UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

ESTATE OF RAYMOND P. SAUSER, and JAMES RAYMOND SAUSER,	)	
Plaintiffs,	)	
v.	)	
UNITED STATES OF AMERICA; SALLY JEWELL AS SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR; and KEVIN WASHBURN AS ASSISTANT SECRETARY OF INTERIOR BUREAU OF INDIAN AFFAIRS;	)	CIV. 14-5051-JLV
Defendants.	)	

BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

FACTUAL BACKGROUND

This is a case about the BIA hearkening back to the dark ages of the relationship between the United States of America and the Indian Tribes. The BIA is acting as the "Great White Father" and in its arrogance, is claiming that it knows better than a college educated Indian as how to distribute that individual competent Indian's trust lands and is forcing a child to inherit what his father clearly did not wish him to receive. In fact, Decedent's son, James Raymond Sauser, is one of the Plaintiffs in this case, seeking judicial review of Defendant's actions in order to ensure that he does not inherit interests in Indian trust land that his father did not wish him to receive. Through its decision, the BIA is taking the unconscionable position that Decedent's Indian trust land should be fractionated between his adopted children. This action unabashedly violates the settled, strong public policy of the United States to avoid and consolidate fractionated interests in Indian trust lands.

Raymond P. Sauser, Decedent, was an enrolled member of the Oglala Sioux Tribe. Many decades ago, he received a bachelor's degree at a time when very few Americans, let alone Indians, were educated beyond the 8th grade. Decedent was domiciled on the Pine Ridge Indian Reservation in the State of South Dakota until the date of his death on March 15, 2008. Decedent died testate, having validly executed a comprehensive 19 page Last Will and Testament dated October 13, 2005. A copy of the Will is attached hereto as Exhibit A. During his life, Raymond P. Sauser adopted two children, James Raymond Sauser and Jonathan Sauser. Jonathan is an enrolled Indian and James is not.

A probate was opened and Defendants have ordered a distribution of Decedent's Indian trust lands in a manner that is in direct contravention of the explicit terms of Decedent's Last Will and Testament. Decedent's Last Will and Testament was admitted to probate by the Bureau of Indian Affairs after an initial hearing was conducted by Administrative Law Judge Richard D. Hines on January 27, 2010. Defendants have approved the Last Will and Testament of Decedent but have ordered distribution of the estate assets in a manner that is contrary to the provisions of the Will and the testamentary intent of Decedent. Decision, p. 1, 3-4. Defendants, however, insist that James R. Sauser should have a ½ interest in all of the Indian trust land and have totally and unwaveringly refused to honor the wishes of the Decedent and both beneficiaries. Decision, p. 3-4.

Defendants are attempting to force James to inherit an interest in the trust lands that Decedent did not wish him to have. Defendants have put the Estate in a position where it has had to expend time and money to take the moral high ground that James should not inherit the interests in his father's trust land that the Defendants are thrusting upon him. Plaintiffs have requested that this Court grant them relief from the arbitrary and capricious actions of

Defendants by granting relief including: 1) That this Court order enter an Order compelling Defendants to approve the Last Will and Testament of Decedent and Order that all of Decedent's Indian transferrable Trust Land interests, except for the "Home Place", be transferred solely to Jonathan Sauser; 2) Alternatively that this Court remand the case to the BIA so that it can enter an order consistent with this Court's determination that Defendants shall approve the Last Will and Testament of Decedent and Order that all of Decedent's Indian transferrable Trust Land interests, except for the "Home Place", be transferred solely to Jonathan Sauser; and 3) Alternatively that this Court find that the Renunciation and Disclaimer executed by James Raymond Sauser is valid and timely filed and require the BIA to change its records so that Jonathan is the sole recipient of Decedent's Indian trust land except the "Home Place."

Decedent's Last Will and Testament unequivocally recites that the most important and overriding intent of the Decedent, Raymond P. Sauser, is that only his enrolled son, Jon who, like his father, Ray, is an enrolled member of the Oglala Sioux Tribe, receive all of Decedent's trust land interests. Decedent's Last Will and Testament, Article VI. Article VI of Decedent's Last Will and Testament recites in relevant part:

> A. In preparing this, my Last Will and Testament, I am presented with certain challenges and difficulties arising out of the fact that only my son, Jon, is an enrolled member of the Oglala Sioux Tribe. Generally, I wish to have my children treated equally under this document. I want them treated equally, both in terms of distribution of my assets, and equally in terms of distribution of income arising from certain provisions in this document. Because only one of my children is an enrolled member of a federally recognized Indian tribe, my son, James, may be subjected to certain federal or state or local government taxation issues which serves to decrease the net benefits to my son, James. Therefore, when this document refers to treating my children equally, such equality is to be determined after taking into account the unique tax consequences to my son James, as a result of his not being an enrolled member of a federally recognized Indian tribe. Challenges to implementing my desires are also presented by the fact that a portion of my estate is held in BIA, Indian, or Tribal Trust (sometimes referred to herein as "Indian Trust") status. I desire my Indian Trust properties to retain their characterization and status as Indian Trust properties. These, then, constitute my overriding and primary intents, wishes, desires and commands,

and my fiduciaries are therefore bound by these overriding and primary intents, wishes, desires and commands:

(1) That my children be treated equally in all respects after taking into account the unequal effects on taxation on them, as much as is reasonably practicable, concerning the distribution of the assets of my estate, the residuary or life estate benefits and income rights of benefits, and all other matters except as specifically stated contrary to this purpose; and

(2) That all property I have which is held in Indian Trust at my demise be kept in such Indian Trust notwithstanding anything to the contrary herein, except for those limited instances otherwise specifically stated elsewhere herein.

B. It is my secondary intent, wish, desire, and command, and my fiduciary is therefore bound to do all which is reasonably practicable to meet this secondary intent, wish, desire, and command, that upon the death of both of my sons, any Indian Trust properties then remaining go the children of my son, Jon, except as otherwise specifically excepted in this document.

Id. Decedent had otherwise provided for James in the Last Will and Testament from assets not subject to BIA probate administration. James does not desire to receive, and should not receive, any interest in his father's Indian Trust Land, except for the "Home Place."

Decedent's wife, Emmaline Sauser, died years ago, leaving a complex will in which she provided for both James and Jonathan as she felt appropriate. Just as with Decedent, the distribution of certain assets under Emmaline's Will was not equal, because she too, had Indian trust lands owned solely by her (she was enrolled with the Cheyenne River Tribe). There was no effort by the BIA to challenge her complicated Will, so Plaintiffs cannot comprehend why the BIA would now revise and rewrite the terms of Decedent's Will.

For the better part of a decade, since 2008, Plaintiffs have attempted to obtain approval of Raymond P. Sauser's Indian Will from the Bureau of Indian Affairs and seek a distribution of the Estate assets that is in accordance with the last wishes of Decedent. James, along with the Estate, appealed said Order to the Board of Indian Appeals (Docket Number IBIA 12-058) in order to ensure that his father's last wish, that his brother Jonathan receive the trust land, was followed.

Defendants, in the Order Denying Rehearing, invited Plaintiff James Raymond Sauser to file a Renunciation and Disclaimer of the trust property. So, on April 22, 2012, James R. Sauser filed a "Renunciation and Disclaimer of Interest in Certain Trust Lands pursuant to U.S.C. 22061(j)(8)" (hereinafter Renunciation and Disclaimer) and thereby did renounce or disclaim any and all right, title, and interest in and to the property to which the Decision improperly awarded him. A copy of the Renunciation and Disclaimer is attached as Exhibit B. James's disclaimer was made in favor of Jonathon Thomas Sauser, the sole child in whom Decedent unequivocally stated it was his desire to vest all that was disclaimed or renounced pursuant to 25 U.S.C § 2206(j)(8).

After the Renunciation and Disclaimer was filed, the IBIA rendered its decision affirming the denial of rehearing for the Raymond P. Sauser Indian Probate on July 17, 2014. Plaintiffs' received their copy of the latest decision on July 21, 2014, which was a copy of the Order Affirming Denial of Rehearing is attached as Exhibit C.

ARGUMENT

The Administrative Procedures Act provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. The real substance of the APA is embodied in section 706, which states in full:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of

> statutory right;
> (D) without observance of procedure required by law;
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706. In addition to the grant of authority for the Court to "compel agency action unlawfully withheld or unreasonably delayed," the court has the power to grant a writ of Mandamus to compel the BIA to comply with their duties under the law. *Id.;* 28 U.S.C. § 1361. The Mandamus Act vests courts with original jurisdiction "to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361.

It cannot be asserted that the case of *Henrietta First Moon v. Starling White Tail*, 46 S.Ct. 246 (1926) bars Plaintiff's ability to seek judicial review of the decision of the Interior Board of Indian Appeals (IBIA). In *First Moon*, the United States Supreme Court held that it lacked jurisdiction to establish interest in allotted lands of deceased Indian after a determination of heirship by the Secretary of Interior. *Id.* However, that decision was based entirely upon a single statute which no longer exists: Act of June 25, 1910, c. 431, s 1, 36 Stat. 855 (Comp. St. s 4226), which provided:

> That when any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive.

It should also be noted that under the facts of this present action, neither the above statute nor its current incarnation found at 25 U.S.C. § 372 would apply. Both statutes require, for their

application, that the "Indian to whom an allotment of land has been made, dies …without having made a will disposing of said allotment…" Raymond Sauser died testate. He had a will that fully disposed of his trust land in a manner that avoided fractionating his Indian trust lands. Because Raymond Sauser died leaving a will, these statutes have absolutely no applicability.

Even if 25 U.S.C. § 372 did apply to the present case, judicial review of the BIA's decision is still permitted. 25 U.S.C. § 372 currently states:

> When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under the Indian Land Consolidation Act [25 U.S.C.A. § 2201 et seq.] or a tribal probate code approved under such Act and pursuant to such rules as he may prescribe, shall ascertain the legal heirs of such decedent, *and his decisions shall be subject to judicial review* to the same extent as determinations rendered under section 373 of this title.

25 U.S.C. § 372 (emphasis added). The statute no longer states that the Secretary's decision is "final and conclusive," rather, it states that the decision is subject to judicial review. This is likely due to the fact that, *First Moon* and the statute it relies upon both predate the Code of Federal Regulations (1939) and the Administrative Procedure Act (1946), both of which specifically provide for Plaintiffs' right to seek judicial review in this case.

1. Plaintiff has Exhausted all Administrative Remedies.

An appeal to federal district court is appropriate pursuant to 28 U.S.C. § 1331 since Appellant has exhausted all administrative remedies pursuant to 43 C.F.R. § 4.314. "An administrative action is final if it marks the consummation of the agency's decisionmaking process – it must not be of a merely tentative or interlocutory nature – and it determines right or obligations from which legal consequences flow." *Crow Creek Tribe v. Bureau of Indian Affairs*, 463 F.Supp.2d 964, 969 (C.D. SD 2006) (internal citations omitted). Plaintiffs have exhausted their administrative remedies because the decision made by the BIA is final and

marked the consummation of the agency's decisionmaking process. Plaintiffs appealed this case to the Interior Board of Indian Appeals (IBIA) on January 19, 2012. Notice of Appeal, dated January 19, 2012. This was the final remedy afforded to Plaintiffs through the BIA as "no further appeal [lies] within the Department from a decision of the Board." As such, Plaintiffs have exhausted their administrative remedies and this case is properly before this Court.

Defendants, however, on page 5 of their Answer, have made the unsupportable assertion that Plaintiffs failed to submit the Renunciation and Disclaimer to the Probate ALJ as required by 43 C.F.R. § 30.181 and 43 C.F.R. § 30.120(e). Neither the filing of a renunciation or disclaimer nor the filing of a gift deed is a required step in exhausting administrative remedies in this case. Rather, these two actions need only be considered in the event this Court determines that the Great White Father's (acting through the ALJ) sense of "fairness" must override the express will of Decedent.

Plaintiffs have clearly exhausted all administrative remedies. "The Administrative Procedure Act, 5 U.S.C. § 704 explicitly requires the exhaustion of all intra-agency appeals mandated either by statute or by agency rule, but courts may not require litigants to exhaust optional appeals as well." *Atl. Tele-Network, Inc. F.C.C.*, 59 F.3d 1384, 1388 (D.C. Cir. 1995) (internal citations omitted). "It is well established that one need not proceed with *optional* administrative processes before seeking relief at law from error of the administrator." *Woods v. Ginocchio*, 180 F.2d 484, 487 (9th Cir. 1950) (citing *Levers v. Anderson*, 326 U.S. 219, 233, 66 S.Ct. 72, 90 L.Ed. 26) (emphasis added). Neither the filing of a renunciation and disclaimer nor the filing of a gift deed are required by law. Further, neither of these are remedies provided through the code of federal regulations. Therefore, Plaintiffs have certainly exhausted their administrative remedies and are properly seeking judicial review of the BIA's arbitrary and

capricious disregard of a college educated Indian's Last Will and Testament.

2. The Board should have reversed the decision of the ALJ and ordered a distribution of Decedent's Indian Trust Land in accordance with the Last Will and Testament.

The distribution of the Estate assets ordered by the ALJ is improper and erroneous as it is directly contrary to the express provision of the Last Will and Testament, Decedent's testamentary intent, and the wishes of both the heirs.

The Department of the Interior may not revoke or rewrite an otherwise valid will disposing of Indian trust or restricted property that reflects a rational testamentary scheme simply because the disposition does not comport with the deciding official's conception of equity and fairness. *Tooahnippah v. Hickel,* 397 U.S. 598 (1970). See also *In re Estate of Ronald Richard Saubel*, 9 IBIA 94 (1981) (holding that it was improper for the Department of the Interior to disapprove an Indian will as a result of the disinheritance to two children whom the decedent had equal concern and affection for as the remainder of his children); *In re Estate of Anthony Bitseedy,* 5 IBIA 270 (1976) (holding that for Secretary to withhold approval of testator's will, which omits his illegitimate child and sole heir at law, would be tantamount to applying a just and equitable standard in passing on an Indian's will, which is the precise error in Departmental judgment previously condemned by the Supreme Court).

The Board should have reversed the Decision of the ALJ and ordered a distribution that complies with the validly executed and approved Last Will and Testament."The principal criterion in construing an Indian will is the intention of the testator, if that intention can be reasonable ascertained and it is not contrary to an established rule of law or in violation of public policy." *Estate of Wilford Hail,* 13 IBIA 140, 143 (1985). The Decedent clearly stated in his last will and testament that it was his intent that all property held in Indian Trust be kept in Indian

Trust unless otherwise specifically stated. ***More precisely, the Decedent's intent was that all trust property, other than the Home Place, be devised exclusively to his enrolled son, Jonathan Thomas Sauser.*** This intent is endorsed by the non-enrolled son, James, a Plaintiff herein. Specifically, the Decedent clearly stated:

> That all property I have which is held in Indian Trust at my demise ***be kept in such Indian Trust notwithstanding anything to the contrary herein***, except for those limited instances otherwise specifically state elsewhere herein.

Last Will and Testament of Raymond P. Sauser, p. 4, Article VI (emphasis added). It is not for the BIA to decide that the Decedent should have left his land interests equally to his two sons. That decision was solely the decision of Ray Sauser and he said plainly that his sons would not be treated equally concerning the Trust Lands. Last Will and Testament of Decedent, p. 4, Article VI. Rather, they would be treated equally overall when considering all his BIA and non-BIA administered assets, which are significant. However, contrary to the Decedent's intent the Court has awarded James Raymond Sauser a ½ life estate in all trust lands.

Decedent clearly wishes to avoid any uncertainty or risk related to the ultimate distribution of his trust lands. However, Defendant's arbitrary and capricious decision to thrust the interests in Indian land upon James will create incalculable uncertainties, risks, and difficulties for not only James, but Jonathan as well. James is not an enrolled Indian. It is uncertain whether James' income from the trust lands would be taxed if he is forced to inherit the trust lands. By treaty, the income from Indian trust lands is exempt from taxation for Indians, however, James is not an enrolled Indian. The possibility that James income would be taxed and Jon's would not is antithetical to the testamentary intent of Decedent. Decedent stated in his Will that:

> when this [Will] refers to treating my children equally, such equality is to be determined after taking into account the unique tax consequences to my son Jim, as a result of his not

being an enrolled member of a federally recognized tribe.

Last Will and Testament of Raymond P. Sauser, p. 4, Article VI. In fact, this directive was Decedent's "overriding and primary intent." *Id.* Decedent's The Defendants, however, have wholly failed to account for any disparity created between James and Jonathan due to taxation. This was unequivocally admitted by the ALJ when he ordered distribution of "the estate without regard to any tax consequences…" Decision, p. 3. This is clearly antithetical the testamentary intent of Decedent.

Another risk and uncertainty that was hoped to be avoided by Decedent, but was fabricated by Defendant's Decision and Orders relates to the business relationship between James and Jonathan. Both James and Jonathan operate the trust land together. However, if James is forced to receive the trust land interests, the boys will be thrust into the unpalatable position of needing to separate their business relationship. They would need to separate their business relationship because they would suddenly become ineligible to receive an Indian preference because James is a Non-Indian. 25 U.S.C. § 3715(b). This certainly was not the intention of Decedent as he desired that both his sons continue to occupy and work the trust land together. Last Will and Testament of Raymond P. Sauser, page 4-5, Article VI. Defendants, through their arbitrary and capricious decisions have started a chain reaction that may result in the dissolution of the familial business relationship that Decedent took care in his will to nurture.

Next, the ALJ incorrectly concluded that Decedent was misinformed as to the law regarding the devise of trust lands to non-enrolled adopted children. In fact, the Decedent had no intention to split his own trust interests; he wanted them to remain entire and to eventually end up with his grandchildren, the children of his son Jonathan. He did not want to take any risks, no matter how small, that his trust lands would ever leave trust status due to yet further changes to

the law.

James Sauser understands that he his entitled to inherit federal Indian trust lands as a legally adopted child of the Decedent under the statutes referenced by this body. But that is not his father's stated intentions for himself. James Sauser is a non-enrolled Indian and any risk that trust land may EVER go out of trust is contrary to the Decedent's intent that trust lands remain in trust. It is James Sauser's wish that his father's last Will and Testament be honored and that all trust lands be distributed as set forth in his father's Will. The detailed provisions in the Decedent's Will as how to equalize his sons' distributions considering for the fact that his enrolled son, Jonathan Thomas Sauser, was to receive the trust lands demonstrates that the Decedent knew exactly what he wanted. James agrees whole-heartedly with his father's clearly stated desire that Jonathan receive the trust lands.

25 U.S.C. § 2206(b)(1)(A)(i) and 25 U.S.C. § 2206(j)(2)(B) simply have no relevance. ***That was simply not the Decedent's intent.*** The question is not what does the statute say, the question is what did Mr. Sauser want and what did he say in his will. The statute referenced was brand new and created a right that had never existed in Indian Law. Mr. Sauser did not want his family involved with a newly created statute concerning trust lands, a statute that could just as easily be amended or repealed by the Congress as it was adopted by the Congress. There was, and there remains today, no way of determining what the effect of a repeal of the law might mean and the risk that the land, even an undivided half, would leave trust status later was a risk that was unacceptable to not only the Decedent, but his children as well. As stated supra, the Decedent clearly stated:

> That all property I have which is held in Indian Trust at my demise ***be kept in such Indian Trust notwithstanding anything to the contrary herein***, except for those limited instances otherwise specifically state elsewhere herein.

Last Will and Testament of Raymond P. Sauser Article VI (emphasis added). That this is so is further demonstrated by the fact that this appeal is also being filed by his non-enrolled son, James. To the extent this tribunal believes that its Decision is a better outcome for James, such belief is not the point; it was not the intent of James's father, an intent that is found throughout the will of Decedent; nor was it James's intent or desire.

It should be telling to the Court that James is spending so much effort to NOT get all the land interests that the BIA wants to force upon him. For these reasons, the Court should find that the Defendants improperly, arbitrarily and capriciously modified and revised Decedent's Will after it was approved by Defendant.

3. The Board erroneously ruled that the finality of the Order Affirming Denial of Rehearing operates to render the Renunciation and Disclaimer untimely.

The Board committed a grievous error of law by not considering and implementing Appellant's Renunciation or Disclaimer of Interest in Certain Lands Pursuant to U.S.C. § 2206(j)(8) (hereinafter "Renunciation and Disclaimer"). The Board erroneously held that it was inappropriate to consider Appellant's renunciation of interests because it was "untimely" filed.

The Board erroneously refused to consider the renunciation and disclaimer because "the Order Denying Rehearing was a final order of the ALJ." Order Affirming Denial of Rehearing at 4. The Board improperly applied the law because it is not the finality of an order on rehearing that will bar a disclaimer, it is the finality of a final order in the entire probate. 43 C.F.R. § 30.181. "To renounce an interest under [43 C.F.R.] § 30.180, [one] must file with the judge, before the issuance of the *final order in the probate case*, a signed and acknowledged declaration specifying the interest renounced." 43 C.F.R. § 30.181 (emphasis added).

The Court made no reference at all to a final order in the probate case. If it had, it would

have found that there exists no final order in the probate and thus, the renunciation and disclaimer was both timely and should have been given effect. An administrative judge's order will not become final until the expiration of thirty days after the notice of the decision "unless a timely petition for rehearing is filed with the judge." 43 C.F.R. § 30.237. Petitioners timely filed a motion for rehearing. Notice of Appeal (Petition for Rehearing). Therefore, the Order of the judge was not finalized and cannot be used to bar the consideration and application of the Renunciation and Disclaimer.

Additionally, "[i]f no interested party requests de novo review within 30 days of the date of the written decision, it will be final for the department." 43 C.F.R. § 30.207. Petitioners have requested de novo review and reconsideration of each decision of the Judge and Board within thirty days. There, to this day, exists no final order in the probate file, so the Renunciation and Disclaimer cannot be precluded as untimely.

For these reasons, the Board has looked to the wrong order in determining whether a final order exists to preclude the Renunciation. There has never been a final order in this probate file due to requests for rehearing and appeals. The Board misapplied the law and made clear errors of law and fact in refusing to consider the Renunciation and Disclaimer as untimely. .

4. **The Board erroneously relied on 43 C.F.R. § 30.243 in determining that the ALJ's Order Denying Rehearing, dated Dec. 20, 2011, was final.**

The Board committed an error of law by citing 43 C.F.R. § 30.243 to support its erroneous finding that the Probate Order is final for purposes of rendering the Renunciation and Disclaimer timely. The IBIA attempted to define a final order by citing 43 C.F.R. § 30.243. Yet, 43 C.F.R. § 30.243 does not even begin to define what constitutes a final order. Rather, it lays out the procedures required for *re-opening a closed probate case*. 43 C.F.R. § 30.243.

The Board acknowledged in its decision that Appellant timely petitioned the Administrative Law Judge (ALJ) for a *rehearing*, not a re-opening of the case: "Appellant bears the burden of showing error in an order on *rehearing*." *Estate of Raymond P. Sauser*, 59 IBIA 29, 31 (2014) (emphasis added). Therefore, 43 C.F.R. § 30.243 has absolutely no effect on the present matter and does not address the finality of any Order or the timeliness of the Renunciation and Disclaimer.

Furthermore, the Board's holding completely disregards the Notice To All Persons Having Or Claiming An Interest In The Subject Matter Of This Proceeding, attached to the Order Denying Rehearing and granting a right to appeal, pursuant to 43 C.F.R. §§ 4.320-323. By filing a timely petition for rehearing pursuant to 43 C.F.R. §§ 4.314, 30.237, 30.242, the Order Denying Rehearing, dated Dec. 18, 2011, remained open and was not a final order. To hold otherwise, as the Board did in its Order Affirming Denial of Rehearing, dated July 17, 2014 is a clear error of law.

The finality of the Order Denying Rehearing was subject to a timely filed appeal to the IBIA. Order Denying Rehearing at 2, Dec. 20, 2011; 43 C.F.R. § 4.314. The Order Denying Rehearing complied with 43 C.F.R. § 4.314, which the Board clearly and erroneously disregarded. 43 C.F.R. § 4.314 (2014) defines what constitutes a final administrative order:

> § 4.314 Exhaustion of administrative remedies.
>
> (a) No decision of an administrative law judge, Indian probate judge, or BIA official that at the time of its rendition is subject to appeal to the Board, will be considered final so as to constitute agency action subject to judicial review under 5 U.S.C. 704, unless it has been made effective pending a decision on appeal by order of the Board.

The ALJ stated that his Order Denying Rehearing would be final, for purposes of administrative exhaustion pursuant to 43 C.F.R. § 4.314, if not appealed in a timely fashion to the IBIA, a

duration of thirty (30) days. The Appellant appealed in a timely fashion, precluding finality.

By finding that the ALJ's Order Denying Rehearing was a final order, the Board disregarded its own regulations in clear legal error. The Board erroneously applied 43 C.F.R. § 30.243 and has cited no authority that the Order Affirming Denial of Rehearing is final for the purposes of rendering the Renunciation and Disclaimer as timely. This is a clear error of the law.

5. **The Board Should Have Reversed the Denial of Rehearing to Consider and Apply the Renunciation and Disclaimer.**

Alternatively, a new hearing should be ordered to address the distribution of the Indian Trust Land with direction that the Renunciation and Disclaimer should be given effect. A petition for reconsideration to be granted must contain an adequate basis for reconsideration such as newly discovered evidence or fraud. *Estate of Ute,* IA-143 (Supp) (August 25, 1955). As discussed above, the Renunciation and Disclaimer was both timely and effective. Additionally, the Department erroneously, arbitrarily and capriciously revised and distorted the intentions of Raymond Sauser in his last will and testament. As such, it constitutes new evidence that will have a dramatic effect on the Decision of the ALJ and the ordered distribution of the Decedent's Estate.

As new evidence has been presented that will materially change the distribution of the Estate, a new hearing will be required to distribute the property in accordance with the testamentary intent of the Decedent. Therefore,

CONCLUSION

For all these reasons, Petitioners respectfully request that the Court to determine that jurisdiction is properly before this court and enter judgment in favor of the Plaintiffs and find

that the actions of Defendant are arbitrary and capricious, and enter an Order granting Plaintiffs the relief requested in the Complaint. Plaintiffs respectfully request that this Court grant Plaintiffs the relief requested in the Complaint but particularly:

1) That this Court order enter an Order compelling Defendants to approve the Last Will and Testament of Decedent and Order that all of Decedent's Indian transferrable Trust Land interests, except for the "Home Place", be transferred solely to Jonathan Sauser;

2) Alternatively that this Court remand the case to the BIA so that it can enter an order consistent with this Court's determination that Defendants shall approve the Last Will and Testament of Decedent and Order that all of Decedent's Indian transferrable Trust Land interests, except for the "Home Place", be transferred solely to Jonathan Sauser; and

3) Alternatively that this Court find that the Renunciation and Disclaimer executed by James Raymond Sauser is valid and timely filed and require the BIA to change its records so that Jonathan is the sole recipient of Decedent's Indian trust land except the "Home Place."

Dated this 26th day of June, 2015.

COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of June, 2015, a true and correct copy of the foregoing **BRIEF IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS** as served upon the following counsel of record, as follows:

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