due to these factors, the Supreme Court held that notice and submission of written evidence satisfied the conditions for the Commission to act "after hearing." 410 U.S. § 240. See also, National Classification Committee v. U.S.; 765 F.2d 1146, 1150 (D.C.Cir. 1985). However, the Supreme Court cautioned in the Florida East Coast Railway Company case that in some circumstances, additional procedures may be needed in order to afford aggrieved individuals due process, when a small number of individuals are impacted by the rulemaking. 410 U.S. § 245-46. We feel this is addressed by the due process procedures described below².

The language in 25 U.S.C. § 372 requiring the Secretary, "upon notice and hearing," to determine the heirs does not require the hearing be "on the record" with an ALJ. The statute does not match the language in 5 U.S.C. § 554(a) which requires adjudication according to the formal hearing requirements of 5 U.S.C. §§ 557 and 558 when statutes require adjudication "on the record after opportunity for an agency hearing." It is analogous to the language in the Interstate Commerce Act which did not require a hearing "on the record" for rulemaking under the Act, and therefore it is arguable that the language in 25 U.S.C. § 372 does not require formal hearings with ALJs due to the lack of language "on the record."

²There is a case dealing with adjudications where the Supreme Court required the Securities and Exchange Commission to provide formal disciplinary hearings pursuant to 5 U.S.C. § 557 and 558. Steadman v. Securities & Exchange Commission, 450 U.S. 91 (1981). The disciplinary hearings were pursuant to two provisions of the Securities and Exchange Act that required "an opportunity for [an agency] hearing;" one provision required a hearing "on the record" and one provision omitted the terms "on the record." The court held that both provisions required a formal hearing due to the "on the record" language, the express provision for a hearing, and the fact that the disciplinary hearing was the final agency action which would create the record to be reviewed by the courts. 451 U.S. 96. In this Proposal, the attorney decision-maker would not be the final decision reviewed by the courts because any aggrieved party could appeal to an ALJ before judicial review. We think this case is distinguishable on these facts; however, we recommend that the regulations providing for this process state that a party must appeal to the ALJ to exhaust administrative remedies.

Even assuming arguendo that 5 U.S.C. § 372 requires a formal hearing with an ALJ, the proposed process meets that standard due to the right to request a formal hearing with an ALJ at any point in the process and the right to appeal the decision of the attorney decision-maker to an ALJ.

In combination with the lack of intent by Congress to require formal hearings and the line of APA cases requiring "on the record" to trigger the formal hearing requirements, we conclude that it is permissible to decide the cases without an ALJ, subject to the rights of appeal and the right to request a hearing at any point in the process.

Will the Proposal Eliminate Due Process Rights?

We do not address whether a potential heir has a property right to due process in the determination of heirs of a deceased Indian, because regardless, the Proposal does give due process rights to all potential heirs. As described above, the proposed process will give notice to all potential heirs; it will allow any interested party to request a full hearing; it will result in a written opinion; and it will allow any aggrieved party to appeal the decision to an ALJ, the Board of Indian Appeals and the Federal Courts, if desired. We assume that the procedures for notice that the attorney decision-maker will follow are the same procedures as are now set out in the regulations in 43 CFR §§ 4.211-4.212.

The fundamental requirement of due process "is the opportunity to be heard at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (internal quotations omitted). The Supreme Court has stated that due process is flexible and "calls for procedural protections as the particular situation demands." Mathews, 424 U.S. at 334. See also, Cleveland Bd. of Public Education v. Loudermill, 470 U.S. 532, 542 (1985); Edelman v. Western Airlines, 892 F.2d 839, 846 (9th Cir. 1989). In the Mathews case, the Supreme Court laid out three factors to evaluate in an examination of due process rights: how private interests are affected by the process; the risk of erroneous deprivations of these private interests through the procedures; and the government's interest, including the administrative burdens that additional process would require. Mathews, 424 U.S. at 335. In Mathews, the Court addressed the process for the termination of Social Security disability benefits where the payments could be terminated after an initial process, for up to a year, during the appeals process. The Supreme Court found written submissions would adequately provide for due process rights where the written materials would be of greater value than oral testimony. The court also found that the burden of additional hearing requirements weighed in favor of the written process." Mathews, 424 U.S. at 345.

Here, the proposed process would possibly impact potential private interests; however, that factor is outweighed as there is no risk of erroneous deprivation of rights as all parties will have all the same procedural rights. The attorney decision-maker will follow the same requirements for notice set out in the regulations so all potential interested parties will have a chance to respond; at any time all parties may request a hearing or that the case be decided by an ALJ. After the decision is issued by the attorney decision-maker, any aggrieved party will have the right to

appeal to an ALJ. The advantages of the attorney decision-maker system will inure to both the government and potential heirs as the backlog of cases is reduced thereby allowing cases to be decided sooner.

Conclusion

We conclude that the BIA may establish a process with attorney decision-makers to determine the heirs of deceased Indians who own Trust property. The procedure should require the attorney decision-maker to follow the same procedures for notice as set out in the regulations at 43 CFR §§ 4.211-4.212 and should apprise all parties of their rights to ask at any time for a hearing by an ALJ or appeal the decision to an ALJ. We also recommend an amendment to the regulations that would allow the attorney decision-maker to determine heirs, similar to 43 CFR § 4.271 and recommend that the regulation address the appeal of the decision from the attorney decision-maker.

United States Department of the Interior
Bureau of Indian Affairs
Office of the Attorney – Examiner of Inheritance
115 Fourth Avenue, SE
Aberdeen, SD 57401

Memorandum

Date: September 14, 2000
From: Marvin Stepson, ADM 
Subj: Summary Distribution Authority
To: File

1. The following is the authority for the summary distribution of the estates of Indians who die intestate and without trust property, leaving an IIM account of less than \$5,000.00, excluding interest.
2. Authority: RS 2478, as amended, 43 USC § 1201, 43 CFR § 4.271
3. By this authority, the Superintendent, now the ADM, is to assemble the apparent heirs for an informal hearing, now a summary distribution conference. The purpose of this conference is to determine the proper distribution of the estate. A memorandum covering the conference is to be retained in the Agency files. The memorandum is to show (a) the date of death; (b) the date of the hearing; (c) the persons notified and attending the conference; and, (d) the amount on hand and its distribution.
4. Creditors' claims, if any, are to be disposed of as provided by §§4.250 and 4.251. The balance remaining, if any, is to be credited to the legal heirs.
5. It is my opinion that 43 CFR 4.271 applies to those who died on or after August 23, 1999.

The following is the authority for the summary distribution of an Indian who dies intestate leaving only personal property or cash of a value less than \$1,000.00, excluding interest:

Authority: 43 CFR 4.271

It is my opinion that this section applies to those Indians who die intestate prior to August 23, 1999.

The Superintendent's or ADM's authority for an informal hearing is essentially identical to that of paragraph 3 above.

cc: Ange Hamilton
Carey Griffin
Cheryl Sam

Executive Summary

The Probate “to be” working group recommended consolidating the existing probate Deciding Officials from the Bureau of Indian Affairs (BIA) and from the Office of Hearings and Appeals (OHA) into one adjudication unit. Previous trust reform measures designed to speed up probate case processing and reduce the backlog of probate cases resulted in the creation of the BIA Attorney Decision Maker (ADM) Program; which is governed by regulations set out at 25 CFR Part 15, adopted in 2001. The Administrative Law Judges (ALJ’s) and Indian Probate Judges (IPJ’s) in the OHA are governed by regulations in 43 CFR.

The current options for the consolidation include:

1. Moving OHA ALJ’s and IPJ’s into the BIA;
2. Creating a new adjudication unit to report to the Assistant Secretary; and
3. Moving the ADM program into OHA.

The Attorney Decision Makers support the first option for the following reasons: 1) Indian Preference in hiring (created by Congress and upheld by the U.S. Supreme Court to give Indians more control over decisions which affect only Indians, because of their unique political status as Indians); 2) Moving the ADM’s into OHA would threaten progress made under Probate trust reform, by returning control and placement of the Indian Probate process back under an organization and structure which did not work; and finally 3) the combined budgets for the ADM program and the OHA are already in BIA’s budget and this option is the most cost effective alternative in a year when all agencies are being asked to take a significant budget cut.

Indian Preference, especially in the critical area of Indian Probate which affects Indians because of their unique political status as Indians, gives Indians more control over a process which primarily affects Indians and their families. This supports the Congressional Policy of Indian Self Determination and has been upheld by the U.S. Supreme Court. Indian decision makers conducting hearings to probate Indian trust and restricted property estates are more likely to be competent in cultural communication and respectful of the cultural practices and beliefs of Indian people. The majority of Attorney Decision Makers are members of the Indian Tribes they serve, have experience working with legal issues in Indian Country, and have received a positive response from their Indian clients.

There is broad consensus that the former structure, governed solely by OHA and regulations in 43 CFR was neither appropriate to, nor efficient in, the probate of small and uncontested Indian trust/restricted property estates. The ADM program, created as part of trust reform, has demonstrated efficiency in both case processing times and adjudication costs per case. Faster adjudication at a lower cost reduces the existing probate backlog (which developed under OHA’s lengthy administration) and addresses concerns raised by litigants in the Cobell case.

Budget concerns, which cannot be determinative of a change which does not address Indian Concerns for continued probate reform, weigh heavily in favor of moving the process into BIA, which has already demonstrated efficiencies in both processing time and volume and in cost per case by moving only the uncontested case adjudication into the Bureau. Attacking the probate backlog in a culturally appropriate, more efficient and cost effective manner is a win/win solution which should be adopted by the Bureau, especially in light of the current budget climate.



United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

AUG 30 1999

To: Solicitor

From: Assistant Secretary-Indian Affairs *Kevin Gades*

Subject: Request for Opinion: On the Constitutionality of Establishment of Attorney-Decision-maker Positions in the Bureau of Indian Affairs

This is a request for a legal opinion on a proposal to hire attorneys as examiners/decision makers in Indian probate cases. The proposal is one of several recommendations made by the Department's Indian Probate Re-invention Lab. The re-invention team members spent several weeks reviewing and analyzing the Indian probate process to determine what processes and workflow procedures could be streamlined to facilitate the timely and efficient disposition of Indian probate cases.

The establishment of attorney decision makers was one of several processes identified and recommended under the re-engineered Indian probate process. These decision makers will hear only those cases without any disputes as to the facts and without any major legal complexities. A notice will be provided to all identified potential heirs. Unidentified potential heirs will be notified through publication in local newspapers and posting of the notice in other public locations. The notice will inform the parties that, under a new process, the BIA attorney decision maker will determine the heirs of a decedent on the record provided to him or her by the BIA probate specialists. No hearing will be conducted and the decision maker will issue a written decision that will be provided to all interested parties.

It is important to note however, that parties will be advised of their right to request a hearing before an administrative law judge at any time before a decision is made. Moreover, any party aggrieved by a decision will have the right to appeal the decision to an ALJ.

An issue has arisen as to whether potential heirs and other interested parties have a right to a hearing before an Administrative Law Judge (ALJ) pursuant to 25 U.S.C. §372, which authorizes the Secretary, upon notice and hearing, to determine the legal heirs of Indians. The new process would eliminate hearings in probate cases if all the parties agreed to use the decision maker process. We are interested in ensuring that the new process meet the constitutional requirements of due process and does not violate any interested party's constitutional rights. We are therefore requesting an opinion on the constitutionality of the proposed new Indian probate process and the use of attorney decision makers to decide probate cases on the record and without a hearing.



IN REPLY REFER TO:

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS

Washington, D.C. 20240

30 November 1999

Note

To: Kevin Gover
Hilda Manuel
Nancy Jemison
Art Geary

From: Harriet Brown 

Subject: Solicitor's Opinion on Attorney Decision-Maker Positions

Attached please find a copy of the Solicitor's Opinion we requested on August 30, 1999 regarding the proposal to hire attorneys as examiners/decision-makers in Indian probate cases. The Opinion notes that: (1) the BIA may establish a process with attorney decision-makers to determine the heirs of deceased Indians who own Trust property; (2) the attorney decision-makers should follow the same procedures for notice as established in 43 CFR parts 4.211 - 4.212; and (3) regulations should be amended accordingly, similar to 43 CFR part 4.271, while also addressing the appeal process.

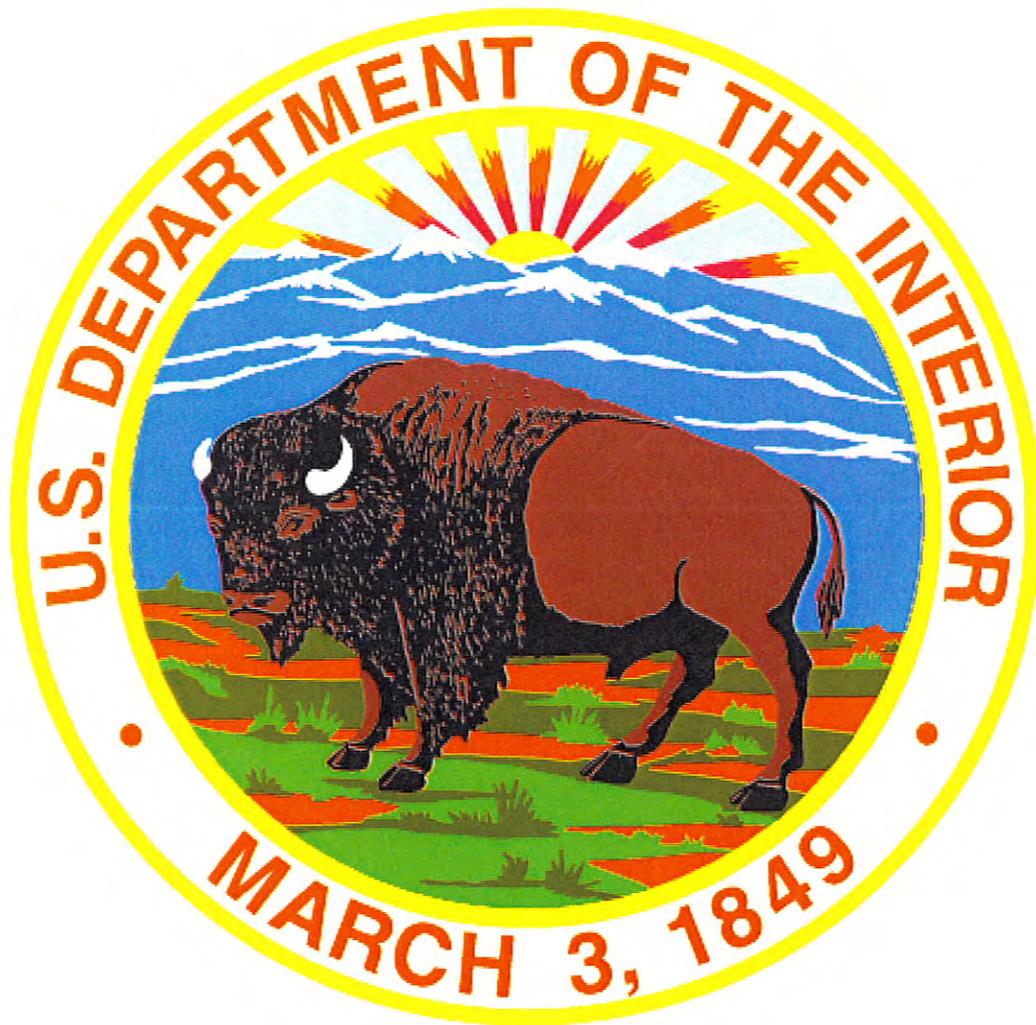
As a result, I am asking my staff to work with the Policies and Procedures Office to develop a work plan to address these regulatory changes. I will also be sharing this opinion with the Office of Hearings and Appeals and the Reinvention Lab coordinators.

Attachments

*Commission to
Look @ Probate Process*

INDIAN PROBATE REINVENTION LAB

FINAL REPORT



JULY 1999

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Executive Summary

The Department of the Interior's Indian Probate Reintervention Lab (IPRL) was formed and tasked with evaluating and redesigning the Indian probate process ensuring timely preparation of cases, adjudication of ownership, and distribution of trust property, so heirs promptly receive trust assets and income to which they are legally entitled.

The team consisted of representatives from the Bureau of Indian Affairs (BIA), the Office of Hearings and Appeals (OHA), the Office of the Solicitor, the Office of Financial Management, and the Department of Veterans Affairs. The Indian Probate Reintervention Lab members reported to a Management Advisory Group made up of senior level managers with the authority to implement change.

The IPRL examined the integrated Indian probate process from a multi-agency perspective of the BIA, OHA, and Office of the Special Trustee for American Indians (OST). IPRL's review of OHA and OST was limited. The IPRL reviewed reports from previous studies concerning Indian probate matters, conducted site visits, interviewed customers and employees, benchmarked practices, analyzed the existing probate process, designed and tested elements of the new probate process, and developed recommendations for implementation.

The IPRL found that with limited resources and competing priorities, responsibilities other than Indian probate often are given a higher priority; training is needed to address inconsistent practices; and the current process is slow and inefficient. Customers voiced concerns that probate cases are processed too slowly and their questions often are not answered promptly and clearly. Furthermore, they questioned the necessity of a fifteen minute hearing when time constraints did not allow them to ask questions. While we recognize that hearings can generally last from five minutes to one hour, we observed that many were scheduled for fifteen minutes. Customers also stated that they are frequently not treated with courtesy and respect.

Several of the key recommendations are identified below.

1. Establish BIA Attorney Decision-Maker positions at area-level offices, and re-establish OHA offices in Billings and Aberdeen areas. Based on criteria to be developed, Indian probate cases will be forwarded to and decisions will be rendered by Agency Superintendents, local BIA Attorney Decision-Makers, or OHA Administrative Law Judges (ALJs).
2. Link OHA, BIA, and OST with a central nationwide probate case tracking system to reflect the status of each probate case from notice of death through distribution of trust assets and closure of estate.
3. Develop standardized practices and utilize automation to streamline the process and enhance efficiency. A revised electronic Form OHA-7 (Data for Heirship Finding and Family History) should be available nationwide for mandatory use.

4. Develop an Indian probate web site which includes information on estate planning, questions and answers on the probate process, a will-preparation kit, other forms, and applicable regulations.
5. Establish one to three temporary Indian Probate Backlog Elimination Teams (similar to SWAT teams) to eliminate the current probate backlog in the three areas with the largest backlogs.
6. Develop performance measures for evaluating all positions involved in processing Indian probates to ensure accountability.

Benefits of implementing the IPRL's recommendations and streamlining the process include reduction in processing time by years, reduction in the Government's administrative and interest costs, automation of information gathering, better customer service, and more fully complying with fiduciary obligations.

Extend the IPRL to focus on streamlining the Indian probate process within OHA. This effort will help to expedite the streamlining of the probate process. An implementation team should be established immediately to put into effect approved recommendations.

1.0 Background

1.1 Introduction

The allotment system, when instituted in the 19th century, was expected to be a quick means of assimilating Indians into the agricultural economy of the day. Tribal lands were parceled out to individuals in trust with the expectation that within a few years these individuals would become successful farmers and the land would be removed from trust status. As it turned out, the period of time that the land was held in trust was prolonged, but no federal system of inheritance was thought to be necessary. Consequently, these trust lands passed from generation to generation. The Department of the Interior (DOI) developed a system of inheritance. This system was initially applied on an *ad hoc* basis, and then later through formal law making. An explanation of the legal development is found at Appendix II.

1.2 The Probate Backlog

As the number of undivided interests in allotted land increases, the Department's trust responsibilities for estate administration and probate also increase. However, the resources available to effectively manage the associated trust responsibility have decreased. The current shortage of qualified probate personnel, funding and system resources, and the priority given to other programs, have joined forces to create a serious backlog in estate administration and probate. Currently, there are approximately 7,800 probate files in BIA that are over 90 days old and now considered backlog because they have not been sent to OHA for hearing. In OHA there are approximately 4,300 probate cases "pending." Unless dramatic action is taken to eliminate the "probate backlog," the situation will only be expected to grow. The action required must address both the existing backlog and the current probate process. Such actions are essential to

ensure the optimum integrity and usefulness of the systems of ownership accountability, distribution of income and land title maintenance.

2.0 Purpose of the Indian Probate Reinvention Lab

The IPRL was established to evaluate and redesign the Indian probate process ensuring timely preparation of cases, adjudication of ownership, and distribution of trust property so heirs receive trust assets and income to which they are legally entitled in a timely manner. The “Charter” that was developed to achieve the purpose of the Lab is provided in Appendix I.

3.0 Scope of Effort

The scope of this re-engineering effort included an evaluation of the Indian probate processes in the BIA. It does not include a review of OHA and OTFM. However, a limited review was made of selected activities in the process where interfaces occur with OHA and OTFM. The primary focus of the review was on the activities of the probate staff. There was no attempt to formally evaluate workload. The work steps currently being performed were evaluated for their effect on the probate process, staff time, and customers. The team accepted conclusions from previous studies that a backlog does exist and felt that it was not within the purview of this effort to verify the actual number of backlog cases.

The report does not include estimated data for possible staffing patterns. Any estimates used in the report are also not intended to be used to develop staffing levels and budget estimates. Any budget and staffing data used in this report were used by the team only as reference points for developing costs to compare the current process with the re-engineered process.

4.0 Methodology – Technical Approach

The team consisted of seven members drawn from Department of the Interior bureaus and offices and a representative from the Department of Veteran Affairs. A facilitator from the DOI Office of Planning and Performance Management was provided. The following Table summarizes the make-up of the team:

**Table 1
Organizational Composition of Indian Probate Reinvention Lab Team**

Department/Office	Total Personnel
Department of the Interior – Bureau of Indian Affairs	4
Department of the Interior – Solicitor’s Office	1
Department of the Interior – Office of Financial Management	1
Department of the Interior – Office of Hearings and Appeals	1
Department of Veteran Affairs	1

The first workshop and training in re-engineering methods occurred the week of February 22, 1999. Several meetings and telephone conferences of the entire group were held. The full team periodically met with the Management Advisory Group to discuss preliminary findings and receive guidance.

Much of the work of the team was accomplished by subgroups and individual team members conducting assigned tasks and then reporting to the entire committee for a vote of consensus. Previous in depth studies related to probate issues and Supplement 8 of the BIA Manual, were reviewed for background information.

A detailed data flow of the current process of preparing files for adjudication was made. It was then analyzed to identify nonessential repetitive steps, and hand-offs. From this analysis, as well as the existing intimate knowledge of the process possessed by team members, a streamlined, "re-engineered" probate process was developed. This process substantially reduces the numbers of steps and hand-offs required for completion of a probate action.

Other potential sources of necessary data for probate actions, such as the Department of Veterans Affairs and the Social Security Administration were identified. Such potential information sources may be leveraged through Memoranda of Understanding and thus enhance the gathering of information.

Team members conducted site visits to various BIA area and agency offices, a tribal office, a Self Governance office, and an Administrative Law Judge's office. These visits occurred in Arizona, South Dakota and Oklahoma, allowing team members to observe the range of practices used in preparing probate files for adjudication. The team tested data gathering and the nationwide notification of death under the proposed revised process. Observations concerning potential standard practices were made.

For the purpose of bench marking alternative practices, a site visit was made to the Office of Register of Wills for Montgomery County, Maryland. This visit provided the opportunity to review the non-Indian probate process, along with standard forms and instructional materials for the public about the process of administering estates in Maryland. In addition, two team members are knowledgeable about non-Indian probate processes in other jurisdictions and information was gathered from the internet and library research.

5.0 Findings and Discussion

Site visits to BIA agencies revealed a lack of probate clerks dedicated specifically to probate work. OHA offices do not have ALJs dedicated to hearing only Indian probate cases. It was also found that there is inconsistency in accountability for the timely processing of probate cases.

Performance measures have not been established for all personnel involved in processing Indian probates. Probate processing is generally considered a collateral duty at BIA. The BIA has not conducted a nationwide Management Control Review of the probate program for approximately seven years. Probates are not a priority at the field offices.

Currently, BIA probate clerks are in the entry-level clerical series. This BIA position classification, does not reflect the experience and skill levels required to adequately perform the duties of the job. Training is not provided for employees in probate processing, estate planning, and the drafting of wills. In an interview with a probate clerk with ten years experience, it was learned that the individual had never received any formal probate training. This team concluded that a probate clerk position should be classified to exceed the entry level for clerical positions. Such personnel should also receive assignments and training that ensures their potential advancement to qualify as a Probate Specialist. Such a strategy would provide for a career ladder and ensure the retention of valuable, skilled, and trained probate personnel.

Overall morale is low among the BIA probate employees. This is a result of the immense workload, a continuing lack of training and a chronic shortfall in staffing. In addition supervisory support and program funding do not provide for upward mobility or job promotion incentives. Poor physical working conditions such as insufficient office space, the non-availability of work enhancing equipment, locking filing cabinets and safes, and buildings that are in dire need of maintenance, repair and renovation all combine to create an unsatisfactory work environment. Offices lack the basic equipment to effectively perform the probate task. The lack of staffing at the agencies causes the probate staff to have additional collateral duties. Often these amount to doing the job of the office administrative clerk, such as answering the phones for the office. All of these factors contribute to the low productivity and are manifested in the large probate backlog.

Many Indian probates are delayed because the BIA has not been able to locate or obtain the current addresses of some of the potential heirs. Current addresses are needed to properly notify potential heirs that a probate hearing on the estate is being held. To implement the new probate process the BIA must develop new resources of information to collect data for contacting potential heirs.

Processing and record keeping standards vary from agency to agency. Agency probate clerks that lack will preparation software are currently drafting wills manually. Several agencies are not properly securing wills and related documents. At one agency visited, the wills were stored in unlocked file cabinets and the office was left unlocked at the close of business. At another agency, the superintendent stated that approximately 100 wills were missing and presumed stolen. The probate staff has replaced approximately 40% of these, had the wills been properly stored and secured, this situation would not have occurred.

There are not enough ALJs who adjudicate Indian probate cases at OHA. Based on the Inspector General Report dated June 4, 1996, the total number of ALJs was reduced from twelve to nine and offices were consolidated into regional areas. The consolidation of the OHA offices removed ALJs from the two BIA areas that have the largest populations, most reported deaths, and the largest fractionation of ownership. Due in part to this loss, probate hearings at some locations are now held only every 12 to 18 months, and hearings are scheduled for an average of fifteen (15) minutes. Customers question the necessity of holding hearings on every case. Customers stated that they might as well not have a hearing if they only have 15 minutes in which to testify. This new organizational structure does not allow ALJs to be located near the BIA offices and requires additional travel time and funding. As a result, some OHA offices now conduct hearings only after 50-80 cases have accumulated. In the current situation, an ALJ can

hear approximately 300-320 probate cases per year. Nine ALJs can hear approximately 2,700 probate cases per year. Some agencies have 25-30 deaths reported each month. Overall, approximately 3,000 probate cases are submitted annually. There is currently a backlog of approximately 7,800 cases in the BIA and approximately 4,300 pending cases in OHA.

Backlog information is based on estimates and underlying data supplied by bureaus and offices. There is no uniform definition of backlog. For example, the BIA defines as backlog any probate package that has not been completed and forwarded to OHA within 90 days. OHA does not even use the term backlog, but considers any case that has not been decided within 18 months from the date of receipt in OHA to be pending. OHA is considering changing its criteria for pending to cases that have not been decided within 12 months of the date of receipt. This lack of consistency in defining backlog impacts the reliability of the statistical data. For example, the team was informed that some superintendents are not doing summary distributions or not doing them in a timely manner. In some cases, the summary distributions are improperly being forwarded to the ALJs. The team was informed that there are 19 pending summary distributions that have been sent to ALJs and should be returned.

The existing probate backlogs in BIA and OHA will continue to grow unless a separate, independent, probate backlog elimination team is developed to work solely on a cleanup effort.

The OST/OTFM is an integral part of the probate process. The Individual Indian Monies (IIM) accounting clerks were contacted by the IPRL at the various sites visited. It was noted that there are inconsistencies regarding how IIM accounts are managed and paid out. Also, it was observed that the management codes are not maintained and current.

At some locations, IIM accounting clerks interpret the ALJs' Order Determining Heirs and Distribution of Assets, prepare journal vouchers, and make distribution. In other locations, BIA probate personnel interpret the ALJs' Order Determining Heirs and Distribution of Assets, and prepare journal vouchers, and OTFM IIM employees distribute the money. The latter process provides a check and balance system. Accounting clerks do not have the requisite knowledge and skills necessary to interpret the intricate and complicated orders.

The current probate process needs to be streamlined. There are approximately 65 steps in the process, and these create excessive and unnecessary document review and surname requirements that add no value to the process. Rather, these unneeded steps simply create points of delay and consequently lengthen the probate process. For a detailed review of the current process refer to Appendix III.

Automation levels and record keeping methods vary from agency to agency. Data gathering is neither automated nor systematized. Many probate cases were identified where all data gathering efforts had been exhausted but the file remains incomplete. It appears that these cases will never be closed because there are no guidelines for closing cases under the current probate process. Any given probate may take between three and six years to complete. There is no nationwide distribution of death notices nor a tracking system for probate cases.

6.0 Re-engineered Probate Process

The following is a description of the new process for probating Indian estates. The objective is to make the process more efficient so the heirs of a decedent receive the assets held by the United States for their benefit in a timely fashion. The new process will reduce the number of hand-offs of the probate case file from approximately twenty to three, while the number of steps to complete the processing of a probate case will decrease from approximately sixty-five to nineteen.

Notification of death will be received at the decedent's home agency from a variety of sources. As soon as the death is reported, the probate staff will initiate a search of data sources to verify the death, including personal contact with decedent's family, funeral homes, newspapers, etc. The probate staff will provide the family with a "Customer Probate Process Handbook," which will guide them through the probate process. The probate file will be established containing all relevant documentation.

The probate staff will enter death notification into the nationwide case management tracking system. This notification will alert the various action offices to provide information regarding the decedent and his trust holdings to the home agency. IIM staff will place a hold upon the decedent's IIM account(s) and change the status to "estate," and if necessary forward decedent's funds to the home agency. BIA's Land Titles and Records Office (LTRO) will generate an automated inventory of the decedent's interests in real property that is being held in trust and change the status of decedent's ownership to "estate". BIA realty personnel will change the status of leasing records to "estate" and notify lessees of the home agency address for rental income payments. Each action office will forward documentation of the action taken to the decedent's home agency. The probate staff will review, verify, and place this documentation in the probate file.

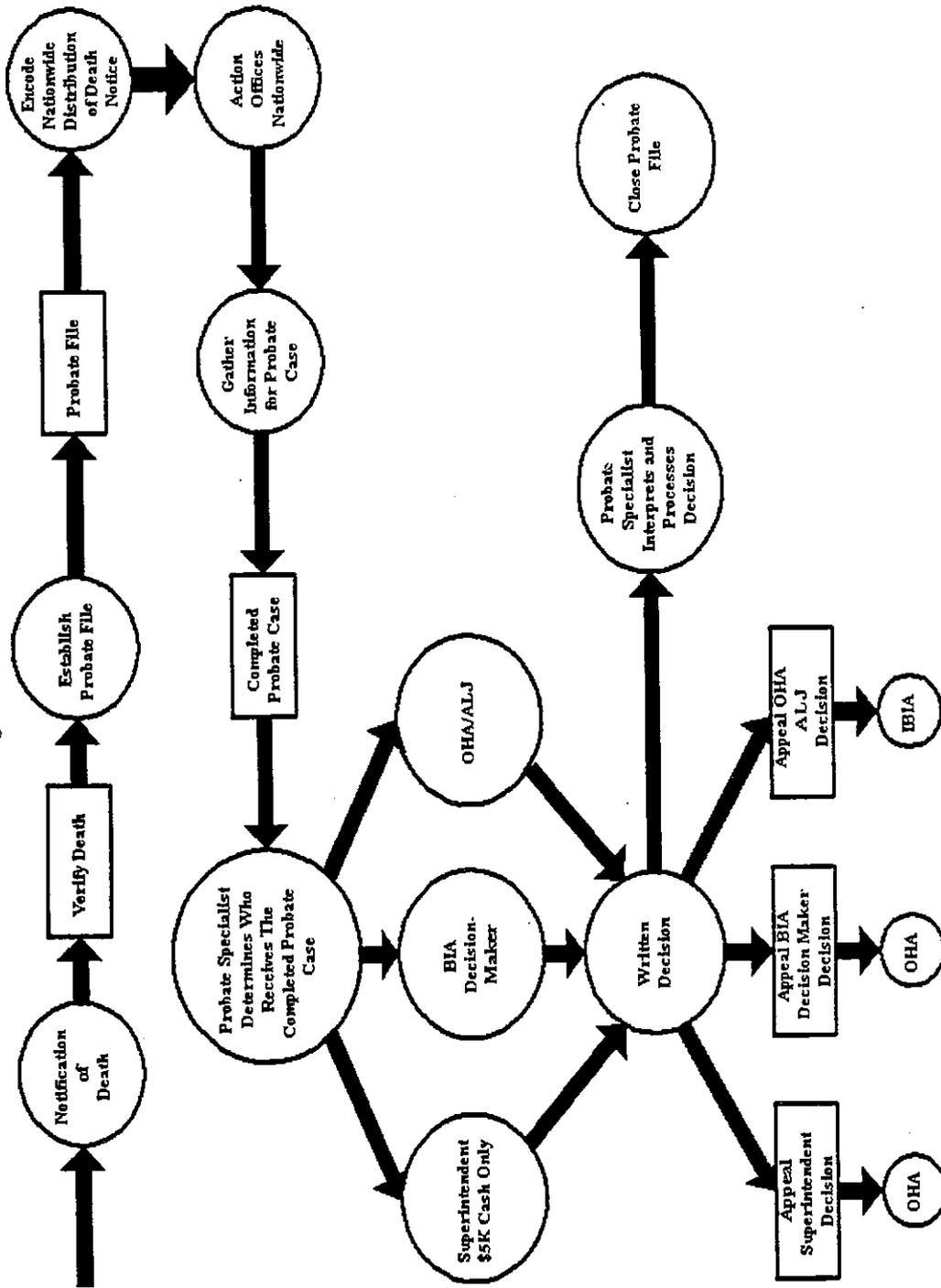
All available data sources will be checked, including those available through use of the internet and data stores that become available through Memoranda of Understanding with tribal and state governments as well as other federal agencies. Information to be placed in the probate file include: certified land inventory, death certificate, court records and affidavits, last will and testament, claims against the estate, names and addresses of potential heirs and family members. The probate staff will complete the OHA-7, enter status of case in the tracking system, and forward the completed probate file to the appropriate deciding official. Upon each change of the probate status, BIA probate staff will notify the IIM staff to change management codes to reflect the current status.

Based upon criteria to be developed, the probate specialist will determine the appropriate recipient of the probate case and forward the file to the superintendent, the BIA Decision-Maker, or the ALJ. The BIA superintendent will decide probate cases where the decedent has cash only of \$5,000 or less in his/her IIM account and no real property. The BIA Decision-Maker will decide cases where a hearing does not appear to be necessary and has not been requested. The BIA Decision-Maker will issue a written decision on the case, based upon the contents of the probate file. If there is a legal or factual dispute, or a request by an interested party, the probate specialist will forward the case to an ALJ in OHA for a hearing and decision. All decisions will be appealable by an interested party, either to the ALJ or to the Interior Board of Indian Appeals.

The final decisions and orders will be sent to the Probate Specialist for interpretation and implementation of the decision. The IIM office will change the administrative management code on the decedent's estate account to reflect the status of the case. If there is no appeal within the 60-day appeal period, the probate staff will prepare documents for the distribution of IIM moneys and for the payment of claims made against the estate account. Upon a final review of documentation, a determination is made to close the probate file, update the tracking system, close the estate account. The BIA LTRO will provide all beneficial owners of a probate with a trust interest report.

Figure 1 illustrates the new probate process. When compared to the complex, 65 step current probate process provided in Appendix III, or as detailed in 54 BIAM Supplement 8, the simplicity of the reinvented procedure is clearly evident. Appendix IV provides a flowchart of the new process.

Figure 1
Diagram of New Process



7.0 Estimated Cost of Re-engineered Probate Process

The re-engineered probate process is expected to save up to \$1,116 per case. Table 2 shows potential cost savings for four alternative situations, the fourth considered unlikely. Alternative 1 assumes all probate personnel devote full time effort to probate work, and productivity will increase from 2700 cases per year to 7500 under the re-engineered process. In Alternative 2, only two-thirds of BIA and OHA personnel effort or staffing (except the BIA Decision-Maker positions) is devoted to probate work. Alternative 3 is based on more conservative estimates of productivity, or more cases being completed under the current probate process and fewer cases completed under the re-engineered process as compared to Alternatives 1 and 2. Alternative 4, considered quite unlikely, includes the reduced effort for probate found in Alternative 2 and the more conservative productivity estimates of Alternative 3. It should be noted that Alternative 4 is the only alternative resulting in a slight increase in costs for the re-engineered process as compared to the current process; however, this negative cost savings quickly becomes positive as the productivity level slightly increases.

Several assumptions underlie Table 2 beside the fact that data is based on estimates, and productivity and costs may be inaccurate. For one thing, the total effort from current positions in BIA and OHA would continue, at least in the short term, under the re-engineered process. Where the effort is estimated at two-thirds on probate (Alternatives 2 and 4), the current process portion of the Table presents salaries reduced to two-thirds with number of existing positions unchanged (i.e., all existing personnel are assumed to spend on average one-third of their time on non-probate work); the re-engineered portion of the Table presents number of positions reduced to two-thirds because all those probate personnel will then be devoted full time to probate. With regard to productivity, current output (probate cases completed) is estimated to range from 5000 to 7500.

The cost of implementing the new probate process includes labor costs for the total number of Decision-Makers, Probate Specialists, and Probate Clerks required in BIA. The cost associated with the current level of probate support in OHA was utilized in the re-engineered probate cost analysis. Starting with the current probate staffing levels in BIA agency offices and OHA offices and adding the BIA new positions and upgrades, a total annual cost of the re-engineered process was estimated in Alternative 1 to be approximately \$8,909,000. From available statistics it was further determined that in an average year approximately 2,700 probate cases are currently adjudicated, and an estimated 7,500 could be adjudicated under the re-engineered process. Thus, the average cost per probate would be \$8,909,000 divided by 7,500 or \$1,188 per case as compared to the current cost of \$2,304 per case.

Table 2
Estimated Probate Cost Savings Analysis

ESTIMATED PROBATE COST SAVINGS ANALYSIS

----- ALTERNATIVE 1 -----
100 % EFFORT ON PROBATE

----- ALTERNATIVE 2 -----
2/3 OF EFFORT ON PROBATE

----- ALTERNATIVE 3 -----
HIGHER CURRENT PRODUCTIVITY
(CASES) & LOWER PROPOSED

----- ALTERNATIVE 4 -----
ALTERNATIVES 2 & 3 COMBINED

ESTIMATED COST OF CURRENT PROBATE PROCESS

Organization	Position	GS	No. of Pos.	Salary	Annual Cost	No. of Pos.	Salary	Annual Cost	No. of Pos.	Salary X 2/3	Annual Cost	No. of Pos.	Salary X 2/3	Annual Cost
BIA	Probate Specialist	9/5	50	\$38,000	\$1,900,000	50	\$25,333	\$1,266,667	50	\$38,000	\$1,900,000	50	\$25,333	\$1,266,667
BIA	Probate Clerk	5/5	27	\$25,000	\$675,000	27	\$16,667	\$450,000	27	\$25,000	\$675,000	27	\$16,667	\$450,000
BIA Total					\$2,575,000			\$1,716,667			\$2,575,000			\$1,716,667
OHA	ALJ	AL-5	9	\$100,000	\$900,000	9	\$66,667	\$600,000	9	\$100,000	\$900,000	9	\$66,667	\$600,000
OHA	Paralegal	9/5	9	\$38,000	\$342,000	9	\$25,333	\$328,000	9	\$38,000	\$342,000	9	\$25,333	\$228,000
OHA	Legal Clerk	6/5	9	\$28,000	\$252,000	9	\$18,667	\$168,000	9	\$28,000	\$252,000	9	\$18,667	\$168,000
OHA	Staff Attorney	14/5	1	\$78,000	\$78,000	1	\$52,000	\$52,000	1	\$78,000	\$78,000	1	\$52,000	\$52,000
OHA Total					\$1,572,000			\$1,048,000			\$1,572,000			\$1,048,000
Total Annual Labor BIA and OHA					\$4,147,000			\$2,764,667			\$4,147,000			\$2,764,667
Benefits @ 1.2					\$4,976,400			\$3,317,600			\$4,976,400			\$3,317,600
Other Direct Costs--Travel, Supplies, and Equipment @ .25					\$1,244,100			\$829,400			\$1,244,100			\$829,400
Total Annual Cost					\$6,220,500			\$4,147,000			\$6,220,500			\$4,147,000
Expected No. of Cases Processed and Completed					2700			2700			3300			3300
Estimated Total Cost Per Case					\$2,304			\$1,536			\$1,885			\$1,257

ESTIMATED COST OF REENGINEERED PROBATE PROCESS

Organization	Position	GS	No. of Pos.	Salary	Annual Cost	No. of Pos. x 2/3	Salary	Annual Cost	No. of Pos. x 2/3	Salary	Annual Cost
BIA	Decision Maker	14/5	10	\$78,000	\$780,000	10,000	\$78,000	\$780,000	10,000	\$78,000	\$780,000
BIA	Probate Specialist	12/5	50	\$55,000	\$2,750,000	33,333	\$55,000	\$1,833,333	33,333	\$55,000	\$1,833,333
BIA	Probate Clerk	7/5	27	\$31,000	\$837,000	18	\$31,000	\$558,000	18	\$31,000	\$558,000
BIA Total					\$4,367,000			\$3,171,333			\$3,171,333
OHA	ALJ	AL-5	9	\$100,000	\$900,000	6	\$100,000	\$600,000	6	\$100,000	\$600,000
OHA	Paralegal	9/5	9	\$38,000	\$342,000	6	\$38,000	\$228,000	6	\$38,000	\$228,000
OHA	Legal Clerk	6/5	9	\$28,000	\$252,000	6	\$28,000	\$168,000	6	\$28,000	\$168,000
OHA	Staff Attorney	14/5	1	\$78,000	\$78,000	0.667	\$78,000	\$52,000	0.667	\$78,000	\$52,000
OHA Total					\$1,572,000			\$1,048,000			\$1,048,000
Total Annual Labor BIA and OHA					\$5,939,000			\$4,219,333			\$4,219,333
Benefits @ 1.2					\$7,128,800			\$5,063,200			\$5,063,200
Other Direct Costs--Travel, Supplies, and Equipment @ .25					\$1,781,700			\$1,265,800			\$1,265,800
Total Annual Cost					\$8,909,500			\$6,329,000			\$6,329,000
Expected No. of Cases Processed and Completed					7500			5000			5000
Estimated Total Cost Per Case					\$1,188			\$1,266			\$1,266
COST SAVINGS (INCREASE) PER CASE					\$1,116			\$692			\$103

Notes and Assumptions

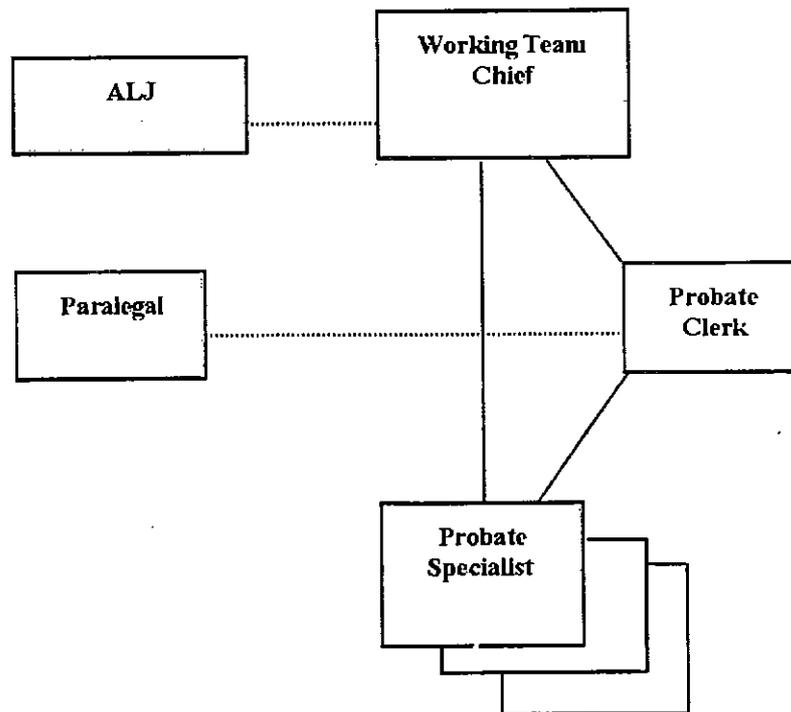
1. Data is based on best assumptions and estimates available within the limited scope of review. Costs and productivity may not be accurate. Data is not intended for budgetary or staffing purposes.
2. All staffing / effort levels are assumed to remain unchanged in the new process, except for addition of decision maker positions and increase in BIA grade levels.
3. Costs and productivity estimates should be reevaluated at time of implementation and periodically. Estimated costs of the reengineered process are expected to change over time.
4. Productivity is expected to range from 2700 to 3300 cases in OHA and from 2000 to 4500 for BIA decision makers. Productivity of 5000 cases in Alternatives 3 & 4 under new process consists of approximately 3000 decisions/dismissals in OHA and 2000 cases completed by BIA decision makers (conservative estimates).

8.0 Probate Backlog Elimination Team

The IPRL considered ways to eliminate the current Indian probate backlog in an effective and timely manner. As a result of much analysis and discussion it was concluded that the best option was to create special probate elimination teams that would focus their efforts exclusively on backlog. Consequently, it is recommended that one to three "Probate Backlog Elimination Teams" be established for the exclusive purpose of completing and closing backlog probate cases. The teams should be initially assigned to the three BIA areas with the largest backlogs - Aberdeen, Minneapolis and Billings. It was further concluded that the teams should address those probate cases with the largest dollar value followed by the oldest probate cases. Each team should consist of one working team leader or chief, three probate specialists, and one probate clerk, as well as one Administrative Law Judge (ALJ) and one paralegal (or staff attorney). Figure 2 illustrates the composition of each such team. The Team Chief would coordinate casework among the other team members, but would not exercise supervision over the ALJ or his/her paralegal assistant. The Team Chief should be an experienced realty specialist who is knowledgeable about the Indian probate process.

The Office of Hearing and Appeals would assign an ALJ and paralegal assistant to each team for a specified duration to work exclusively on probate cases. They would receive files prepared for adjudication by other team members and, pursuant to 25 U.S.C. § 372 and § 373, hear and decide probate matters. The concept is for the ALJ to be able to immediately conduct probate hearings, approve wills, render decisions determining heirs, and prepare distribution orders to be sent to heirs, devisees, claimants, and the BIA.

Figure 2
Probate Backlog Elimination Team



The three probate specialists on each team would be responsible for the preparation and proper assembly of all heirship data, as well as other probate case documents for transmittal to the ALJ. Responsibilities include: preparing Form OHA-7 (Data for Heirship Finding and Family History); listing probate inventory; locating wills, codicils, and witnesses; collecting information to establish domicile at date of death; conducting research to identify probable heirs; compiling documentation to support family relationship of heirs and their qualification to inherit property; conducting land title and fiscal research on estate property inventory; and assembling the file for use in adjudication.

Both the Probate Backlog Elimination Team(s) and the streamlined re-engineered probate process are needed to significantly reduce the probate backlog within a reasonable period of time. The teams would efficiently and effectively initiate and complete the process of eliminating the backlog. This would be achieved by preparing and submitting case files to the ALJ in an accelerated fashion, thus minimizing the delay between submittal to the ALJ and the hearing date. Hearings would be held in closer proximity to the reservations, providing more convenience for Indian family members and potential heirs. This should result in better attendance, and therefore the quality of evidence should be improved. As the dedicated ALJ in the field considers the relevant factual and legal issues in each case, there should be a reduced time period from hearing date to issuance of the final distribution order.

9.0 Estimated Cost of Probate Backlog Elimination Team

The anticipated annual cost of each Probate Backlog Elimination Team is estimated at \$612,000 as shown in Table 3.

**Table 3
Estimated Cost of Probate Backlog Elimination Team**

Organization	Position Description	GS	Total Positions	Annual Salary	Annual Cost
BIA	Team Chief	13/5	1	\$66,000	\$66,000
	Probate Specialist	12/5	3	\$55,000	\$165,000
	Probate Clerk	7/5	1	\$31,000	\$31,000
BIA Total Annual Labor					\$262,000
Organization	Position Description	GS	Total Positions	Annual Salary	Annual Cost
OHA	Administrative Law Judge	AL/5	1	\$100,000	\$100,000
	Paralegal	11/5	1	\$46,000	\$46,000
OHA Total Annual Labor					\$146,000
Total Annual Labor BIA and OHA					\$408,000
Employee Benefit Computation (EBC) @ 1.20 (\$5,939,000 X 1.20)					\$489,600
Other Direct Cost - Travel, Supplies, and Equipment @ .25 (\$489,600 X .25)					\$122,400
Total Annual Cost Per Team					\$612,000

10.0 Customer Service

Site visits and informal surveys disclosed several deficiencies in the manner in which the Indian customers are dealt with in the probate process. Customers interviewed said they wanted probate cases processed quickly, as well as timely, and answers in plain English to their probate questions. Customers requested that they be treated with courtesy and respect. To improve overall customer service within the BIA, to aid in the processing of probate claims, and to provide faster and more efficient service to the Indian customer, the following should be implemented:

Establish a one-stop contact person, for all customers which could be a secretary or clerk, but not the probate staff. This person should be trained and have a general knowledge of the activities of the agency. A one-stop contact person will eliminate interruptions of the probate staff allowing them to remain focused on their existing assignments while they are developing probate packages or interviewing clients for estate planning. Currently, the probate staff often have collateral duties such as answering the telephone, doing lease distribution, directing clients to proper branches for services, etc.

To ensure privacy of information and customer sensitivity, dedicate a private office space for use in conducting probate interviews.

To assure the continuous flow of probate case processing in the probate section, the contact person must exhaust all possible steps in aiding and assisting the customers. This benefits the customers by providing one-stop service for the majority of their needs.

The OHA-7 form is being revised to be more customer focused and this form will be put on the BIA probate web page. This will enable customers to complete the form at their convenience.

11.0 Recommendations

11.1 Develop Memoranda of Understanding/Agreement with Other Organizations

Develop Memoranda of Understanding/Agreement with tribal governments, state and local governments, and other Federal agencies to obtain new sources of essential information to locate potential or missing heirs, obtain death certificates and determine current addresses. These data resources will enhance the probate process by providing additional means to obtain information necessary to complete the probate package.

11.2 Develop and Implement a Customer Service Outreach Program

Create a question and answer handbook to explain the Indian probate process. The current Indian probate process is unfamiliar and confusing to many Indian customers. Brochures on estate planning and a will preparation kit will be part of the customer outreach service program. In some locations, it may be advisable for tribes to provide this literature in their native language. Each agency should develop a list or pool of certified interpreters conversant in the native dialect from which agency personnel and Indian clients can obtain assistance.

Provide tribes with model inheritance codes. The enactment of tribal inheritance codes would aid the effort to prevent further fractionation of ownership interests in Indian allotments. It would encourage tribal members who own trust or restricted property to make wills, deeds by gift, life estate, joint tenancy, or to disclaim their fractionated ownership to a co-owner.

Form a partnership with tribal governments to educate tribal members of the benefits of estate planning. Estate planning brochures should be created for this program to encourage tribal members to write wills which would limit further fractionation of trust property.

Create a comprehensive web page. The Indian probate web page would be used to inform the Indian customers about pending probates, answer questions about the probate process, include an electronic version of the family history form (OHA-7), a will preparation kit, and existing probate regulations. An encrypted portion of the page would permit BIA, OST, and OHA personnel to exchange information regarding death notices, family histories and the current addresses of potential heirs.

Revise the OHA Form-7 to be customer focused. In preparing probate packages for review and the preparation of a decision, there are a number of measures which should be considered. Among these recommendations is the use of an electronic OHA Form 7 (family history) by BIA and OHA. Its use should be mandated as part of an effort to begin working toward the creation of virtual files. Because there is no policy on completing probate packages or ceasing the search for missing heirs, the BIA should establish policies, procedures, and time frames for locating potential heirs and completing probate packages.

11.3 Develop and Mandate the Use of a Standard Probate Checklist

Develop and mandate the use of a standard probate checklist by all who process Indian probate cases. The purpose of this standard checklist is to enable any member of the probate staff to determine what documents have been acquired and what documents are needed to complete the probate package without having to review the contents of the entire file.

Develop a step by step checklist for preparing a probate case to be used by probate staff. This will serve as a guide .

11.4 Establish a Nationwide Probate Tracking System

Link BIA, OHA and OST in a central data base tracking system. Distribute and mandate its use. Until the deferred section of TAAMS related to Indian probates is operational, the existing case management tracking system used by some offices at OHA should be expanded into a nationwide system. This system would permit the probate staff at BIA agencies, OST, LTRO, and OHA to track a case as it is processed. This standardized tracking system would enable all agencies to be notified when an individual who owns trust property dies. This notification would alert each BIA agency to search its land records to determine whether the decedent held an interest in any real property at that agency. If so, the probate staff at that agency would automatically prepare and send an inventory of the interests in trust lands in its jurisdiction,

which the decedent possessed at the time of his death, to his home agency. The probate staff at the decedent's home agency would verify that a hold on the decedent's IIM account had been entered and that the decedent's account had been changed to an estate account. In addition, a nationwide tracking system would enable the probate staff to provide better service to the decedent's heirs by being able to inform them about the status of the case. After a case has been decided, the nationwide tracking system would enable the probate staff to verify the closure of the decedent's estate account and transfer the ownership of the land on the title records to the decedent's heirs.

In order to permit each agency or office in BIA, OHA, OST, and LTRO to have access to the nationwide case management tracking system, it may be necessary to upgrade computers or purchase new computers and install or upgrade telephone and/or data lines.

11.5 Create Attorney Decision Maker Positions

Create 10 Attorney Decision Maker positions within the BIA. This will require legislative and regulatory changes, position descriptions will need to be developed, and criteria established to determine which cases Attorney Decision Makers will review. These Attorney Decision Makers will determine the decedents' legal heirs and determine the distribution of the decedents' trust property without conducting a hearing. To enable the Attorney Decision Makers to issue a determination of heirs and order the distribution of trust property, current law must be changed. The Secretary, or those he delegates to act on his behalf, must be granted discretionary authority to decide Indian probate cases without conducting a hearing. In addition, the Secretary must be granted the authority to designate individuals who are not ALJs to decide Indian probate cases.

The individuals hired for these new positions will be assigned to specific area offices. Listed in the Table 4 below are the BIA Area Offices to which the Attorney Decision Makers should be assigned. The table includes the number of Attorney Decision Makers that should be assigned to each office. The recommendation regarding the number of Attorney Decision Makers is based on the number of backlogged cases, specified in the draft report of Sub-Project 3's supplement to the High Level Implementation Plan, and the presence of large resident populations and probate caseloads on the Indian reservations served by the specific Area Office. The Attorney Decision Makers will be placed under the supervision of the Director of Trust Responsibilities.

**Table 4
Number of Proposed BIA Decision Makers**

Area Office	Number of Decision Makers	Estimated Backlog	Notes
Eastern	0		No allotments
Aberdeen	2	1,256	15 -30 deaths per mo.
Albuquerque	(1) Shared with Phoenix and Navajo	41	Few allotments
Anadarko	(1) Shared with Muskogee	491	
	2	2,001	
Juneau	1	208	
Minneapolis	2	1,018	Many allotments
Muskogee	Shared with Anardarko	68	
Navajo	Shared with Abuquerque and Phoenix	642	
Phoenix	Shared with Alburquerque and Navajo	916	
Portland	(1) Shared with Sacramento	645	
Sacramento	Shared with Portland	506	
Totals	10	7,792	

The Probate Specialist, under the supervision of the Agency Superintendent, will make the initial determination regarding the complexity of the case within criteria established by regulation and his/her knowledge of the potential conflicts within the decedent's family, the Probate Specialist will refer the case to one of three groups of decision makers: a Superintendent, an Attorney Decision Maker, or an ALJ.

11.6 Designate Probate Specialists to write wills.

Develop a will preparation kit and make it available at the local level and on the probate web site.

The IPRL is cognizant that the recommendation that a Probate Specialist assist in preparing wills is controversial. It has been a long standing practice of the BIA to offer will preparation as a service to Indians who own trust or restricted fee allotments. Procedural instructions on will writing are contained in the BIA Manual (54 BIAM Supplement 8, Release 3 of July 7, 1992). Attorneys in Field Solicitor's Offices in several regions regularly approve the form of wills that have been drafted by probate specialists and probate clerks. If the BIA is to continue its effort to reduce the fractionation of heir property, the availability of assistance in writing wills is necessary. Consistent with standards of state law practice, it is recommended that only those individuals with paralegal skills and training should be permitted to draft wills. Two types of standardized position descriptions must be developed for a Probate Clerk and a higher grade

Probate Specialist who may draft wills. Further, we recommend that a coop or similar type of program be established to develop paralegal staff at the local level.

There is a significant portion of the resident population of Indians who hold interests in land on reservations that will not be able to pay a private attorney to write a will. If the present policy is changed, the trust responsibility may be construed to require another means to provide assistance in will writing. The possibility of contracting for the service or getting local legal aid offices, law students, or local attorneys to work pro bono should be explored.

11.7 Upgrade positions of Probate Clerks and Specialists

Probate Clerks and Probate Specialists positions should be upgraded to reflect the responsibilities of their duties. Position descriptions should be revised to show their active role in information gathering and interaction with those seeking information about the probate process and estate planning. The paralegal nature of the Probate Specialists' job requirements present a strong argument for upgrading the position of Probate Specialist. Paralegal training and a certification program should be developed for Probate Specialists. In addition, there is a need to have a permanent well trained, knowledgeable corps of professionals who will remain in their positions because there is an opportunity for upward mobility. As a result, new positions are needed for Attorney Decision Makers, and the revision of the duties of Probate Specialists and a Probate Clerks. Position descriptions for all three positions must be written to reflect their duties.

When the probate package is completed, the Probate Specialist, using criteria that will be established, will decide which official is appropriate to decide the case. The development of a policy that provides instructions on closing a probate package should be part of the effort to standardize the probate process.

11.8 Legal, Regulatory, and Policy Changes

Issue a policy directive requiring that the decisions of the ALJ determining heirs and ordering the distribution of property be interpreted by BIA Probate Specialists. This policy directive is necessary because inconsistencies exist in who receives and interprets the orders. Some OST/OTFM employees who receive these decisions and orders lack the specialized skills and knowledge to interpret them properly. As a result, there are misinterpretations of the orders and delays in the distribution of trust assets.

Require BIA and OST/OTFM personnel to reconcile the management codes, addresses, Social Security numbers, and other relevant data for IIM accounts on a monthly basis. This establishes a method of check and balance to determine the accuracy of data and provides probate progress.

Grant authority to the Secretary, in his discretion, to designate Attorney Decision Makers to render decisions without holding hearings. In order to implement the redesigned probate process, statutory and regulatory changes will be required.

The new regulations should permit BIA Superintendents to make a summary distribution of an Indian decedent's estate when it contains \$5,000 cash or less, and no interest in land. Current regulations governing the probate of Indian estates must be reviewed and rewritten so that the DOI's regulations are consistent with their statutory bases.

Develop a policy that sets forth the standards in which the search for missing heirs will be conducted (i.e. the sources of information that will be reviewed), the time frames for completion of the search, and finally a time period for closing the probate package or initiating a presumption of death action. There is no policy establishing standards or a time frame for conducting a search for missing heirs, initiating a presumption of death action. Some probate cases could remain open indefinitely.

Retain the current moratorium on contracting or compacting probate cases. We recommend the moratorium remain in effect until such time as the new probate process is implemented and the probate backlog is eliminated. We recommend that contracting or compacting tribes send their probate staff to training on the new process before taking over the probate data collection.

11.9 Approaches to Eliminate the Probate Backlog

There should be a three prong approach to eliminating the probate backlog. The first prong, the hiring of temporary and/or permanent staff and authorizing the use of overtime to work on the backlog has already been initiated. The second prong involves instituting those changes in the probate process that have been recommended by the IPRL. The third prong involves the creation of one to three Probate Backlog Elimination Teams. Each team will begin to work on the probate backlog in a different area. The ALJ and the paralegal will begin to process pending cases while the Probate Specialists are gathering information to complete the probate package of the oldest probate cases. Once the packages have been completed, the ALJ can begin to conduct hearings and issue written decisions. It is estimated that each Probate Elimination Backlog Team will cost an average of \$612,000 per year and will complete an average of 350 cases per year.

11.10 Establish Mandatory Training Programs

A professional, well trained, probate staff will be required to implement the newly designed probate process. Training will be a critical component of any implementation plan. It will be necessary to conduct nationwide probate seminars for all employees, including Superintendents, involved in probate to explain the new process. As part of that effort, course materials must be developed along with a new probate handbook. Like the approach to the backlog problem, training can be initiated in several forms. While the course materials and handbook are being prepared, the probate backlog elimination teams can begin to train agency personnel in how to search for missing heirs, i.e. the sources of information to use, and obtain the documents necessary to close the probate package and give the case to an administrative law judge.

In addition, it will be necessary develop and implement a customer service orientation program to change the existing institutional culture so that providing service to the decedent's heirs and potential heirs will become a top priority at the agency level.

It will probably take six months or more to adequately train the personnel in the agencies under one BIA Area Office. In addition to the new process, training must include the duties of OST's OTFM personnel and their handling of the IIM accounts.

11.11 Reestablish ALJ Offices in the Billings and Aberdeen Areas

Reestablish ALJ offices to conduct Indian probate hearings in Aberdeen and Billings areas. Aberdeen and Billings areas have the largest number of probate backlog cases, fractionated land interests, and the largest number of tribal members residing on the reservation. The probate backlog has steadily increased over the past four years. Attached documentation supports this recommendation, and it is anticipated that the number of probate cases in these two areas will continue to increase in the future. In order to reduce costs and place ALJs closer to customers, it is recommended that these offices be established in an existing federal agency whereby they may share office space and administrative support. See Appendix IV

11.12 Other Recommendations

A Solicitor's Opinion should be requested on the issue of when beneficial title passes from the decedent to his heirs, and whether income from decedent's property after his death can be used to pay creditors. In accordance with Departmental regulations, orders issued by an ALJ, the BIA has engaged in a practice of holding open the estate account of a decedent for a number of months or years so that income that has accrued since the date of decedent's death is used to pay the decedent's creditors.

Create and use electronic documents where it is feasible so that an electronic file may be developed when every BIA agency and OST office has been computerized and linked through TAAMS.

Establish performance measures for evaluating all positions of those involved in processing Indian probate cases.

Establish a probate paralegal certification program for probate staff. This will promote the establishment of a cadre of professionals by providing for in-house training. The certificate program would enable Probate Clerks to train for the position of Probate Specialist. Furthermore, such a program enhances upward mobility and improves morale.

12.0 Conclusions

Resolution of the problems identified by the IPRL will require immediate action on the following three issues. First, funding must be made available to field offices to support current probate efforts and to negate the further build-up of probate backlog. Secondly, additional funding to provide for the implementation of the Probate Backlog Elimination Team(s) must be made available. Thirdly, the newly designed probate process or its equivalent must be endorsed and implemented. Additional attention is directed to the following items:

1. The streamlined process presented in this report can be a success only with legislative changes as follows:
 - Amend 25 U.S.C. 372 and 373 to make probate hearings discretionary
 - Amend 5 U.S.C. 3105 to remove the reference to DOI/ALJ's with respect to Indian probate and give the Secretary discretion to appoint Indian probate Attorney Decision Makers.
2. Establish an Indian probate Attorney Decision Maker position in the BIA who reports to the Director, Trust Responsibilities. This is the key element in the design of the new streamlined process. The establishment of this position along with upgrading of the Probate Clerks and Probate Specialists must be part of a design to create a permanent well trained, knowledgeable corps of professionals who will remain in their positions because there is a career track which offers an opportunity for upward mobility.
3. The team strongly recommends increasing the BIA Superintendent's Summary Distribution authority amount to \$5,000 or less, cash only. This regulatory change would have an immediate impact on lessening the delays in pending OHA cases. It is also a second key element in the reinvention package. Superintendents must be trained and held accountable for processing probates in their performance standards.
4. Re-establish OHA offices in the Billings and Aberdeen areas. Because of the large Indian populations that exist in these areas, fractionated land interests, and increasing backlog, these two offices are critical to the effective processing and completion of probates by both the BIA and OHA. Even though the office of the Inspector General recommended that these offices be closed, the IPRL team strongly recommends that these office be reestablished. The Department cannot provide timely service to the Indian residents of these areas unless these offices are staffed.
5. Place the supervision of Probate Clerks and Specialists positions under the Superintendent. This will eliminate unnecessary hand-offs and delays in the probate process.

13.0 Implementation

An Indian Probate Implementation Team should be formed to execute the recommendations contained in this report. Selected members of the IPRL Reinvention Lab should be included on the Implementation Team to ensure project continuity. The approach detailed in this report includes a combination of short term and long term corrective measures. The Probate Backlog Elimination Team, probate backlog funding, and the establishment of dedicated and trained probate staff are efforts that can have an immediate effect on probate backlog. The more fundamental recommendations, which require legislative, regulatory or organizational changes, are considered long-term measures and can be expected to have major, positive impacts on the Indian probate process.

DECISION LETTER
THE MANAGEMENT ADVISORY GROUP OF
INDIAN PROBATE REINVENTION LABORATORY
August 12, 1999

The Management Advisory Group (MAG) met on July 15, 1999, for the purpose of discussing the draft report and recommendations of the Indian Probate Reintervention Laboratory (IPRL). MAG members present were Bob Lamb, Deputy Assistant Secretary-Budget and Finance; Hilda Manuel, Deputy Commissioner of Indian Affairs; Bob Baum, Director, Office of Hearings and Appeals; Tom Gernhofer, Assistant to the Assistant Secretary-Policy, Management and Budget; and Norma Campbell, Acting Director, Office of Planning and Performance Management. Other attendees included John Berry, Assistant Secretary-Policy, Management and Budget; Kevin Gover, Assistant Secretary of Indian Affairs; Nancy Jemison, Director of Trust Management Improvement Project, Tom Thompson, Principal Deputy, Special Trustee for American Indians; and Charles Breece, Deputy Director, Office of Hearings and Appeals.

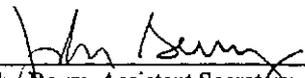
The MAG approved all the recommendations in the report by consensus with the following modifications:

- 11.5 **Establish Attorney Decision-Maker positions in the BIA to decide Indian probate cases without holding hearings.** Upon notification of death, a BIA Probate Specialist will gather information, prepare the probate case file, and evaluate the case under fixed criteria. These criteria, which will be established during the implementation phase, will be used to distinguish cases which must go to an ALJ for a hearing from those which can be decided in an expedited fashion by a BIA Attorney Decision-Maker without a hearing. If the criteria indicate that the case requires a hearing, the case file will be forwarded to OHA. If, on the other hand, the case meets the criteria established for a decision without a hearing, BIA will notify by mail all identified interested parties in accordance with regulations. Also, BIA will provide constructive notice through posting and/or publication for all potential interested parties. These notices will state that BIA has an expedited procedure to probate estates without a hearing, but any interested party may elect to have the estate probated by an ALJ. If a request is made for a hearing, the case file will be forwarded to OHA. But if no interested party requests a hearing, the case file will be forwarded to a BIA Attorney Decision-Maker to be probated. Subsequently, within the time period to be fixed by regulation, any interested party may request that the BIA Attorney Decision-Maker's decision be set aside and the case forwarded to OHA to be probated. OHA may decide the matter by summary affirmance based upon the existing record. If OHA determines that a hearing is required, based on criteria established by regulations, OHA will conduct the hearing and decide the matter.

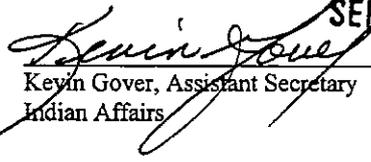
11.8 **Retain the current moratorium on contracting and compacting the probate program.** We cannot support a long term moratorium. The funds and activities related to the cleanup of the probate backlog are appropriated through OST and are not subject to contracting or compacting. Contracting and compacting the probate program will be an option when the funds are available in BIA appropriations.

11.11 Reestablish ALJ offices in the Billings and Aberdeen areas. The OHA Reinvention Lab, in addition to streamlining the process, will review the OHA probate caseload and determine if additional ALJs are necessary. Depending on the workload, the Lab team will recommend where ALJs should be located.

Approved by Consensus

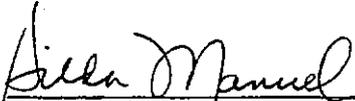


John Berry, Assistant Secretary
Policy, Management and Budget

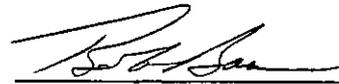


Kevin Gover, Assistant Secretary
Indian Affairs

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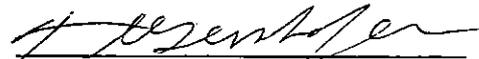
Hilda Manuel, Deputy Commissioner
Indian Affairs



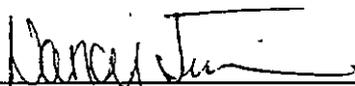
Bob Baum, Director
Office of Hearings and Appeals



Bob Lamb, Deputy Assistant Secretary
Budget and Finance



Tom Gernhofer, Assistant to the Assistant
Secretary-Policy, Management and Budget



Wayne Nordwall, Area Director
Phoenix Area



Norma Campbell, Acting Director
Planning and Performance Management.

References

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9. 54 BIAM Supplement 8, Estate Planning and Administration Guidelines, Department of the Interior, Bureau of Indian Affairs, Division of Real Estate Services, July 07, 1992.



U. S. Department of the Interior
INDIAN PROBATE REINVENTION LAB



Charter

To support Vice President Gore in creating a government that works better and costs less, the Department of the Interior is establishing a reinvention laboratory as part of an overall effort to address issues related to the administration and management of Indian Trust funds.

Team Title: Indian Probate Reinvention Lab

Background Information:

By law, the Secretary is charged to probate Indian Trust estates. The probate backlog has been an issue for decades. There have been numerous efforts to address the issue; however, these efforts have not resolved the problems. The Indian Probate Reinvention Lab has been established to analyze and redesign the process.

Team Mission:

The Indian Probate Reinvention Lab will review, evaluate, and redesign the Indian Probate Process ensuring timely preparation of cases for adjudication of ownership and distribution of trust property, so the heirs promptly receive trust assets and income to which they are legally entitled.

Customers:

Heirs, Co-owners, Lessees, Estates and Employees

Objectives:

Short-term objectives include:

- Reviewing previous studies and reports.
- Revising OHA Form 7.
- Enlarging our data resources.
- Reducing the probate backlog by utilizing reengineering principles.

Long-term objectives include:

- Developing a streamlined system that complies with the law.
- Implementing a reengineered design.

Sponsors:

Assistant Secretary - Policy, Management and Budget; Deputy Assistant Secretary - Budget and Finance; Assistant Secretary - Indian Affairs; Deputy Commissioner for Indian Affairs; Director, Office of Planning and Performance Management; Director, Office of Hearings and Appeals; Assistant to the Assistant Secretary - Policy, Management and Budget; Area Director, Phoenix.

Sponsor Commitments:

Support from the sponsors is vital and will include:

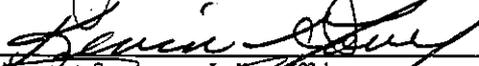
- Waivers, within the law, that liberate the organization from regulations and policies that hinder progress.
- Freedom to be creative and innovative, take risks, and provide incentives for change within the law.
- Adequate time to evaluate the long term success of the effort.
- Budgetary support where needed.
- Empowerment.

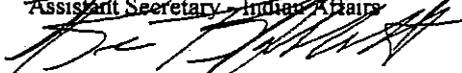
Team Commitment:

The team members are committed to:

- Attending the appropriate training.
- Utilizing the principles and tools of quality management/reengineering.
- Defining the issue, collecting data, and developing recommendations.
- Advising and consulting with the designated Management Advisory Group on the process through briefings/meetings, as appropriate.
- Facilitating a team-based approach to the issue.
- Being creative, innovative, risk-taking, and customer focused.


Assistant Secretary - Policy, Management and Budget


Assistant Secretary - Indian Affairs


Secretary


Vice President

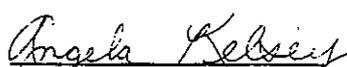
Team Members:

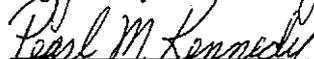

Edie Adams


Bill Bonner

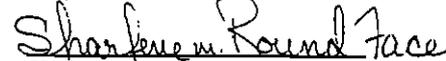

Nadine Bruh-Schiffer


Eric Eisenstein


Angela Kelsey


Pearl Kennedy


Patty McDonald


Sharlene Rbund Face

Appendix II - Description of Legal Development of Indian Probate Backlog

Individually-Owned Indian Lands

On February 8, 1887, Congress formalized an Indian land allotment policy by passing what is frequently referred to as the General Allotment Act, 24 Stat. 389. This Act provided for parcels of tribal and public domain lands to be allotted in severalty to Indians (conversion of communal ownership to individual ownership), with title to be held by the United States in trust for individual allottees and their heirs, for twenty-five years. The trust period could be extended at the discretion of the President. The General Allotment Act further provided that the law of descent, in force in the state in which the trust lands were located, would apply to such lands.

Similarly, at other times prior to 1887, treaties and statutes had authorized allotments of land in severalty to members of specific tribes, with title to be held by individual Indians and their heirs, subject to Federal restrictions for a term of years. Because this title was held by the individual in restricted status, as opposed to being held by the United States in trust status for the individual, the terms "restricted title" or "restricted land" are frequently employed when referring to land in restricted status. Holding land in trust or restricted status for a specified number of years was thought to be an effective means of preventing any improvident sale or disposition by the Indian owners.

Other statutes, enacted subsequent to the General Allotment Act of 1887, authorized individual Indians to acquire lands in trust or restricted status, through purchase or gift (e.g., Act of June 30, 1932, 47 Stat. 474; Indian Reorganization Act of June 18, 1934, 48 Stat. 985; etc.)

Authority to Probate Estates

Beginning with the Act of June 25, 1910, 36 Stat. 855, Congress authorized the Secretary of the Interior to approve wills and to determine the legal heirs to trust or restricted property of deceased Indians.

Chronology of Authority

Since the 1910 Act, the following instructions have governed the Bureau of Indian Affairs (BIA) in the execution of its roles and responsibilities in the probate process:

1. Indian Office Circulars (No. 480, 10/17/1910; No. 524, 4/20/1911; No. 549 6/14/1911; No. 588, 12/6/1911, amended 1/22/1912; and No. 1059, 12/16/1915).
2. Regulations (approved 9/13/1915, 6/19/1923 and 5/31/1935; 25 CFR 81, 1938-1957; 25 CFR 15, 1958-1971; and 43 CFR 4 Subpart D, 1972-present).
3. BIA Manuals (54 BIAM 8, 7/16/1952-8/22/84; 54 BIAM Supplement 8, Release 1 and 2, 8/23/84-7/6/1992; and 54 BIAM Supplement 8, Release 3, 7/7/1992-present). The BIA role has always included the estate administration function.

From 1910 to 1915, Agency Superintendents conducted probate hearings. From 1915 to 1970 Examiners of Inheritance, employed by either the BIA or the Departmental Solicitor's Office,

conducted the hearings. Since 1970, the hearings have been conducted by Administrative Law Judges in the Department of the Interior's Office of Hearings and Appeals (OHA).

From 1910 through 1943 and then from 1944 to 1949, the actual heirship determination or probate decision was made respectively at the Secretary of Interior and then the Commissioner of Indian Affairs level. Since 1949, the determination has been made by either the Examiners of Inheritance or the Administrative Law Judges. In 1971, shortly after responsibility for conducting probate hearings and adjudicating estates of trust or restricted lands was transferred to OHA, new regulations governing Indian probate matters were, for the first time, promulgated by OHA and published in Title 43 of the CFR.

The inception of the estate administration process, as performed by BIA personnel, may be found in Indian Office Circular No. 480, dated December 17, 1910. While the activities remain basically the same, subsequent statutory requirements and the movement of Indian owners away from the reservations have made the work more complex and time-consuming. The estate administration activities begin when an owner's death is brought to the attention of the Agency, and major duties include the identification, research (family history, estate inventory, etc.), distribution, payment of claims, and closing the estate. The BIA duties do not currently include the adjudication, per se, which is a function performed by OHA.

A probate division existed within the Central Office of the BIA from the 1920's (possibly earlier) until the 1940's. Its purpose was to provide for uniform practices, including the maintenance of filing and docket systems. In 1960, the BIA established several "Title Plants", now known as a Land Title and Record Office (LTRO). The LTRO is the official office of record for title documents, including probate orders and the posting and maintenance of title (ownership) for trust and restricted Indian lands. Prior to that time, the Central Office of the BIA constituted the sole office of record for all title documents.

The Heirship Problem

Based upon the belief that many Indians were not ready to, or could not, assume full responsibilities as landowners, at the expiration of the trust or restricted periods, the periods were administratively extended from time to time. In fact, through legislation, they have now been extended in perpetuity. When the extensions were granted, no provisions were made to control or limit the increasing number of owners per tract of land. As the original allottees (owners) and their heirs have died, their estates have been probated by the Department of the Interior. The vast majority of heirs have inherited as tenants in common, with each holding an undivided interest in the tract. With rare exception, the land has not been physically partitioned. This has resulted in the so-called "heirship problem" or fractionation that is prevalent today. Tracts of land are owned by an ever-increasing number of individuals. In many instances there are several hundred such owners and the owners can include a proportionate number who are not members of the tribe. The result is a cost/benefit ratio that grows worse with time. More and more individuals own smaller and smaller interests in a given tract of land. As the number of Indian owners increases and the number of deaths increases there results a greater demand for estate administration and probate. The combination of Anglo-American property law with Indian trust status, has aggravated the situation and for the most part eliminated the mechanism by which fractionated title is normally cured. This in turn has led to the current probate backlog that has accumulated over the course of time.

Appendix III - Step by Step Procedures for Current Probate Process

#	Description of Step	Time frame	Value Added	Non-Value Added
1	Notification of Death from family, obituaries, etc. to BIA	1 day	X	
2	Anyone in BIA receives notice Superintendent, Clerk)			X
3	Probate Clerk receives death information	1 day - 6 months	X	
4	Probate Clerk prepares IIM Change Order document which puts hold on decedent=s account	1 day - 6 months	X	
5	Probate Clerk sends Change Order to realty supervisor	1 day		X
6	Realty supervisor sends Change Order to Land Operations division	1 day - 6 months		X
7	Change Order goes to Superintendent for approval	1 day - 6 months	X	
8	Superintendent approves Change Order	1 day	X	
9	Change Order is sent to OTFM for encoding	1 day - 6 months	X	
10	Change Orders hand carried or mailed to OTFM & LTRO	1 day - 1 week		X
11	OTFM Data Entry/Accounting Technician puts Change Order in Jacket File	1 day - 6 months	X	
12	Change Order encoded in computer by OTFM	1 day - 1 week	X	
13	LTRO receives Change Order (Hand carried or mail)	1 day - 1 week	X	
14	* Ownership & Leasing records are posted as A71" death	1 day - 6 months	X	
15	* Probate Clerk posts lease, rental, allotment, & inherited interest cards at the agency	1 day - 6 months	X	
16	LTRO posts to their system	1 day - 6 months	X	
17	* Probate Clerk begins data gathering efforts	1 day - 1 year	X	
18	* Requests death certificate from family, vital stat.			
19	* Requests land inventory from LTRO			
20	* Requests appraisal from appraiser			

21	* Interviews family members			
22	* Checks for will			
23	* Researchs lease income	(delete)		
24	* Verifies inventory from LTRO (per TAAMS)	1 day - 6 months		
25	* Research family history	(delete covered in 17-22)		
26	* Verifies amount in decedent=s IIM account at date of death	1 day - 6 months		
27	Probate Clerk prepares probate package	1 day - 6 months	X	
28	Probate Clerk gives probate package to supervisor for approval	1 day		X
29	Realty Officer certifies & gives probate package to superintendent	1 day - 1 week		X
30	Superintendent approves probate package & sends back to Probate Clerk	1 day - 1 week	X	
31	Probate Clerk sends probate package to OHA which includes: OHA-Form 7 Property inventory Claims (if any) Death Certificate Court documents (marriage-birth certificates, will, etc.)	1 day - 1 week	X	
	Probate package sent through regular mail to OHA	(delete)		
32	OHA Legal Clerk receives package	1 day - 6 months	X	
33	Emergency requests to release funds for burial			
34	* Judge or Legal Clerk reviews file for completeness	1 day - 6 months	X	
35	* Minor missing info - BIA is called		X	
36	* Major missing info, package goes back to BIA	1 day - 12 months	X	
37	If file is complete, probate package is logged in, batched & filed by geographic location for hearing	1 day - 1 month	X	

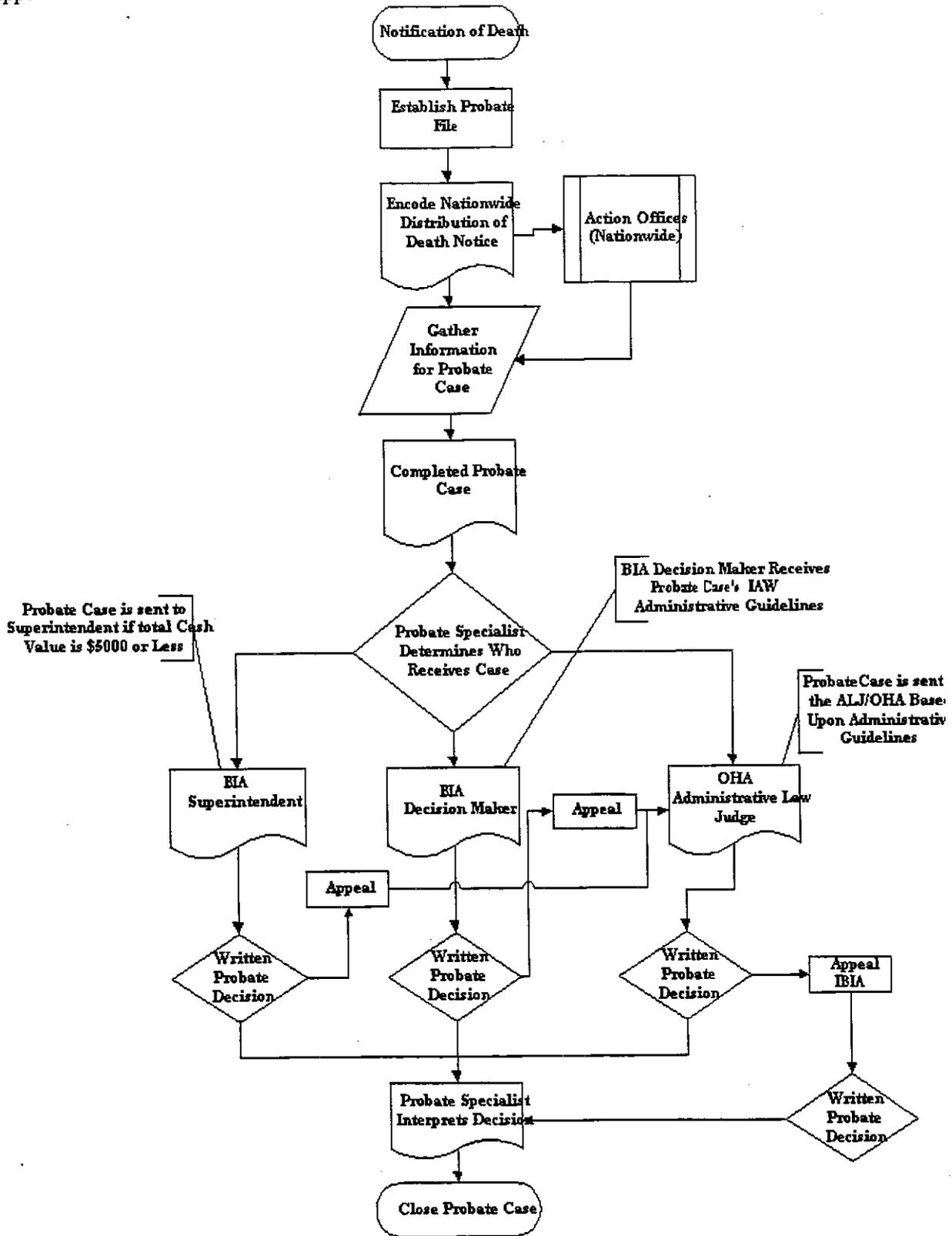
38	Factors considered in scheduling hearing: Central location of heirs Travel \$\$ Age of cases @ a particular location Number of cases @ particular location High IIM Account balance cases (lot of \$\$ involved) Staffing levels Time of year/weather			
39	Legal Clerk physically schedules hearing	1 week - 1 month	X	
40	OHA mails out notice of hearing to heirs, home agencies and land agencies (20 day due process letter)	1 week - 1 month	X	
41	Agency posts notice @ 5 (minimum) different places	1 week - 1 month	X	
42	20 day due process letter sent	(delete- see 40)		
43	Paralegal reviews file-preparation for hearing	2 days - 1 week		X
44	Paralegal gives to ALJ for review	2 days - 1 week	X	
45	* Pre-hearing is held-ALJ & heirs (Conference & questions)	1/4 hour - 2 hours	X	
46	* ALJ checks addresses of heirs Management ? Have heirs sign address change form	1/4 hour	X	
47	* Formal hearing on record ALJ & heirs Testimony is taken - identify potential research	1/4 hour - 3 days	X	
48	* More discussion (Q & A)			X
49	* ALJ gives handouts			
50	ALJ decides whether to transcribe testimony	1/4 hour	X	
51	Paralegal (prepare partial) transcribes testimony	1/4 hour - 1 week	X	
52	Factual research-Paralegal ALJ Legal research may include: Supplemental hearing - Phone calls - letters	1 day - 4 years	X	
53	Case gets put back on docket (could take a year)	1 day - 1 year	X	
54	Affidavits, Depositions (ALJ does or is done by another office or staff attorneys)	1 day - 4 years	X	

55	ALJ or Paralegal drafts decision (routine-full legal analysis)	1/4 hour - 1 month	X	
56	ALJ reviews & approves decision	1 day - 1 week	X	
57	Legal Clerk mails out order to every heir, agency w/land, home agency, & original to LTRO	1/4 hour - 1 week	X	
	60 day appeal period begins when decision is mailed out	60 days	X	
58	Decision filed according to date when mailed (OHA)	1 day - 1 week		X
59	After appeal period expires, Legal Clerk logs out case	1 day - 1 week		X
60	original documents are copied & sent back to heirs	(delete)		X
61	Notes: If an appeal is filed, closure is delayed until appeal is resolved. LTRO posts immediately upon receipt of decision.			
62	* After appeal period expires, BIA Probate Clerk implements decision & ALJ's orders.	1 day - 3 years	X	
63	* Realty/OTFM-IIM posts decision	1 day - 3 years	X	
64	* OTFM closes IIM account	1 day - 6 months	X	
65	* OTFM-IIM establish new accounts for new heirs, as necessary	1 day - 6 months	X	

* Indicates that the steps are occurring simultaneously.

Dark double lines indicate stall times.

Appendix IV New Probate Process Flowchart



Appendix V – BIA Area Offices’ Probate Caseload Chart

Area	Indian Enrollment*	Project Annual Death Rate**	LTRO Probates Processed***	BIA Probate Backlog****
Aberdeen	172,306	1,034	1,344*****	1,256
Albuquerque	64,192	385	5*****	41
Anadarko	89,816	539	264	491
Billings	62,441	375	1,300	2,001
Juneau	112,982	678	290	206
Minneapolis	149,853	899	336*****	1,018
Muskogee	461,865	2,771	232	68
Navajo	234,786	1,409	138	642
Phoenix	128,517	771	276	916
Portland	82,849	497	105	645
Sacramento	42,223	253	180	506

**Indian Labor Force Report, Portrait 1997 (Bureau of Indian Affairs/Central Office)*

***Indian Health Services uses 0.6 % annual death rate*

****Bureau of Indian Affairs (Central Office) Land Title Records Office 1997*

*****Report by Area Offices*

******Aberdeen LTRO handles Minneapolis area (approximately 1/5 of the caseload)*

******Albuquerque LTRO handles Navajo (1/3); Phoenix (2/3); and Albu (5)*



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS

1700 Louisiana NE Suite 220

Albuquerque, New Mexico 87110

(505) 346-7265

IN REPLY REFER TO:

MEMORANDUM

To: Norma Campbell, PMB

From: Patricia McDonald
Administrative Law Judge, OHA

Re: Probate Reinvention Lab Recommendations

Date: October 8, 1999

This memorandum is written in response to your inquiries whether I still want my memorandum of July 14, 1999 included in the final report of the probate reinvention lab. On October 6, 1999 I received a copy of Assistant Secretary Gover's request of August 30 to the Solicitor for an opinion on the constitutionality of the establishment of attorney decision-maker positions in the Bureau of Indian Affairs to determine heirs on the record as developed by the BIA realty staff, without a hearing. While I am pleased to see that the legal review has been requested, I still have concerns.

As you know, the OHA reinvention team's report is scheduled for completion October 29, 1999, and the team members are not at liberty to discuss their deliberations or recommendations before the report is issued. Some of the team members have told me that they are attempting to build due process protections into our team's recommendations, but without seeing their final report, I cannot say that whatever they will recommend will satisfy my concerns that the Department adhere to the requirements of due process in the trust context, including independent review.

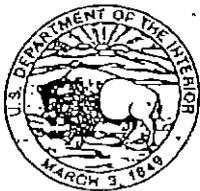
I believe it is necessary to spell out some of the practical concerns that have been expressed verbally, but not addressed in the report. These relate to the legal issue of independent review. The underlying difficulty facing everyone is the shortage of resources to accomplish the necessary work. The Area Directors face complex crises on nearly a daily basis and often cannot get immediate legal advice from the Solicitor's office. Regardless of who in the organization is the attorney decision-maker's official supervisor, the attorney may become the Area Director's *de facto* staff attorney, at the expense of probate adjudications. Resources that have been earmarked for probate work have been diverted to other needy programs. I am aware of the current effort to control diversion of resources, but the results of that effort are not yet known. In some areas cronyism could be a real problem for BIA and our clients. Many heirs are reluctant to reveal sensitive family history at the BIA because of the perception that private information will become fodder for local gossip. These factors cannot be ignored if the new system is to be a success, both in the short and long term.

Memo - Page 2

October 8, 1999

Re: Probate Reinvention Lab Recommendations

I wish to emphasize that I am not opposed to change in the way probate cases are adjudicated. I think the recommendations in our report for improving case preparation for submission for probate are sound and long overdue. I also strongly support the application of Indian preference in hiring for everyone working in the Indian probate field. I know that the cases can be triaged so that cases of differing levels of complexity receive appropriate levels of service because that is done now, informally. The current recommendation for attorney decision-maker positions in BIA can be fine-tuned so that constitutional defects are avoided, Indian preference applies, the process is streamlined, and both short and long term benefits are realized. However, I cannot support the recommendation in its present form, so must reluctantly dissent. I insist that this memorandum and the July 14, 1999 memorandum be appended to the report.



United States Department of the Interior

OFFICE OF THE SOLICITOR

Washington, D.C. 20240

NOV 30 1999

Memorandum

To: Assistant Secretary - Indian Affairs

From: Karen Sprecher Keating, Associate Solicitor, Division of General Law *Samuel S. Elliott* 100
per

Re: Establishment of Attorney Decision-maker Positions in the Bureau of Indian Affairs

Your request of August 30, 1999, discussed the proposal to hire attorneys as examiners/decision-makers in Indian probate cases ("Proposal"). These attorney decision-makers would determine the heirs of a decedent without a hearing, although any interested party could obtain a hearing at any point in the process. This proposal was one of the re-invention proposals designed to streamline the disposition of Indian probate cases. We conclude that 25 U.S.C. § 372 does allow the use of attorney decision-makers, as proposed, rather than administrative law judges ("ALJs") to determine the heirs of decedents in simple cases, and that the process will not violate the due process rights of any potential heirs. We do not address whether ALJs must hold the hearing if one is requested, since that question was outside the scope of your request.

Issues Presented

There are two issues raised by this Proposal. The first issue is whether 25 U.S.C. § 372 requires the Bureau of Indian Affairs ("BIA") to use a hearing to determine the heirs, and involves an examination of 25 U.S.C. § 372, the implementing regulations and the formal hearing requirements of the Administrative Procedure Act ("APA"), 5 U.S.C. § 554(a). The second issue is whether a potential heir's due process rights will be abrogated by the elimination of a hearing.

The Proposal for Attorney Decision-makers

As described in your memo, the Bureau of Indian Affairs would establish a procedure for the probate of cases without any factual disputes and without any major legal complexities. Attorney decision-makers would issue written decisions based on the record submitted by BIA probate specialists. No hearing would be held. The BIA would provide a notice to all identified potential heirs, and place notices in the local newspapers and other locations to notify potential unidentified heirs. The notices would inform the parties of the new process and inform them of their right to request a hearing before an administrative law judge at any time before the attorney decision-maker issues a decision. In addition, any party aggrieved by the decision would have the right to appeal the decision to an administrative law judge. It is unclear if the Proposal would require an aggrieved party to appeal to an administrative law judge before judicial review, or if the decision from the attorney decision-maker could be appealed in court directly.

The History of the Indian Probate Hearings Examiners

The determination of heirs has been regarded as a judicial or quasi-judicial function, which was performed by the courts prior to an Act of Congress in 1910 conferring this function upon the Department of the Interior. Between 1947 and 1954, hearings examiners¹ performing Indian probate work were recruited, examined and certified pursuant to the provisions of the APA. From 1954 to 1967, at the request of the Department, Congress granted a yearly exemption from the APA requirements for hearing officers². The exemption removed the hearing officers from the qualification and experience standards for ALJs set out in the APA. This made the positions easier to fill, which reduced the backlog of unprobated cases. In 1967, Congress permanently exempted the Indian probate hearing officers from the requirements of the APA. In 1990, Congress repealed the exemption, and, by law, "grandfathered" into the ALJ corps all Indian probate hearing officers who met the ALJ requirements. Pub. L. 101-301 § 12(b), 104 Stat. 211 (1990).

Does 25 U.S.C. § 372 Require a Formal, Oral Hearing for All Indian Probate Cases?

The Statute and Regulations Addressing Indian Probate Cases: Section 372 addresses the ascertainment of heirs of Indian estates and the settlement of the estates involving trust lands. It addresses the determination of heirs, stating that "... the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decisions shall be subject to judicial review. . . ." 25 U.S.C. § 372 (1999 Supp.).

There are two interpretations of the 1990 amendments that grandfathered the hearings examiners into the ALJ corps. Arguably, the repeal of the exemption allowing persons other than ALJs to decide Indian probate issues indicates Congress' desire to have all Indian probate cases decided by ALJs. On the other hand, a good argument can be made that while Congress decided to grant ALJ status to the hearings examiners, Congress did not state that only ALJs could make the determinations of heirs and in fact stated that the Secretary could prescribe rules to guide the determination. We subscribe to this argument; therefore, we interpret the statute as meaning all interested parties should have a fair chance to present their views but the statute does not govern the precise manner in which that should happen.

The 1990 amendments also changed the second part of the sentence in 5 U.S.C. § 372 which requires the Secretary to ascertain heirs, to clarify that the decision of the Secretary determining the legal heirs is subject to judicial review. At the same time Congress could have amended the

¹The title "hearing examiner," used by the APA, was changed to ALJ in 1978. Pub. L. 95-251, § 3.

²Congress seemed to have used the term "hearing officer" as synonymous with "hearing examiners".

first part of the sentence to make clear that all decisions concerning the heirs of Indian decedents must be made by an ALJ, but did not. Another indication that Congress did not intend that ALJs make all determinations of heirs is that a number of other important determinations in the Indian probate process do not require formal hearings. For example, the section following 25 U.S.C. § 372 concerns the distribution of Indian property by will. It does not mention a hearing at all, much less one on the record. 25 U.S.C. § 373.

The regulations governing Indian hearings and appeals address the procedural rules for settlement of trust estates of Indians who die possessed of trust property. 43 C.F.R. §§ 4.200-4.357. One function of the ALJs is to determine the heirs of Indians who die intestate and own trust property. The regulations state that the ALJs "shall" determine the heirs, 43 C.F.R. § 4.202, 4.240. If the Proposal is adopted, this regulation would have to be changed. The regulations grant the ALJs the same powers generally conferred by the APA, such as authority to administer oaths, issue subpoenas, take and cause depositions to be taken, etc., 43 CFR § 4.230 *et seq.* However, there is an exception to the regulatory requirement that an ALJ determine the heirs. Section 4.271 allows the Superintendent to assemble the heirs; hold an informal hearing, and make decisions on the distribution of property when an Indian dies intestate and the value of the trust personal property is less than \$1000. 43 C.F.R. section 4.271. The regulation has recently been amended to increase the value to \$5000 and clarify that any interested party has the right to appeal the Superintendent's decision to the Board of Indian Appeals. This regulation allowing a non-ALJ to make determinations of heirs for distribution of personal property has been in place since 1971.

From our reading of the statute, our view is that while Indian probate cases can be decided by the ALJs, the process envisioned by the Proposal is also valid if the regulations are amended. The Proposal constitutes a voluntary, alternative process that does not eliminate the need for the ALJs but is parallel to the ALJ process that will be used on the more complex cases and cases in which parties desire a hearing.

The APA: The APA is relevant to this proposed process. Sections 553 (c) and 554(a) of the APA address certain hearings and the procedures the agency must follow in conducting those hearings. 5 U.S.C. § 553(c), 554(a). Section 553 addresses rulemaking and section 554 addresses adjudications. When adjudications or rules are required by statute "to be determined on the record after opportunity for an agency hearing," 5 U.S.C. § 553(c), 554(a), then the APA provisions on formal hearings apply. The APA provisions on formal hearings provide that the presiding officer shall be an ALJ and require evidentiary hearings that include the right of parties to present evidence, conduct cross-examination and rebut evidence. 5 U.S.C. §§ 557-558.

A line of APA cases addresses the applicability of formal hearings to rulemaking and can be extended by analogy to adjudications, assuming, for the sake of argument, that there are not due process concerns (which are addressed in the next section). The courts have consistently held that the formal hearing provisions apply only when the statutes requiring promulgation of rules used the exact language of "on the record after opportunity for an agency hearing." In United

States v. Florida East Coast Railway Company, 410 U.S. 224, 240-241 (1973), the Supreme Court held that the Interstate Commerce Act, § 1(14)(a), requirement authorizing the Commission to act "after hearing" was not the same as a requirement that a rule be made "on the record after opportunity for an agency hearing," since the Interstate Commerce Act provision had been amended after the enactment of the APA and the statute did not suggest that the informal rulemaking requirements in the APA § 553 were not adequate. Therefore the Supreme Court held that reference to the APA to determine the meaning of a provision for a hearing in another statute was reasonable since the APA deals with questions such as the nature and scope of hearings. In the Florida East Coast Railway Company case, interested parties were given notice and the opportunity to comment, object, submit, or make other written recommendations. In addition, the Commission was willing to consider proposals for modification of the rules after experience had been gained with them. Due to these factors, the Supreme Court held that notice and submission of written evidence satisfied the conditions for the Commission to act "after hearing." 410 U.S. § 240. See also, National Classification Committee v. U.S.; 765 F.2d 1146, 1150 (D.C.Cir. 1985). However, the Supreme Court cautioned in the Florida East Coast Railway Company case that in some circumstances, additional procedures may be needed in order to afford aggrieved individuals due process, when a small number of individuals are impacted by the rulemaking. 410 U.S. § 245-46. We feel this is addressed by the due process procedures described below³.

The language in 25 U.S.C. § 372 requiring the Secretary, "upon notice and hearing," to determine the heirs does not require the hearing be "on the record" with an ALJ. The statute does not match the language in 5 U.S.C. § 554(a) which requires adjudication according to the formal hearing requirements of 5 U.S.C. §§ 557 and 558 when statutes require adjudication "on the record after opportunity for an agency hearing." It is analogous to the language in the Interstate Commerce Act which did not require a hearing "on the record" for rulemaking under the Act, and therefore it is arguable that the language in 25 U.S.C. § 372 does not require formal hearings with ALJs due to the lack of language "on the record."

³There is a case dealing with adjudications where the Supreme Court required the Securities and Exchange Commission to provide formal disciplinary hearings pursuant to 5 U.S.C. § 557 and 558. Steadman v. Securities & Exchange Commission, 450 U.S. 91 (1981). The disciplinary hearings were pursuant to two provisions of the Securities and Exchange Act that required "an opportunity for [an agency] hearing;" one provision required a hearing "on the record" and one provision omitted the terms "on the record." The court held that both provisions required a formal hearing due to the "on the record" language, the express provision for a hearing, and the fact that the disciplinary hearing was the final agency action which would create the record to be reviewed by the courts. 451 U.S. 96. In this Proposal, the attorney decision-maker would not be the final decision reviewed by the courts because any aggrieved party could appeal to an ALJ before judicial review. We think this case is distinguishable on these facts; however, we recommend that the regulations providing for this process state that a party must appeal to the ALJ to exhaust administrative remedies.

Even assuming arguendo that 5 U.S.C. § 372 requires a formal hearing with an ALJ, the proposed process meets that standard due to the right to request a formal hearing with an ALJ at any point in the process and the right to appeal the decision of the attorney decision-maker to an ALJ.

In combination with the lack of intent by Congress to require formal hearings and the line of APA cases requiring "on the record" to trigger the formal hearing requirements, we conclude that it is permissible to decide the cases without an ALJ, subject to the rights of appeal and the right to request a hearing at any point in the process.

Will the Proposal Eliminate Due Process Rights?

We do not address whether a potential heir has a property right to due process in the determination of heirs of a deceased Indian, because regardless, the Proposal does give due process rights to all potential heirs. As described above, the proposed process will give notice to all potential heirs; it will allow any interested party to request a full hearing; it will result in a written opinion; and it will allow any aggrieved party to appeal the decision to an ALJ, the Board of Indian Appeals and the Federal Courts, if desired. We assume that the procedures for notice that the attorney decision-maker will follow are the same procedures as are now set out in the regulations in 43 CFR §§ 4.211-4.212.

The fundamental requirement of due process "is the opportunity to be heard at a meaningful time and in a meaningful manner." Mathews v. Eldridge, 424 U.S. 319, 333 (1976) (internal quotations omitted). The Supreme Court has stated that due process is flexible and "calls for procedural protections as the particular situation demands." Mathews, 424 U.S. at 334. See also, Cleveland Bd. of Public Education v. Loudermill, 470 U.S. 532, 542 (1985); Edelman v. Western Airlines, 892 F.2d 839, 846 (9th Cir. 1989). In the Mathews case, the Supreme Court laid out three factors to evaluate in an examination of due process rights: how private interests are affected by the process; the risk of erroneous deprivations of these private interests through the procedures; and the government's interest, including the administrative burdens that additional process would require. Mathews, 424 U.S. at 335. In Mathews, the Court addressed the process for the termination of Social Security disability benefits where the payments could be terminated after an initial process, for up to a year, during the appeals process. The Supreme Court found written submissions would adequately provide for due process rights where the written materials would be of greater value than oral testimony. The court also found that the burden of additional hearing requirements weighed in favor of the written process." Mathews, 424 U.S. at 345.

Here, the proposed process would possibly impact potential private interests; however, that factor is outweighed as there is no risk of erroneous deprivation of rights as all parties will have all the same procedural rights. The attorney decision-maker will follow the same requirements for notice set out in the regulations so all potential interested parties will have a chance to respond; at any time all parties may request a hearing or that the case be decided by an ALJ. After the decision is issued by the attorney decision-maker, any aggrieved party will have the right to

appeal to an ALJ. The advantages of the attorney decision-maker system will inure to both the government and potential heirs as the backlog of cases is reduced thereby allowing cases to be decided sooner.

Conclusion

We conclude that the BIA may establish a process with attorney decision-makers to determine the heirs of deceased Indians who own Trust property. The procedure should require the attorney decision-maker to follow the same procedures for notice as set out in the regulations at 43 CFR §§ 4.211-4.212 and should apprise all parties of their rights to ask at any time for a hearing by an ALJ or appeal the decision to an ALJ. We also recommend an amendment to the regulations that would allow the attorney decision-maker to determine heirs, similar to 43 CFR § 4.271 and recommend that the regulation address the appeal of the decision from the attorney decision-maker.

United States Department of the Interior
Bureau of Indian Affairs
Office of the Attorney – Examiner of Inheritance
115 Fourth Avenue, SE
Aberdeen, SD 57401

Memorandum

Date: September 14, 2000
From: Marvin Stepson, ADM *MS*
Subj: Summary Distribution Authority
To: File

1. The following is the authority for the summary distribution of the estates of Indians who die intestate and without trust property, leaving an IIM account of less then \$5,000.00, excluding interest.
2. Authority: RS 2478, as amended, 43 USC § 1201, 43 CFR § 4.271
3. By this authority, the Superintendent, now the ADM, is to assemble the apparent heirs for an informal hearing, now a summary distribution conference. The purpose of this conference is to determine the proper distribution of the estate. A memorandum covering the conference is to be retained in the Agency files. The memorandum is to show (a) the date of death; (b) the date of the hearing; (c) the persons notified and attending the conference; and, (d) the amount on hand and its distribution.
4. Creditors' claims, if any, are to be disposed of as provided by §§4.250 and 4.251. The balance remaining, if any, is to be credited to the legal heirs.
5. It is my opinion that 43 CFR 4.271 applies to those who died on or after August 23, 1999.

The following is the authority for the summary distribution of an Indian who dies intestate leaving only personal property or cash of a value less then \$1,000.00, excluding interest:

Authority: 43 CFR 4.271

It is my opinion that this section applies to those Indians who die intestate prior to August 23, 1999.

The Superintendent's or ADM's authority for an informal hearing is essentially identical to that of paragraph 3 above.

cc: Ange Hamilton
Carey Griffin
Cheryl Sam

Executive Summary

The Probate “to be” working group recommended consolidating the existing probate Deciding Officials from the Bureau of Indian Affairs (BIA) and from the Office of Hearings and Appeals (OHA) into one adjudication unit. Previous trust reform measures designed to speed up probate case processing and reduce the backlog of probate cases resulted in the creation of the BIA Attorney Decision Maker (ADM) Program; which is governed by regulations set out at 25 CFR Part 15, adopted in 2001. The Administrative Law Judges (ALJ’s) and Indian Probate Judges (IPJ’s) in the OHA are governed by regulations in 43 CFR.

The current options for the consolidation include:

1. Moving OHA ALJ’s and IPJ’s into the BIA;
2. Creating a new adjudication unit to report to the Assistant Secretary; and
3. Moving the ADM program into OHA.

The Attorney Decision Makers support the first option for the following reasons: 1) Indian Preference in hiring (created by Congress and upheld by the U.S. Supreme Court to give Indians more control over decisions which affect only Indians, because of their unique political status as Indians); 2) Moving the ADM’s into OHA would threaten progress made under Probate trust reform, by returning control and placement of the Indian Probate process back under an organization and structure which did not work; and finally 3) the combined budgets for the ADM program and the OHA are already in BIA’s budget and this option is the most cost effective alternative in a year when all agencies are being asked to take a significant budget cut.

Indian Preference, especially in the critical area of Indian Probate which affects Indians because of their unique political status as Indians, gives Indians more control over a process which primarily affects Indians and their families. This supports the Congressional Policy of Indian Self Determination and has been upheld by the U.S. Supreme Court. Indian decision makers conducting hearings to probate Indian trust and restricted property estates are more likely to be competent in cultural communication and respectful of the cultural practices and beliefs of Indian people. The majority of Attorney Decision Makers are members of the Indian Tribes they serve, have experience working with legal issues in Indian Country, and have received a positive response from their Indian clients.

There is broad consensus that the former structure, governed solely by OHA and regulations in 43 CFR was neither appropriate to, nor efficient in, the probate of small and uncontested Indian trust/restricted property estates. The ADM program, created as part of trust reform, has demonstrated efficiency in both case processing times and adjudication costs per case. Faster adjudication at a lower cost reduces the existing probate backlog (which developed under OHA’s lengthy administration) and addresses concerns raised by litigants in the Cobell case.

Budget concerns, which cannot be determinative of a change which does not address Indian Concerns for continued probate reform, weigh heavily in favor of moving the process into BIA, which has already demonstrated efficiencies in both processing time and volume and in cost per case by moving only the uncontested case adjudication into the Bureau. Attacking the probate backlog in a culturally appropriate, more efficient and cost effective manner is a win/win solution which should be adopted by the Bureau, especially in light of the current budget climate.



United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

AUG 30 1999

To: Solicitor

From: Assistant Secretary-Indian Affairs *Kevin Jones*

Subject: Request for Opinion: On the Constitutionality of Establishment of Attorney-Decision-maker Positions in the Bureau of Indian Affairs

This is a request for a legal opinion on a proposal to hire attorneys as examiners/decision makers in Indian probate cases. The proposal is one of several recommendations made by the Department's Indian Probate Re-invention Lab. The re-invention team members spent several weeks reviewing and analyzing the Indian probate process to determine what processes and workflow procedures could be streamlined to facilitate the timely and efficient disposition of Indian probate cases.

The establishment of attorney decision makers was one of several processes identified and recommended under the re-engineered Indian probate process. These decision makers will hear only those cases without any disputes as to the facts and without any major legal complexities. A notice will be provided to all identified potential heirs. Unidentified potential heirs will be notified through publication in local newspapers and posting of the notice in other public locations. The notice will inform the parties that, under a new process, the BIA attorney decision maker will determine the heirs of a decedent on the record provided to him or her by the BIA probate specialists. No hearing will be conducted and the decision maker will issue a written decision that will be provided to all interested parties.

It is important to note however, that parties will be advised of their right to request a hearing before an administrative law judge at any time before a decision is made. Moreover, any party aggrieved by a decision will have the right to appeal the decision to an ALJ.

An issue has arisen as to whether potential heirs and other interested parties have a right to a hearing before an Administrative Law Judge (ALJ) pursuant to 25 U.S.C. §372, which authorizes the Secretary, upon notice and hearing, to determine the legal heirs of Indians. The new process would eliminate hearings in probate cases if all the parties agreed to use the decision maker process. We are interested in ensuring that the new process meet the constitutional requirements of due process and does not violate any interested party's constitutional rights. We are therefore requesting an opinion on the constitutionality of the proposed new Indian probate process and the use of attorney decision makers to decide probate cases on the record and without a hearing.



United States Department of the Interior

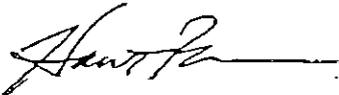
BUREAU OF INDIAN AFFAIRS
Washington, D.C. 20240

IN REPLY REFER TO:

30 November 1999

Note

To: Kevin Gover
Hilda Manuel
Nancy Jemison
Art Geary

From: Harriet Brown 

Subject: Solicitor's Opinion on Attorney Decision-Maker Positions

Attached please find a copy of the Solicitor's Opinion we requested on August 30, 1999 regarding the proposal to hire attorneys as examiners/decision-makers in Indian probate cases. The Opinion notes that: (1) the BIA may establish a process with attorney decision-makers to determine the heirs of deceased Indians who own Trust property; (2) the attorney decision-makers should follow the same procedures for notice as established in 43 CFR parts 4.211 - 4.212; and (3) regulations should be amended accordingly, similar to 43 CFR part 4.271, while also addressing the appeal process.

As a result, I am asking my staff to work with the Policies and Procedures Office to develop a work plan to address these regulatory changes. I will also be sharing this opinion with the Office of Hearings and Appeals and the Reinvention Lab coordinators.

Attachments

*BLA Probate Training Session
August 21 - 25, 2000
BLM National Training Center
9828 North 31st Avenue
Phoenix, Arizona 85051*

Monday, August 21, 2000:

8:00am - 8:30am - Welcome/Introductions/Orientation	Barry Welch Kathleen Supernaw
8:30am - 9:00am - History of Probate	Charles Breece
9:00am - 9:30am - HLIP Trust Programs	Nancy Jemison
9:30am - 10:15am - Trust Responsibility-- Why does the federal government probate estates?	Mike Jones
10:15am - 10:30am - BREAK	
10:30am - 11:45am - Roles of BIA/OHA/OST	Mike Jones
11:45am - 1:00pm - Lunch (on your own)	
1:00pm - 2:00pm - The Indian Land Consolidated Act and Fractionated Lands	Stan Webb
2:00pm - 3:30pm - Inheritance Codes and Tribal Laws	Judge Patty McDonald
3:30pm - 3:45pm - BREAK	
3:45pm - 5:00pm - Records Management for Probate Files	Ken Rossman

Tuesday, August 22, 2000:

8:30am - 9:30am - Overview of "Old" BIAM Probate Procedures	Sharlene Round Face
9:30am - 10:15am - OHA Regulations and Procedures	Rein Heymering
10:15am - 10:30am - BREAK	
10:30am - 11:45am - The Reinvented Probate Process and Proposed Federal Regulations	Kathleen Supernaw
11:45am - 1:00pm - Lunch (on your own)	

1:00pm - 3:00pm - IBLA Caselaw

Priscilla Wilfahrt

3:00pm - 3:15pm - BREAK

3:15pm - 5:00pm - Choice of Law and Estimates of Value

Judge Richard Reeh

Wednesday, August 23, 2000:

For Probate Specialists, Clerks, ADM Clerks:

For ADM Specific:

Judge Richard Reeh, Instructor

8:00am - 9:00am - Probate File Contents/Checklist
Ernie Titchywy

Roles of ADM's & ALJ's
Decisional Independence

9:00am - 10:00am - Electronic Version OHA-7 Form
Pam Menien

Impact of Specific Regulations
Receiving/Administering the
Inventory of Cases

10:00am - 10:15am - BREAK

BREAK

10:15am - 12:00pm - Internet Searches/Access
Rein Heymering

Common Concerns
The ADM Workplace
Local Politics, Revisited
Sensitivity to the Service Population

12:00pm - 1:00pm - LUNCH

LUNCH

1:00pm - 3:00pm - Will Preparation
Judge Patty McDonald

Summary Distributions

3:00pm - 3:15pm - BREAK

BREAK

3:15pm - 4:15pm - Will Interviews
Judge Patty McDonald

Research Database
Various Legal Issues—Choice of Law

4:15pm - 5:00pm - Existing Best Practices Discussion
Ernie Titchywy
Sharlene Roundface

Decision Writing
Template for Uniform Decisions

Thursday, August 24, 2000:

8:00am - 4:00pm - Field Trip to Pima Agency for Probate Specialists, Clerks, ADM Clerks
Breakdown into two groups. Alternating realty/probate and FOIA sessions.

8:00am - 5:00pm - Specific for ADM's only
Judge Richard Reeh and Judge Patty McDonald

The Computer Operation System
Receiving and scheduling a new case
Creating Notices/Labels/correspondence
Finding information about specific cases
Monthly Reporting
The §4.271 Summary Distribution Workshop
Informal Hearings
Best Practices
Round Table Discussion

Friday, August 25, 2000:

8:30am - 10:30am - Wrap-Up Session/Closeout/Comments

ACH VENDOR PAYMENT SYSTEM PAYMENT INFORMATION FORM

Data being collected under this form is required under provisions of 31 U.S.C. 3322 and 31 CFR 210. Failure to provide information may prevent the receipt of payments through the P638 Contract Payment System and/ or ACH Payments.

VENDOR INFORMATION (VENDOR)

Add New Code

Change Information

Active Code

Inactive Code

Name Angelita Hamilton Vendor Code/ DUNS Number _____

Address 1 [REDACTED] Home ORG _____

Address 2 _____ SSN/ Fed ID Number: [REDACTED]

City: Gracemont State: OK ZIP Code: [REDACTED]

SF 1099 Vendor: yes no Telephone Number: [REDACTED]
(If 1099 is Yes, must have the EDV/ SS Number) FAX Number: [REDACTED]

Vendor Status:	Emerging Small Business <input type="checkbox"/> YES, LIST SIZE _____	Small Business <input type="checkbox"/> YES, LIST SIZE _____	Large Business YES or NO (Circle)	Woman Owned YES or NO (Circle)	Minority Owned YES or NO (Circle)
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FINANCIAL INSTITUTION INFORMATION (VENDOR)

Name: _____

Address 1: _____

Address 2: _____

City: _____ State: _____ Zip Code: _____

ACH Coordinator: _____

Telephone Number: _____ Nine Digit Routing Number: _____

Account Number: _____ Checking: _____ Savings: _____

Depositor Account Title: _____

Financial Institution Representative Name: _____

Title: _____ Telephone: _____

BUREAU OF INDIAN AFFAIRS INFORMATION (BIA Personnel)

Home Organization K 00271 Telephone: _____

Contact Person: Kirt D. Frejo FAX Number: 202-208-6595 (63) 407-5312

Vendor type: G T X N E I C



Existing
OHA Regulations

A Brief Introduction

Presented by Rien Heymering, Special Counsel
Office of Hearings & Appeals - Salt Lake City

Tuesday August 22, 2000
Phoenix, Arizona



Before We Begin

A Professional Qualifications Assessment Quiz

- ★ Q1. How do you put a *giraffe* into the refrigerator?
- ★ Open the door. Put the giraffe inside. Then close the door.
- ★ This question tests whether you have a tendency to make simple tasks more complicated than they need to be.



Before We Begin

A Professional Qualifications Assessment Quiz

- ★ Q2. How do you put an *elephant* into the refrigerator?
- ★ First you open the door and take the giraffe out. Then you put the elephant in the refrigerator and close the door.
- ★ This question tests your ability to take into account the consequences of your previous actions.



Before We Begin

A Professional Qualifications Assessment Quiz

- ★ Q3. The Lion King called a meeting of **all** the animals in the jungle. Which animal did not attend?
- ★ The elephant did not attend.
(*The elephant is in the refrigerator.*)
- ★ This question tests your ability to recall and associate relevant information.



Before We Begin

A Professional Qualifications Assessment Quiz

- ★ Q4. You have to cross a river inhabited by ferocious crocodiles. How do you manage to cross the river, safely?
- ★ Just swim across. (*The crocodiles are at the meeting called by the Lion King.*)
- ★ This question tests your ability to learn from your previous mistakes.



Before We Begin

A Professional Qualifications Assessment Quiz

- ★ How many of you got all 4 right?
- ★ How about 3 out of 4 right?
- ★ How about 2 right?
- ★ How about just 1 right?
- ★ Anybody willing to admit that they missed them all?



Before We Begin

A Professional Qualifications Assessment Quiz

- ★ According to Andersen Consulting Worldwide, around 90% of the professionals they tested got all of the questions wrong.
- ★ But many preschoolers got several correct answers.
- ★ Anderson Consulting says this conclusively disproves the theory that most professionals have the brains of a four year old.



Lessons to Take Home

Yes, there's a point to the joke.

- ★ Don't make things more complicated than they are.
- ★ Think through the consequences of your actions.
- ★ Learn to remember information relevant to the task at hand.
- ★ Learn from your mistakes.



Good Morning !

-
- ★ Who am I?
 - ▶ OHA Salt Lake since 1986
 - ▶ Probate since 1992
 - ▶ LRIS II
 - ▶ OHA Docketing System
 - ▶ TAAMS
 - ▶ Probate Reinvention Lab II
 - ▶ Trust Management Architecture Workgroup
 - ▶ Special Counsel for Probate Backlog Project / HLIP
 - ★ What will we cover today?



Getting to Know You

Before we begin....

- ★ How many of you have **never** had anything to do with Indian trust or restricted property before?
- ★ How many of you have some experience with Indian trust or restricted property, but have never been involved with **Indian probate**?
- ★ How many of you **have** had some experience with Indian probate?
- ★ How many of you are new to BIA?
- ★ How many of you have been w/ BIA and are moving into new positions?



What We're Here to Learn

"Everything you always wanted to know about OHA -- but were afraid to ask."

- ★ What is OHA's authority and what does OHA do?
- ★ What information does OHA need to do its job, and where does it get it?
- ★ What happens after OHA completes a probate?



Why Is This Important?

- ★ You will need the same information needed by the administrative law judge in order to **determine the legal heirs** to trust or restricted property
- ★ You will follow similar procedures
- ★ You will want to know what happens when you refer a case to an ALJ



Training Objectives

What we hope to accomplish with in this session

- ★ **First objective:** Understand OHA's authority and what OHA does.
- ★ **Second objective:** Understand what information OHA needs to do its job, and where it gets it.
- ★ **Third objective:** Understand what happens after OHA completes a probate.



OHA Probate Process

What happens in OHA

- ★ Notice of Death
- ★ Submit Case (OHA-7 Form etc.)
- ★ Notice of Hearing
- ★ Hearing
- ★ Decision
- ★ Set by Dockets (batching)
- ★ 12 - 16 months (average)
- ★ New procedures to shorten time

notice by Puller? ..

*43.2--
Agreement between heirs - allows AIT to accept inheritance between heirs.*



Statutory Authority

Laws Pertaining to Indian Affairs

- ★ Title 25 of the United States Code



Statutory Authority

Intestate Succession

★ 25 U.S.C. § 372

- ★ Provides that the Secretary of the Interior is to determine the heirs to Indian trust property, according to the regulations he prescribes.



Statutory Authority

Wills

★ 25 U.S.C. § 373

- ★ Provides that Indians may make wills to distribute their Indian trust property.



Statutory Authority

Wills

★ 25 U.S.C. § 464

- ★ Part of the Indian Reorganization Act of 1934.
- ★ Restricts those to whom Indians may distribute Indian trust property located on IRA reservations.



Statutory Authority

Inheritance

★ 25 U.S.C. § 371

★ Provides that children may inherit even if their parents were not married in a manner recognized by state law



Statutory Authority

Adoption

★ 25 U.S.C. Sec. 372a

★ Provides only 4 specific ways of effecting an adoption that the Department will recognize in probate proceedings

passed in 1941



Regulatory Authority

The Secretary's Rules

★ Title 43
Code of Federal Regulations

★ Part 4

★ Subpart D

★ 43 CFR 4.200 *et seq.*



Regulatory Authority

Administrative Law Judges (OHA)

- ★ 43 CFR 4.202 and 43 CFR 4.230
- ★ Gives ALJ's the authority to probate Indian trust property, and describes powers



Regulatory Authority

Superintendents and ADMs (BIA)

- ★ 43 CFR 4.271
- ★ Gives **BIA** the authority to do Summary Distributions of certain Indian trust property

ADM authority where no land involved no will value is \$500 or less



Data for Heirship Finding

43 CFR 4.210 & The OHA-7 Form

- ★ **Vital statistics about the decedent**
 - ▶ Information about decedent's family
 - ▶ Information about their legal relationships to decedent
 - ▶ Information about decedent's wills and codicils
 - ▶ Information about decedent's presumed beneficiaries
 - ▶ Information about decedent's trust and restricted property
 - ▶ Information about any adoptions
 - ▶ Information about any illegitimate children (proof of paternity)
 - ▶ Information about any creditors claims
 - ▶ Names and addresses of all interested parties
- ★ *It helps to have probate numbers for all deceased family members, if available*



43 CFR 210(b)

Data For Heirship Finding

- ★ Why do we want this information?
 - ▶ To resolve issues of legal status & determine the heirs at law
 - Marriage & Divorce
 - Adoption
 - Paternity
 - ▶ To identify decedent's trust and restricted property
 - ▶ To identify potential beneficiaries
 - ▶ To identify who has a claim against the decedent's estate
 - ▶ To be able to notify all interested parties of the proceeding



Notice

Notice must be posted publicly and sent personally

- ★ 43 CFR 4.211 tells when, how, and to whom, Notice is to be given
- ★ 43 CFR 4.212 sets out the content of the Notice



Discovery

And Other Pre-trial Procedures

- ★ 43 CFR 4.220 - Production of Documents
- ★ 43 CFR 4.221 - Depositions
- ★ 43 CFR 4.222 - Written Interrogatories
- ★ 43 CFR 4.225 - Prehearing Conference
- ★ 43 CFR 4.230(b) - Subpoenas



Hearings

43 CFR 4.230 through 4.236

- ★ On the record (recorded verbatim) - and under oath
- ★ Rules of Evidence
- ★ Procedures for Proving Wills
- ★ Use of Witnesses and Interpreters



Miscellaneous Issues

To take into consideration at the hearing

- ★ 43 CFR 4.260 - Making a will
- ★ 43 CFR 4.261 - Anti-lapse provision *gift does not fail*
- ★ 43 CFR 4.262 - Disqualifies the killer
- ★ 43 CFR 4.250 – 4.252 - Creditor's Claims
- ★ 43 CFR 4.208 - Renunciations
- ★ 43 CFR 4.300 et seq. - Purchase Options
- ★ 43 CFR 4.281 - Attorney Fees
- ★ 43 CFR 4.282 - Guardians for Minors & Incompetents



The Decision

Orders Approving Wills & Making Distributions

- ★ Contents and Distribution
- ★ 43 CFR 4.240



After The Decision

Rehearings, Reopenings and Appeals

- ★ 43 CFR 4.241 - Petitions for Rehearing
- ★ 43 CFR 4.242 - Requests for Reopening
- ★ 43 CFR 4.310 - Appeals
- ★ 43 CFR 4.272 and 4.273 - Modifications

should be done by Superintendent



Other Authorities

- ★ Title 25 Code of Federal Regulations
 - ▶ Correcting Title Errors
 - ▶ Managing Trust Money (in IIM Accounts)
 - ▶ Apportioning Life Estate Income
 - ▶ The New Part 15

★ Decisions of the IBIA and Solicitor

★ Decisions of the U.S. Courts

And Tribal Law -



Questions and Answers

What questions did you have that we haven't covered?.

★ Thank you!

PROBATE LAWS

1. 25 U.S.C. Section 348
Part of the General Allotment Act. The same Act that provided for the division of tribal lands in severalty authorized the determination of heirs in accordance with the laws of the state in which the property is located.
2. 25 U.S.C. Section 371
(February 28, 1891)
Children born to custom marriages or cohabitation or casual liason are entitled to inherit. Note: Fathers do not acquire inheritance rights under this provision.
3. 25 U.S.C. Section 372
(June 25, 1910)
After notice and hearing, the Secretary may determine the heirs of an Indian who dies possessed of trust or restricted lands. The rules for probate are as he prescribes in his discretion. 43 C.F.R., Part 4, Subpart D.
4. 25 U.S.C. Section 373
(June 25, 1910)
Any 21+* year old Indian with trust or restricted property, with capacity, can make a will in accordance with such requirements as the Secretary may in his discretion impose.
5. 25 U.S.C. Section 464
(June 18, 1934)
For IRA tribes only. Any member of an IRA tribe can leave land subject to such tribe's jurisdiction to: (1) an heir at law; (2) a member of the tribe with jurisdiction over the land, or (3) the tribe with jurisdiction over the land. These provisions remained unchanged until September 26, 1980.

*/ Regulations were amended to permit 18 year olds to make wills. There is an inconsistency between the statute and the regulations.

6. 25 U.S.C. Section 372a
(July 8, 1940)

In probate, only four types of adoptions are recognized: Those finalized by: (1) state court decrees; (2) tribal court decrees; (3) written adoptions approved by the agency superintendent and recorded in a standard adoption book, and (4) custom adoptions recorded with the superintendent in a book kept for that purpose.

7. 25 U.S.C. Section 372-1
(Repealed. See Item
12, infra.)

The Secretary is authorized to appoint non-APA hearing examiners to conduct Indian probate proceedings.

8. Act of September 26, 1980

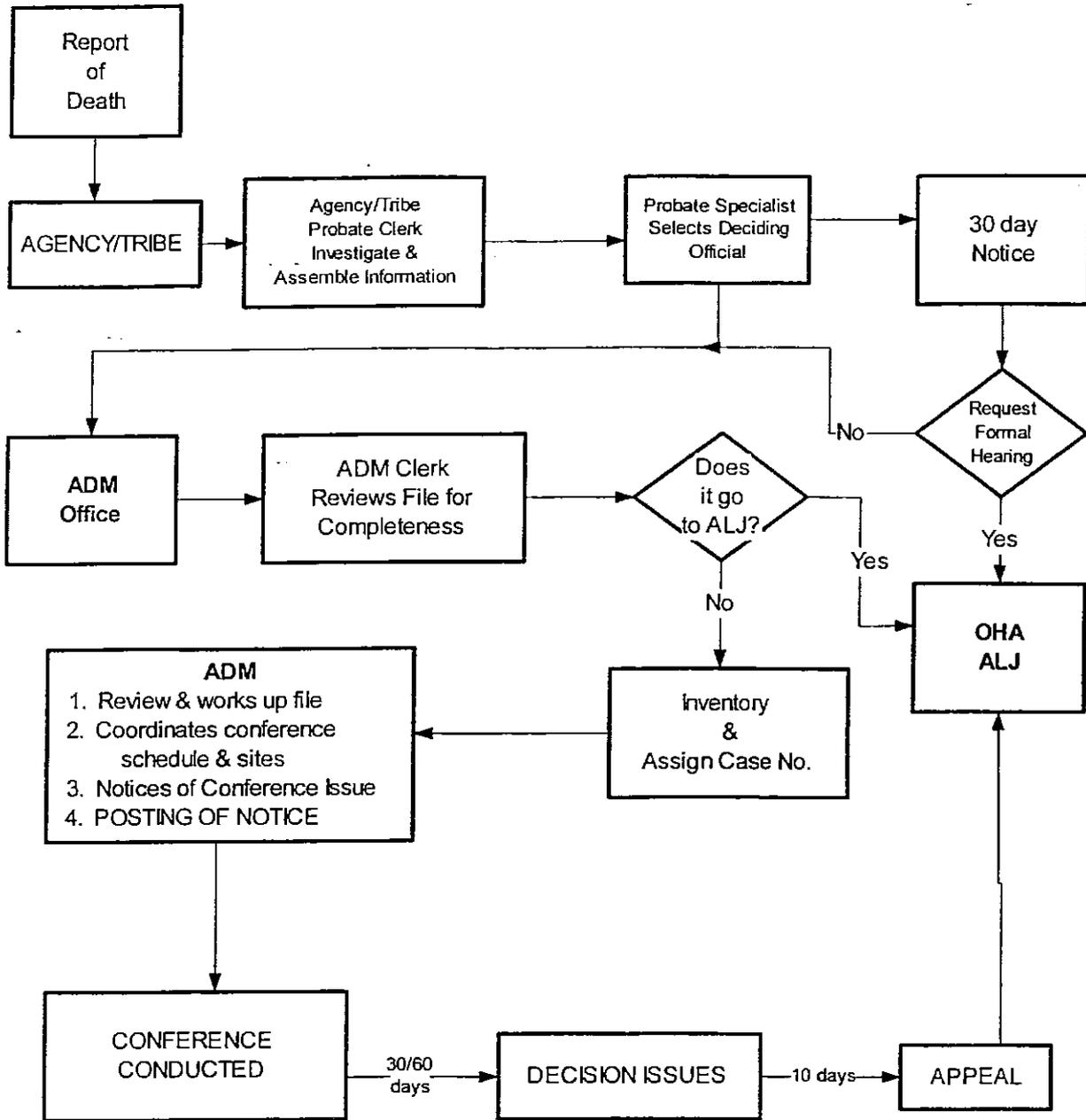
Section 464, above, is amended to expand the scope of Indians eligible to inherit. The original proponents of the amendment sought only to add the words "or their lineal descendents to the three categories of eligible beneficiaries listed above.

So far as is known, there was no departmental policy study undertaken to back the change.

The amendment has not repealed Section 464 as suggested. The limitations upon inheritance are maintained insofar as non-Indians are concerned until the individual tribes act to limit non-Indian or non-member or non-Indian inheritance under Section 2205 of the ICLA.

9. The Act of January 12, 1983
- The ICLA authorized land consolidation programs and codes tribal buy-out of land interests; codes to regulate non-Indian and non-member inheritance and limitations upon the passage of 2% interest which did not produce \$100 in income in the year before the owner's death.
10. The Act of July 26, 1983
- NOTE: Printing problems were corrected. Also corrected were substantive defects. The Act, as originally promulgated, failed to provide for the succession of remainder interests.
11. The Act of October 30, 1984
- Principal changes were in 2206. The amended income requirement for a 2% interest is that it not be capable of producing \$100 in income in any of the five years before the owner's death. A presumption of income production incapability arises if the property did not produce the same in the five year period preceding death. Gifts in wills to persons already owning an interest in the same allotment are deemed valid.
12. The Act of May 24, 1990
- The Administrative Law Judges (Indian Probate) are appointed under 5 U.S.C. Section 3105.

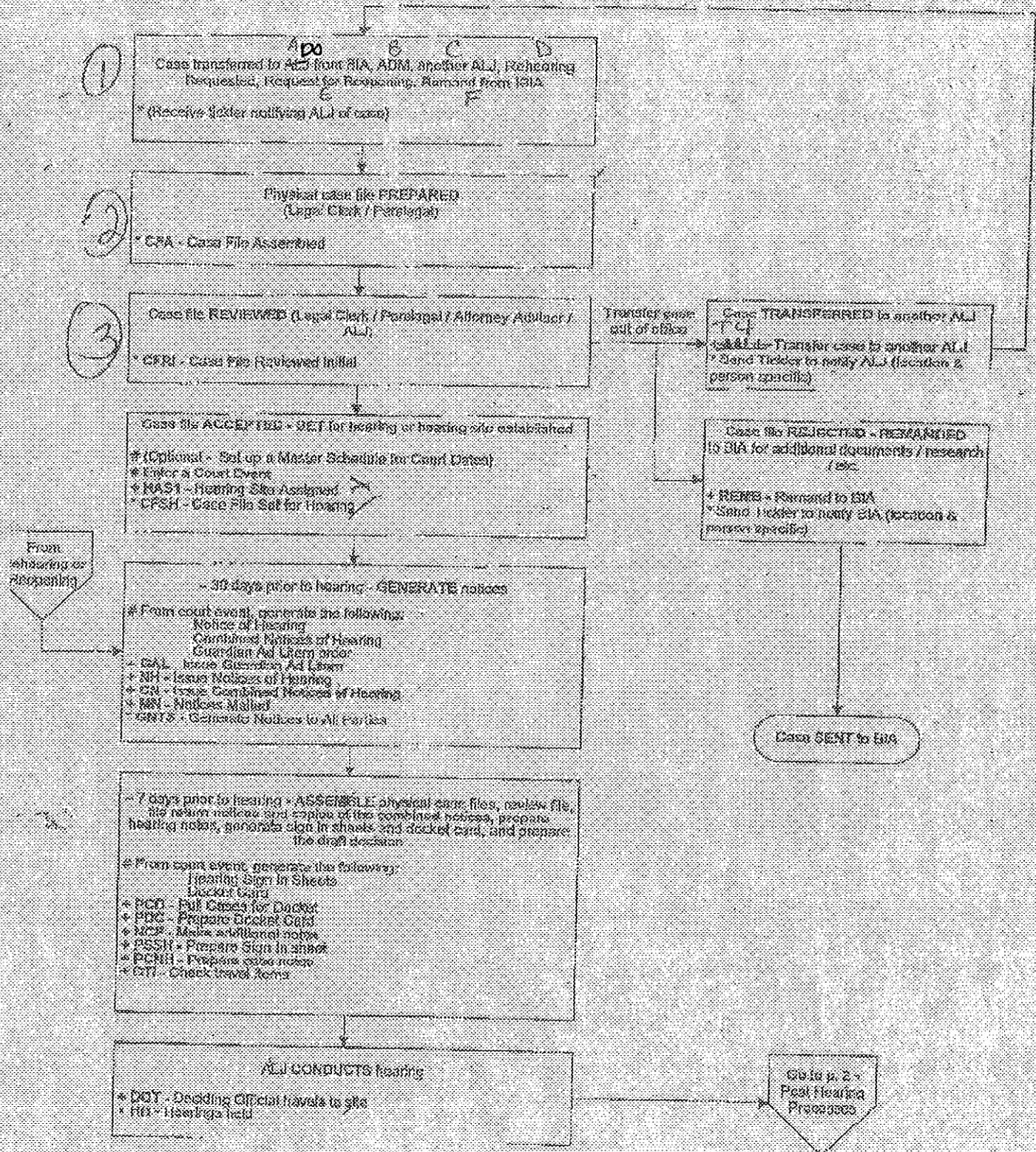
PROBATE PROCESS



Type

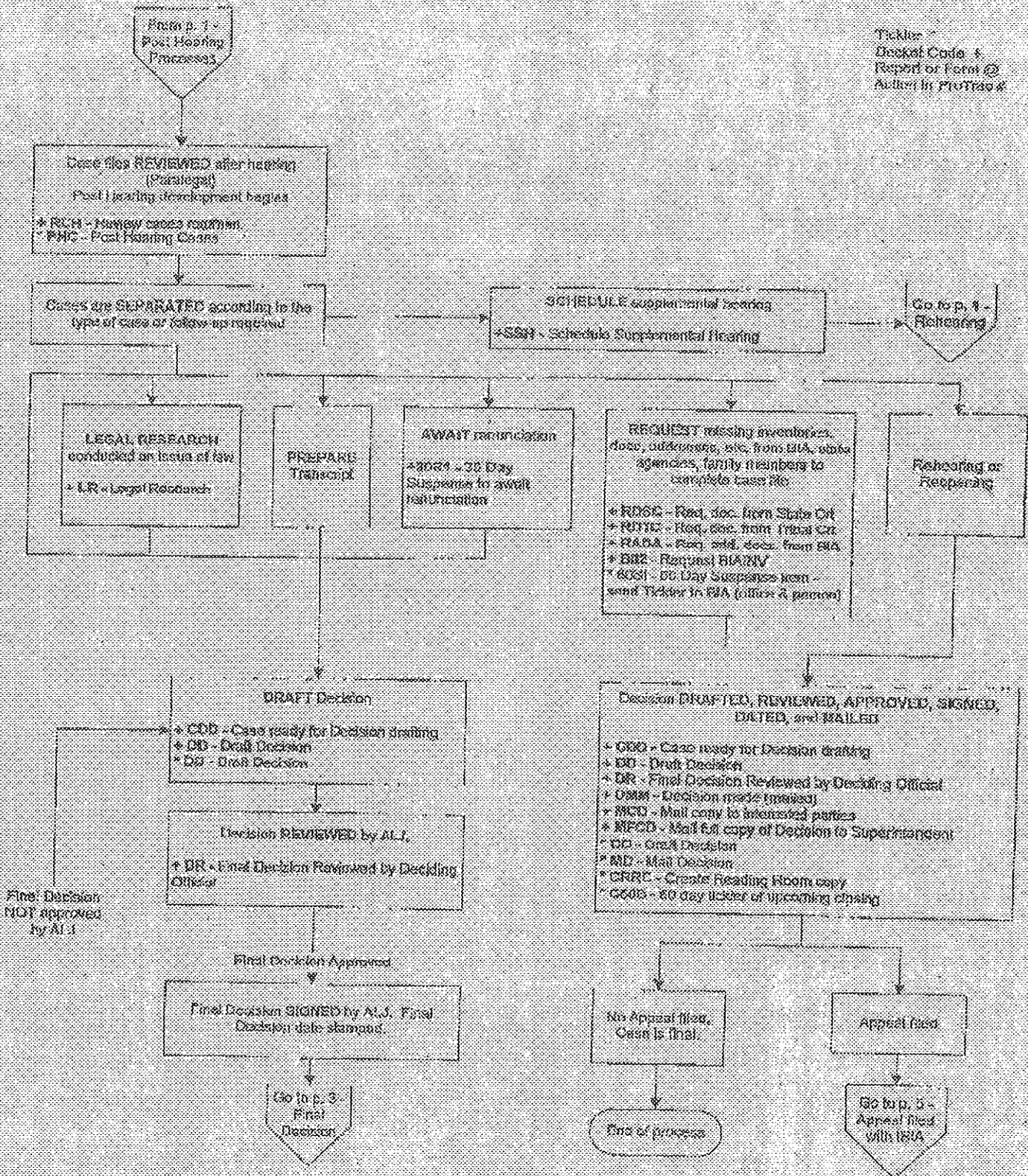
OHA PROTRAC FLOWCHART - RECEIPT OF CASE v.1, pg. 1

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Docket Code *
Report or Form #
Action in ProTrac #



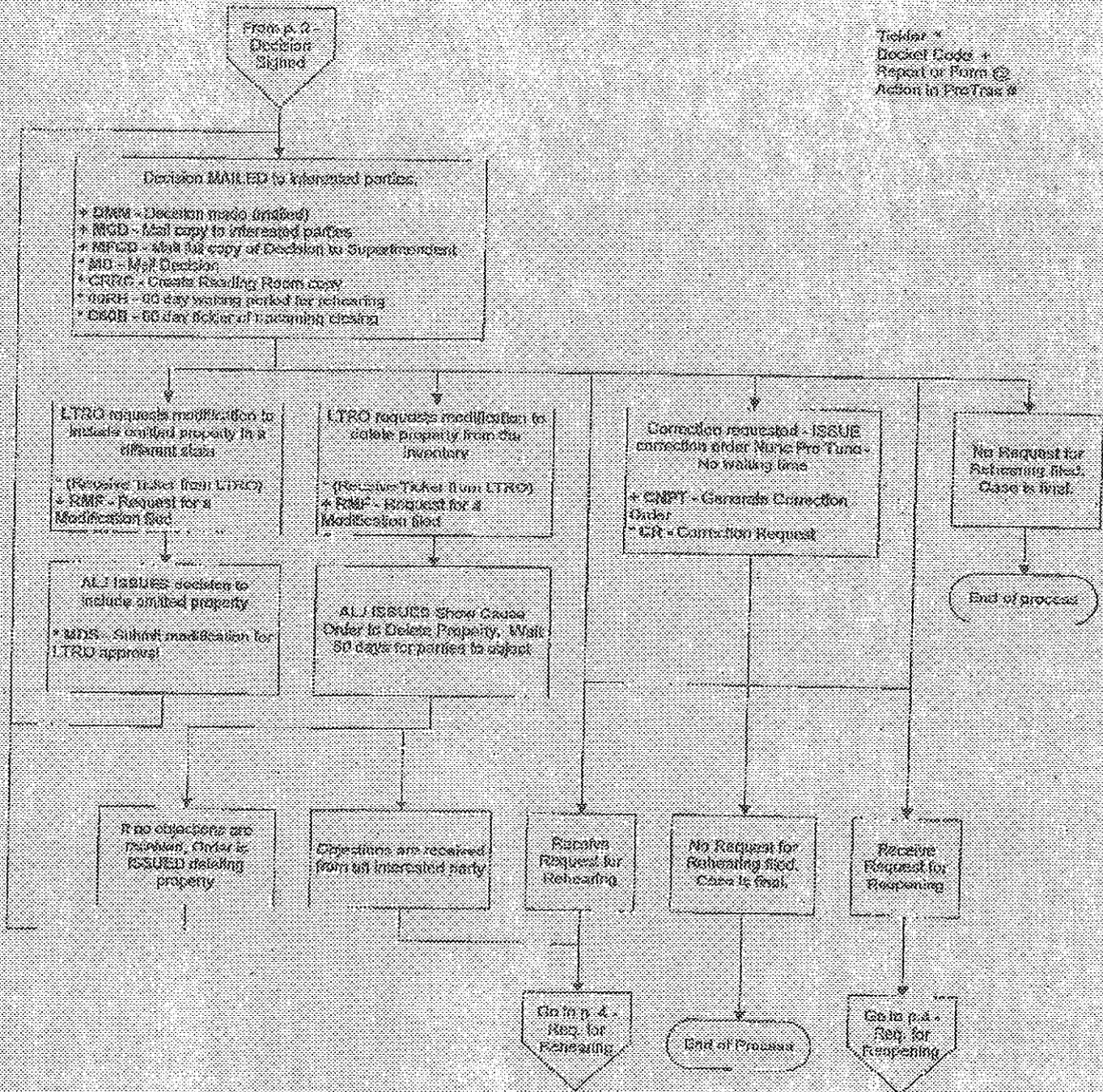
OHA PROTRAC FLOWCHART - POST HEARING v.1, pg. 2

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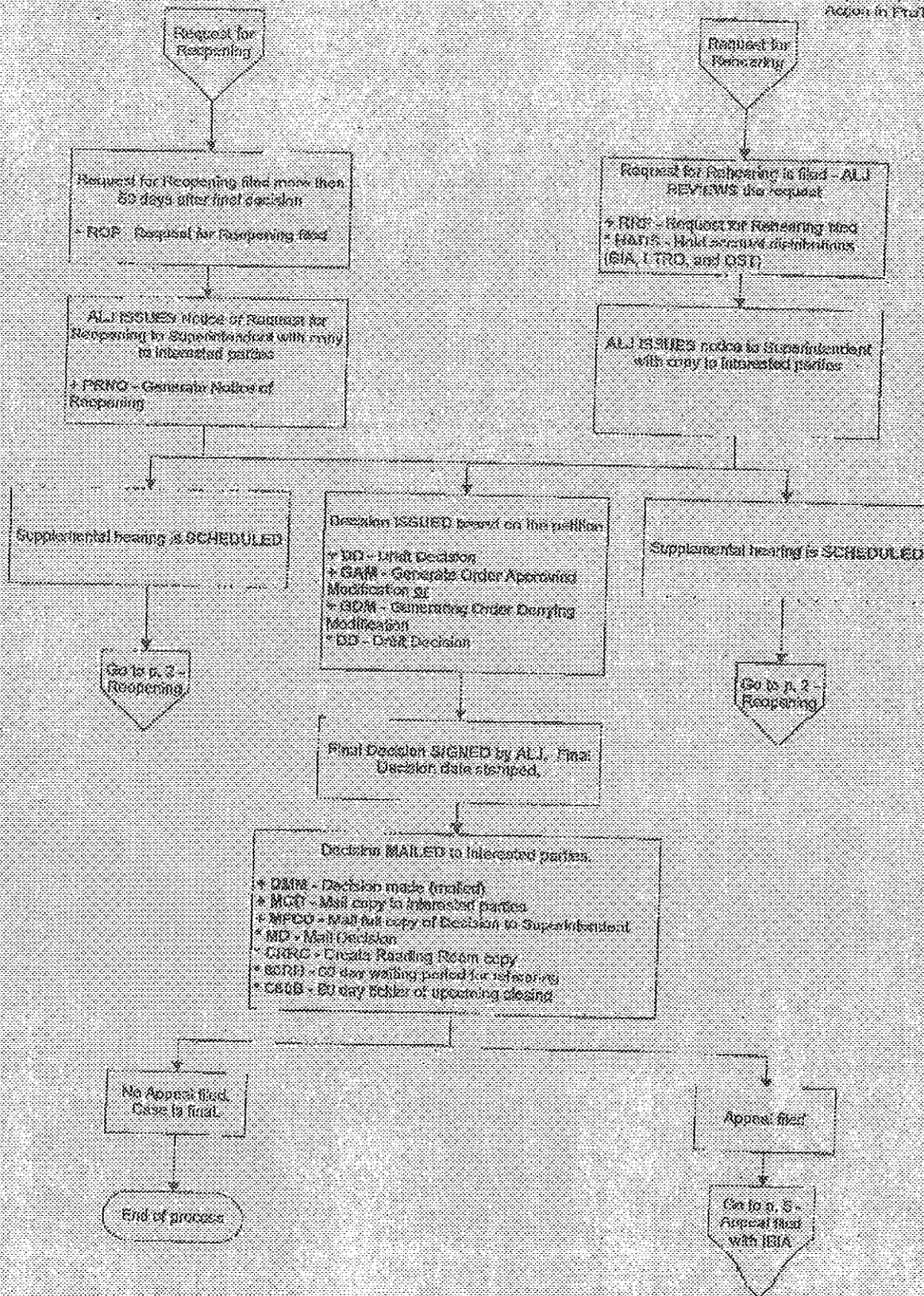
OHA PROTRAC FLOWCHART - POST HEARING (cont'd) v.1, pg.3

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Repeat of Form #
Action in ProTrac #



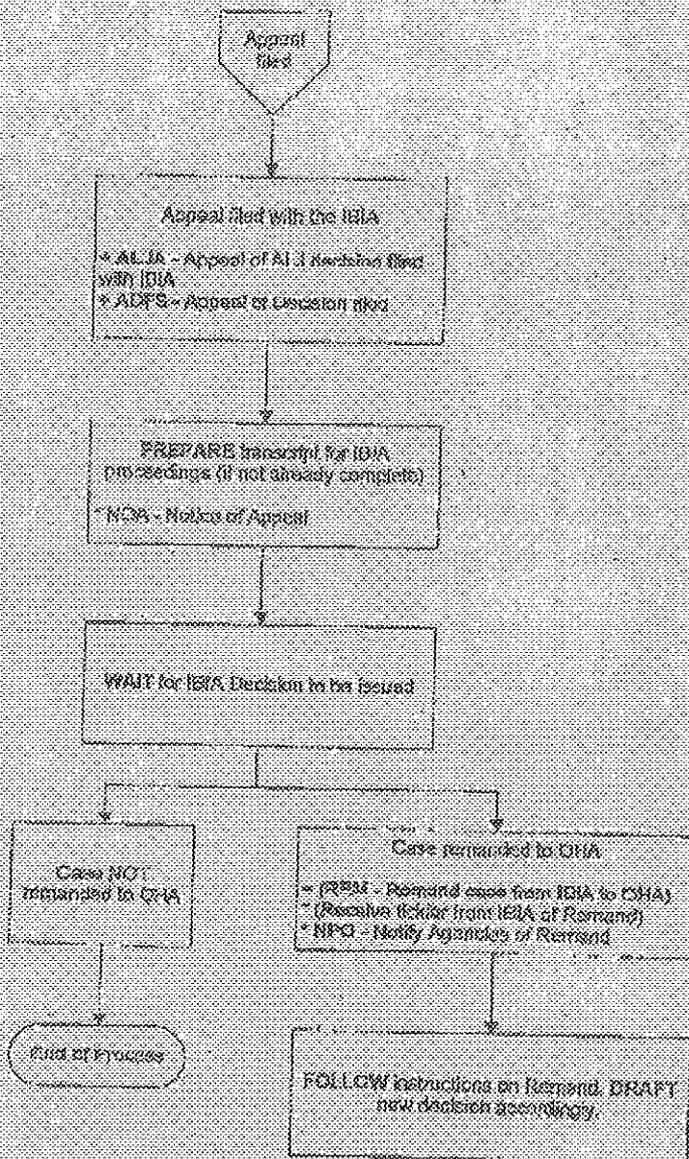
OHA PROTRAC FLOWCHART - REOPENING v.1.1 pg. 4

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OHA PROTRAC FLOWCHART - IBIA Appeal v.1, pg. 5

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Docket Code #
Report or Form #
Action in ProTrac #





ProTrac ADM Training Syllabus

Monday June 14, 2004

1:00pm – 5:00pm

- Sharlene to give brief introduction
- ProTrac Functional Application Overview
- Main Search Screen
- Person Screen
- Case Screen
- Master Scheduler
- Court Event
- Progress Docket
- Tickler
- Forms Generation
- Reports
- Security

Special Projects of BIA (PROBATE)
- Creative Data Solutions
sales contractor (CDS)
- G+B Solutions in
Primary contractor

Total 21,500 in Probate
1700 or 1800 cases
to be accounted
for

Tuesday June 15, 2004

8:00am – 12:00pm

- Case Prep
 - o Search for existing person
 - o Create relationships if they don't already exist
- Add a new case
- Enter Docket Code to tickle to Probate Specialist
- Generate forms

- used to determine
of K Data Com
received.
OKA
- need connections to
Trust net
& Lotus

1:30pm – 5:00pm

- Business Process Review

Wednesday – June 16, 2004

8:00am – 5:00pm

- Business Process Review

Thursday – June 17, 2004

8:00am – 5:00pm

- Adjudication Process
- Closing Process

Friday – June 18, 2004

8:00am – 12:00pm

- Questions and Comments

840
1068 X 1068

ADM PROTRAC FLOWCHART - POST HEARING

Tickler *
Docket Code +
Report or Form @
Action in ProTrac #

From p. 1 -
Post Hearing
Processes

Case files REVIEWED after hearing
ADM
Post Hearing development begins
Cases are SEPARATED according to the
type of case or follow-up required
(summary or non-summary)

Request for Formal Hearing
+ BRFH - Request for Formal Hearing
Received (cont) - Update Case to
"Transferred to DO"
+ BR2 - Refer to ALJ
+ B0RC - @Order referring case to
ALJ
* BRFH - Request for formal Hearing
received

ORDER
Need BMCD

BDTF -
30 Day Tickler - PSA/ADM
60 Day Tickler - PSA/ADM
Refer to ALJ w/ 5 days PSA/ADM

SCHEDULE supplemental hearing
+ SSH - Schedule Supplemental Hearing - Bring
up Court Event Screen

Go to p. 1 -
Hearing

LEGAL RESEARCH
conducted on issue of
law
+ BLR - Legal Research

AWAIT renunciation
+ BRLE - @
Renunciation with
reservation of Life
Estate
+ BR @ Renunciation
+ BRS - Suspense to
await renunciation
* BRS - Suspense Item
- send Tickler to PSA/
ADM

REQUEST missing inventories,
docs, addresses, etc. from BIA,
state agencies, family members to
complete case file
add Request Del from Family Members
+ BRDS - Req. doc. from State Crt
+ BRDT - Req. doc. from Tribal Crt
+ BRAD - Req. add. docs. from BIA
* BRD - Suspense Item - send
Tickler to BIA (office & person)
+ BOI - Request Omitted BIAINV
* BOI - Request for omitted BIAINV
+ BOTF - Request Document from
OTFM
* BOTF - Request Document from
OTFM - IIM Account Current, IIM
Log/History.

Remand to Agency
+ BREM - Remand to BIA - Generate
Order Remanding Case to Agency
@orderremand
+ ATIC - Notify Agency Case is Being
Sent Back
+ - DRTA - Date Remanded to
Agency - Update Case status (Case
Prep BIA)
* CFR - Case File Returned (Remand)
to Agency.
Need BMCD

Indian Renunciation
+ BIR - Indian Renunciation
BRS - Send Tickler to request Order
BIR Indian Renunciation to ALJ

Decision REVISIED by ADM
+ BDP - Decision Prepared by ADM
+ BDD - Draft Decision @

Amended Order
(Substantive Issues)
+ BAO - Amended Order
* B60A - 60 day appeal Period
- LTRD/Agency/OTFM - Mail
Decision (PSA)
Need BMCD

Final Order
Final Decision SIGNED by ADM
Decision Signed.
+ BDI - Decision Signed - Update Case Date
of Decision Signed to Current Date. Also
update case status to " B60A - Begin 60
DAY Wait - APPEAL"
* B60A - 60 day appeal Period - LTRD/
Agency/OTFM - Mail Decision (PSA).
BDD is mail du pater

Correction requested - ISSUE
correction order Nunc Pro Tunc
No waiting time
+ BNPT - Generate Correction
Order
BCR - Correction Request
* BNPT - Correction Request
NEED BMCD

Go to p. 3 -
Final
Decision

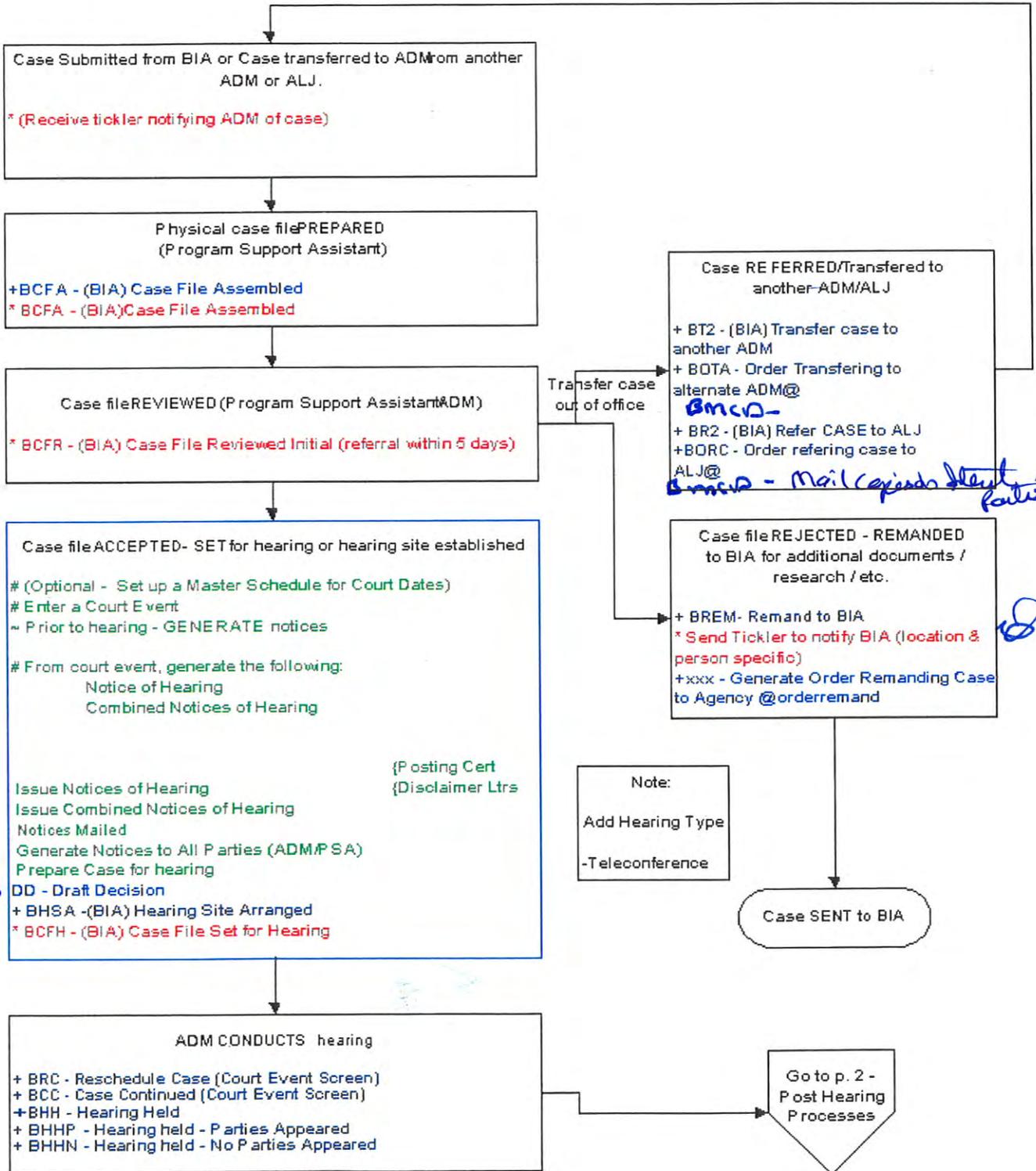
ORDER

Go to p. 1 - Rehearing

ADM PROTRAC FLOWCHAR T - RECEIPT OF CASE v.1, pg. 1

Tickler *
Docket Code +
Report or Form @
Action in ProTrac #

Probate court screen is court screen



B

8

ADM PROTRAC FLOWCHART - POST HEARING (cont'd)

From p. 2 -
No Appeal
Filed

Record to agency and LTRO.

- + BSLT - Mail copy of record to Superintendent & original record to LTRO
- * BSLT - Record mailed to Superintendent & LTRO - Self Ticker to send record to Superintendent (P SA/ADM) / Self ticker to send record to LTRO (P SA/ADM)
- + BSLS - Mail original record to Superintendent.
- * BSLS - Record mailed to Superintendent - Self Ticker to send record to Superintendent (P SA/ADM)
- + BSHA - Deliver case back to home Agency. (Transfer back to home agency)
- * BSHA - Ticker notification to home agency.
- + BDR - Deliver Record - Update case status to "CC - Case Closing".

Appeal
filed

Appeal filed with ADM

- + BAFA - Appeal filed with ADM
- @ Notice of Appeal
- + BMCD - Mail copy to interested parties (link docket code BSZ)
- + BS2 - (BIA) Submission of CASE to ALJ

End of P process

Ticker *
Docket Code +
Report of Form @
Action in P roTrac #

LTRO requests modification to include omitted property in a different state

ORDER
NGSAD
BMCD

* (Receive Ticker from LTRO)
+ RMF - Request for a Modification filed @

End of P process

* need "Order of Modification" form generated from

Main Seed Scan

click Ingest Scan =

Enter Location

Scan & ~~Save~~ =

See window:

Doc. type

omniFold case
yes no.

Miss SX - Karen ratified Agnes

Sept 22 - shot down date

George Nadeloff

6/13/04

OHA asking for 4 m. more
b/c of case load &
want to hire more ACTS

will do:

pulls @ public & can make an
offer @
probate

Issue: Schedule function
Desktop function

when first renewed case - say X agency
inputs ^{schedule} pull up X agency.

Challenge

People based system -) do people first
then build case

Standardization of Case Numbering
& forms & layout.

Essential job - no mainly Data Mgmt

- Data tests & Case Dates
- Record Keeping - no lost cases
- no Data calls.

Future Issues

Valiant Baker - ARMD for
Security roles

Franco on old

Lost Pinned issues - 2 copies

Help Desk - PEO - 821-418 S#

Felicia Webb - Herndon VA

703-775-4334

Ernie Tidus

COTR on Data Com K. - Western Region

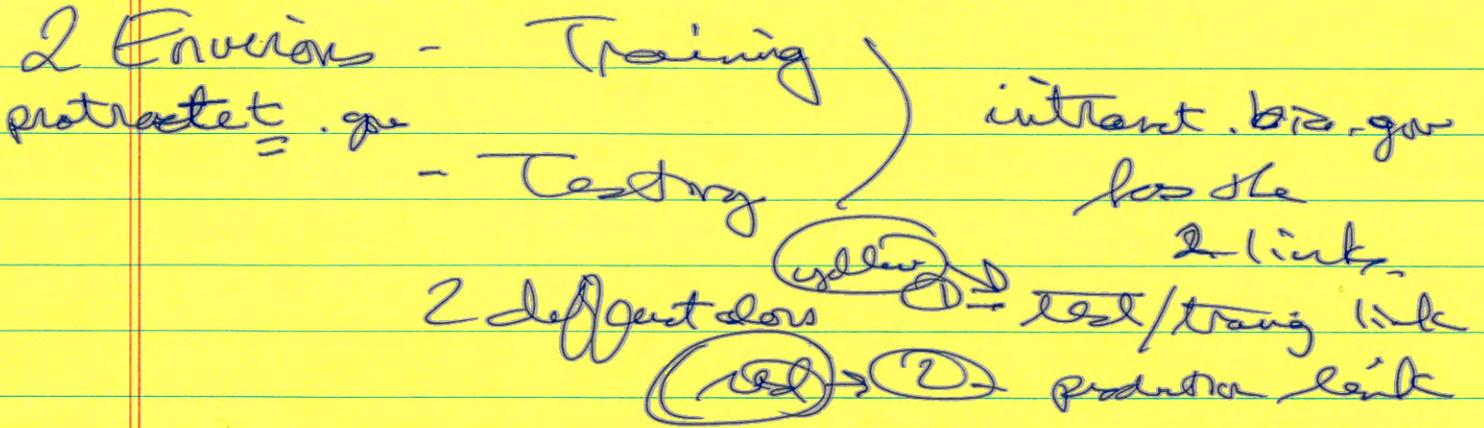
Bill Tishovay - ^{New} Manager of Special Projects

ILCA
(Roberts) ^{continued}

- ~~Delita~~ ^{game} ~~Beck~~ -

- also - Shawn Clark Beggs

- Production environment is local data (probate.gov)



① Citrix - Environment is Henderson, VA
so LA log into Citrix

② Tenant will go to ProTree

③ Actual work on file, is a Box Production

Search criteria = last^{of date} name
a Pin~~no~~#

- SSN
- Total #
- DOB, POB
- Case #/is also

Pull up Home Sings -

~~Quick glance~~

House - Home Sings) w/ address
- Home Sings - no address

See ~~see~~ dup - helps of ~~copy~~
on hi

see he has addresses
see (his Progress Packet) - explain later.

Click Family Party Info
tab -

Click Address Search (next to New Search?)
- new search window.
- click X to close this.

* See ~~and~~
Case - all cases to be made a certain date

Click on Home Sings - it will show
all info of
a person.
- no ~~red~~ ^{red} ~~job~~ ^{job} ~~case~~
- just person info of
that person

Yakov's small home is used a lot: so search for it first
- don't add it again

Do Search first before (adding a new person)
(X put in a new SS# can catch that)

PIN #'s can get a master list

Check
Uniform Polite
Law =
in guidelines

Also need creat ability.

* Hit/Cancel & now need to find the
pin # need

"OK" to save left side only
Apply save ~~to~~ right of screen only

Can enter new address

Type "C" - give current Date
Type "E" - () current date minus (day

To move from field to field use Tab
Button
(This was a data entry program initially)

* Can Print Screen if need do (hit Print
Screen)

Cases Screens

There are 407,000 data entry into Pre-Trial
Cavalley

Tipappia Cliffs

guit site
Hilton Point Cliff Court

Click on the case of person
+ it will show progress docket
- click on case
where he is docketed on

Shows his probate case.

Case # is @ top

Can update the Progress docket
by date

Progress Docket is only a historical record
of events. Use left hand side of "Case Options"
to input stuff into each field.

Hearings are different places =
Need scheduler

6/14/04
2nd Day

Log In =
8 characters:
1 upper
1 special character
rest is lower case

Citrix password: Probatel

[redacted] - citrix

Protree Login =

[redacted] - pro-tree (w/a)

Ⓟ

New Password
[redacted]

Main Sequence

Citrix Log. In 2

[redacted]

Then new password =

[redacted]

Shows: Ms Word - ProTree - Pro-Tree
- taken

click yellow ProTree folder

Enter ~~Pro-Tree~~ Login -
password - [redacted]

[redacted]

[redacted]

Then Login = [redacted]
Old Password = [redacted]

Changed to same new Password = [redacted]

Main Sequence

Pre-trial Login - [redacted]
Password - [redacted]

Note = if have to re-use or get a new password
can't use last 10 passwords already used
- must change every 90 days

UTZ

Review:

Person file
+
Case file

on left side
Button
of Case screen

Note "originated By" - Screens added the case, origin & date

Location - where file is physically located
Current Location - Aberdeen

Left Side of Case Screen

- (a) Case mode
- (b) " Note
- (c) Count Event
- (d) Progress bar
- (e) Rules history
- (f) Service history (X will be hidden - not used)
- (g) Ticker (work flow)
= can be set to show every so many minutes.

(a) Case Notes

* (c) Count Event:

Scheduling

can also generate forms,

Every event has an Event ID (#34 i.e.)

(Citrix Event) IC Out = full Access
= never Ask again

of Elements / of you can still then - hit + get out of all
it continues running unless - get out details

From screen: Under Case options = can go to "Count Event" &
of case highlighted.

Locations - can you show all
ones, @
one location
& can you get. Things sent to
that location.

Associate multiple postings sites,
& send out,
& contact name.
System assigns it a code.

Can show all ~~costs~~ at one site or the
same date.

Schedule different content for
each time?
Not need to.

Base Date - current date = type
C

Click Notice & it generates - Notice for each
party
Then select form you want to generate.

Buy notes input here can be part of the form.
It will bring up the card detail.

Auto Pick - pulls from
Master Schedule
for every ADM you set
their calendar.

Case aging \Rightarrow one frame for it.

~~Create~~ Can pull up an ad hoc report
to show all cost & their age

① Case Modification

Hard copy
when I visit
a case

② Service History

Auto Image a full page form to view

③

Feb 5 71-936-1922

In Case Folder - Progress Report

Claims =
multiple claims

Progress Report, + Ticklers

Person w/ no knowledge of case - can
look @ Progress Report &
know what's going on in case

To find Report Code = enter % & search =

* PADM - by code, can generate
a document if
needed

assign to ALJ
takes us to = Tickler Screen.

" Notifies ALJ of assignment &
Shows multiple task details.

i.e. job is to clean house - code CC
but many tasks in this is done for
This is task details list → @ volume
@ disks

CDS House

Who is to do jobs =

- Viz - DAD
- Chalene - daughter
- Tony - son
- Felicia - mom
- Richard - son

we define these users to roles
i.e. ADMs.

Mogdhor - is son

Wileen - Dad

Alisa - daughter

↳ also mom

These people
are assigned

So my location - my House - get the ADM

Registration of task assigns the tasks,

* Hit
F9 key
on any of pop-ups
shows the pop-up list

Task ID is assigned
list of users comes up.

Check off who want to
do the task
or have 2 diff. people
do it.

Once send to them - i.e. ^{write} sent to ALL

Exit out & it shows the form
Hit Print if want to Print form

Miami ^{it's ok}
Semi-C
Quezon ^{it's ok}
Pavia
Wyndette ^{Nation}
Madara ^{it's ok}

D: 5:50 - 6:00
C: 6:00 - 6:15
8:50

Because of ticklers - shows the work flow. & show on do assignments.

Tickler task list

Views of all tasks assigned

Can check to see if task done.
- also cancel tasks done in certain time period

Digitized on task & it will show details of the task who assigned who assigned ~~to~~ when completed.

Once job is complete - digitizer is one who will designate it as completed
- save it

- One does it pulls it off of tickets & ✓

Flowchart =
Receipt of case notes

Case transferred to A.C.T.

6/15/04

All progress dockets can be given added text.

Ticklers - can be given added instructions in "comment & section"
= Can also save to myself.

Hit Inquiry & see all ticks assigned to me

Action performed dock - once saved - verified as done if goes to originator

Tickler Detail - go to this to see next dock to be reviewed

forms - Word docs

*

- can be saved back into Protree
- ndiffs, put a date etc.
- Protree can allow all docs to be saved a Protree.

= Hearing Site arranged

Code BETH. = full access to set for Hg.

Its a task list Bca shows up.

Can add to this. = by administrator

Pata scanned
Judge info system

External Scanning Software
that connects scanner

6/17
10/04

Scan Manager

- Import scan

- Save as

Save Thursday, June 16, 2004

* This is

BIA stored

- TIFF multi-page (*.tif)

Doc Process Judge Scan

- associate image w/ a case #
- select electronic document
(pop-up is for both scanning)

Loading of Doc. - select sign-in sheet

Do you want to create a Progress Document of this yes or no

= Sign-in sheet associated of
"they held - parties appear"

To View drag = hit View image

under

System Set-Up is window where share
"Master Schedule" =

Master Schedule

Add new Case Event.

Auto Pick Button =

find available dates

Sort by county, location, judge

See days available.

Event type - i.e. teleconference

Maximum allowed cases - 5 cases.

(Notice can generate the time)

Auto-Pick will go to 8:00

BUT override it to show real

Hearing time.

(Latest Dates calendar shared)

last two can see each other's calendar in Lotus)

- Can put in request for each agency's ~~calendar~~
to see APM Schedule



IN REPLY REFER TO:

United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Washington, D.C. 20240

JUL 21 2000

Memorandum

To: All Regional Directors

From: Deputy Commissioner of Indian Affairs *Sharon Beckwith*

Subject: Probate Personnel Training

In accordance with the Higher Level Implementation Plan, the Probate Implementation Project Team (PIPT) will provide a training session for BIA Probate personnel. The probate training will be held the week of August 21 - 25, 2000, in Phoenix, Arizona, at the BLM National Training Center, 9828 North 31st Avenue, Phoenix, Arizona, 85051, (602) 906-5555. The meeting room notification will be posted in the lobby at the BLM facility.

Approximately 75 rooms at a hotel across the street from the BLM National Training Center Facility have been reserved for the probate staff attending the training. The hotel is The Four Points Barcelo Hotel Phoenix MetroCenter, 10220 North Metro Parkway East, Phoenix, Arizona, 85051, (602) 997-5900, and fax number (602) 997-1034. The probate staff should make their own arrangements, and state that they attending the BIA Probate Training Session to obtain the government rate of \$59.00/night. This rate will be held only until August 4, 2000. Thereafter, the employee must find their own lodging at a government rate.

The cost of this training for 100% full time BIA probate employees will be paid by the Probate Implementation Project. Car rentals will only be authorized for the Regional Office Probate Specialists, and the arrival of the agency and field probate staff should be coordinated with the Regional Office for airport transportation. Your staff should prepare the travel authorizations using the account code of K00420/9900/34320. The travel authorizations should be faxed to the Central Office Probate Staff for signature at (202) 208-2680. The Central Office staff will fax the signed copy back to your office for obligation of funds. Lastly, your office should prepare and sign the vouchers for reimbursement.

A draft agenda for the probate training will be sent out within the next couple of weeks. Plans for more extensive probate training for the implementation of final probate regulations will be held early next year. Should you have any questions, please contact Kathleen Supernaw, Project Co-Director, Probate Implementation Project, at (202) 219-1192.