INTERIOR BOARD OF INDIAN APPEALS

Estate of Bertha Mae Tabbytite

45 IBIA 10 (05/07/2007)

Judicial Review:
Reversed and remanded, Law Offices of Vincent Vitale v. Kempthorne, No. 3:07-cv-094 RRB (D. Alaska May 6, 2008)

On remand:
48 IBIA 281
57 IBIA 80

Related Board Cases:
33 IBIA 63
36 IBIA 177
54 IBIA 86, *recons. denied,* 54 IBIA 229

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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ESTATE OF BERTHA MAE TABBYTITE	)	Order Affirming Denial of Reopening
	)	
	)	Docket No. IBIA 05-41
	)	
	)	May 7, 2007

The Law Offices of Vincent Vitale (Appellant) seeks review of an Order Denying Petition to Reopen, dated December 21, 2004, and entered by Administrative Law Judge (ALJ) Richard Reeh in the estate of Bertha Mae Tabbytite (Decedent), deceased Comanche, Probate No. AK-975-0602-1 (also referenced as IP AK 975-006). Appellant sought to reopen Decedent's trust estate to assert a claim based upon a 1997 Alaska state court judgment awarded to Appellant against Decedent for legal services. Judge Reeh denied reopening because he found that Appellant's claim was not timely under the applicable regulations.

We affirm the order denying reopening because Judge Reeh correctly concluded that the regulations governing claims, 43 C.F.R. § 4.250(a) (2001) and 25 C.F.R. § 15.303(c) (2001), effectively required that all claims against an Indian estate be filed with the Bureau of Indian Affairs (BIA) within 60 days from the date BIA received verification of the decedent's death, even if a creditor — in this case, Appellant — had no notice of the probate proceedings. Appellant did not meet that deadline, and therefore its claim was untimely.

Factual and Procedural Background

I. Alaska State Court Judgment

This appeal is the latest chapter in a long history of Appellant's attempt to collect for legal services it rendered to Decedent during a four-year period over twenty years before her death. Between 1976 and 1980, Appellant performed legal services for Decedent in connection with litigation over a road that had been constructed across Decedent's Indian allotment in the Chugach Mountains near Anchorage, Alaska. Decedent dismissed Appellant as her attorney in 1980, shortly after the Supreme Court decided *United States v.*

Clarke, 445 U.S. 253 (1980), in favor of the United States on behalf of Decedent.[1] In subsequent condemnation litigation, which concluded in 1992, Decedent received a monetary award for condemnation of the affected portion of her allotment and for precondemnation use of the road. *See Law Offices of Vincent Vitale*, 942 P.2d at 1145.

Prior to being dismissed by Decedent, Appellant filed an attorney's lien against any litigation proceeds, for payment of attorney fees. After Decedent received the condemnation award, Appellant sought to enforce the lien against those proceeds. Decedent filed a petition for arbitration of the fee dispute, and an arbitration panel concluded in 1995 that the value of Appellant's services to Decedent, together with simple interest, totaled $64,375. Appellant then sought to enforce the arbitration award against the condemation proceeds awarded to Appellant. Eventually the issue reached the Alaska Supreme Court, which held that Appellant was barred by 25 U.S.C. § 410 from recovering the judgment from the funds generated by the condemnation litigation. *Law Offices of Vincent Vitale*, 942 P.2d at 1147-48.[2] The court, however, remanded the matter back to the state superior court for entry of personal judgment against Decedent based on the arbitration award. *Id.* at 1149. On remand, the superior court entered judgment on September 25, 1997 in favor of Appellant. *Anchorage v. Tabbytite,* No. 3AN-93-9653 (Alaska Super. Ct. Sept. 25, 1997).

Appellant subsequently asked the Juneau Area Director, BIA (Area Director)[3] to retroactively approve its 1976 attorney contract with Decedent. When the Area Director declined to do so, Appellant appealed to the Board of Indian Appeals (Board). While that

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[1] A history of the litigation can be found in *Law Offices of Vincent Vitale v. Tabbytite*, 942 P.2d 1141 (Alaska 1997). Briefly summarized, in 1969, the United States, as trustee and on behalf of Decedent, filed suit for injunctive relief and trespass damages for the road. Decedent intervened in the suit and in 1976 retained Appellant as counsel. Following an adverse decision in the court of appeals against the United States and Decedent, the United States successfully appealed to the Supreme Court. *See Clarke*, 445 U.S. 253. The dispute between Decedent and Appellant began well before Decedent dismissed Appellant in 1980. Decedent appeared in the Supreme Court proceedings in support of the position of the United States, *id.* at 254 n.1, represented by both the Native American Rights Fund and Appellant.

[2] Section 410 of 25 U.S.C. prevents liability from attaching to funds accruing from the lease or sale of Indian trust land, except with the approval of the Secretary of the Interior.

[3] The Juneau Area Director is now called the Alaska Regional Director.

appeal was pending, Appellant asked the Area Director to pay the state superior court judgment from funds deposited in Decedent's Individual Indian Money (IIM) account. In order to allow consideration of Appellant's request, the Board vacated the Area Director's decision and remanded the matter for consideration of the request for payment. *Vitale v. Juneau Area Director*, 33 IBIA 63 (1998). On remand, the Area Director declined to pay Appellant's attorney fee awards from funds in Decedent's IIM account. Appellant appealed to the Board. The Board affirmed the Area Director's decisions not to retroactively approve the attorney contract and not to pay the attorney fee award from Decedent's IIM account. *Vitale v. Juneau Area Director*, 36 IBIA 177, 182-83 (2001).

II. Original Probate Proceedings

Decedent died on August 5, 2001, at Oklahoma City, Oklahoma. At the time of her death, Decedent owned an undivided interest in Allotment No. A-056890, in Alaska, and a substantial balance was on deposit in her IIM account.

Decedent had executed a will on June 7, 2001. The will devised various life estates and remainder interests in Allotment No. A-056890: a life estate in one-half interest to Decedent's daughter, Maudean Tabbytite (Maudean), with the remainder to Maudean's surviving children; and a life estate in the other one-half interest to Maudean and five grandchildren, with the remainder to Maudean's surviving children and the surviving children of the five grandchildren. The will devised "all the rest and residue," including "real, personal, and mixed" property, to Maudean. The will further provided: "I direct that no monies are to be paid to Vincent Vitale, Attorney, of Anchorage, Alaska, from my estate."

The West Central Alaska Field Office, BIA (Field Office) completed a Data for Heirship Finding and Family History form (OHA-7 form) on January 30, 2002, and submitted it, along with a death certificate and other documents, to Administrative Law Judge Harvey Sweitzer in the Office of Hearings and Appeals (OHA) in Salt Lake City, Utah. The OHA-7 form stated that a "list of creditors will be submitted directly to the Administrative Law Judge per discussion with [Maudean]." On March 27, 2002, pursuant to requests by Maudean for an advance disbursement from Decedent's IIM account to purchase a headstone for Decedent and to pay Decedent's federal and state income taxes, Judge Sweitzer issued an Interim Order for Release of Funds and Transfer of Case. The order noted that no claims had been filed against the estate, and that "[i]t is anticipated that no claims of any significant size will be filed." The order also transferred the case to OHA in Oklahoma City, as a convenience to Decedent's family members residing in Oklahoma, and Judge Reeh assumed responsibility over the case. On May 3, 2002, Judge Reeh issued an interim order authorizing release of IIM funds to reimburse Maudean for funeral

expenses. Judge Reeh's order reiterated the statement in Judge Sweitzer's earlier order that no claims had been filed and that it was anticipated that no significant claims would be filed.

On August 6, 2002, Judge Reeh held a hearing on the Ponca Reservation in Oklahoma to determine Decedent's heirs and settle Decedent's estate. Notice of the hearing was mailed on July 1, 2002, to members of Decedent's family and to the company that provided Decedent's headstone. Notice was not mailed to Appellant. Notice of the hearing was also posted at several locations in Oklahoma and Kansas, but not in Alaska. During the hearing, no inquiry apparently was made regarding claims.[4]

Judge Reeh issued an Order Approving Will and Decree of Distribution on August 14, 2002, in which he approved Decedent's will and distributed her estate in accordance with the provisions of the will. Judge Reeh reconfirmed the interim orders releasing funds, and noted that no additional claims were submitted. The order was sent to members of Decedent's family, the office for IIM accounts at the Field Office, and the BIA Land Titles and Records Office, Alaska Region. The order was not sent to Appellant.

No petitions for rehearing were filed.

Decedent's IIM account was closed on November 19, 2002, after the remaining funds in the account had been distributed to Maudean pursuant to the decree of distribution by transferring them to Maudean's IIM account.

By letter dated November 24, 2003, Appellant, through counsel, advised Maudean that it had represented Decedent in legal proceedings against the Municipality of Anchorage (the road litigation), but that Decedent had not paid Appellant for its services. Appellant noted that on September 25, 1997, the state superior court had entered judgment against Decedent and in favor of Appellant in the amount of $64,375, plus costs, attorney fees, and interest. Appellant stated that only a small amount of money, apparently from non-trust assets, had been paid on the judgment. Appellant attached a copy of the judgment to the letter, and noted that it "recently bec[a]me aware that [Decedent] died," leaving an estate with a value well in excess of the claim. Letter from Appellant to Maudean, Nov. 24, 2003.

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[4] In his order denying reopening, Judge Reeh stated that, at the hearing, family members indicated their desire that the interim claims orders be reconfirmed, but that no inquiry was made regarding additional claims. The testimony on claims referred to by Judge Reeh is not included in the portion of the transcript of the August 6, 2002, hearing in the probate record. A letter from Maudean to Judge Reeh, dated November 6, 2003, indicates that only part of the hearing was recorded.

Appellant stated that "[i]t appears that you are [Decedent's] closest living relative, and that there are sufficient assets to cover this debt. Therefore, we are contacting you to arrange payment." *Id.*

Maudean did not reply to Appellant's letter. However, on December 2, 2003, Maudean wrote to Judge Reeh, to ask for "clarification" regarding Decedent's estate. She stated that it was her understanding that "[Decedent's] estate is completed and any claims against her are no longer valid." Maudean noted that the funds in Decedent's IIM account had been transferred to her in November 2002. She asked whether she was "legally responsible for any expenses [Decedent] might have had since I inherited the money . . . there should not be any further filings concerning [Decedent's estate.]."

On December 23, 2003, an OHA paralegal specialist responded to Maudean's letter, and advised Maudean that "[c]laims may no longer be filed in these proceedings but may still be filed in a State Court probate proceeding." The paralegal also stated that she could not say whether Maudean was legally responsible for any expenses Decedent might have had because Maudean had received Decedent's IIM account funds.

III. Appellant's Petition to Reopen

On March 12, 2004, Appellant filed a petition to reopen Decedent's estate with Judge Reeh. Appellant claimed an interest in Decedent's estate based upon the 1997 state court judgment. According to Appellant, the amount then due was $163,849.94, which included interest that had accrued at the rate of 10.5 percent, through March 15, 2004. Appellant asserted that it had no actual notice of the original proceedings and that it was not in the vicinity of the reservation when public notices of the hearing were posted. Appellant also stated that BIA had notice of Appellant's claim "for many years," but did not notify Appellant of the probate proceedings. Petition to Reopen Case at 2. Appellant claimed a "lien on all assets of the estate." *Id.*

On March 29, 2004, Judge Reeh issued a Notice of Petition for Reopening and Order Inviting Comment/Objection. Judge Reeh asked BIA to inform him whether Decedent's IIM account funds had been distributed. Judge Reeh subsequently was informed that Decedent's IIM account had been closed on November 19, 2002.[5]

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[5] On September 15, 2004, over Maudean's objections, Judge Reeh issued an Order to Maintain Status Quo on Petition to Reopen, which ordered BIA and/or the Office of Trust Funds Management to restrict Maudean's IIM account as to money on deposit as a

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Judge Reeh limited briefing to the "threshold issues" of "when claims must be submitted against a trust estate and whether - after a trust estate's assets have been fully distributed - a creditor may successfully come forward to request reopening." Notice and Order Authorizing Extension of Time for Submitting Response, May 19, 2004. Maudean opposed Appellant's petition to reopen. She asserted that Appellant, as a creditor, was not an individual contemplated by the regulations to have standing to reopen the estate; the Alaska state court judgment was not binding on Judge Reeh and enforcement of the state court judgment would violate federal statutes and regulations protecting IIM accounts; the claim was barred by the applicable statute of limitations of Alaska and Oklahoma; and Judge Reeh would lack authority to invade her IIM account without her consent.

On September 29, 2004, Maudean filed a supplement to her response to Appellant's petition to reopen, arguing that Appellant's claim was barred by 43 C.F.R. § 4.250(a), which provides a deadline for filing claims against an Indian decedent's estate. Appellant filed a response in which it argued, among other things, that subsection 4.250(a) only applies to filing claims in pending probate proceedings, and does not apply to petitions to reopen closed cases.

Judge Reeh issued his order denying reopening on December 21, 2004. Judge Reeh first concluded that Appellant satisfied the standing criteria in 43 C.F.R. § 4.242 for filing a petition to reopen, which requires that a petitioner must have had no actual notice of the original proceedings and was not on the reservation or otherwise in the vicinity at the time that public notices of the hearing were posted. Judge Reeh noted that there was no allegation that Appellant had either actual or constructive notice of either Decedent's death or the initial probate proceedings. Judge Reeh also rejected Maudean's argument that creditors could not file petitions to reopen an estate, concluding that creditors are defined as interested parties by 43 C.F.R. § 4.201 and therefore Appellant, as a creditor asserting a

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distribution from Decedent's estate. The Superintendent of the Anadarko Agency, BIA (Superintendent) apparently scheduled a hearing on the restriction pursuant to 25 C.F.R. Part 115, but then postponed the hearing pending resolution of the probate proceedings. Maudean apparently filed an appeal and brief with the Southern Plains Regional Director from the Superintendent's postponement decision, but the record before the Board contains no further information concerning that proceeding. In her answer brief in this appeal, Maudean stated that she would file an application to the Board for release of her funds, but no such application has been filed. Because we affirm Judge Reeh's denial of reopening, we also vacate his order to restrict Maudean's IIM account.

claim against Decedent's estate, was not precluded, based on a lack of standing, from filing a petition for reopening.

Having found that Appellant had standing to file a petition for reopening, Judge Reeh nevertheless concluded that Appellant's claim was time-barred by the regulations, and therefore Appellant could not show "proper grounds" for reopening, as required by 43 C.F.R. § 4.242(b) (2001). Judge Reeh rejected Appellant's argument that the regulatory deadline for filing claims against an Indian decedent's estate, did not apply to petitions for reopening, and further found that Appellant had missed the deadline under the applicable version of that regulation.[6]

Judge Reeh first determined that because Decedent had died on August 6, 2001, an interim version of subsection 4.250 (interim subsection 4.250(a)), promulgated on June 18, 2001 and made effective immediately, applied to Decedent's probate. *See* Interim Rule with Request for Comments, 66 Fed. Reg. 32,884 (June 18, 2001). Interim subsection 4.250(a) provided that "[a]ll claims against the estate of a deceased Indian held by creditors chargeable with notice of the decedent's death must be filed with the agency within 60 days from the date BIA receives verification of the decedent's death . . . ." 43 C.F.R. § 4.250(a) (2001).[7] When interim subsection 4.250(a) was promulgated, a provision in BIA's probate regulations provided in relevant part: "If the decedent owed me money, how do I file a claim? . . . (c) We must receive your claim within 60 days from the

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[6] Judge Reeh also noted the existence of other "potential issues," that might have barred reopening, including whether the 1997 state court judgment would still be effective and enforceable as a matter of state law or was barred by statute of limitations laws; whether interest could accrue after Decedent's death; and whether a creditor's claim can be considered after the probate case has been closed and a decedent's IIM account has been distributed.

[7] "Agency" is defined as "the agency office or any other designated office in BIA having jurisdiction over trust or restricted property and money . . . [and] any office of a tribe which has contracted or compacted the BIA probate function . . . ." 43 C.F.R. § 4.201 (2001). For the sake of simplicity, and because this case does not involve a contracting tribe, we will refer to BIA as synonymous with "agency" in the probate regulations.

date the BIA receives the verification of the decedent's death in § 15.101 to be included as part of the probate package." 25 C.F.R. § 15.303 (2001).[8]

As described in Judge Reeh's order, interim subsection 4.250(a) provided that "a claim must be disallowed if not filed with the BIA within 60 days from the time the BIA verified the Decedent's death." Order Denying Petition to Reopen at 3. Judge Reeh noted that interim subsection 4.250(a) "made no exception for creditors without notice of the decedent's demise," and that "[t]he creditor was required to file the claim whether or not it knew of the decedent's demise." *Id.* at 4. Judge Reeh noted that this was consistent with section 15.303 of 25 C.F.R., which applied the same 60-day deadline and made no provision for creditors without notice of a decedent's death. Judge Reeh commented that these provisions were "Draconian in that they placed creditors without notice in untenable, if not impossible positions." *Id.* Nevertheless, he found that the provisions applied to Appellant's claim.

Judge Reeh concluded that BIA had verification of Decedent's death at least by January 30, 2002, because that was the date on which the Field Office certified the probate package, which included the death certificate. Because the claim was submitted more than 60 days after January 30, 2002, Judge Reeh found that Appellant's claim was untimely.

Judge Reeh noted that subsection 4.250(a) was amended on December 31, 2001, to "afford[] creditors additional time (20 days from when they were chargeable with notice of death) in which to file claims against trust estates." *Id.* He concluded, however, that even if the amended rule were applied to this case, it would not help Appellant because it filed the petition to reopen well beyond the 20-day deadline that would be triggered by notice of Decedent's death. Judge Reeh found that Appellant was chargeable with actual notice of Decedent's death on November 24, 2003, as evidenced by Appellant's counsel's letter to Maudean. Appellant's Petition to Reopen was filed more than three months later.

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[8] Section 15.101 of 25 C.F.R. provides that, to begin the BIA probate process, an individual may provide BIA with a certified copy of the death certificate, if one exists. It also lists additional documentation that may be submitted to BIA to establish verification of a decedent's death.

Appellant filed a timely appeal to the Board.[9] Appellant and Maudean submitted briefs.

Discussion

The parties raise the following issues on appeal: (1) does Appellant, as a creditor, have standing to file a petition to reopen Decedent's estate; (2) if so, did the deadline for filing claims against an estate apply to claims filed in a petition for reopening; and (3) if the regulatory claims deadline applies to petitions for reopening, is Appellant's claim untimely under interim 43 C.F.R. § 4.250(a) or under 25 C.F.R. § 15.303(c) because it was not filed within 60 days of BIA's receipt of verification of Decedent's death.[10] We need not

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[9] Appellant styled his notice of appeal to the Board "conditional" because Appellant simultaneously filed a "Petition for Rehearing" before Judge Reeh, concerning the denial of reopening. However, the proper course for seeking review from an order denying reopening of an Indian probate is an appeal to the Board — not a petition for rehearing. *See* 43 C.F.R. § 4.242(g) (no distribution for 60 days following order concerning reopening "pending the filing of a notice of appeal"); *id.* § 4.320(a) (right to appeal to the Board from an order on a petition for reopening). On February 23, 2005, the Board issued an order concluding that Appellant's notice of appeal was timely filed, and that Judge Reeh no longer had jurisdiction over the matter. Prior to the issuance of the Board's order, on February 22, 2005, Judge Reeh similarly had denied Appellant's petition for rehearing on the grounds that a petition for rehearing was not an "appellate avenue" available to Appellant from an order denying reopening. Order Denying Petition for Rehearing at 2.

[10] In addition to raising these issues, Appellant contends that even if the 60-day deadline applies, it has not been triggered because there is no evidence of "the filing of a certified copy of the death certificate or other verification of the decedent's death under 25 C.F.R. § 15.101." Opening Brief at 11. This argument is without merit and need not be discussed further: The record contains an original of the death certificate and a letter dated January 30, 2002, from the BIA Alaska Field Representative transmitting the original death certificate to the BIA realty office in Anchorage. BIA's receipt and possession of the death certificate is sufficient to satisfy the requirements of 25 C.F.R. § 15.101 and interim subsection 4.250(a).

Appellant also argues that "any deadline applicable under the 'interim rule' was waived by Maudean by her failure to assert it in her answer and response to petition to reopen, submitted June 29, 2004." Opening Brief at 11. We disagree. The failure of an interested party to initially raise a time-bar provision does not waive the effect of a regulation, which

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address the first issue because even assuming Appellant has standing to file a petition for reopening, we answer the second and third issues by concluding that a claims deadline does apply to Appellant's claim and that the claim is untimely. We therefore affirm Judge Reeh's denial of reopening on the ground that Appellant's claim is time-barred. We address the second and third issues in turn.

I. Does a Deadline for Filing Claims Apply to Appellant's Petition for Reopening?

Appellant contends that Judge Reeh erred by confusing the three-year reopening period authorized by 43 C.F.R. § 4.242 with the claim deadline in subsection 4.250(a), which Appellant argues is applicable only to claims asserted during the original probate proceeding. Appellant argues that no deadline applies for claims filed in petitions for reopening. That is not how we read the regulations.

As we discuss below in tracing the history of the regulatory time-bar provisions for claims, there was some support in earlier versions of the regulations that the claims deadline in subsection 4.250(a) applied only to the original probate proceedings and, more importantly, that no claims deadline applied to creditors who were not chargeable with notice of the probate hearing. As we further explain, however, in January and June of 2001, BIA and OHA, respectively, revised their probate regulations. Those revised regulations effectively required that all claims against an Indian estate be filed with BIA within 60 days from the date BIA received verification of a decedent's death. In addition, the provisions governing standing to file a petition for reopening do not displace the claims deadlines in 25 C.F.R. § 15.303(c) and interim subsection 4.250(a). Thus, even assuming Appellant had standing to file for reopening, its claim was still time-barred under the applicable regulations governing claims.

Before it was amended in 2001, subsection 4.250(a) provided as follows: "All claims against the estate of a deceased Indian held by creditors chargeable with notice of the hearing under § 4.211(c) shall be filed with either the [BIA] Superintendent or the [ALJ] prior to the conclusion of the first hearing, and if they are not so filed, they shall be forever

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[10](...continued)
in this case directs how the Department of the Interior (Department) will treat claims against the trust assets of a deceased Indian. The Board lacks authority to disregard the regulation. *Louriero v. Acting Pacific Regional Director,* 37 IBIA 158, 159 (2002); *Vitale,* 36 IBIA at 183.

barred." 43 C.F.R. § 4.250(a) (2000).[11] Notably, section 4.250(a) was the only provision in either OHA or BIA regulations with a deadline for filing claims. By its terms, it applied only to creditors "chargeable with notice" and it allowed claims to be filed with either BIA or the ALJ.[12] Thus, under the regulations as they existed prior to 2001, there was at least a question whether any time limitation applied to a claim brought by a creditor who was not chargeable with notice of the probate hearing. There may have been other obstacles for successfully asserting a claim after an estate had been closed — e.g., satisfying the "manifest injustice" standard;[13] the Department's authority to invade assets that have already been distributed — but the Department's regulations were silent with respect to a time period for claims brought by creditors who were not chargeable with notice.

The promulgation of revised BIA and OHA probate regulations in 2001 altered the procedures and rules applicable to filing claims in an Indian probate proceeding. In January of 2001, BIA promulgated 25 C.F.R. § 15.303(c). As already quoted, *supra* at 16-17, section 15.303(c) provided that if a creditor wished to make a claim against the estate of a decedent, BIA must receive the claim within 60 days from the date BIA receives verification of the decedent's death to be included in the probate package. BIA's rule made no exception for claims by creditors not chargeable with notice of a decedent's death, and BIA's rules provided no other avenue for submission of a claim. Therefore, the probate package was the exclusive means by which a claim could be submitted through BIA to an ALJ for consideration.

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[11] Section 4.211(c) of 43 C.F.R. (2000) provided that, "[a]ll parties in interest, known and unknown, including creditors, shall be bound by the decision based on [the probate hearing] if they lived within the vicinity of any place of posting during the posting period, whether they had actual notice of the hearing or not." Subsection 4.211(c) is now codified at subsection 4.216(c).

[12] As originally promulgated on April 15, 1971, subsection 4.250(a) applied to all claims and made no distinction between creditors who were or were not chargeable with notice. *See* 36 Fed. Reg. 7185, 7197 (Apr. 15, 1971). Later in 1971, however, subsection 4.250(a) was amended to cover only claims held by "creditors chargeable with notice." *See* 36 Fed. Reg. 24,813 (Dec. 23, 1971).

[13] Section 4.242(h) provides that a petition for reopening filed more than three years after the entry of a final decision will only be allowed upon a showing that a manifest injustice will occur.

Thus, in January of 2001, even though the time-bar provision in subsection 4.250(a) applied only to creditors chargeable with notice, there was now a new and separate time-bar provision in BIA's regulations that applied to all claims filed with BIA. Then, in June of 2001, OHA amended subsection 4.250(a). Interim section 4.250(a) provided that claims must be filed with "the agency" — BIA — thus removing the ALJ as an avenue for filing claims. The rule also incorporated the same 60-day deadline contained in 25 C.F.R. § 15.303(c): "All claims against the estate of a deceased Indian held by creditors chargeable with notice of the decedent's death must be filed with the agency within 60 days from the date BIA receives verification of the decedent's death . . . ." 43 C.F.R. § 4.250(a) (2001). Although interim subsection 4.250(a) still contained the language limiting it to claims held by "creditors chargeable with notice," the Department explained the rule in unequivocal terms in the preamble: "Paragraph (a) of [section 4.250] is revised to provide that *all claims* must be filed within 60 days from the date BIA receives verification of the decedent's death, in accordance with 25 CFR 15.303(c)." 66 Fed. Reg. at 32,885 (emphasis added). In addition, the Department explained its revisions as "making those changes to [OHA's] regulations that are necessary to avoid inconsistencies in the processing of Indian probate cases between BIA and OHA deciding officials." *Id.* at 32,884.

The effect of the BIA and OHA revisions meant that while interim subsection 4.250(a) might still have been applicable only to creditors who were chargeable with notice, BIA's probate regulations contained an independent deadline that applied to all claims and to all creditors without regard to notice.[14] Neither BIA's regulations nor OHA's regulations provided any additional window for the submission of claims. Whether or not this limited

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[14] It is possible that the Department's retention of the "chargeable with notice" language in interim subsection 4.250(a) was simply an oversight, given the expressed, unequivocal intent to make the OHA rules conform to BIA's rule. On the other hand, we note that a subsequent revision of subsection 4.250(a) added a 20-day grace period for creditors who were not chargeable with notice, although all claims must still be filed with BIA. *See* 66 Fed. Reg. 67,652, 67,662 (Dec. 31, 2001), *codified at* 43 C.F.R. § 4.250(a)(ii) (2002). The June 2001 interim rule and the December 2001 final rule applied only to cases in which a decedent died after the effective date of the respective rule. *See* 66 Fed. Reg. at 67,652. Judge Reeh found that even if the December 2001 rule were applicable to this case, Appellant's claim would be untimely because it was filed more than 20 days after Appellant was chargeable with notice of Decedent's death.

We note that under a proposed probate rule published in the Federal Register on August 8, 2006, claims that are not filed by the conclusion of the first probate hearing would be barred forever, without regard to whether or not a creditor has notice. *See* 71 Fed. Reg. 45,174, 45,208-09, 45,234 (Aug. 8, 2006) (proposed 25 C.F.R. § 15.202(d) and 43 C.F.R. § 30.140(b)(2)).

claims to the "original probate proceeding," as Appellant contends, is not the point. The point is that the rules now contained a time-bar provision with no exceptions for creditors, such as Appellant, who were not chargeable with notice. As Judge Reeh observed, this may have placed certain creditors in an untenable position, but the Board is not empowered to disregard the regulation.

Appellant relies on several Board cases, including *Estate of Woody Albert,* 14 IBIA 223 (1986), as illustrating that the Board has allowed reopening of estates years after the original probate decision. The cases relied on by Appellant are inapposite. None of the cases cited involved creditors with claims against an estate. Rather, in each case a petition for reopening was filed by a possible heir. None involved a creditor or a deadline for submitting claims against an estate.

The requirements of section 4.242(a), that an individual petitioning for reopening not have had notice of the original proceedings, and that the petition be filed within three years of the date of the final decision, do not displace the requirements of subsection 4.250(a) and subsection 15.303(c) — they are in addition to subsection 4.250(a) and subsection 15.303(c)'s requirements. Subsection 4.242(a)'s requirements are relevant to standing; the requirements of subsections 15.303(c) and subsection 4.250(a) are relevant to the timeliness of a claim. A creditor seeking to reopen a closed estate to assert a claim must show that he has standing to reopen the estate under subsection 4.242(a), but must also show that his claim is not barred under regulatory provisions specifically governing the time for filing claims.

In summary, we reject Appellant's argument that the time-bar provisions governed only the original probate proceedings and not proceedings to reopen a probate. Even if interim subsection 4.250(a) is limited to claims of creditors chargeable with notice, the OHA and BIA regulations, read together, clearly provide that BIA is the exclusive avenue for filing claims and that unless a claim is timely filed with BIA and included in the probate package, it will be regarded as untimely.

II. Is Appellant's Claim Time-Barred?

Appellant does not disagree with Judge Reeh's understanding of the effect of interim subsection 4.250(a). In its opening brief, Appellant states: "The 'interim rule' required that any petition to reopen a probate must be filed within 60 days of verification by the BIA of the decedent's death, regardless of whether the creditor knew of the decedent's death or knew of the existence of a probate proceeding, and regardless of whether the BIA, the ALJ, or the principal beneficiary of the estate was already aware of the creditor's claim." Opening Brief at 3. Thus, Appellant does not dispute the fact that if the claims deadlines in

25 C.F.R. § 15.303(c) and interim subsection 4.250(a) apply to reopening proceedings, Appellant's claim is time-barred.

Appellant contends that the interim regulation is "plainly unconstitutional" when applied to bar Appellant's claim. *Id.* But Appellant also correctly acknowledges that the Board lacks jurisdiction to review the constitutionality of a regulation, *id.*, and therefore we do not review this issue further. *See Smith v. Acting Eastern Oklahoma Regional Director,* 38 IBIA 182, 186 (2002).[15]

Conclusion

The regulations applicable to filing claims against Decedent's estate provided that all claims of creditors, whether or not they were chargeable with notice of Decedent's death, had to be filed with BIA within 60 days of BIA's receipt of verification of the decedent's death. The general provisions allowing a party with standing to file a petition for reopening do not displace the specific provisions in the regulations governing the time for submitting claims against an estate. Appellant did not meet the 60-day time period, and therefore Judge Reeh correctly denied reopening on the grounds that Appellant's claim was untimely.

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 affirms Judge Reeh's denial of reopening, and vacates his order to restrict Maudean's IIM account.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Debora G. Luther
Administrative Judge

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[15] Appellant also argues that Judge Reeh erred in denying it an evidentiary hearing to present evidence concerning waiver, estoppel, fraudulent concealment, and other issues "that should bar any objection to [Appellant's] petition to reopen the estate." Opening Brief at 12. Appellant requested a "hearing" before Judge Reeh only in the most general terms, and failed to identify any material disputed facts that would be relevant to application of the regulatory time-bar to Appellant's claim. Therefore, we reject this allegation of error. Even on appeal, Appellant has failed to show how its allegations of "fraud" by Maudean, or even lack of notice from BIA or the ALJ, are relevant to application of the claims limitations period in this case.