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Part II

Department of the Interior

Bureau of Indian Affairs

**25 CFR Part 61
Preparation of Rolls of Indians; Final
Rule**

DEPARTMENT OF THE INTERIOR**Bureau of Indian Affairs****25 CFR Part 61**

RIN 1076-AE44

Preparation of Rolls of Indians**AGENCY:** Bureau of Indian Affairs, Interior.**ACTION:** Final rule.

SUMMARY: The Bureau of Indian Affairs is amending its regulations governing the compilation of rolls of Indians in order to open the enrollment application process for the Western Shoshone Identifiable Group of Indians. The enrollment application process will give individuals an opportunity to file applications to share in the Western Shoshone judgment fund distribution authorized under the Western Shoshone Claims Distribution Act of July 7, 2004.

DATES: *Effective Date:* This rule becomes effective on April 4, 2007.

FOR FURTHER INFORMATION CONTACT: Daisy West, Office of Indian Services, Bureau of Indian Affairs, 1849 C Street, NW., Mail Stop 4513-MIB, Washington, DC, (202) 513-7641.

SUPPLEMENTARY INFORMATION: The authority to issue this document is vested in the Secretary of the Interior by 5 U.S.C. 301, 25 U.S.C. 2 and 9, and Public Law 108-270, 118 Stat. 805. The Secretary has delegated this authority to the Principal Deputy Assistant Secretary—Indian Affairs by part 209 of the Departmental Manual.

Background

The Western Shoshone Judgment Fund Distribution Act dated July 7, 2004, Pub. L. 108-270, 118 Stat. 805 (Act), requires the Secretary of the Interior to establish a judgment fund per capita roll to distribute the judgment funds awarded to the Western Shoshone by the Indian Claims Commission on August 15, 1977, in Docket No. 326-K. The Act also establishes a Western Shoshone Educational Fund with the funds awarded in Dockets Nos. 326-A-1 and 326-A-3. The principal funds will be held in a perpetual trust and the interest funds will be used for educational purposes. Those listed on the per capita payment roll, and their lineal descendants will be eligible to receive the education funds.

Review of Public Comments

The Bureau of Indian Affairs published a proposed rule to amend the regulations in 25 CFR part 61 on May 19, 2005, 70 FR 28859. The comment

period was open for 162 days, from May 19, 2005, to October 28, 2005. Copies of the proposed rule were mailed to approximately 2,300 individuals along with a notice of two public meetings that were being held for the purpose of discussing the proposed rule. The first meeting was held on August 20, 2005, in Elko, Nevada. Approximately 500 individuals attended the meeting. The second meeting was held on August 27, 2005, in Reno, Nevada. Approximately 600 individuals attended the second meeting. We received written comments from 36 individuals concerning the proposed rule. The comments and our responses to the comments are organized into 8 categories. We combined similar comments when the response is the same for each of the comments.

1. Application Period

Comment: We received several comments regarding the length of the application period. Recommendations were made that the application period should be limited to 180 days because BIA is giving individuals too much time to file applications. Another individual recommended that the application period be for one year.

Response: We will not establish a firm application deadline date because we do not know how long it will take BIA to complete the enrollment process. The BIA has a trust responsibility to give potential eligible beneficiaries every opportunity to file an application to share in the judgment fund. Almost 10 years ago the BIA was required to reopen an enrollment application period because the Eighth Circuit Court of Appeals decision in *Loudner v. U.S.*, 108 F.3d 896 (8th Cir. 1997), held that the BIA did not give proper notice of the application period, and that 5 months was not a sufficient time period within which to file applications, in light of internal agency delays in implementing distribution of the fund.

BIA has developed a process for establishing the application deadline date that takes into account the time it may take the BIA to implement the distribution. BIA has adopted the process for establishing the application deadline date that was described in the notice of proposed rule. The process adopted for establishing an application deadline is described below under the heading "Application Deadline" of this preamble.

Comment: The example BIA used to illustrate the process for establishing an application deadline date should be amended to reduce the number of applications received from 10,000 to 5,000 applications.

Response: The number used to illustrate the process for establishing an application deadline date is only an example. Reducing the number used as an example will not clarify our explanation of the process.

2. Eligibility Requirements in 25 CFR 61.4(k)(1)*Comment:*

(a) The ¼ blood degree requirement is abusive to their grandchildren. The funds should be distributed to all Western Shoshone descendants regardless of blood degree.

(b) The regulations should be amended to allow those who died prior to the date of the Act to be eligible for a share of the funds. The amendment would allow the decedent's heirs, who might otherwise be ineligible, to share in the decedent's estate.

(c) Minors' parents filed applications on behalf of their children to share in earlier judgment fund distributions. The applications were filed without the minors' consent. Consequently, many of those individuals are ineligible to share in the Western Shoshone judgment fund distribution. The regulation should be amended to say that "individual Indians of Western Shoshone descent of age 18 or older (at the time of judgment payment roll preparation) that share in any other judgment is ineligible * * *"

Response: We cannot adopt the recommendations because the eligibility requirements in the proposed rule were established by Congress in Section 3 of the Western Shoshone Claims Distribution Act. The BIA cannot change the requirements established through enactment of law.

Comment: Some of the Western Shoshone are concerned that their application to share in this judgment fund distribution will be denied because they were eligible to share in other awards. They did not apply to share, or receive payment from the other judgment fund distributions. To clarify the issue, the BIA should insert the words "and did receive" into 25 CFR 61.4(k)(1)(iv) so that it will read "Any individual that is certified by the Secretary to be eligible to receive and did receive a per capita payment from any other aboriginal land claim * * *"

Response: That situation will not occur. We will limit our review to 1/ judgment fund distributions derived from non-Western Shoshone aboriginal land claims monies, and 2/ to those individuals who are actually listed on an approved judgment fund payment roll, or who have received notification that their application was approved to share in a non-Western Shoshone judgment fund distribution. Only those

individuals would be deemed ineligible to share in the Western Shoshone judgment fund who are listed on an approved non-Western Shoshone judgment fund payment roll, or who have received notification that their application was approved to share in a non-Western Shoshone judgment fund distribution. The words "and did receive" would add many more years to the review process because BIA would need to document whether an individual actually received a payment. In some instances it would be impossible to document because the actual checks used to make the per capita payment were destroyed by the Department of the Treasury many years ago. In cases where the cancelled checks still exist, an individual might appeal their denial claiming that they did not endorse the check.

3. Consultation With Tribal Governments

Comment: The statement should be amended to add the words "or any political organization."

Response: We will not adopt the recommendation because Executive Order 13175 and 513 DM 2 require us to consult with federally recognized tribes when appropriate. We are not required to consult with political organizations, thus we are not required to evaluate the potential effects of this rule on political organizations.

4. Information Collection

Comment:

(a) The estimated burden hours on the public to prepare and file an application should be reduced because everyone already has the required information and documentation.

(b) The BIA should reduce the number of applications it expects to receive from 10,000 to 6,000 because of the recommendation to limit the application period to 180 days.

(c) The BIA should reduce its estimate of the number of applicants from 10,000 to 5,000 because of the $\frac{1}{4}$ Western Shoshone blood degree requirement.

(d) The BIA should reduce its estimate of the time required to review the applications and prepare the roll because BIA already has all of the necessary information concerning the applicants.

Response: We used our prior experience in enrollment matters to develop our estimate of the burden hours required for persons to prepare and file an application. We stand by our estimate.

Comment: The BIA should collect Social Security Numbers to determine if payments were made to the applicants

from earlier judgment fund distributions.

Response: The enrollment application form contains a space for the applicant to provide their Social Security Number.

Comment: Elders should be asked to verify descendants of family members if no other record exists.

Response: The provisions in 25 CFR 61.9 describe the types of records an applicant can use to establish eligibility for enrollment. Affidavits are among the documents listed. The applicant can request an elder to provide an affidavit describing the elder's personal knowledge of an individual's birth date or place of birth, etc.

Comment:

(e) The application process should include Internet online filing.

Response: BIA does not have access to the Internet.

5. Review Process

Comment: BIA should use a computer to manage the application and review process.

Response: BIA will use computers in all phases of the application review process.

Comment: The BIA should make other judgment fund rolls available to BIA staff and contractors. The same process used to develop those rolls should be used to develop the Western Shoshone roll.

Response: Other judgment fund per capita rolls will be cross-referenced with the applications we receive under this enrollment process.

Comment: The applications should be reviewed as they are received. Once the application period closes, 90 days will be sufficient time period to complete the review. If necessary, additional time could be granted in 90-day increments.

Response: The applications will be reviewed in the quickest manner possible. The quickest way is usually by reviewing applications by family group.

Comment: BIA should give the general public access to the Indian census rolls prepared between the years 1885 and 1940. Currently, the information is limited to the descendants of those listed on the census rolls.

Response: BIA does not release personal information to the general public. The census rolls, however, are available from the National Archives Records Administration (NARA).

Comment: BIA should not use the census records prepared by BIA between 1885 and 1940 because the records are inaccurate.

Response: The census records are the most comprehensive lists of Western Shoshone Indians available to us. If the

census records contain inaccurate or conflicting information pertaining to a particular individual, we will use other records to help clarify or correct the record.

Comment: BIA should provide a copy of the completed roll to the Administrative Committee responsible for the Western Shoshone Educational Trust Fund.

Response: The Western Shoshone per capita payment roll is subject to the provisions of the Privacy Act. The information contained on that roll will not be released to anyone without the explicit permission of the individuals listed. Each individual who participates in the distribution has the option to decide if they want to release information to a third party concerning their participation in the distribution.

The Administrative Committee will need to develop a procedure for collecting such information from individuals who want to voluntarily reveal their participation in the Western Shoshone judgment fund distribution.

Comment: BIA should recruit volunteers to review enrollment applications if BIA does not have sufficient funding to hire staff so that the enrollment process can be complete within a year.

Response: BIA is not authorized to recruit volunteers to review enrollment applications. It would be a violation of the prohibition against augmentation of appropriations.

6. Appeal Process

Comment: BIA should establish a separate appeal process for the Western Shoshone Roll preparation.

Response: The appeal process contained in 25 CFR part 62 is sufficient to handle any appeals filed in this process. If it were necessary for a separate appeal process to be established for the Western Shoshone Roll preparation, it would cause at least another year delay to promulgate additional regulations.

7. Partial Per Capita

Comments:

(a) BIA should make a partial per capita payment to all individuals determined eligible as of the date of the closing of the application period.

(b) BIA should make a partial per capita payment to the elders first.

(c) BIA should define the term "elderly" to mean all individuals 55 years of age, or older, on July 7, 2004.

(d) The partial per capita payment should be \$10,000.

(e) The partial per capita payment should be 50 percent.

(f) BIA should not make a partial payment.

Response: The Secretary has a responsibility to ensure that the judgment funds are distributed to eligible individuals in a timely manner. We anticipate that the review process will be lengthy and may cause hardship to many. We are adopting the recommendation to make a partial per capita payment to all individuals determined eligible as of the date of the closing of the application period. It will encourage applicants to file early. It will also give the Western Shoshone the ability to implement Section 4 of the Western Shoshone Claims Distribution Act prior to the completion of the roll. Section 4 pertains to the distribution of a separate fund, called the Western Shoshone Joint Judgment Funds, for educational purposes.

8. Informational Meetings

Comments:

(a) Meetings should be held in Reno and Las Vegas, Nevada, to accommodate the Western Shoshone who are not members of federally recognized tribes.

(b) Meetings should be limited to Te-Moak, Duckwater, Yomba, Ely, Duck Valley and Fallon Reservations. Meetings should not be held at other Shoshone and Shoshone-Paiute Reservations.

Response: We are adopting the recommendation to hold meetings in Reno and Las Vegas, Nevada. Some of the non-enrolled applicants have indicated that they would feel intrusive if they had to attend a meeting held within another tribe's jurisdiction. We will not adopt the recommendations to limit the locations where meeting will be held because it limits the amount of information available to potential applicants.

Changes to the Proposed Rule

We are adding Reno and Las Vegas, Nevada, to the list of locations where we will conduct public meetings for the purpose of answering questions and assisting applicants to prepare and file their applications. We also adopted the recommendation to make a partial per capita payment. The enrollment process will be lengthy and we want to make the funds available to the Western Shoshone as quickly as possible.

Additional Notice and Public Meetings

We will take several steps to ensure that all potential applicants are informed of the opening of the enrollment application period.

(1) We will notify all BIA Regional Directors and Agency Superintendents and require them to post notices in regional offices, agency offices, community centers on and near

reservations, and in Indian Health Clinics.

(2) We will notify tribal newspapers and newspapers of general circulation in major communities in Nevada, California, Idaho, Arizona, Oregon and Utah.

(3) We will hold community meetings in Reno and Las Vegas, Nevada, and on or near the Indian reservations or the established service areas for the following tribes: Duckwater, Duck Valley, Ely, Fallon, Ft. McDermitt, Te-Moak, Timbisha and Yomba.

At each of the community meetings we will:

(1) Inform potential beneficiaries of the opening of the enrollment process for this judgment fund;

(2) Inform potential beneficiaries of eligibility criteria; and

(3) Help applicants to prepare and file applications.

Application Deadline

We will not establish a firm application deadline in this rule. In order to allow adequate time for submitting and processing applications we will establish a deadline using the following three steps:

Step 1. One hundred and eighty days (180) after opening the enrollment application process, we will count all applications that we have received.

Step 2. We will note the date on which we complete the eligibility determinations of 90 percent of the applications that we receive by the date established under Step 1.

Step 3. The application deadline will be 90 days after the date noted in Step 2.

For example, if we receive 10 applications during the first 180 days after opening the application process, the final application deadline date will be 90 days after we process 9 applications. Similarly, if we receive 10,000 applications during the first 180 days after opening the application process, the final application deadline date will be 90 days after we process 9,000 applications.

We will take several steps to ensure that all potential applicants are informed of the application deadline date for filing applications to share in the Western Shoshone judgment fund distribution.

1. We will notify all BIA Regional Directors and Agency Superintendents and require them to post notices in regional offices, agency offices, community centers on and near reservations, and in Indian Health Clinics.

2. We will notify tribal newspapers and newspapers of general circulation

in major communities in Nevada, California, Idaho, Arizona, Oregon and Utah.

3. We will hold community meetings in Reno and Las Vegas, Nevada, and on or near the Indian reservations or the established service areas for the following tribes: Duckwater, Duck Valley, Ely, Fallon, Ft. McDermitt, Te-Moak, Timbisha and Yomba.

At each of the community meetings we will:

(1) Inform potential beneficiaries of the application deadline date for filing applications to share in the distribution of the Western Shoshone judgment fund;

(2) Inform potential beneficiaries of eligibility criteria; and

(3) Help applicants to prepare and file applications.

Partial Per Capita Payment

A partial per capita payment will be made to all individuals determined eligible as of the closing date of the enrollment application period. It will take us approximately 90 days to determine the total number of applicants, and to update the addresses of all of the individuals listed on the partial per capita roll. We anticipate that the first partial payment will not exceed a 70 percent share of the funds. The remaining funds will be distributed after all of the applications have been reviewed and the appeal process is complete. The final payment of remaining funds will include a second partial payment to those who participated in the first payment, and a full (100 percent) share to all individuals determined eligible after the closing date of the enrollment application period.

Regulatory Planning and Review (Executive Order 12866)

This document is not a significant rule and is not subject to review by the Office of Management and Budget under Executive Order 12866.

(1) This rule will not have an effect of \$100 million or more on the economy. It will not adversely affect in a material way the economy, productivity competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities. This rule only involves individual Indians who wish to apply for a share of the Western Shoshone judgment funds.

(2) This rule will not create a serious inconsistency or otherwise interfere with an action taken or planned by another agency. This rule does not impact other agency programs.

(3) This rule does not alter the budgetary effects or entitlement, grants, user fees, or loan programs or the rights or obligations of their recipients. This rule does not impact other agency programs. The funds distributed to eligible applicants will not be considered to be income or resources for any purpose; or be used as a basis for denying or reducing financial assistance or any other benefit to which a household or Western Shoshone member would otherwise be entitled to receive under the Social Security Act, or any other Federal or federally-assisted program. (See subsection 3(c)(3) of Pub. L. 108-270.)

(4) This rule does not raise novel legal or policy issues. All potential legal or policy issues were litigated in several Federal courts during the 1980s and 1990s, before the enactment of Public Law 108-270.

Regulatory Flexibility Act

The Department of the Interior certifies that this document will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule makes technical changes that do not affect the substance of the rules there is no economic effect at all, other than to improve the utility of the rules for users.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

(1) Does not have an annual effect on the economy of \$100 million or more. This rule does not involve small business; it only involves individuals who wish to apply to share in the judgment fund distribution.

(2) Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

(3) Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Unfunded Mandates Reform Act

This rule does not impose an unfunded mandate on State, local, or tribal governments or the private sector of more than \$100 million per year. The rule does not have a significant or unique effect on State, local or tribal governments or the private sector. A statement containing the information required by the Unfunded Mandates

Reform Act (1 U.S.C. 1531 *et seq.*) is not required. This rule does not involve small business; it only involves individuals who wish to apply to share in the judgment fund distribution.

Takings (Executive Order 12630)

In accordance with Executive Order 12630, the rule does not have significant takings implications. This rule does not affect property rights of the public. This rule does not involve a taking, it only involves individuals who wish to apply to share in the judgment fund distribution. A takings implication assessment is not required.

Federalism (Executive Order 13132)

In accordance with Executive Order 13132, this rule does not have significant Federalism effects. A significant Federalism assessment is not required. The rule will not have substantial direct effects on a state or tribe, in the relationship between the Federal Government and a state or tribe, or on the distribution of power and responsibilities among the various levels of government.

Civil Justice Reform (Executive Order 12988)

This rule complies with the requirements of Executive Order 12988. Specifically, this rule:

(a) Does not unduly burden the judicial system;

(b) Meets the criteria of section 3(a) requiring that all regulations be reviewed to eliminate errors and ambiguity and be written to minimize litigation; and

(c) Meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

Any enrollment appeals will be decided by the Secretary of the Interior under 25 U.S.C. 62.

Paperwork Reduction Act

This rule requires collection of information from many enrollees. As required by the Paperwork Reduction Act of 1995 (44 U.S.C. 3507(d)), the Department submitted a copy of the application to the Office of Management and Budget (OMB) for its review. OMB approved the application form and assigned it OMB Control Number 1076-0165 with the expiration date of June 30, 2008.

The information collected is submitted to obtain a benefit, namely a share in the funding distribution. The nature of the information, such as birth/death certificates, etc., indicates the respondent will keep their own copies indefinitely for their own purposes.

Because of the nature of some of the information, it will be protected under the Privacy Act, 5 U.S.C. 552a.

The burden of preparing and submitting an application to share in the judgment fund distribution will vary widely depending upon the applicant's age and family history. Individuals 50 years or older will probably spend an average of 1 hour per response. Those individuals 30 years and younger, and non-enrolled tribal members may require 20 hours to prepare a response, including the time for reviewing instructions, gathering and maintaining data, and completing and reviewing the form. The applicants are required to file only once during the estimated 2-year enrollment application period. We estimate that the total burden hours for the entire process is 112,000 hours for a 2-year annual average of 56,000 hours.

We invite comments on:

(1) Whether the proposed collection of information is necessary for the proper performance of the Program, including the practical utility of the information to BIA;

(2) the accuracy of BIA's burden estimates;

(3) ways to enhance the quality, utility, and clarity of the information collected; and

(4) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology.

You may submit comments on ways to reduce the burden to the Information Collection Clearance Officer at 625 Herndon Parkway, Herndon, VA 20170.

We will not request nor sponsor a collection of information, and you need not respond to such a request, if there is no valid Office of Management and Budget Control Number.

National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment. A detailed statement under the National Environmental Policy Act of 1969 is not required. This rule does not impact the environment; it only involves individuals who wish to apply to share in the judgment fund distribution.

Consultation With Indian Tribes (Executive Order 13175)

In accordance with Executive Order 13175, we understand that we must relate to federally recognized Indian tribes on a government-to-government basis. We have evaluated potential effects on federally recognized Indian tribes and have determined that there are no potential effects. The judgment

funds do not belong to any federally recognized tribe, nor can any tribe treat the judgment funds as a tribal resource. The judgment funds will be distributed to individual Indians of Western Shoshone descent, who may or may not be enrolled with a federally recognized tribe.

Effects on the Nation's Energy Supply (Executive Order 13211)

In accordance with Executive Order 13211, this regulation does not have a significant effect on the nation's energy supply, distribution, or use. This rule does not involve the nation's energy supply; it only involves individuals who wish to apply to share in the judgment fund distribution.

Data Quality Act

In developing this rule, we did not conduct or use a study, experiment, or survey requiring peer review under the Data Quality Act (Pub. L. 106-554).

List of Subjects in 25 CFR Part 61

Indians, Indians—claims.

Dated: February 16, 2007.

Michael D. Olsen,

Principal Deputy Assistant Secretary—Indian Affairs.

■ For the reasons set out in the preamble, Part 61 of Chapter 1 of Title 25 Code of Federal Regulations is amended as set forth below.

PART 61—PREPARATION OF ROLLS OF INDIANS

■ 1. The authority citation for 25 CFR part 61 is revised to read as follows:

Authority: 5 U.S.C. 301; 25 U.S.C. 2 and 9, 1300d-3(b), 1401 *et seq.*, and Pub. L. 108-270.

■ 2. Section 61.3 is revised to read as follows:

§ 61.3 Information collection.

The Office of Management and Budget has reviewed and approved the information collection for § 61.4(k). The OMB Control Number assigned is 1076-0165. A federal agency may not conduct or sponsor, and you are not required to respond to, a collection of information unless it displays a currently valid OMB Control Number.

■ 3. Section 61.4 is amended by adding a new paragraph (k) to read as follows:

§ 61.4 Qualifications for enrollment and the deadline for filing application forms.

* * * * *

(k) *Western Shoshone Identifiable Group of Indians.*

(1) Under section 3(b)(1) of the Act of July 7, 2004, Pub. L. 108-270, 118 Stat. 805, the Secretary will prepare a roll of all individuals who meet the eligibility criteria established under the Act and who file timely applications prior to a date that will be established by a notice published in the **Federal Register**. The roll will be used as the basis for distributing the judgment funds awarded by the Indian Claims

Commission to the Western Shoshone Identifiable Group of Indians in Docket No. 326-K. To be eligible a person must:

(i) Have at least ¼ degree of Western Shoshone blood;

(ii) Be living on July 7, 2004;

(iii) Be a citizen of the United States; and

(iv) Not be certified by the Secretary to be eligible to receive a per capita payment from any other judgment fund based on an aboriginal land claim awarded by the Indian Claims Commission, the United States Claims Court, or the United States Court of Federal Claims, that was appropriated on or before July 7, 2004.

(2) Indian census rolls prepared by the Agents or Superintendents at Carson or Western Shoshone Agencies between the years of 1885 and 1940, and other documents acceptable to the Secretary will be used in establishing proof of eligibility of an individual to:

(i) Be listed on the judgment roll; and

(ii) Receive a per capita payment under the Western Shoshone Claims Distribution Act.

(3) Application forms for enrollment must be mailed to Tribal Government Services, BIA-Western Shoshone, Post Office Box 3838, Phoenix, Arizona 85030-3838.

(4) The application period will remain open until further notice.

* * * * *

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