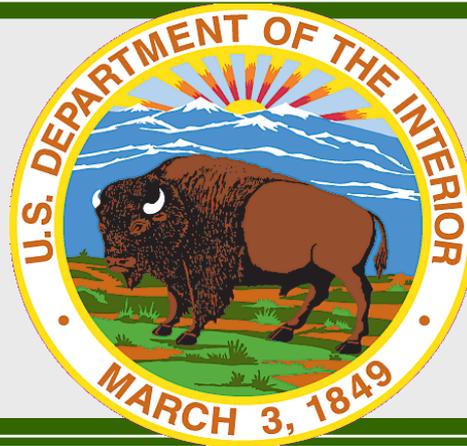


Department of the Interior
**Office of Hearings and Appeals &
Office of the Assistant Secretary – Indian Affairs**



Updates to American Indian Probate Regulations

Proposed Rule - 86 FR 1037 (January 7, 2021)

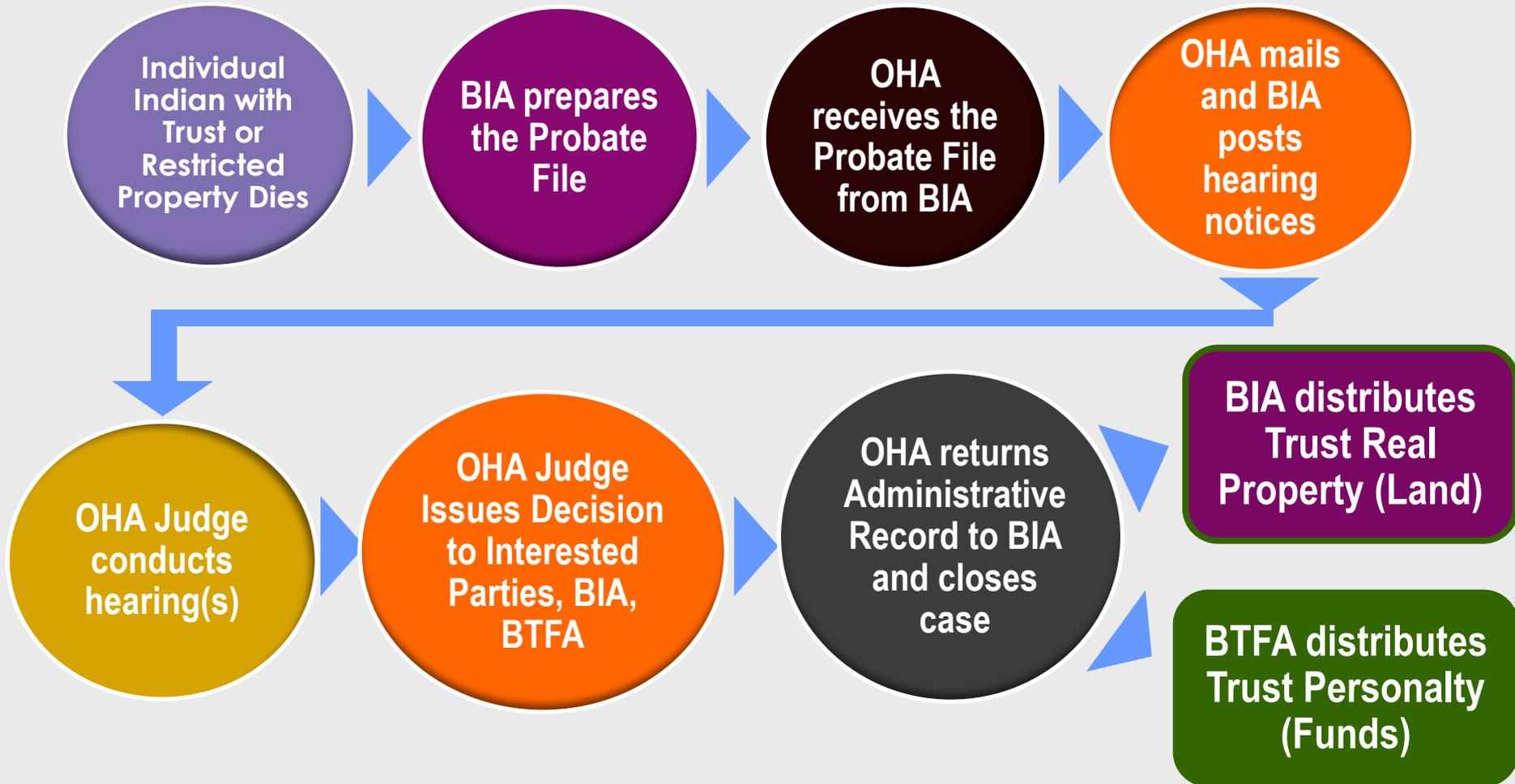
To Revise 25 CFR 15 & 43 CFR 30

Background: Roles in Probate Process

- Bureau of Indian Affairs (BIA):
 - Compiles the decedent’s “probate file”
 - Inventory of Indian trust or restricted assets, and family and estate information
- Office of Hearings and Appeals (OHA):
 - Receives the probate file from BIA, adjudicates the probate, and issues a decision as to who receives which property in the decedent’s estate
- BIA then:
 - Distributes trust or restricted real property (land)
- Bureau of Trust Funds Administration (BTFA)*:
 - Distributes trust funds in accordance with OHA’s order

*formerly, the Office of the Special Trustee for American Indians (OST)

Background: Overview of Probate Process



History of Probate Regulations & Revisions

- 2008 - Current regulations were put into place to implement the American Indian Probate Reform Act (AIPRA)
- 2011 – Regulations were amended to address statutory updates
- 2016 & 2017 – BIA hosted Tribal consultations and listening sessions for ideas on improving the process
- 2019 – BIA & OHA published an advance notice of proposed rulemaking (ANPRM) identifying areas where improvements could be made through regulation
- Early 2020 – BIA & OHA reviewed comments to incorporate suggestions and drafted this proposed rule
- Now – This proposed rule addresses input on ANPRM & proposes ways to improve the clarity & efficiency of the probate process and get probates closed more quickly

Need for Proposed Rule

- Each open probate case
 - Has the potential to create ripple effects of uncertainty as heirs/devisees become decedents themselves
 - Takes a financial and emotional toll on families
- Goals of proposed rule:
 - Clarify regulations to address inefficiencies that may cause delays
 - Streamline probate processes (while protecting due process) to close probate cases so that:
 - There is earlier certainty in determination of heirs/devisees
 - Estates may be distributed to heirs/devisees more quickly

Proposed Rule - Overview

Revisions to Regulatory Provisions on 10 Main Topics:

1. Trust funds for funeral services
2. Notice in formal probate proceedings
3. Partition
4. Presumption of death
5. Renunciations
6. Summary probate proceedings
7. Rehearings & Reopenings
8. Inventory corrections
9. Purchase at probate
10. Miscellaneous

January 2021

Proposed Rule - Overview

Revisions to Regulatory Provisions on 10 Main Topics:

- 1. Trust funds for funeral services**
2. Notice in formal probate proceedings
3. Partition
4. Presumption of death
5. Renunciations
6. Summary probate proceedings
7. Rehearings & Reopenings
8. Inventory corrections
9. Purchase at probate
10. Miscellaneous

Trust Funds for Funeral Services

- Situation: The person responsible for making funeral arrangements for a decedent has an immediate need to pay for funeral services and requests funds from the decedent's IIM account to pay for them
- Current regulation:
 - Allows distribution of up to \$1,000 from a decedent's IIM account if IIM account has a balance of at least \$2,500
- Proposed:
 - Allows distribution of up to \$5,000 from a decedent's IIM account, without requiring a minimum balance remain in account
 - Clarifies that funds are taken from the balance of the account as of the date of death

Proposed Rule - Overview

Revisions to Regulatory Provisions on 10 Main Topics:

1. Trust funds for funeral services
- 2. Notice in formal probate proceedings**
3. Partition
4. Presumption of death
5. Renunciations
6. Summary probate proceedings
7. Rehearings & Reopenings
8. Inventory corrections
9. Purchase at probate
10. Miscellaneous

Notice in Formal Probate Proceedings: Mailings

- Current regulation:
 - Mailed notice to all eligible heirs and devisees
- Proposed:
 - Mailed notice to all eligible heirs and devisees
 - **Except** for heirs who may inherit because they are co-owners and there are no other heirs and no Tribe with jurisdiction
 - These co-owner heirs will still receive mailed notice if they previously filed a request for notice with BIA or OHA
 - Specifies mailed notice will include decedent's will, if there is one

Notice in Formal Probate Proceedings: Physical Postings/Publications

Current Regulation:

- Requires physical posting at:
 - Agency with jurisdiction over land
 - 5 locations in vicinity of hearing
- Authorizes (but does not require) physical posting at other places as judge deems appropriate
- Authorizes (but does not require) publication in newspaper in vicinity of hearing (costs paid from estate)

Proposed Regulation:

- Requires physical posting* at:
***See next slide for exception**
 - Decedent's home agency
 - Agency with jurisdiction over land if different from home agency
 - 1 location in vicinity of hearing if in-person hearing planned
- Authorizes (but does not require) physical posting at other places as judge deems appropriate
- Requires publication on OHA's website

January 2021

Proposed
§§ 30.210, 30.211

Notice in Formal Probate Proceedings: Postings/Publications (cont'd)

- Proposed Exception to Physical Posting Requirement:
 - OHA may proceed with the hearing **without physical posting** of the notice **if** physical posting was **not possible due to**:
 - (1) The agency office being closed or inaccessible; or
 - (2) Extenuating circumstances preventing personnel from physically posting.

Proposed Rule - Overview

Revisions to Regulatory Provisions on 10 Main Topics:

1. Trust funds for funeral services
2. Notice in formal probate proceedings
- 3. Partition**
4. Presumption of death
5. Renunciations
6. Summary probate proceedings
7. Rehearings & Reopenings
8. Inventory corrections
9. Purchase at probate
10. Miscellaneous

Partition

- Situation: A will attempts to divide an allotment into two or more distinct portions and devises at least one of those portions
 - EXAMPLE:
 - Will says “*I grant the west half of my land to my son and the east half of my land to my daughter*”
 - Under the proposed regulation:
 - Judge may partition the allotment so son & daughter receive west and east halves of the land, respectively, so long as the decedent wholly owned the allotment and the portions are adequately described

Proposed Rule - Overview

Revisions to Regulatory Provisions on 10 Main Topics:

1. Trust funds for funeral services
2. Notice in formal probate proceedings
3. Partition
- 4. Presumption of death**
5. Renunciations
6. Summary probate proceedings
7. Rehearings & Reopenings
8. Inventory corrections
9. Purchase at probate
10. Miscellaneous

Presumption of Death

- Situation: The judge needs to determine whether someone (person, for whom a probate case has been opened, an heir, or a devisee) is deceased
- Current regulation:
 - Clear and convincing evidence that person is deceased
- Proposed:
 - Lists evidence that may create a presumption that person is deceased
 - Presumption may be rebutted by evidence that person is still alive or explains the absence to be consistent with continued life

Proposed Rule - Overview

Revisions to Regulatory Provisions on 10 Main Topics:

1. Trust funds for funeral services
2. Notice in formal probate proceedings
3. Partition
4. Presumption of death
- 5. Renunciations**
6. Summary probate proceedings
7. Rehearings & Reopenings
8. Inventory corrections
9. Purchase at probate
10. Miscellaneous

Renunciations

- Current regulation: Any heir/devisee who wants to renounce an interest they will inherit must do so:
 - **Before** probate decision issued
 - By providing a signed and acknowledged declaration specifying the interest renounced
- Proposed:
 - Allows heirs and devisees additional time to renounce: before probate decision, within 30 days of the decision, upon rehearing, or when additional property is added to the decedent's estate
 - Allow heirs and devisees to renounce their interests at hearings (having their written declarations acknowledged before a judge)

Proposed Rule - Overview

Revisions to Regulatory Provisions on 10 Main Topics:

1. Trust funds for funeral services
2. Notice in formal probate proceedings
3. Partition
4. Presumption of death
5. Renunciations
- 6. Summary probate proceedings**
7. Rehearings & Reopenings
8. Inventory corrections
9. Purchase at probate
10. Miscellaneous

Summary Probate Proceedings

- Summary Probate Proceeding = OHA adjudication without hearing
- Current regulation:
 - Cash-only estate of \$5,000 or less
 - Allow claims against the estate
 - Allow opportunity to convert to formal probate proceeding
- Proposed:
 - Cash-only estate of \$300 or less
 - No claims against the estate allowed
 - No opportunity to convert to a formal probate proceeding

Summary Probate Proceedings (cont'd)

- Current regulation:
 - Notice prior to the proceeding
 - Notice of summary probate decision
 - Right to request de novo review
- Proposed:
 - No notice prior to proceeding (no longer a need, because no claims, no opportunity to convert to formal probate proceeding, and now can renounce after decision issued)
 - Notice of the summary probate decision
 - Right to request review by OHA and appeal to IBIA

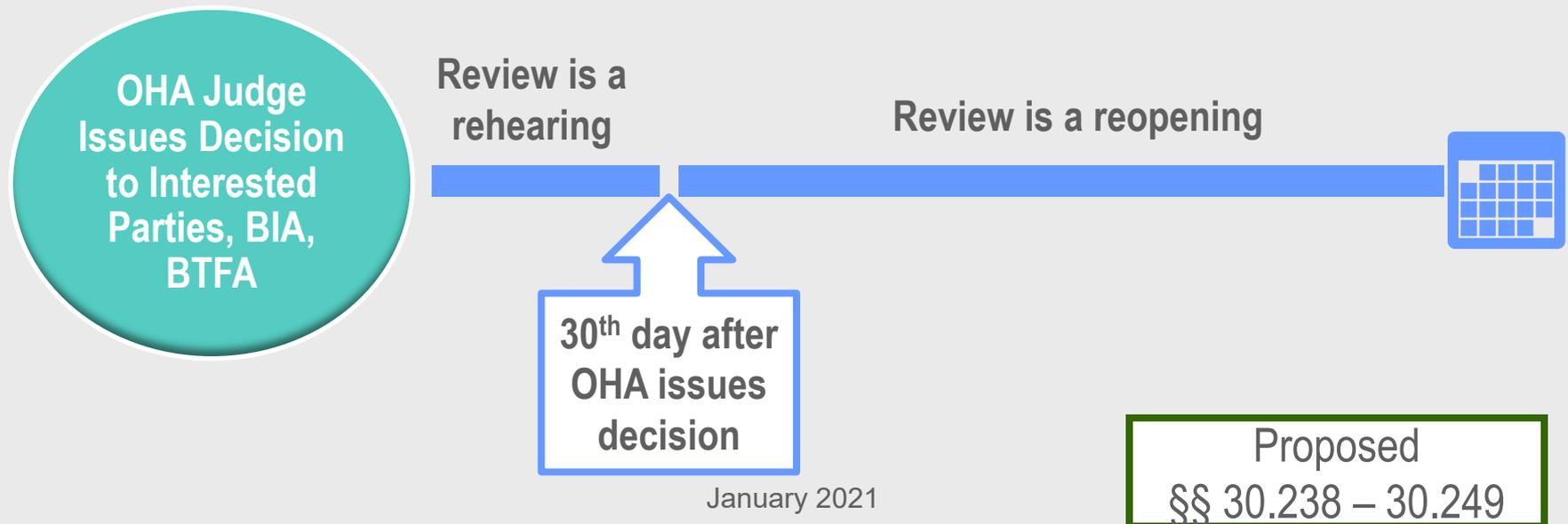
Proposed Rule - Overview

Revisions to Regulatory Provisions on 10 Main Topics:

1. Trust funds for funeral services
2. Notice in formal probate proceedings
3. Partition
4. Presumption of death
5. Renunciations
6. Summary probate proceedings
- 7. Rehearings & Reopenings**
8. Inventory corrections
9. Purchase at probate
10. Miscellaneous

Rehearings & Reopenings

- Background
 - After probate decision issued
 - Request review within first 30 days = rehearing
 - Request review after 30 days = reopening



Rehearings & Reopenings

- Rehearings
 - Current regulation:
 - No limits on grounds for requesting review, except if based on newly discovered evidence, requestor must state reasons why wasn't presented before decision and include affidavits
 - Proposed:
 - Must allege there was an error of fact or law in the decision
 - May raise an issue only if raised before or during the hearing
 - Same requirements for newly discovered evidence
 - Allows judge to summarily dismiss if petition is deficient

Rehearings & Reopenings (cont'd)

- Reopenings
 - Current regulation:
 - Mixes deadline for filing with legal standard applied to reopen
 - Proposed:
 - Separates out:
 - Deadline for filing: 1 year from discovery of error of fact or law
 - Legal standard for reopening: if more than 3 years after date of decision/order, then judge will weigh the need to correct the error against the interests in finality of the decision/order

Rehearings & Reopenings (cont'd)

- Reopenings (cont'd)
 - Current regulation:
 - To correct errors of law or fact, and requires factual error to be supported by documentation or affidavits
 - Proposed:
 - To correct errors of law or fact but **not** to:
 - Raise issues already addressed in prior rehearing/reopening
 - Raise issues that could have been raised at a prior hearing
 - Submit evidence discoverable at time the decision was issued or during rehearing period
 - Allows judge to summarily dismiss if petition is deficient

Rehearings & Reopenings (cont'd)

- Reopening to correct a non-substantive error in a decision or order
 - Current regulation:
 - **Must reopen** probate case to correct non-substantive and typographical errors
 - Proposed:
 - Allows OHA to issue a correction order to correct non-substantive and typographical errors **without reopening** the probate case

Proposed Rule - Overview

Revisions to Regulatory Provisions on 10 Main Topics:

1. Trust funds for funeral services
2. Notice in formal probate proceedings
3. Partition
4. Presumption of death
5. Renunciations
6. Summary probate proceedings
7. Rehearings & Reopenings
- 8. Inventory corrections**
9. Purchase at probate
10. Miscellaneous

Inventory Corrections

- BIA identifies additional property (or incorrectly included property) after OHA probate decision
 - Current regulation:
 - OHA issues two orders: an order notifying parties of modifications, then a final order if no objections are raised
 - Challenge to IBIA
 - Proposed:
 - OHA issues a single order:
 - Directing distribution of additional property; or
 - Notifying all heirs or devisees of the correction and addressing any changes in distribution of property resulting from the correction
 - Challenge through OHA reconsideration process

Proposed Rule - Overview

Revisions to Regulatory Provisions on 10 Main Topics:

1. Trust funds for funeral services
2. Notice in formal probate proceedings
3. Partition
4. Presumption of death
5. Renunciations
6. Summary probate proceedings
7. Rehearings & Reopenings
8. Inventory corrections
- 9. Purchase at probate**
10. Miscellaneous

Purchase at Probate

- Background
 - AIPRA authorizes the Department to sell, during the probate of an estate of an individual who died on or after June 20, 2006, all or part of that estate to an “eligible purchaser”
 - Eligible purchaser
 - Any devisee or eligible heir who is taking an interest in the same parcel of land in the probate proceeding;
 - Any person who owns an undivided trust or restricted interest in the same parcel of land;
 - The Indian Tribe with jurisdiction over the parcel containing the interest; or
 - The Secretary on behalf of the Tribe.

Purchase at Probate (cont'd)

- Current regulation:
 - Allows the eligible purchaser to request to purchase:
 - Before OHA issues a probate decision
- Proposed:
 - Requires the eligible purchaser to request to purchase:
 - Before the end of the first probate hearing; or
 - To purchase property added to the estate, within 30 days of the distribution order adding that property

Purchase at Probate (cont'd)

- Current regulation:
 - Requires probate case to remain open until the purchase at probate is complete
- Proposed:
 - Allows probate case to close before completion of purchase at probate
 - Any property subject to pending request for purchase distributed with an encumbrance until purchase complete (or denied)

Purchase at Probate (cont'd)

- Current regulation:
 - Purchase occurs before probate decision, so no final determination of heirs/devisees has been made yet
 - Consent for purchase is given by **provisional** heirs/devisees
- Proposed:
 - Probate decision with determination of heirs/devisees is issued before the purchase
 - Consent for purchase is given by **determined** heirs/devisees
 - Heir/devisee whose consent is required may notify OHA at any time they are not willing to consent to sell the property

Proposed Rule - Overview

Revisions to Regulatory Provisions on 10 Main Topics:

1. Trust funds for funeral services
2. Notice in formal probate proceedings
3. Partition
4. Presumption of death
5. Renunciations
6. Summary probate proceedings
7. Rehearings & Reopenings
8. Inventory corrections
9. Purchase at probate

10. Miscellaneous

January 2021

Miscellaneous

- Revises current regulation to:
 - Require judge to determine status of individual as an “Indian”
only when relevant
- Proposes new sections on:
 - How trust personalty will be distributed when there are no eligible family heirs and either no land in estate or land in the jurisdiction of more than one Tribe
 - How joint tenancy and anti-lapse provision operate in determining heirs and devisees
- Definition updates

Comments Due

Comments on the proposed rule are due: March 8, 2021

Email is preferred method to submit comments: consultation@bia.gov

- Sessions on proposed rule:
 - Tribal consultation: February 9, 2021 – 2pm ET
 - Call-in number: (800) 369–3356. Passcode: 8182564
 - Public hearing: February 11, 2021 – 2pm ET
 - Call-in number: (888) 790–3548. Passcode: 6643062
- Next steps
 - Review comments, make changes as appropriate
 - Publish a final rule in the Federal Register
 - Final rule will not become effective for at least 30 days after publication

For Further Information

See: <https://www.bia.gov/as-ia/raca/potential-probate-regulatory-revisions>

Elizabeth Appel
Office of Regulatory Affairs & Collaborative Action
Office of the Assistant Secretary – Indian Affairs
Elizabeth.appel@bia.gov
(202) 738-6065 (mobile)

Josh Epstein
Office of Hearings and Appeals
Joshua_epstein@oha.doi.gov
(703) 235-3810