Stewards of Indigenous Resources Endowment

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Keeping Tribal Lands in Member's Hands!

December 30, 2019

VIA EMAIL AND FEDERAL RULEMAKING PORTAL

Ms. Elizabeth K. Appel, Director
Office of Regulatory Affairs & Collaborative Action
U.S. Department of the Interior
1849 C Street NW, Mail Stop 4660
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Federal Rulemaking Portal: www.regulations.gov

Re: DOI-2019-0001, Updates to American Indian Probate Regulations, Thursday, October 31, 2019, 58353.

Dear Ms. Appeal,

Thank you for the opportunity to comment on the proposed Updates to American Indian Probate Regulations. However, we also request a public hearing on the proposed rules. Changes to the current regulatory scheme, untouched in 13 years, could have a dramatic impact on Indian land ownership, which is historically fraught, deeply important to Indian people, and deserving of the most careful consideration.

My name is Roberta Armstrong, Washington State Bar Member No 42343, and I am the founder and executive director of the Stewards of Indigenous Resource Endowment ("SIRE"), a grassroots 501(c)3 non-profit professional service corporation, providing Indian estate planning services and education to tribal communities throughout Indian Country since 2007. We have completed hundreds of Indian estate plans and provide an on-line Indian will production tool at www.NativeWill.org. We currently work with the San Xavier Allottees Association of the Tohono O'odham Nation to provide Indian will education and services.

In addition to my state law license, I practiced law in over 20 tribal communities and have represented tribal heirs in federal probate matters before the Office of Hearings and Appeals of Indian Probates for five years. I am compelled by this experience to comment on the proposed regulatory updates.

Our intent here is to comment on the proposed regulations from our perspective as attorneys who represent individual Indian clients in probate proceedings. In particular, we wish to bring to the Department's attention the current lack of due process provided by existing AIPRA regulations and our deep concerns that the proposed "Updates to American Indian Probate Regulations" threatens to further curtail due process protections.

I wish to point out that individual Indians and legal practitioners, such as myself and others, will have other suggested issues or perspectives on the listed issues that would best be raised prior to the publication of a Proposed Rule as opposed to being raised in response to a Proposed Rule. A public meeting is necessary to facilitate this Department's request for comments in advance of proposed rulemaking. SIRE welcomes the opportunity to participate with the Department's effort in streamlining the probate process in a way that benefits individual Indians and other stakeholders.

Sincerely,

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The proposed regulations would hack away at the modest due process protections afforded to Individual Indians under the current regulatory scheme.

As an initial matter, we note that descriptions of the potential regulatory changes listed in the Federal Register are brief and lack detail necessary to properly comment on them. We therefore respectfully request publication of additional details about the proposed regulations and a public hearing at which others and we may provide further comment.

Our chief concern with the proposed regulations is the reduction of due process it embodies. Some of the regulations attempt to streamline the probate process by eliminating or reducing due process. This would throw the baby out with the bathwater; the attempt to speed probates by curtailing due process would harm some of the same people the regulations are purported to help – namely individual Indians. To better explain what we mean, let's consider some of the major due process shortcomings in the current statute and regulations.

Interested parties rarely see their federal probate case files. Before AIPRA, it was unclear whether parties had a right to view their files at all. Today, they are able to request the files if they do so in writing, although most probably do not know this. When files are requested, they sometimes arrive long after the initial hearing. A system more devoted to due process would guarantee that a copy of the file is delivered to each interested party along with the notice of initial hearing. Imaging if state or federal courts refused to provide parties their files until well after a critical hearing. It would not be tolerated.

Most interested parties represent themselves in probate matters. This in itself places limits on due process. Interested parties have a right to legal counsel, *Estate of Peahner Mahseet*, 5 I.B.I.A. 27 (1976), but many can't afford the fees that they are required to pay because of extreme poverty in Indian country. As a result, the vast majority of heirs and beneficiaries are forced to navigate the probate process alone.

Finding a lawyer with federal probate knowledge can be impossible. A substantial number of the attorneys who practiced Indian probate law stepped back from the process once AIPRA became law. Our clients and former clients report undertaking Herculean efforts to hire a lawyer because few attorneys today practice in the field. The lack of counsel itself guarantees some loss of due process.

AIPRA anticipates some of these problems. For example, current law places "an affirmative duty [on the judge] in an Indian probate hearing 'to develop the record and to ensure that the facts, both pro and con, are brought out.'" *Estate of Jeanette Little Light Adams*, 39 I.B.I.A. 32, 35 (2003). But this is only part of the picture, for ". . . the Judge is not an advocate for any party and is not required to anticipate a party's arguments or evidence." *Estate of Rose Medicine Elk,* 39 I.B.I.A. 167 (2003). In other words, judges must develop the record in some cases but are not required to inform parties of legal claims or arguments that could result in more favorable outcomes for them.

The probate process is highly technical, which limits due process. Former Indian probate judge and current Administrative Law Judge Hon. James J. Yellowtail cited two quotes by Winston Churchill to describe the nebulas nature of the federal Indian probate process under AIPRA back in 2006. To the uninitiated, the probate process is "'. . . a riddle wrapped in a mystery inside an enigma,'" Indian probate is "'one of those cases where the imagination is baffled by the facts.'" Judge Yellowtail reported, again citing Churchill[i]. Nonetheless, "parties to a probate proceeding are presumed to have knowledge of the regulations governing those proceedings." *Estate of John Martin Red Bear*, 41 I.B.I.A. 273, 275 (2005). Frankly, many of our clients and former clients express fear and apprehension about the prospect of representing themselves in probate matters – let alone gaining mastery of the law and regulations beforehand. Again, access to lawyers is limited.

Clearly, AIPRA and its regulations and case law provide a dearth of due process protections to individual Indians, heirs, and devisees. Yet, the proposed regulations would strip away even more. This must not be allowed.

Individual Indians are entitled to heightened due process standards thanks to the federal tribal trust doctrine.

In 2011, in *United States v. Jicarilla Apache Nation*, the Supreme Court recognized the existence of the trust relationship and noted that the "[g]overnment, following 'a humane and self-imposed policy ... has charged itself with moral obligations of the highest responsibility and trust,' obligations 'to the fulfillment of which the national honor has been committed.'" 131 S. Ct. 2313, 2324-25 (2011)(internal citations omitted).

"In exercising this broad authority, past Secretaries [of the Interior] have acknowledged that the Department's relationship with Indian tribes and ***individual Indian*** beneficiaries is guided by the trust responsibility and have expressed a paramount commitment to protect their unique rights and ensure their well-being, while respecting tribal sovereignty." Order No. 3335, The Secretary of the Interior, Sally Jewell, August 20, 2014, See also, Secretary's Order 317 5, Departmental Responsibilities for Indian Trust Resources (Nov. 8, 1993) (emphasis added).

Individual Indians enjoy the due protections provided by the Fifth and Fourteenth amendments to the U.S. Constitution, along with time honored due process protections provided under federal administrative law. Importantly, they also benefit from the federal government's fiduciary trust responsibilities. The Department must take this into consideration when designing due process requirements. In other words, the Department's goal should not be issuing regulations that offer the minimum due process required by the Constitution and administrative law theory; they must create regulations that meet or exceed the federal trust requirements.

The existing regulations already fail in this regard. Further reductions in due process under the proposed regulations should not be seriously considered.

As a spokesperson for the tribal communities we serve, I would also like to raise specific concerns regarding the proposed Updates to American Indian Probate Regulations:

Issue 2: Overly Burdensome "purchase at probate" Process

This proposed regulation turns traditional notions of due process upside down. It would not only eliminate the right of "eligible purchasers" to notice when the OHA receives a request to purchase at probate. It would place the onus on them to provide notice to the BIA that they wish to be told of such purchase offers. This goes too far.

This provision will benefit the most sophisticated parties while making the probate system less accessible to the many, many individuals who appear *pro se*. It undermines basic concepts of justice and fair play. We urge the Department to reject this proposed regulation.

Issue 3: Notice to Co-Owners Who Are "potential heirs"

Under this regulation, owners of trust land would no longer receive notice when they become potential heirs to an estate based on their land ownership status. Instead, they would be required to notify the BIA or OST of their wish to be notified when they become a potential heir. Suddenly, owners who were entitled to due process in the form of notice now have to provide notice themselves! Many Indian landowners have no idea they own trust lands, let alone possess the sophistication required to ask the government for notice in advance of a theoretical right to inherit land. All co-owners, as eligible heirs, must receive equal due process as other devisees with written notice, sent by first class mail. 25 USC § 2206(o)(4)(B).

Issue 7: Unclear Judicial Authority To Access Necessary Information

While this proposed regulation is on the right track, it falls far short of what is needed. Of course judges should have authority to order critical documents. But the Department should also consider expanding discovery powers available to interested parties in federal probates. Current limits on discovery restrict the ability of interested parties to exercise their rights because they lack basic facts about their cases.

Issue 11: The Requirements for Filing Petitions for Rehearing and Reopening Need Clarification

Additional limitations on petitions to reopen should be rejected. While it may seem straightforward to block those who fail to participate in probates from later petitioning for the right to reopen them, this ignores the reality of Indian probate.

Individuals fail to participate in probates for many legitimate reasons. For example, the list of landowners for whom the BIA has no current contact information is legion, *i.e. whereabouts unknown*. Some people, moreover, only learn about their tribal

heritage later in life and so engage the probate process at that time. The potential scenarios of this kind are endless.

The proposed limits on reopening would almost certainly reduce the probate judge's ability to provide justice to these individuals and their heirs and devisees. Importantly, probate judges already have discretion to deny petitions to reopen where they see fit. We urge the Department to reject this proposed regulation.

Issue 12: Even Small, Simple Estates Must Undergo a Probate Proceeding

Eliminating hearings for simple estates would undermine due process. We have serious concerns, moreover, that this provision would apply to estates containing real property, which should not be considered. Again, the goal of the Department should be not to provide the very minimum due process required, but to honor its trust responsibility by providing parties with the due process owed by a fiduciary. We urge the Department to reject this proposed regulation.

The stated intent of the proposed regulations is to "streamline the [probate] process and benefit Indian heirs and devisees." To accomplish this, we request the comment period on the proposed rule to be extended to afford interested parties time to obtain information needed to provide meaningful comments. In addition, we also request a public hearing to further understand the Department's reasons for the potential regulatory changes and afford individual Indians an opportunity to be heard.

Thank you for your consideration.

[i] *See* Administrative Law Judge Honorable James J. Yellowtail's document available online at *https://law.seattleu.edu/documents/indian-institute/FederalProbateProcess.pdf*