



INTERIOR BOARD OF INDIAN APPEALS

Estate of Elmer Wilson, Jr.

47 IBIA 1 (04/15/2008)



# United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS  
INTERIOR BOARD OF INDIAN APPEALS  
801 NORTH QUINCY STREET  
SUITE 300  
ARLINGTON, VA 22203

ESTATE OF ELMER WILSON, JR.	)	Order Vacating Order Denying Appeal
	)	and Remanding for Further
	)	Proceedings
	)	
	)	Docket No. IBIA 06-25
	)	
	)	April 15, 2008

This appeal raises two key questions: (1) the procedural question of whether a reopening provision in the Department of the Interior’s (Department) probate regulations allowed the Bureau of Indian Affairs (BIA) to seek reopening of a final Indian probate decision issued by an Attorney Decision Maker (ADM); and if so (2) the substantive question of whether the Indian Reorganization Act of 1934 (IRA), *see* 25 U.S.C. § 464, allows the devise of an interest in Indian trust property on an IRA reservation to a group that the Department has declined to recognize as an Indian tribe within the meaning of Federal law. Contrary to the underlying order from which this appeal is taken, we answer the procedural question in the affirmative, and the substantive question in the negative.

The BIA and the Quinault Indian Nation (Nation) (collectively, Appellants) jointly appealed to the Board of Indian Appeals (Board) from an Order Denying Appeal, Rehearing or Reopening (Order Denying Appeal) issued on October 21, 2005, by Administrative Law Judge (ALJ) Robert G. Holt, in the estate of Elmer Wilson, Jr. (Decedent), deceased Chinook Indian, Probate No. NW-150-0151. The Order Denying Appeal rejected, on both procedural and substantive grounds, a request by BIA to modify a final Order Determining Heirs, Approving Last Will & Testament and Decree of Distribution (Order Approving Will) for Decedent’s estate, which had been issued by ADM Cathern E. Tufts on June 9, 2003. The ADM’s order approved and gave effect to Decedent’s will, which included a devise of an interest in certain trust property on the Quinault Reservation to “The Chinook Indian Tribe.” In 2002, the Assistant Secretary - Indian Affairs (Assistant Secretary) declined to acknowledge a present-day group calling itself the Chinook Indian Tribe (CIT) — for which the devise was intended — as an Indian tribe. BIA sought modification of the ADM’s order on the ground that CIT does not constitute a “tribe” that is eligible, under the IRA, to be a devisee of interests in trust property located on the Quinault Reservation.

The ALJ concluded that BIA's request, which was submitted approximately 16 months after the ADM's decision, could not be treated as a timely appeal to him under the BIA regulations then in effect governing probate proceedings conducted by ADMs, *see* 25 C.F.R. § 15.403 (2003). The ALJ further concluded that even if BIA's request could be considered as a petition for reopening under the probate regulations of the Department's Office of Hearings and Appeals (OHA), *see* 43 C.F.R. § 4.242, BIA lacked standing to seek reopening because BIA had actual notice of the original proceedings, *see id.* § 4.242(a). In the alternative and on the merits, the ALJ concluded that the IRA allowed CIT to be an eligible devisee of trust property on the Quinault Reservation because the "Chinook Tribe" was included in the group of tribes for which the Reservation was created.

On the procedural issue, we conclude that subsection 4.242(d) (2003),<sup>1</sup> which the ALJ did not consider, applies to this case. That provision expressly allows BIA to petition for reopening of an Indian trust estate within three years of a final decision, based on manifest error, and is broad enough to encompass reopening of the ADM's decision.

On the merits, we conclude that it was manifest error in the present case for the ADM and the ALJ to give effect to a devise of Indian trust land on the Quinault Reservation to CIT. CIT's eligibility for the devise depends, among other things, on its status as an "Indian tribe" under the IRA, *see* 25 U.S.C. § 464. Because the Department denied CIT's petition for Federal acknowledgment as an Indian tribe, we conclude that CIT does not qualify as an eligible devisee under the IRA.

Therefore we conclude that the ALJ erred in denying BIA's request for modification. We vacate the Order Denying Appeal, order that the estate be reopened with respect to the attempted but invalid devise to CIT, and remand for further proceedings consistent with this decision.

## **Background**

### **I. Introduction**

Decedent died testate on September 28, 2001, at Seaside, Oregon, owning interests in trust or restricted property located on the Quinault Reservation in the State of Washington. In his will, Decedent devised to "The Chinook Indian Tribe" all of his interest in allotments located on the Quinault Reservation, subject to the proceeds from such allotment interests going to his wife, Sally J. Wilson (Wilson), during her life. New Fourth

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<sup>1</sup> Presently codified at 43 C.F.R. § 4.242(e).

Paragraph, Decedent's Codicil to Will, Sept. 26, 1995.<sup>2</sup> It is undisputed among the parties to this appeal that CIT was the intended devisee. What is disputed is whether Federal law allows the devise to CIT.

Section 4 of the IRA prohibits the transfer, including transfers by devise, of Indian trust lands on an Indian reservation to which the provisions of the IRA apply, with limited exceptions. The one exception that is relevant to this case is that the IRA allows a transfer to "the Indian tribe in which the lands . . . are located." 25 U.S.C. § 464. Leaving aside the meaning of the phrase "in which the lands . . . are located," this provision requires the transferee to be an Indian "tribe." The IRA defines the term "tribe" . . . to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." *Id.*

In July of 2002, the Assistant Secretary issued a final decision for the Department, in which he declined to acknowledge CIT as an Indian tribe within the meaning of Federal law. *See* Reconsidered Final Determination to Decline to Acknowledge the Chinook Indian Tribe/Chinook Nation (Reconsidered FD); Notice of Reconsidered Final Determination, 67 Fed. Reg. 46,204 (July 12, 2002).<sup>3</sup> The Assistant Secretary found that CIT's members descend from historic Chinook bands, and that the United States had recognized Chinook bands in treaty negotiations in 1851. Reconsidered FD at 2, 66, 75. He also concluded, however, that the available evidence did not demonstrate that the historic Chinook bands continued to exist or that they merged as a single tribe. *Id.* at 57. In effect, the Assistant

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<sup>2</sup> Decedent executed a will on May 7, 1991, and a will codicil on September 26, 1995. The will codicil amended the will to include the devise to CIT. Wilson was also named as the devisee of any residual property.

<sup>3</sup> CIT filed the petition for Federal acknowledgment in 1979. *See* 44 Fed. Reg. 52,757 (Sept. 10, 1979). The Assistant Secretary first proposed not to acknowledge CIT as an Indian tribe, but later issued a Final Determination favorable to CIT. *See* 67 Fed. Reg. at 46,204. The Nation sought reconsideration of the Final Determination pursuant to the Department's administrative review process for acknowledgment determinations. *See* 25 C.F.R. § 83.11. The Board affirmed the Final Determination with respect to issues raised by the Nation over which the Board had jurisdiction, *see In re Federal Acknowledgment of the Chinook Indian Tribe/Chinook Nation*, 36 IBIA 245 (2001), but referred additional issues to the Secretary, who then requested reconsideration by the Assistant Secretary. Upon reconsideration of the issues referred by the Secretary, the Assistant Secretary issued the Reconsidered Final Determination, which reversed the initial Final Determination and constituted the Department's final decision in the matter. *See* 25 C.F.R. § 83.11(h)(3).

Secretary concluded that CIT had not shown itself to be the same entity as, or a successor to, one or more historic Chinook bands.<sup>4</sup>

## II. Proceedings Before the ADM

On February 18, 2003, a BIA probate specialist assigned Decedent's probate case to ADM Tufts, after concluding that the case might be suitable for informal probate proceedings, which at the time were governed by BIA's regulations. *See* 25 C.F.R. §§ 15.201-15.205 (2003). The ADM held an informal probate conference at Chinook, Washington, on May 23, 2003. CIT attended through its Chairman, Gary Johnson, who is also Decedent's nephew. Apparently, Decedent's will was not challenged, nor was the devise to CIT contested.

On June 9, 2003, the ADM issued the Order Approving Will. The ADM approved Decedent's will and will codicil, and ordered that Decedent's interests in trust property located on the Quinault Reservation be distributed to CIT, subject to Wilson's life estate rights. Order Approving Will at 3. The Order Approving Will advised interested parties of their right to appeal the decision by filing a written appeal within 60 days with the ADM, pursuant to 25 C.F.R. § 15.401 (2003), and then advised the parties of their options if they missed the 60-day appeal period.<sup>5</sup> The Order Approving Will was sent to BIA and to the Chairman of the Nation.

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<sup>4</sup> CIT claimed to be the successor the Lower Band of Chinook. Reconsidered FD at 58.

<sup>5</sup> Subsection 15.403(b) of 25 C.F.R. (2003) provided that if the 60-day appeal period were missed, an interested party could still file a request with the ADM asking to have the decision changed, based on one or more of the following grounds: the party did not receive notice of the probate; the party obtained new evidence or information after the decision was made; or the party had evidence that was known at the time of the probate proceeding but was not included in the probate package. On receipt, the ADM forwards the request to the appropriate ALJ for action pursuant to 43 C.F.R. Part 4, Subpart D.

At the time Decedent died and his probate was initiated, ADMs were part of BIA, and not OHA. In 2005, the ADMs were transferred from BIA to OHA, and the regulatory provisions dealing with ADMs were transferred from BIA's regulations in 25 C.F.R. Part 15 to OHA's regulations in 43 C.F.R. Part 4. 70 Fed. Reg. 11,804 (Mar. 9, 2005).

### III. Superintendent's Request to Modify

More than 16 months later, on October 29, 2004, the Superintendent sent a memorandum to the ADM, in which he requested that the ADM's decision be modified pursuant to the OHA probate regulations governing reopening of a case, 43 C.F.R. § 4.242. The Superintendent argued that CIT could not be considered a "tribe" for purposes of the IRA because it was not Federally recognized as a tribe and therefore it was not an eligible devisee of interests located on the Quinault Reservation.

The ADM issued a Notice of Request for Re-opening and/or Appeal on November 10, 2004, in which she advised interested parties that she was forwarding the memorandum and record to an ALJ for further consideration. The ADM noted that subsection 4.242(d) of 43 C.F.R., which allows a BIA officer to petition for re-opening within three years of the date of the final decision to prevent manifest error, "most closely approximates a basis for a re-opening" of Decedent's estate. Notice of Request for Re-Opening and/or Appeal at 1.<sup>6</sup>

### IV. ALJ's Order Denying Appeal

On October 21, 2005, the ALJ issued the Order Denying Appeal. The ALJ first denied the Superintendent's petition on procedural grounds because he concluded that the Superintendent could not satisfy the procedural requirements for an appeal from an ADM decision, or for seeking rehearing or reopening. The ALJ determined that (1) review of ADM decisions was limited by the right of appeal or review by an ALJ pursuant to the procedures stated in BIA's regulations governing ADM proceedings, and the Superintendent's petition did not constitute a timely appeal under 25 C.F.R. § 15.403; and (2) even assuming that ADM decisions are subject to reopening under the OHA probate regulations, the Superintendent had notice of the original proceedings and was therefore not eligible to reopen the estate under 25 C.F.R. § 4.242(a).<sup>7</sup> The ALJ did not address whether the Superintendent's petition could be considered as properly before him under subsection 4.242(d).

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<sup>6</sup> The ALJ sent a notice to interested parties stating that a hearing on the Superintendent's memorandum would be held at Portland, Oregon, on July 25, 2005. No one attended the hearing.

<sup>7</sup> Subsection 4.242(a), provides that, to have standing to petition for reopening within three years of the date of the original decision, an individual must not have had constructive or actual notice of the original proceedings.

The ALJ then concluded that, even if the Superintendent had satisfied the procedural requirements for an appeal or reopening, the Superintendent's petition should still be denied on the merits. Relying on *Williams v. Clark*, 742 F.2d 549 (9th Cir. 1984), the ALJ determined that if CIT was "included in the group of tribes for which the Quinault Reservation was created," it may be considered an Indian tribe in which the lands are located for purposes of section 464. Order Denying Appeal at 4.<sup>8</sup> Citing the Supreme Court's decision in *Halbert v. United States*, 283 U.S. 753 (1931),<sup>9</sup> the ALJ concluded that the "Chinook tribe" was within the group of tribes for which the Quinault Reservation was created, and therefore CIT was a proper devisee under the IRA.<sup>10</sup>

BIA and the Nation jointly appealed to the Board, and submitted a statement of reasons with their notice of appeal. CIT, through its chairman, Gary Johnson, filed a brief and also filed a motion to dismiss, in which it argued that BIA and the Nation lacked standing to bring this appeal. BIA and the Nation filed separate reply briefs, in which they responded to the motion to dismiss and CIT's answer brief. CIT filed a reply brief.

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<sup>8</sup> In *Williams*, the decedent, a member of the Federally-recognized Quileute Tribe of Indians, had devised trust land on the Quinault Reservation to a non-heir who was also member of the Quileute Tribe. The Ninth Circuit held that the Quileute tribal member was a permissible devisee under the IRA because the Quileute Tribe had certain rights in the Quinault Reservation and constituted a "tribe in which the lands are located," within the meaning of the IRA, 25 U.S.C. § 464. 742 F.2d at 556.

<sup>9</sup> In *Halbert*, the Supreme Court concluded that the Chehalis, Chinook, and Cowlitz tribes were among the tribes whose members were entitled to take allotments within the Quinault Reservation, under the Act of March 4, 1911, 36 Stat. 1345, an allotment act pertaining to the Quinault Reservation.

<sup>10</sup> On October 18, 2005, while the proceedings before the ALJ were pending, the Superintendent sent a letter to Indian Probate Judge M.J. Stancampiano, requesting that he review the Order Approving Will and raising the same objection that CIT is not an eligible devisee. The letter was received by OHA's office in Billings, Montana, on October 27, 2005, after the Order Denying Appeal issued. On November 9, 2005, Chief ALJ Earl J. Waits issued an order in which he treated the Superintendent's letter as a petition for rehearing and rejected it on the ground that the October 21, 2005, Order Denying Appeal was dispositive. Appellants have not challenged Chief Judge Waits's order.

## Discussion

### I. Introduction

The facts in this case are undisputed. The only issues are those of law. The Board reviews questions of law de novo. *Hardy v. Midwest Regional Director*, 46 IBIA 47, 52 (2007).

We conclude that the ALJ erred in rejecting BIA's petition on procedural grounds. BIA was entitled to petition to reopen Decedent's estate to prevent manifest error pursuant to 43 C.F.R. § 4.242(d), regardless of whether the regulations governing ADM procedures would otherwise have precluded BIA from seeking relief. We thus reject CIT's argument that BIA lacked standing to petition for relief from the ADM's Order Approving Will.<sup>11</sup> On the merits, we summarily reject CIT's argument that the IRA does not apply to the Quinault Reservation, and we also conclude that it was manifest error for the ADM and ALJ to give effect to Decedent's devise to CIT of Indian trust land on the Quinault Reservation.

### II. Procedural Issue: Was BIA Allowed to Petition to Reopen the ADM's Decision Within Three Years of its Issuance?

Appellants contend that the reopening provision contained in 43 C.F.R. § 4.242(d) allowed BIA to seek and obtain reopening of Decedent's estate within three years to prevent manifest error. Appellants argue that whether or not the regulations providing for an appeal from or modification of ADM decisions, *see* 25 C.F.R. § 15.403, might otherwise bar review in this case, OHA's regulations governing reopening of probate cases provided an additional mechanism that was available to BIA. Appellants contend that the applicable reopening provision was 43 C.F.R. § 4.242(d), which specifically applies to BIA and which does not include the lack-of-notice requirement that is found in subsection 4.242(a), on which the ALJ relied.

CIT counters that the ALJ correctly denied BIA's request to modify the ADM's Order Approving Will because BIA's regulations governing ADM proceedings provided the exclusive mechanism for seeking review of ADM decisions, and because BIA is neither an "interested party," within the meaning of those regulations, nor did BIA file an appeal

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<sup>11</sup> Because BIA and the Nation jointly filed the appeal to the Board and the Nation raises no separate claims, we need not address CIT's argument that the Nation lacks standing to bring the appeal.

within the prescribed 60-day time period.<sup>12</sup> In support of its argument, CIT argues that petitions for reopening, including those filed by BIA, are limited to seeking review of an ALJ or Indian Probate Judge (IPJ) decision, because subsection 4.242(a) specifically refers only to reopening of ALJ or IPJ decisions and therefore this limitation must be read into subsection 4.242(d).

We reject CIT's argument that section 15.403 provided the exclusive mechanism for seeking review of the ADM's decision. We conclude that the ALJ should have treated BIA's request as a permissible petition for reopening under 43 C.F.R. § 4.242(d) to prevent manifest error.

The OHA regulations that were in effect when BIA submitted its request provided, subject to certain requirements, that individual interested parties could, within three years from the date of a final decision "issued by an OHA deciding official," seek reopening of the case. 43 C.F.R. § 4.242(a) (2003). At the time, an ADM was not an "OHA deciding official" because ADMs were located within BIA. *See* 43 C.F.R. § 4.201 (defining "OHA deciding official" as ALJs or IPJs and defining "BIA deciding official" as including ADMs).

However, another reopening provision, subsection 4.242(d), contains no such language referring to a decision of an OHA deciding official. Rather, subsection 4.242(d) provides simply that "[t]o prevent manifest error an OHA deciding official may reopen a case within a period of 3 years from the date of the final decision, after due notice on his or her own motion, or on petition of a BIA officer." CIT urges us to read into subsection 4.242(d) the apparent limitation contained in subsection 4.242(a), and to declare that subsection 4.242(d) only applies to reopening of decisions issued by an ALJ or an IPJ and is thus unavailable as a means to correct an ADM's decision. We decline to do so.

We conclude that the language in subsection 4.242(d) is broad enough to encompass the reopening of any probate "case" for which a final decision was issued, regardless of whether it was issued by an ALJ, an IPJ, or an ADM. To hold otherwise would be to find that ALJs and IPJs are without any authority to correct an ADM's decision on their own motion (because no such authority is granted in the regulations governing ADM proceedings) and that BIA at best can appeal from an ADM's decision

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<sup>12</sup> The regulations governing ADM proceedings provide that an "interested party" may seek review of an ADM decision. BIA is not expressly included in the definition of the term "interested party." *See* 25 C.F.R. § 15.403 (2003) ("you" may appeal or request review); *id.* § 15.2 (definitions of "you" and "interested party"); *cf.* 43 C.F.R. § 4.215 (2005) ("interested party" may seek de novo review of ADM decision); *id.* § 4.201 (definition of "interested party").

within 60 days or be limited to seeking modification on three specifically prescribed grounds in the ADM-related regulations.<sup>13</sup> We reject that result as implausible, and certainly not mandated by the regulatory language. Thus, we conclude that subsection 4.242(d) was broad enough to encompass reopening of an ADM's decision without regard to the appeal procedures that were included in the BIA regulations.<sup>14</sup>

We therefore conclude that the ALJ erred in dismissing the Superintendent's petition on procedural grounds. Under 43 C.F.R. § 4.242(d), the Superintendent had standing to petition for reopening to correct manifest error, and BIA has standing to bring this appeal.<sup>15</sup>

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<sup>13</sup> We note that CIT does not concede this latter point. CIT argues that BIA is not an "interested party" to an ADM proceeding, and therefore *never* has standing to seek correction of an ADM's order, whether or not such relief is sought within the 60-day appeal period.

<sup>14</sup> CIT also argues that, because BIA did not style its request as a petition for reopening, but instead styled it as a request for rehearing, it cannot be treated as a request for reopening. CIT's Response to BIA's and Nation's Reply Briefs at 8. We disagree. The Board has long recognized that an untimely "petition for rehearing" may be treated as a petition for reopening. *See, e.g., Estate of Baz Nip Pah*, 22 IBIA 72, 73 (1992); *Estate of Julia Tieyah*, 11 IBIA 211, 212 (1983). In the present case, although BIA's petition was incorrectly styled, it specifically referred to section 4.242, and thus it is undoubtedly proper to treat it as a petition to reopen to prevent manifest error under 43 C.F.R. § 4.242(d).

CIT also argues that the Superintendent's petition should have been dismissed because the Superintendent waited for over a year from the date of the ADM's decision to seek review and therefore did not exercise due diligence. But CIT relies on *Estate of Louise (Louisa) Mike Sampson*, 29 IBIA 86 (1996), which involved a petition for reopening filed under the regulations governing reopening more than three years after the final decision, to which a "manifest injustice" standard applies. *See* 43 C.F.R. § 4.242(h). The Board has never held that a "due diligence" standard applies to a reopening petition by BIA within three years of a final decision.

<sup>15</sup> The Board's own regulations, of course, identify BIA as an interested party for purposes of filing an appeal with the Board. 43 C.F.R. § 4.311(c). CIT's argument that subsection 4.311(c) does not apply to the probate regulations is without merit: The provision is located under the "General Rules Applicable to Proceedings on Appeal Before the [Board]." *See also* 43 C.F.R. § 4.200 ("[i]ncluded in . . . §§ 4.310 through 4.323 are procedural rules applicable to the settlement of trust estates of deceased Indians who die possessed of trust property").

### III. The Merits: Does the IRA Authorize Decedent's Devise to CIT?

As summarized earlier, Appellants contend that because CIT is not Federally recognized as an Indian tribe, it does not constitute a "tribe" under the IRA, 25 C.F.R. § 464, and therefore is not an eligible devisee of Decedent's interest in trust property on the Quinault Reservation. CIT argues, first, that the IRA does not apply to the Quinault Reservation, and second, that even if the IRA applies, CIT qualifies as a tribe under the IRA. We disagree with both of CIT's arguments.

We begin by summarily rejecting CIT's argument that the Quinault Reservation is not subject to the IRA. It is well-established that the IRA applies to the Quinault Reservation. *See Williams*, 742 F.2d at 551 n.2 (threshold inquiry that the IRA applies to the Quinault Reservation is "easily resolved" and reaffirmed); *Cultee v. United States*, 713 F.2d 1455, 1460 (9th Cir. 1983) (IRA applied to devise of trust land on Quinault Reservation); *Van Mechelen v. Portland Area Director*, 35 IBIA 122 (2000) (applying IRA to attempted gift conveyance of Quinault allotment); *Estate of Peter Alvin Ward*, 19 IBIA 196, 199-200 (1991) (Quinault Reservation Indians voted to accept the IRA). The only arguments that CIT makes on this issue pertain to whether the Nation's *government* is organized under the IRA, *see, e.g.*, CIT Answer Brief at 18 (Nation never obtained "full-chartered IRA corporate status"), and not whether the IRA applies to the Quinault Reservation. *Cf. Edwards v. Pacific Regional Director*, 45 IBIA 42, 44 (2007) (Indians voted to decide whether the IRA provisions would apply to their "reservation"). Thus, we find no basis to reconsider the applicability of the IRA to the Quinault Reservation.

We now turn to the issue of whether CIT is an eligible devisee of trust real property interests located on the Quinault Reservation. CIT's eligibility for the devise at issue in this appeal depends on its status as an "Indian tribe" under the IRA. As discussed below, we conclude that because the Department denied CIT's petition for Federal acknowledgment as an Indian tribe within the meaning of Federal law, CIT cannot constitute an "Indian tribe" within the meaning of the IRA, and is thus ineligible to receive Decedent's devise. It was manifest error for the ADM and the ALJ to give effect to a devise of Indian trust land on the Quinault Reservation to CIT.

As noted earlier, the IRA prohibits the devise of Indian trust land on an Indian reservation to which the provisions of the IRA apply, with limited exceptions. One of those exceptions is where the devise is to "the Indian tribe in which the lands . . . are located." To fall within the category of "the Indian tribe in which the lands . . . are located," two requirements must be met. First, the devisee must be an "Indian tribe," and second, that Indian tribe must be the "Indian tribe in which the lands . . . are located." 25 U.S.C.

§ 464. The first requirement is dispositive in this case, and leads us to conclude that CIT is not an eligible devisee.

The IRA defines “tribe” as “any Indian tribe, organized band, pueblo, or the Indians residing on one reservation.” 25 U.S.C. § 479. For purposes of this appeal, the IRA definition of “tribe” is circular: CIT claims to be a “tribe” within the meaning of the IRA and the IRA says that the term “tribe” shall be construed, in relevant part, to mean an “Indian tribe.” Under the circumstances, our analysis of the meaning of “Indian tribe” under the IRA, and more specifically whether CIT qualifies as an Indian tribe under the IRA, is guided and informed by the IRA generally and by principles of Federal Indian law.

CIT argues that the concept of Federal recognition cannot inform the definition of “Indian tribe” for purposes of construing the IRA because the list of Federally-recognized tribes was not published in the Federal Register until 1979. However, the fact that the Government did not publish a list of Federally-recognized tribes when the IRA was enacted does not mean that the Federal Government did not explicitly or implicitly recognize certain entities, e.g., through its dealings with them, as constituting pre-existing and semi-sovereign political tribal entities, and therefore as constituting “Indian tribes” as that term was understood in the IRA. In addition, without regard for organizational status, the IRA defined “tribe” to include a group of Indians residing on one reservation. 25 U.S.C. § 479. The absence, until relatively recently, of a formal administrative process for determining whether a group exists as a tribe, *see* 25 C.F.R. Part 83, does not mean that such determinations were not made. *See generally Cohen’s Handbook of Federal Indian Law* §§ 3.02[3]-3.02[5], at 138-44 (2005 ed.). Nowhere does the IRA suggest, even remotely, that a group of individuals of Indian descent, which the Federal Government has expressly *declined* to acknowledge as existing as an Indian tribe within the meaning of Federal law, may nevertheless constitute a “tribe” within the meaning of the IRA and obtain the benefits that the IRA conferred on tribes.

The Federal Government’s recognition or acknowledgment of an entity as an Indian tribe, however manifested, “institutionaliz[es] the government-to-government relationship between the tribe and the [F]ederal government.” *Cohen’s Handbook of Federal Indian Law* § 3.02[3], at 138; *see also* H.R. Rep. No. 103-781, reprinted at 1994 U.S.C.C.A.N. 3768, 3769 (1994) (Federal recognition permanently establishes a government-to-government relationship between the United States and the recognized tribe and establishes tribal status for all Federal purposes). Congressional authority over Indian affairs under the Constitution is based on tribes’ political status, and if the Department has determined that a group is *not* a political entity with whom the Federal Government has a government-to-government relationship, that group cannot be considered a “tribe” within the meaning of the IRA. *See* U.S. Constitution, Art. I, § 8, cl. 3. (giving Congress power “[t]o regulate

Commerce . . . with the Indian Tribes”); 25 C.F.R. § 83.2 (acknowledgment shall subject the tribe to the same authority of Congress and the United States to which other Federally acknowledged tribes are subjected).

The underlying premise throughout CIT’s argument that it is a “tribe” for purposes of being an eligible devisee under the IRA is that CIT is one and the same as a historic Chinook band or tribe with which the United States had dealings in the 1850s. In concluding that CIT was an eligible devisee, the ALJ also appears to have simply assumed that CIT was a successor in interest to the “Chinook tribe” that was included among the fish-eating tribes for which the Quinault Reservation was set aside. *See* Order Denying Appeal at 4 (“[T]he Chinook tribe is within the group of tribes for which the Quinault Reservation was created and thus may be considered an Indian tribe in which the lands are located.”).<sup>16</sup> However, CIT’s argument and the ALJ’s assumption are contrary to the Department’s determination that CIT failed to demonstrate that it is a tribe within the meaning of Federal law and that CIT had *not* shown itself to be the same entity as, or a successor to, one or more of the historic Chinook bands. *See* Reconsidered FD at 132 (“[i]t is the function of the Federal acknowledgment process to determine whether a petitioner for acknowledgment descends from a historical tribe and has continued to exist as a separate political entity from historical contact to the present”); 67 Fed. Reg. at 46,204, 46,205 (concluding that the evidence did not show that CIT had been identified as an Indian tribe from historical times until the present, or from last acknowledgment in 1855 until the present, on a substantially continuous basis); Reconsidered FD at 73 (same). The Department’s final decision not to acknowledge CIT as an Indian tribe within the meaning of Federal law is a determination that is binding on the Board.

Because the Department denied CIT’s petition for Federal acknowledgment, rejecting CIT’s claim that it is the continuation of one or more historic bands of Chinook, CIT is not eligible to receive Decedent’s devise, regardless of the relationship between the historic Chinook bands and the Quinault Reservation. Thus, the ALJ erred in concluding that CIT is an eligible devisee under the IRA, and the Order Denying Appeal must be vacated and the matter remanded.

### **Conclusion**

The ALJ erred in denying the Superintendent’s petition on procedural grounds, because the Superintendent properly petitioned for reopening to prevent manifest error under subsection 4.242(d). On the merits, we conclude that it was manifest error for the

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<sup>16</sup> In relying on *Williams v. Clark*, the ALJ also failed to address the fact that the Quileute Tribe, unlike CIT, is Federally recognized.

ADM and the ALJ to give effect to a devise of Indian trust land on the Quinault Reservation to CIT.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board vacates the October 21, 2005, Order Denying Appeal, orders that the estate be reopened with respect to the attempted but invalid devise to CIT, and remands for further proceedings consistent with this decision.

I concur:

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Steven K. Linscheid  
Chief Administrative Judge

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// original signed  
Debora G. Luther  
Administrative Judge