



INTERIOR BOARD OF INDIAN APPEALS

Estate of Edward Benedict Defender

47 IBIA 271 (10/15/2008)

Related Board cases:

36 IBIA 280

44 IBIA 8

Judicial review of this case:

Affirmed, *Defender v. U.S. Dept. of the Interior*, Civ. 08-1022, 2010 WL 1299767
(D.S.D. Mar. 30, 2010)



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 EDWARD BENEDICT)	Order Affirming Dismissal of Petition for
DEFENDER)	Rehearing but Modifying Order of
)	Modification
)	
)	
)	Docket No. IBIA 06-109
)	
)	
)	October 15, 2008

The Superintendent of the Standing Rock Agency, Bureau of Indian Affairs (Superintendent; BIA), appealed to the Board of Indian Appeals (Board) from an Order Dismissing Petition for Rehearing entered on August 10, 2006, by Administrative Law Judge (ALJ) Richard L. Reeh in the estate of Edward Benedict Defender (Decedent), deceased Standing Rock Sioux Indian, Probate No. TC-037 H 00-1. The Superintendent had sought rehearing from an Order of Modification¹ entered by Indian Probate Judge (IPJ) George Tah-bone on December 22, 2005, following the Board’s remand in *Estate of Benedict Edward Defender*, 36 IBIA 280 (2001).² The Superintendent argued that the Order of Modification misapplied the Standing Rock Heirship Lands Act (SRHLA or the Act), 96 Pub. L. No. 274, 94 Stat. 537 (Jun. 17, 1980), by allowing Decedent’s ex-wife, whom the IPJ found was non-Indian, to receive a devise of Decedent’s Indian trust or restricted real property on the Standing Rock Reservation, subject to the Standing Rock Sioux Tribe’s right to obtain the property by paying its fair market value.

Judge Reeh, to whom the case had been transferred, found that the Superintendent’s petition for rehearing was a successive petition for rehearing. Successive petitions for rehearing are not allowed under 43 C.F.R. § 4.241(f), and therefore Judge Reeh concluded

¹ The Order of Modification was captioned “Order on Remand Modification.”

² Decedent’s birth certificate identifies him as “Benedict Edward Defender,” but he apparently used Edward as his first name, as evidenced by his will (“Edward B. Defender”). *See also* Marriage License (“Eddie Defender”); Death Certificate (“Ed Defender”).

that he lacked authority to consider the Superintendent's petition.³ The Superintendent now seeks review of Judge Reeh's order and asks that the Board either vacate Judge Reeh's order of dismissal and remand the matter to him for a decision consistent with the terms of the SRHLA, or, in the alternative, reopen this matter on the Board's authority and decide the distribution of the estate pursuant to the terms of the SRHLA.

We conclude that Judge Reeh correctly dismissed the Superintendent's petition for rehearing as an impermissible successive petition for rehearing. However, exercising our authority under 43 C.F.R. § 4.318 to consider matters outside the usual scope of review, in order to correct a manifest error, we also conclude that the Order of Modification must be modified. Although the Order of Modification correctly determined that Decedent's ex-wife was not an eligible devisee under the SRHLA, it clearly misconstrued and misapplied the rules of descent under the Act. We could remand the matter to the ALJ, who could then consider the merits of this case in a reopening proceeding under 43 C.F.R. § 4.242(e) (reopening within three years to prevent manifest error). But the merits were fully briefed in earlier proceedings and the record fully developed. Therefore, exercising our authority under 43 C.F.R. § 4.318, we modify the Order of Modification and direct that Decedent's Indian trust or restricted real property on the Standing Rock Reservation be distributed to his three surviving siblings, as required by section 3(a)(5) of the SRHLA. We also modify the Order of Modification such that the trust personalty Decedent's ex-wife receives from Decedent's Individual Indian Money (IIM) account excludes any income arising from Decedent's Indian trust or restricted real property on the Standing Rock Reservation after Decedent's death, as well as any interest attributable to such income.

Background

I. Introduction: The Decedent, His Will, and the Standing Rock Heirship Lands Act

Decedent, a 45-year old artist, died on August 27, 1999. At his death, Decedent owned Indian trust or restricted real property on the Standing Rock, Crow Creek, and Pine Ridge Indian Reservations. In 1996, Decedent executed a will to devise his entire estate, including "all of [his] Trust Property," as well as "all of the rest and residue of [his] estate, real, personal and mixed" to his wife, Martha Sue Harvey Defender (Sue Defender), from whom he was subsequently divorced. Last Will and Testament of Edward B. Defender, Nov. 7, 1996. Decedent's will identified Sue Defender as an Eastern Cherokee, an identity

³ Judge Reeh inadvertently cited 43 C.F.R. § 4.241(e), where the prohibition against successive petitions was previously located. *Compare* 43 C.F.R. § 4.241(e) (2004) *with* 43 C.F.R. § 4.241(f) (2006).

to which she testified during probate proceedings in 2000.⁴ At the time of his death, Decedent's parents had predeceased him, he had no children or other issue, and he had not remarried. Decedent was, however, survived by three siblings: Darrel, Bridget, and Leonard Defender.⁵

The SRHLA controls disposition of Decedent's Indian trust or restricted real property on the Standing Rock Reservation. Of import here are sections 2, 3(a)(5), 3(a)(6), and 4(b) of the SRHLA, which provide as follows:

Sec. 2. Only the Standing Rock Sioux Tribe of North Dakota and South Dakota (hereinafter the "tribe") or persons who are (a) enrolled members of the tribe, (b) members of a federally recognized Indian tribe, or (c) otherwise recognized as Indians by the Secretary of the Interior (hereafter the "Secretary") shall be entitled to receive by devise or descent any interest in trust or restricted land within the boundaries of the reservation as defined by the Act of March 2, 1889 (25 Stat. 888), except as provided in section 4 of this Act.

Sec. 3. (a) Whenever any Indian dies possessed of any interest in trust or restricted land within the reservation and the trust or restricted land has not been devised by a will approved by the Secretary pursuant to section 2 of the Act of June 25, 1910 (36 Stat. 856), as amended (25 U.S.C. 373) and which is consistent with the provisions of section 2 of this Act, such interest shall descend to the following persons, subject to their being eligible heirs pursuant to section 2 of this Act:

. . . .

(5) if there is no surviving spouse, and no surviving children or issue of any child, and no surviving parent, the interest shall descend equally to the brothers and sisters of the decedent; and

⁴ The Eastern Band of Cherokee Indians of North Carolina is a Federally-recognized tribe. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 73 Fed. Reg. 18,553, 18,554 (Apr. 4, 2008).

⁵ Darrel, Bridget, and Leonard Defender are Decedent's paternal half-siblings. *See* Sue Defender Affidavit of Family History (Affidavit), undated at 2. For ease of reference, this opinion identifies them as Decedent's "siblings" rather than "half-siblings."

(6) if there is no surviving spouse, no surviving children or issue of any child, no surviving parent, and no surviving brothers or sisters, the interest shall escheat to the tribe.

. . . .

Sec. 4. (b) If a decedent has devised an interest in trust or restricted land located within the reservation to a person prohibited by section 2 from acquiring an interest in such trust or restricted land and the consequence of such prohibition is that the interest in land would escheat to the tribe pursuant to section 3(a)(6) of this Act, the devise shall be prohibited only if, while the estate is pending before the Secretary, the tribe pays to the Secretary on behalf of such devisee the fair market value of such interest as determined by the Secretary as of the date of the decedent's death. . . .

94 Stat. 537-538.

II. Proceedings Before Administrative Law Judge William S. Herbert

Administrative Law Judge William S. Herbert conducted the initial probate proceedings and approved Decedent's will. Accepting Sue Defender's status as an Eastern Cherokee based upon the statement in Decedent's will and Sue Defender's uncontested testimony at the probate hearing that she was "an Indian descendent of Eastern Cherokee," *see* Deposition of Sue Defender, Apr. 4, 2000, at 5, Judge Herbert decreed her eligible to acquire the "[t]rust real property located on the Standing Rock, Crow Creek, and Pine Ridge Reservations, including any income accrued after [D]ecedent's death, and trust personalty in [Decedent's] [IIM] account" bequeathed to her by Decedent. Order Determining Heirs, Approving Will, and Decree of Distribution (Order Determining Heirs), Sept. 28, 2000, at 3. Judge Herbert noted, however, that had Decedent died without a will, each surviving Defender sibling would have been eligible under the SRHLA to a one-third interest in Decedent's trust or restricted real property on the Standing Rock Reservation. *See* Order Determining Heirs at 2.⁶

The Superintendent and Decedent's sister, Bridget, filed separate petitions for rehearing, arguing that Sue Defender was non-Indian and thus ineligible to receive a devise of Indian trust or restricted real property on the Standing Rock Reservation. Neither of the

⁶ The siblings' eligibility under the SRHLA had Decedent died without a will is undisputed.

petitions for rehearing addressed the relevance of Sue Defender's Indian or non-Indian status with respect to Decedent's Indian trust or restricted real property on the Pine Ridge Reservation.⁷

Judge Herbert denied Bridget Defender's petition, stating "there was substantial evidence . . . that Sue Defender is Indian, and none to the contrary." *Estate of Benedict Edward Defender*, 36 IBIA at 280, citing Jan. 9, 2001, Order re Bridget Defender's Petition at 1. Bridget Defender then appealed to the Board.

On June 29, 2001, Judge Herbert issued a Final Order Denying Petition of Superintendent, without addressing the Superintendent's legal arguments. *See Estate of Benedict Edward Defender*, 36 IBIA at 283. The Superintendent appealed to the Board.⁸

By order dated August 22, 2001, the Board vacated the Final Order Denying Petition of Superintendent and remanded the case to Judge Herbert for consideration of the questions of law raised by the Superintendent. Because Bridget Defender raised the same argument as the Superintendent concerning Sue Defender's eligibility to take real property on the Standing Rock Reservation, the Board also vacated the January 9, 2001, order denying her petition for rehearing so that Judge Herbert could consider all arguments in both of the petitions for rehearing.

⁷ The Indian Reorganization Act (IRA) applies to the Pine Ridge Reservation, and section 4 of the IRA, 25 U.S.C. § 464, prohibits a devise to a non-Indian (other than an heir). At the time of Decedent's death, 25 U.S.C. § 464 (1994) provided in relevant part as follows:

Except as herein provided, no sale, devise, gift, exchange, or other transfer of restricted Indian lands . . . shall be made or approved: *Provided, however*, That such lands or interests may, with the approval of the Secretary of the Interior, be sold, devised, or otherwise transferred to the Indian tribe in which the lands . . . are located . . . and in all instances such lands or interests shall descend or be devised, in accordance with the then existing laws of the State, or Federal laws where applicable, in which said lands are located . . . to any member of such tribe or . . . any heirs or lineal descendants of such member or any other Indian person for whom the Secretary of the Interior determines that the United States may hold land in trust

⁸ Judge Herbert had denied the Superintendent's Petition for Rehearing on Jan. 9, 2001, but purported to "stay" the effect of that order for 60 days to allow the Superintendent to submit "substantive evidence" that Sue Defender was not an Indian.

III. Proceedings on Remand Before Indian Probate Judge George Tah-bone and the Order of Modification

On remand, the case was assigned to Judge Tah-bone. On December 22, 2005, after additional briefing and evidentiary submissions by the parties, Judge Tah-bone issued the Order of Modification, which addressed the distribution of Decedent's Indian trust property on the Standing Rock, Crow Creek, and Pine Ridge Reservations. The order first considered whether Sue Defender is an Indian. Judge Tah-bone found that Sue Defender is not an Indian, noting that although she "ha[d] shown she is of Indian descent, she is not a person for whom the United States can hold land in trust because she is not descended from a member of a federally recognized tribe." Order of Modification at 13.⁹ The order then considered the significance of Sue Defender's non-Indian status with respect to the

⁹ In proceedings before Judges Herbert and Tah-Bone, Sue Defender submitted extensive materials concerning the history of the Cherokees and tracing her own lineage to one or more individual Cherokees. In her brief to Judge Tah-Bone, Sue Defender argued that she had established her descendancy from "Gi-Yo-Sti, the sister of Old Tassle, DoubleHead, Pumkin Boy, and Nettle Carrier, all being Cherokee Chiefs or Headmen and signers of the Treaties," and that she had since "received tribal membership in the Southern Cherokee Nation, No. 16719." Memorandum of Sue Defender, Jun. 28, 2002, at 2-3. There is no "Southern Cherokee Nation" that is Federally recognized as an Indian tribe within the meaning of Federal law. *See* 73 Fed. Reg. at 18,556. In addition, the reference to "No. 16719" refers to a "Certificate of Degree of Indian Blood" (CDIB) card, which is identified as having been issued by the "Department of the Interior, Bureau of Indian Affairs, Southern Cherokee Agency," on May 17, 2001, certifying that Sue Defender is "64/128 degree Indian blood of the SOUTHERN CHEROKEE Tribe." There is no "Southern Cherokee Agency" of the Bureau of Indian Affairs. The CDIB card does not state that she is actually a member of the "Southern Cherokee Tribe," which also is not Federally recognized.

Relevant to Sue Defender's initial assertion that she was a non-enrolled "Eastern Cherokee," *see* Affidavit at 1, the enrollment officer of the Eastern Band of Cherokee Indians reported that based on a search of the tribe's records, Sue Defender "can not be certified as a descendant of the Eastern Band of Cherokee Indians." Letter from Eastern Band of Cherokee Indians to Superintendent, Oct. 18, 2000. Sue Defender contended that she descended from earlier Eastern Cherokees, when rolls and enrollments were not kept. *See* Memo for Record of Judge Herbert, Sept. 26, 2000.

As noted in the Order of Modification, Judge Tah-Bone did not question Sue Defender's Cherokee ancestry, but concluded that such genealogical lineage was insufficient for her to have the status as an Indian under the SRHLA.

devise—under an otherwise valid will—of Indian trust or restricted real property within each of the three aforementioned reservations.

A. Standing Rock Reservation

With respect to the Standing Rock Reservation, Judge Tah-bone found that because Sue Defender is not an Indian, she is “prohibited under [s]ection 2 of the [SRHLA] from receiving an interest in Standing Rock Reservation lands.” *Id.* at 14. Judge Tah-bone further reasoned, however, that because Decedent’s will had been approved, he had died “testate,” and thus, he had, by definition, died without heirs. *See id.* at 19.¹⁰ Based on his conclusion that Decedent had no “heirs,” Judge Tah-bone declined to consider the descent of Decedent’s Indian trust or restricted real property to family members under section 3(a)(1) - (5) of the SRHLA, but he did find that the property would escheat to the Tribe under section 3(a)(6) of the Act. *Id.* And, because Sue Defender is a prohibited devisee under section 2 the SRHLA, Judge Tah-bone found that section 4(b) of the Act applied, and therefore Decedent’s devise to her would be prohibited only “after payment of [the property’s] fair market value, otherwise the property would pass to the devisee.” *Id.*

The Order of Modification directed that Sue Defender receive “[a]ll of [D]ecedent’s Indian trust or restricted property located on the Standing Rock Sioux Reservation, including any income accrued after . . . [D]ecedent’s death, and trust personalty in . . . [D]ecedent’s [IIM] account.” *Id.* at 22. Provided, however, that

[b]ecause [Sue Defender] . . . is prohibited from taking trust or restricted property on the Standing Rock Reservation, the Standing Rock Sioux Tribe may purchase an[y] Standing Rock interest which she received by devise . . . , such purchase [to] be subject to the terms and conditions of . . . Sec. 4. (b) [of the SRHLA]. Should the Standing Rock Sioux Tribe elect not to exercise its right of first refusal the property will pass to the devisee out of trust.

Id.

¹⁰ “[T]he heirs aren’t heirs because the decedent is testate. Technically, the word ‘heir’ is reserved for one who received property by action of the laws of intestacy, which operate only in the absence of a valid will.” Order of Modification at 19.

B. Crow Creek and Pine Ridge Reservations

With respect to the Crow Creek Reservation—to which the IRA does not apply—the Order of Modification directed that Sue Defender “receive all of . . . [D]ecedent’s Indian trust property located on the . . . [r]eservation, including income accrued after . . . [D]ecedent’s death.” *Id.* at 23.

The IRA does apply to the Pine Ridge Reservation, and therefore, because Judge Tah-bone found that Sue Defender is not an Indian,¹¹ the Order of Modification concluded that section 4 of the IRA rendered Sue Defender ineligible to take the Pine Ridge trust property devised to her. Judge Tah-bone concluded that, “[c]onsequently, [D]ecedent’s interest will pass to his heirs.” *Id.*

IV. Appeal from the Order of Modification

The Order of Modification directed that “[a]ny appeal must be filed within 60 days . . . with the Interior Board of Indian Appeals” *Id.* Sue Defender did not appeal Judge Tah-bone’s adverse ruling that her non-Indian status precludes her from receiving Decedent’s trust property on the Pine Ridge Reservation.¹² The Superintendent did not file

¹¹ The IRA defines “Indian” as follows:

The term “Indian” as used in this Act shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction, and all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and shall further include all other persons of one-half or more Indian blood. . . . The term “tribe” wherever used in this Act shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation. . . .

25 U.S.C. § 479 (1994).

¹² In her brief to Judge Tah-bone, Sue Defender had argued that the remand issues were limited to the Standing Rock property and that her entitlement to the Crow Creek and Pine Ridge properties should be affirmed. *See* Memorandum of Sue Defender at 8 n.3.

an appeal either. He did, however, file a Request for Rehearing with Judge Tah-bone on January 4, 2006.¹³ In so doing, the Superintendent explained that he sought

correction of the order distributing trust property on the Standing Rock Reservation so that the decision is consistent with prior probate decisions interpreting the Act and the language of the Act itself. The Superintendent requests that the provisions of [s]ection 3(a) be applied so that eligible heirs—siblings—inherit the property. The request on rehearing is the application of [s]ection 3(a) following the finding that Sue Defender is a prohibited devisee. With such an application, the Deciding Official should find that it is unnecessary to reach the conclusion that the consequence of the prohibited devise would be an escheat to the [t]ribe. The consequence of [the] prohibited devise is that heirs who are eligible pursuant to [s]ection 3(a)(5) should receive the trust property on the Standing Rock Reservation.

Request for Rehearing, Jan. 4, 2006, at 3.

On February 9, 2006, notwithstanding his instructions that the proper course for review of the Order of Modification was an appeal, Judge Tah-bone issued a Notice to Show Cause Why Agency's Petition for Rehearing Should Not Be Granted. Sue Defender timely filed a Request for Denial of Agency's Petition for Rehearing (Request for Denial). In her Request for Denial, Sue Defender continued to assert that she is an Indian, arguing that as

the primary and residuary devisee in this matter, [she had] shown clear lineal descendancy of her Indian heritage. However, [Judge Tah-bone] held, with regard to the "Indian" issue, that "while Sue Defender has shown she is of Indian descent, she is not a person for whom the United States can hold land in trust because she is not descended from a member of a federally recognized Indian tribe." *See* Order of Modification . . . at 13, Paragraph 3. It is the position of . . . Sue . . . Defender that her position on this issue taken continuously throughout these proceedings is a correct one and should have been adopted by [Judge Tah-bone] in this case. In other words, she is Indian and the United States can hold land in trust for her. No arguments made by

¹³ By letter to Judge Tah-bone dated February 17, 2006, Bridget Defender also requested a rehearing. The record does not evidence a response from either Judge Tah-bone or Judge Reeh.

. . . Sue . . . Defender in responding to the Notice to Show Cause should be deemed an abandonment of her position on this issue.

Request for Denial, Mar. 8, 2006, at 2-3. With respect to Judge Tah-bone's interpretation and application of the SRHLA, Sue Defender asserted that the Order of Modification was correctly decided and that rehearing should be denied. She did not argue that the Request for Rehearing was improper on procedural grounds or as a successive petition for rehearing.

V. Proceedings Before Administrative Law Judge Richard L. Reeh and the Appeal from his Order

Prior to Judge Tah-bone's disposition of the Superintendent's petition for rehearing, the case was transferred to Judge Reeh. On August 10, 2006, Judge Reeh issued the Order Dismissing Petition for Rehearing. Judge Reeh found that the Superintendent's Request for Rehearing was a successive petition for rehearing, which was prohibited by 43 C.F.R. § 4.241(f). Thus, Judge Reeh concluded that he lacked authority to consider the petition and issued his order of dismissal.

The Superintendent appealed to the Board and submitted an opening brief. Sue Defender submitted an answer brief. No other briefs were received.

Discussion

I. Standard and Scope of Review

The Board reviews questions of law de novo. *Estate of Elmer Wilson, Jr.*, 47 IBIA 1, 7 (2008); *Birdtail v. Rocky Mountain Regional Director*, 45 IBIA 1, 5 (2007). In general, the Board's scope of review on appeal is limited to the issues that were before the ALJ, but the Board may exercise the inherent authority of the Secretary to correct a manifest injustice or error when appropriate. 43 C.F.R. § 4.318.

II. The Request for Rehearing was a Successive Petition for Rehearing, and the Order Dismissing Petition for Rehearing was Correct

The Superintendent argues that his Request for Rehearing was not a successive petition for rehearing because no previous petition for rehearing had been filed regarding the Order of Modification. The Superintendent argues that because his Request for Rehearing related to a new order and a new issue prompted by the Order of Modification—interpretation of the SRHLA—it was not a successive petition for rehearing. In support of his contention, the Superintendent relies on the *Estate of James Wermey Pekah*,

11 IBIA 237 (1983), 13 IBIA 264 (1985), and 26 IBIA 200 (1994) (*Pekah I*, *Pekah II*, and *Pekah III*), which he characterizes as an “estate[] with multiple decisions, each of which was susceptible to a petition for rehearing.” Appeal from Denial Order, Aug. 25, 2006, at 5.

We disagree with the Superintendent. After Judge Herbert issued the Order Determining Heirs, the Superintendent petitioned for a rehearing. Although Judge Herbert initially denied the Superintendent’s petition, we vacated Judge Herbert’s decision and remanded the matter to Judge Herbert with instruction to consider the questions of law raised by the Superintendent in his petition for rehearing. Thus, the subject of the remand proceedings, ultimately decided by Judge Tah-bone, was the Superintendent’s petition for rehearing on the Order Determining Heirs. The Order of Modification was an “order . . . on a petition for rehearing,” which was appealable to the Board, *see* 43 C.F.R. § 4.320(a), and not subject to another petition for rehearing. For us to hold otherwise would result in confusion over whether review of an order on a petition for rehearing should be sought through a new petition for rehearing or through an appeal to the Board. The right of appeal to the Board from an order on a petition for rehearing, and the prohibition against successive petitions for rehearing, yields a clear answer.

The *Pekah* cases do not lead to a different result. In *Pekah I*, the Board reversed in part an order denying rehearing and remanded the case with the instruction that “[t]he decision of the Administrative Law Judge on remand will be final unless appealed in accordance with the provisions of 43 CFR 4.241 and 4.320.” *Pekah I*, 11 IBIA at 243. Section 4.241 concerns rehearings. Thus, *Pekah I* specifically directed that any review of the resulting order on remand proceed through a petition for rehearing. The fact that there was a successive petition for rehearing in *Pekah II* is, therefore, attributable to specific remand instructions and rights given by the Board in *Pekah I*. The positive treatment of a successive petition for rehearing in *Pekah II* should, therefore, be limited to its facts.¹⁴

The Superintendent suggests that other probate cases support the contention that his Request for Rehearing should not be construed as a successive petition for rehearing. But the Superintendent does not identify any such case, and thus we do not consider the contention further.

¹⁴ *Pekah III*, 26 IBIA 200, affirmed the denial of a third petition for rehearing, which Judge Reeh had found to be both untimely and a successive petition for rehearing. Nothing in *Pekah III* lends support to the contention that successive petitions for rehearing are acceptable outside the fact pattern leading from *Pekah I* to *Pekah II*.

We conclude that Judge Reeh correctly dismissed the Superintendent's Request for Rehearing as a successive petition for rehearing, and therefore we affirm the Order Dismissing Petition for Rehearing pursuant to 43 C.F.R. § 4.241(f). When no party appealed to the Board within 60 days after issuance of the Order of Modification, the decision became final.

III. Reopening of the Estate to Prevent Manifest Error

Although the Order of Modification became final 60 days after issuance, when no party appealed, it was still subject to reopening for a 3-year period to prevent manifest error.¹⁵ To prevent manifest error, an ALJ or IPJ may reopen a case within 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. 43 C.F.R. § 4.242(e). In the present case, once the appeal period for the Order of Modification expired, Judge Reeh arguably could have considered the Superintendent's petition under this reopening authority. Thus, although we conclude that Judge Reeh correctly dismissed the Superintendent's petition for rehearing, we could remand the matter to him for further consideration to determine if the estate should be reopened to prevent manifest error. Under the circumstances of this case, we decline to do so because the Board also has authority to prevent manifest error, the evidentiary record is complete, the issues have been fully briefed, and final resolution of this case has been delayed long enough.

Based on the Board's authority under 43 C.F.R. § 4.318 to correct a manifest error, we reopen the estate and modify the Order of Modification. Correctly applied, the SRHLA requires that Decedent's three surviving siblings, not Sue Defender, receive his Indian trust or restricted real property on the Standing Rock Reservation. We also modify the Order of Modification such that the trust personalty Sue Defender is entitled to receive from Decedent's IIM account excludes any income from Decedent's Indian trust or restricted real property on the Standing Rock Reservation that accrued after his death, as well as any interest attributable to such income. We leave intact Judge Tah-bone's finding that Sue Defender is not "otherwise recognized" by the Secretary as an "Indian" within the meaning of the SRHLA.

¹⁵ "Manifest error" is an obvious error. *See Estate of Anthony "Tony" Henry Ross*, 44 IBIA 113, 119 (2007).

A. Whether Sue Defender is an “Indian” within the meaning of the SRHLA

Although, as discussed in section III.B, we conclude that Judge Tah-bone committed a manifest error in his interpretation of the SRHLA, we first address his finding that Sue Defender is not an “Indian” within the meaning of the SRHLA. If that finding was in error, and Sue Defender does have legal status as an “Indian,” then she would be entitled to receive Decedent’s devise of the Standing Rock property, albeit on different grounds than those relied on by Judge Tah-bone.

Sue Defender did not appeal from Judge Tah-bone’s adverse ruling that she is not an “Indian” within the meaning of the IRA, *see supra* note 7, and therefore is precluded from receiving Decedent’s trust property on the Pine Ridge Reservation. But in her objection to the Superintendent’s petition for rehearing, Sue Defender asserted that she continued to maintain her position that she is an Indian, and thus an eligible devisee under the SRHLA. The record is fully developed with respect to Sue Defender’s Indian heritage, and the parties have fully briefed the “Indian” issue during the earlier probate proceedings. *See also* Brief of Sue Defender, Nov. 20, 2006, at 6 (the issues were “fully briefed” below). Thus, while Sue Defender has not “abandoned” her position on this issue, no purpose would be served by another round of briefing.

The record supports Judge Tah-bone’s finding that, even accepting Sue Defender’s showing of her Indian ancestry, she is not an eligible devisee under the SRHLA. It is undisputed that she is not a member of the Standing Rock Sioux Tribe or of another Federally-recognized tribe. At issue is whether she has demonstrated that she is “otherwise recognized as [an] Indian[] by the Secretary.” SRHLA § 2, 94 Stat. 537. We conclude that she has not.

First, as we have noted, Sue Defender did not appeal from Judge Tah-bone’s ruling that under the definition of “Indian” in the IRA, Sue Defender is not an Indian. Nor, for that matter, did she even make the contention in the proceedings below that she does fall within the definition of “Indian” under the IRA. She did, however, argue generally that she “is an Indian and the United States can hold land in trust for her.” *See* Request for Denial at 3. But the record amply supports Judge Tah-Bone’s finding that she is neither an Indian under the IRA nor someone for whom the United States can hold land in trust. *See* 25 U.S.C. § 479 (definition of “Indian”); 25 C.F.R. § 151.2 (definitions of “Individual

Indian” and “Tribe,” for purposes of acquiring land in trust).¹⁶ Thus, we conclude that she has not shown that she is “otherwise recognized” by the Secretary as an Indian under the IRA.

Second, although Sue Defender disagrees with Judge Tah-bone’s finding that she is not an “Indian” within the meaning of the SRHLA, her opposition to the Superintendent’s Request for Rehearing failed to identify any legal authority for finding that she is “otherwise recognized as [an] Indian[] by the Secretary,” as required by the SRHLA.¹⁷ Her opposition likewise failed to proffer any evidence showing that the Secretary has, in fact, recognized her as an Indian for whom the United States may hold land in trust, as she contends.

The SRHLA was enacted, in part, to provide a uniform rule for the descent of property on the Standing Rock Reservation, which straddles the border of North Dakota and South Dakota. The property would otherwise be subject to differing state rules of intestacy, depending upon which side of the border an Indian decedent’s property was located. The SRHLA was also enacted to prevent further fractionalization of Indian lands, to prevent the passing of Indian lands out of Indian ownership and trust status, and to consolidate Indian and tribal land ownership. Nowhere in the language or purpose of the

¹⁶ Although Sue Defender asserts she is “of Cherokee blood,” *see* Letter from Sue Defender to Judge Herbert of Sept. 2, 2000, her claim is one of descent from a group (Southern Cherokee Nation) that is not Federally recognized as a tribe within the meaning of Federal law.

¹⁷ As noted earlier, the CDIB produced by Sue Defender purports to have been issued by the Southern Cherokee Agency of the BIA, which does not exist, and purports to certify a blood degree from the “Southern Cherokee Nation,” which is not Federally recognized as an Indian tribe within the meaning of Federal law. *See supra* note 9. Therefore, the CDIB is not evidence that she has been recognized as an Indian by the Secretary. A letter in the record from the “Principal Chief of the Southern Cherokee Nation” concedes that the group is not Federally recognized, but suggests that its members would qualify for public domain allotments under the General Allotment Act of 1887. *See* Letter from Principal Chief of Southern Cherokee Nation to Terry L. Pechota, Oct. 31, 2002. The letter enclosed a document styled as an “Application for Certificate of Eligibility for Indian Allotment of Public Domain Land” under the General Allotment Act. The application is not filled out, and there is no evidence in the record that the BIA ever issued a certificate of eligibility to Sue Defender. *See* 43 C.F.R. § 2531.1 (qualifications of applicants for Indian public domain allotments).

Act do we find any indication of Congressional intent for the phrase “otherwise recognized as [an] Indian[] by the Secretary” to include all individuals of Indian ancestry, even though that ancestry cannot be traced to a member of a Federally-recognized tribe, or to include those individuals who do not fall within the definition of “Indian” under the IRA, or to include those for whom land may not be held in trust by the United States.

In her brief to Judge Tah-bone, Sue Defender took the position that it was within the delegated authority and discretion of the ALJ to determine who may be recognized as an “Indian” under the SRHLA. Answer of Sue Defender, July 11, 2002, at 4. We disagree. We read the “otherwise recognized” language of the SRHLA to refer to Secretarial recognition of Indian status under some other source of legal authority—e.g., the IRA—and not to vest broad authority in ALJs, or the Board, to confer “Indian” status on individuals based simply on genealogical evidence of descent from a Native American ancestor.

Sue Defender also contends that because BIA did not publish its interpretation of section 2(c) of the SRHLA in the Federal Register, as allegedly required by the Administrative Procedure Act, 5 U.S.C. § 551(a)(1), the Act cannot be applied in a manner that excludes her from the definition of “otherwise recognized as [an] Indian[].” *See* Memorandum of Sue Defender at 13-15. We disagree. The Department of the Interior need not resort to notice-and-comment rulemaking when simply interpreting a statute. *See* 5 U.S.C. § 553(b)(3)(A); *see also British Caledonian Airways, Ltd. v. Civil Aeronautics Board*, 584 F.2d 982, 991 (D.C. Cir. 1978).

Upon consideration of Sue Defender’s arguments regarding her status, we conclude that she has not shown she is “otherwise recognized [as] an Indian[] by the Secretary,” and therefore has not shown that she is an eligible devisee under section 2 of the SRHLA. Thus, we leave intact Judge Tah-bone’s finding on this issue.

B. Application of the Standing Rock Heirship Lands Act to Decedent’s Indian Trust or Restricted Real Property on the Standing Rock Reservation

We now turn to Judge Tah-bone’s interpretation and application of the SRHLA. We conclude that Judge Tah-bone committed a manifest error when he applied section 4(b) of the SRHLA, thus finding the devise to Sue Defender invalid only if the Standing Rock Sioux Tribe paid fair market value for Decedent’s Indian trust or restricted real property on the Standing Rock Reservation. Section 4(b) applies if (a) a decedent has devised an interest in trust or restricted land to a person who cannot inherit pursuant to section 2 of the SRHLA, *and* (b) the consequence of such prohibition is that the interest in land would escheat to the Tribe pursuant to section 3(a)(6) of the SRHLA. Although Sue Defender is

a prohibited devisee under section 2 of the Act, the consequence of this prohibition does not result in an escheat to the Tribe because section 3(a)(5) requires that the property descend to Decedent's siblings.

All property that belongs to a decedent at his or her death, but that for some reason does not or cannot pass under a will left by him or her, descends and is distributed as intestate property under the statutes of descent and distribution. Thus, if an intended devise or bequest in an otherwise valid will fails by reason of a violation of law, the property involved becomes intestate property. 23 Am. Jur. 2d *Descent and Distribution* § 22; 80 Am. Jur. 2d *Wills* § 1445. Here, the specific devise of Indian trust or restricted real property on the Standing Rock Reservation to Sue Defender, either as primary or residuary devisee, fails with respect to the Standing Rock property because she is a prohibited devisee under section 2 of the SRHLA. Thus, even though Decedent's will was approved, and validly devised some of Decedent's property (i.e., his property on the Crow Creek Reservation), his Indian trust or restricted real property on the Standing Rock Reservation passes as intestate under the applicable statute of descent and distribution, which, in this instance, is section 3 of the SRHLA.

Section 3(a)(5) provides that, in the absence of a surviving spouse, surviving children or issue of any child, or surviving parent, any interest in Indian trust or restricted land on the Standing Rock Reservation that has not been devised by a will that is (a) approved by the Secretary, *and* (b) consistent with the provisions of section 2 of the SRHLA, shall descend equally to the brothers and sisters of the decedent, provided such siblings are eligible heirs pursuant to section 2 of the Act. Judge Herbert approved Decedent's will on September 28, 2000. The will was not, however, consistent with section 2 of the Act, and therefore the rules of descent under section 3 were triggered.

At his death, Decedent had no spouse. He had no children. He had no surviving parents. He did, however, have three surviving siblings—Darrel, Bridget, and Leonard—each of whom is a member of the Standing Rock Sioux Tribe. *See* Appeal from Denial Order at 2. Under section 2 of the SRHLA, members of the Standing Rock Sioux Tribe—such as Decedent's surviving siblings—are “entitled to receive by devise or descent any interest in trust or restricted land within the . . . [Standing Rock] [R]eservation.”

Judge Tah-bone mistakenly ruled that the surviving siblings were not “eligible heirs” under section 2 of the Act, and thus could not take under section 3(a)(5) of the Act, because he believed they were not “heirs.” “Heirs,” Judge Tah-bone observed, only exist when a decedent dies intestate. We do not disagree with Judge Tah-bone's definition of “heir.” We do, however, disagree with his failure to recognize that a decedent may die “testate” with respect to some property, and “intestate” with respect to other property.

Decedent's attempt to devise his Indian trust or restricted real property on the Standing Rock Reservation to Sue Defender fails by reason of a violation of law: section 2 of the SRHLA. The property involved therefore becomes intestate. See *Estate of Cecilia Smith (Borger)*, 3 IBIA 56, 59 (1974); *Estate of Morris A. (K.) Charles*, 3 IBIA 68, 71 (1974). Thus, with respect to the failed devise, Decedent *did* leave heirs, as determined by section 3 of the Act. Judge Tah-bone himself applied the SRHLA in this straightforward manner in the *Estate of Amelia Has Tricks Mattson*, Case No. IP TC 188 R 98 (Jan. 14, 2003). In *Estate of Mattson*, a decedent died possessed of trust property on the Standing Rock Reservation. The decedent had a valid will, which left the property to her non-Indian spouse. In this circumstance, Judge Tah-bone found that

the decedent's non-Indian spouse is prohibited by section 2 from acquiring a full interest. He is limited to take only a one-half life estate. The remainder passes to eligible heirs according to section 3 of the [A]ct. Since the decedent had an eligible heir, [a surviving sister,] the interest will not escheat to the [t]ribe.

Estate of Mattson at 14. He did not find that the testate decedent had no eligible heir due to her valid will, and thus he did not find that her trust property would escheat to the Tribe.

The same result applies here.¹⁸ Sue Defender is a prohibited devisee under section 2 of the Act. The Decedent's Indian trust or restricted land on the Standing Rock Reservation therefore passes to eligible heirs according to section 3 of the Act. Since Decedent has eligible heirs, his three surviving siblings, the interest will not escheat to the Standing Rock Sioux Tribe. Because the interest in land would not escheat to the Tribe pursuant to section 3(a)(6) of the Act, but would instead descend to surviving siblings under section 3(a)(5), section 4(b) does not apply. And because section 4(b) does not apply, the devise to Sue Defender fails without any qualifications based on the Tribe's payment of fair market value.

This result is also consistent with Judge Tah-bone's application of the IRA in this case. Judge Tah-bone ordered Decedent's property on the Pine Ridge Reservation to be

¹⁸ Sue Defender attempts to distinguish *Estate of Mattson* from the current case. Although there are factual differences between the two cases, none of the differences are material to the legal analysis that Indian trust or restricted real property does not escheat to the Standing Rock Sioux Tribe under section 3(a)(6) of the Act when a devise to a non-Indian fails under section 2 and the decedent is survived by a sibling meeting the section 2 eligibility requirements.

distributed to his heirs. The Pine Ridge Reservation is organized under the IRA. The Order of Modification found, without comment, that Sue Defender was ineligible to take the trust property devised to her due to the prohibition found in section 4 of the IRA, 25 U.S.C. § 464. *See supra* note 7. “Consequently, [D]ecedent’s interest will pass to his heirs,” whom the order identifies as Decedent’s three surviving siblings. Order of Modification at 23. The Order of Modification did not assume that, by reason of his will, which was valid with respect to the Crow Creek property, Decedent left no heirs to whom to distribute Indian trust or restricted real property on the Pine Ridge Reservation.

Decedent’s surviving siblings are, therefore, entitled to receive his Indian trust or restricted real property on the Standing Rock Reservation through descent as eligible heirs under the Act. Thus, under section 3(a)(5) of the SRHLA, Decedent’s Indian trust or restricted real property on the Standing Rock Reservation descends to Darrel, Bridget, and Leonard Defender, and we hereby modify the Order of Modification to reflect this. Because Sue Defender is not entitled to receive any interest in Decedent’s Indian trust or restricted real property on the Standing Rock Reservation, she is not entitled to the portion of trust personalty in his IIM account, accruing after his death, that is attributable either to income from such real property or to interest generated from such post-death income. Thus, except for income attributable to the Crow Creek property, Sue Defender is only entitled to that portion of trust personalty in Decedent’s IIM account that resided in his account as of his death and any interest income accruing from that balance, and we hereby modify the Order of Modification to reflect this conclusion.

Conclusion

With respect to procedure, we conclude the Superintendent’s Request for Rehearing was a successive petition for rehearing, and we affirm Judge Reeh’s Order Dismissing Petition for Rehearing under 43 C.F.R. § 4.241(f). On the merits, we conclude that it was manifest error for the Order of Modification to give effect to a devise of Indian trust or restricted land on the Standing Rock Reservation to Sue Defender. Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. §§ 4.1 and 4.318, the Board reopens the estate and modifies the Order of Modification such that (a) Decedent’s Indian trust or restricted property on the Standing Rock Reservation is ordered to be distributed to Decedent’s three surviving siblings consistent with section 3(a)(5) of the SRHLA, and (b) the trust personalty Sue Defender receives from Decedent’s IIM account excludes any post-death income arising from the

Indian trust or restricted real property on the Standing Rock Reservation, as well as any interest attributable to such post-death income.¹⁹

I concur:

// original signed
Maria Lurie
Acting Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

¹⁹ This opinion only affects the disposition of trust assets on the Standing Rock Reservation. The Order of Modification's conclusions regarding the Crow Creek and Pine Ridge Reservations stand.