



United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Pacific Regional Office
2800 Cottage Way
Sacramento, California 95825

IN REPLY REFER TO:

MAY 20 2014
NOTICE OF DECISION

CERTIFIED MAIL-RETURN RECEIPT REQUESTED – 7011 1570 0000 4227 8005

Honorable Clifford LaChappa
Chairman, Barona Group of the Capitan Grande Band of Mission Indians
1095 Barona Road
Lakeside, CA 92040

Dear Chairman LaChappa:

This is our Notice of Decision for the application of the Barona Group of the Capitan Grande Band of Mission Indians to have the below-described property accepted by the United States of America in trust for the Barona Group of the Capitan Grande Band of Mission Indians of the Barona Reservation, California:

Real property in the City of San Diego, County of San Diego, State of California, described as follows:

NORTHEAST QUARTER AND NORTHWEST QUARTER OF SOUTHEAST QUARTER OF SECTION 29, TOWNSHIP 14 SOUTH, RANGE 1 EAST, SAN BERNARDINO MERIDIAN, IN THE COUNTY OF SAN DIEGO, STATE OF CALIFORNIA, ACCORDING TO THE UNITED STATES GOVERNMENT SURVEY.

The subject property consists of one parcel commonly referred to as Assessor's Parcel Number 329-090-03. The parcel is contiguous to the Barona Reservation.

Federal Law authorizes the Secretary of the Interior, or his authorized representative, to acquire title on behalf of the United States of America for the benefit of tribes when such acquisition is authorized by an Act of Congress and (1) when such lands are within the consolidation area; or (2) when the tribe already owns an interest in the land; or (3) when the Secretary determines that the land is necessary to facilitate tribal self-determination, economic development, or tribal housing. In this particular instance, the authorizing Act of Congress is the Indian Land Consolidation of 1983 (25 U.S.C. § 2202). The applicable regulations are set forth in the Code of Federal Regulations (CFR), Title 25, INDIANS, Part 151, as amended. This land acquisition falls within the land acquisition policy as set forth by the Secretary of the Interior.

TAKE PRIDE
IN AMERICA 

On November 8, 2013 by certified mail, return receipt requested, we issued notice of and sought comments regarding the proposed fee-to-trust application from the California State Clearinghouse, Office of Planning and Research; Ms. Andrea Lynn Hoch, Legal Affairs Secretary, Office of the Governor; Sara Drake, Deputy Attorney General, State of California; James Peterson, District Director, Office of the Honorable Senator Dianne Feinstein; U.S. House of Representatives, 52nd District; San Diego County Assessor; San Diego County Treasurer and Tax Collector; County of San Diego, Office of the Chief Administrative Officer; San Diego County Sheriff's Department; Campo Band of Mission Indians; Ewiiapaayp Band of Kumeyaay Indians; Inaja-Cosmit Band of Mission Indians; Jamul Indian Village; La Jolla Band of Luiseno Indians; La Posta Band of Mission Indians; Los Coyotes Band of Cahuilla & Cupeno Indians; Manzanita Band of Mission Indians; Mesa Grande Band of Mission Indians; Pala Band of Mission Indians; Pauma Band of Mission Indians; Rincon Band of Mission Indians; San Pasqual Band of Mission Indians; Santa Ysabel Band of Mission Indians; Sycuan Band; and the Viejas Band of Mission Indians. The November 8, 2013 Notice superseded a Notice of Application issued by the Bureau of Indian Affairs, Southern California Agency, dated May 7, 2007.

The May 7, 2007 Notice of Application, received five (5) comment letters from the following:

1. Letter dated May 31, 2007 from the County of San Diego, Assessor/Recorder/County Clerk providing information on the assessed value and property tax information on the subject property.
2. Letter dated June 8, 2007 from the County of San Diego, Chief Administrative Office opposing the fee-to-trust application.
 - A. The County does not agree that the subject parcel is contiguous to the exterior boundaries of the Barona Indian Reservation.
 - B. The County opposes all trust taking in the absence of "a negotiated agreement to mitigate the impacts of the existing Barona Casino."
 - C. The "impacts of removing APN 329-090-03 from County jurisdiction and the tax roll have not been addressed."

By letter dated August 15, 2007, the Barona Band responded to the above opposing comment letter.

- **Because Congress took the former Brynwood and Hutton parcels into trust for the Barona Band as additions to the Barona Indian Reservation in 2004, the current subject 200 acres parcel is contiguous to the Indian Reservation.**
- **The Indian Gaming Regulatory Act, 25 U.S.C. 2701, et seq., ("IGRA") requires each tribe desiring to engage in class III gaming to enter**

into a compact with the state in which the gaming is located. The statute simply does not speak of or require a negotiated agreement with the County.

- The Barona Band has offered to provide exactly what the County now seeks. The impact on the County's tax roll is infinitesimal. Whatever loss of tax revenue will befall the County is more than offset by the benefits that the Barona Band confers on the County and its residents.
3. Letter dated June 8, 2007 from Ewiiapaayp Band supporting the fee-to-trust application.
 4. Letter dated July 6, 2007 from Congressman Duncan Hunter stating concerns on the Tribe accessing the San Vicente Reservoir for the purpose of building a pipeline to transport water from the reservoir to the reservation.

Congressman Hunter's goal has been to help identify a solution that will provide a benefit to all involved and assist whenever possible. He requests not to place this land into trust at this time, until the entire community endorses an approach that meets the needs of all its residents.

Mr. Hunter stated: "I do not oppose the overall goals of the Tribe to build a pipeline to the reservoir." He believes it will serve a great benefit toward meeting some of the water needs of our local community.

Mr. Hunter respectfully requests and recommends that a groundwater study of the reservation and the surrounding community be incorporated into any federal environmental examination that occurs for purposes of placing this land into trust.

By letter dated August 15, 2007, the Barona Band responded to the above comment letter.

A groundwater study might be appropriate for a pipeline project, but not for this trust taking for housing purposes. As stated in the application, the Barona Band's primary purpose in seeking this trust taking is to provide land for housing.

At this time the pipeline project is far too speculative to be the basis for environmental review focused on it. Before any such project could proceed, the following would have to occur. At this time, there is no specific project concerning any pipeline, only the possibility that, at some time in the future, if and when all the approvals have been obtained, the route of such a pipeline might traverse the subject parcel.

By letter dated January 12, 2012, the Barona Band states for clarification, that the Tribe has no plans for housing at this time.

A Finding of No Significant Impact (FONSI) was signed April 22, 2013, in cooperation with the Barona Band, to select the No Action Alternative, as it best meets the purpose and need of the Tribe. As no development is currently proposed for the property, no significant impacts are anticipated.

5. Letter dated July 13, 2007 from the Office of the Governor opposing the fee-to-trust application as follows:

- A. The Band Failed to Provide Sufficient Demonstration of Immediate Need or Necessity Required by 25 U.S.C. § 465 and 25 C.F.R. §§ 151.3(a)(3), 151.10(b).
- B. The Band's Application Did Not Provide Enough Information to Allow the Secretary to Comply with the National Environmental Policy Act.

By letter dated August 15, 2007, the Barona Band responded to the above opposing comment letter.

- The relevant code and CFR sections do not require a showing of "immediate or necessity."
- All that the statute and regulations require is that a trust taking "is necessary to facilitate ... Indian housing" and that there is a "need of the ... tribe for additional lands."
- The Secretary will perform a standard Environmental Assessment and, based on it, will issue a Finding of No Significant Impact.

By letter dated January 12, 2012, the Barona Band states for clarification, that the Tribe has no plans for housing at this time.

A Finding of No Significant Impact (FONSI) was signed April 22, 2013, in cooperation with the Barona Band, to select the No Action Alternative, as it best meets the purpose and need of the Tribe. As no development is currently proposed for the property, no significant impacts are anticipated.

In response to the re-issue of our November 8, 2013 notification, we received the following comments:

1. Letter dated November 18, 2013 from the Native American Heritage Commission stating that they had no objections to the proposed acquisition.
2. Letter dated December 4, 2013 from the County of San Diego, Assessor/Recorder/County Clerk providing information on the assessed value and property tax information on the subject property.
3. Letter dated December 16, 2013 from the County of San Diego, Planning & Development Services stating the following:

- *The annual amount of property taxes currently levied on the subject property allocated to your organization.*
- *Any special assessments and amounts thereof that are currently assessed against the property in support of your organizations.*
- *Any government services that are currently provided to the property by your organization.*
- *If subject to zoning, how the intended use is consistent, or inconsistent, with current zoning.*

By letter dated January 28, 2014, the Barona Band's response is as follows:

- ***The annual amount of property taxes currently paid to the County is \$25,976.92, which includes special assessments for services that the tribe provides for areas in which it has jurisdiction. The tribe provides its own fire and paramedic services. In addition, the tribe contracts with the San Diego County Sheriff to provide a resident Deputy Sheriff and has its own Tribal Enforcement Dept. to supplement the law enforcements services of the sheriff.***
- ***Education is provided via a charter school located on the Barona Indian Reservation, and the tribe regularly supports local schools and charities. This is in addition to funds that county agencies receive from the Special Distribution Fund, which is funded by the tribe.***
- ***The services provided by the tribe far exceed any projected loss in property tax revenue.***
- ***The County points out that the property has access to regionally-provided County services, but cannot point to any services that have actually been provided.***
- ***The County is also at a loss to point to any area in which the intended use for the property is inconsistent with current zoning. Instead, they urge the BIA to consider the cumulative fiscal impact of all proposed trust application in San Diego when evaluating this specific trust application. This approach would be inconsistent with the evaluation criteria set forth in 25 CFR 151.***

Pursuant to 25 CFR 151.10, the following factors were considered in formulating our decision: (1) the need of the tribe for additional land; (2) the purposes for which the land will be used; (3) impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls; (4) jurisdictional problems and potential conflicts

of land use which may arise; (5) whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of land in trust status; (6) the extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions; Hazardous Substances Determinations. Accordingly, the following analysis of the application is provided.

Factor 1 - Need for Additional Land

Barona needs this land to provide for future needs of the reservation. Population growth increases the need for dependable water sources, as well as additional housing.

Although an agreement is far from complete, and negotiations are currently on hold, the Tribe has entered into negotiations with the City of San Diego to construct a pipeline to pump non-portable water from the San Vicente Reservoir to the reservation boundary. The reservoir does not border the reservation. The proposed pipeline runs across this parcel to reach reservation land. Any water received will be used to supplement the Tribe's water supply and will ensure that adequate water is available for the tribe's future subsistence.

This land has never been developed. The only possible land use change is anticipated at the present time is future construction of the water pipeline. The letter dated January 12, 2012 from the tribe clarifies the tribe has no plans for housing at this time.

An Executive Order of December 27, 1875 set aside land for this Reservation and Executive Order of May 3, 1877 and May 15, 1976 restored portions to public domain. An Act of May 27, 1902 appropriated \$100,000.00 for purchase of land in Southern California for Mission Indians (32 Stat. 257 c. 888). Executive Order of June 19, 1883 set apart certain lands for this reservation.

Factor 2 - Proposed Land Use

The land acquisition is for 200.40 acres more or less, consisting of one parcel located in San Diego County, California. The property site is undeveloped with rock outcroppings and steep sloping hillsides. The subject property is contiguous to the Barona Reservation. This land has never been developed. The only possible land use change is anticipated at the present time is future construction of the water pipeline.

Factor 3 – Impact on State and Local Government's Tax Base

This parcel has very little impact on the state and its political subdivisions. The Tribe is hopeful that, at some point in time, an agreement can be reached with the City of San Diego to construct a pipeline and begin pumping water from the San Vicente Reservoir. The land will not be used for any commercial purposes, it is therefore not expected to increase traffic or police protection. In fact, acquisition of this parcel will have a positive impact on the County of San Diego in that it provides a means by which the Tribe may

acquire sufficient water to not only meet the needs of its people, but also to enhance the ability of the Barona Fire Department to control fires on the reservation as well as the surrounding communities. The only negative impact on the County of San Diego, in which the parcel is located, will be the loss of an estimated \$20,000 per year in property taxes.

Factor 4 - Jurisdictional Problems and Potential Conflicts of Land Use Which May Arise

There are no land use conflicts. The Tribe does not intend to develop this parcel, other than construct a pipeline, when and if an agreement is reached with the City of San Diego. Other than the area needed to construct and maintain the pipeline, at the present time, the Tribe plans to leave the parcel in its original condition.

The land presently is subject to the full civil/regulatory and criminal/prohibitory jurisdiction of the State of California and San Diego County. Once the land is accepted into trust and becomes part of the Reservation, the State of California will have the same territorial and adjudicatory jurisdiction over the land, persons and transactions on the land as the State has over other Indian counties within the State. Under 18 U.S.C. § 1162 and 28 U.S.C. § 1360 (P.L. 83-280), except as otherwise expressly provided in those statutes, the State of California would retain jurisdiction to enforce its criminal/prohibitory law against all persons and conduct occurring on the land. The Barona Indian Reservation will continue to provide fire protection, emergency medical services and a tribal security force.

Factor 5 - Whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status

Acceptance of the acquired land into Federal trust status should not impose any additional responsibilities or burdens on the BIA beyond those already inherent in the Federal trusteeship over the existing Barona Reservation. This acquisition anticipates no change in land use; and therefore, any additional responsibilities resulting from this transaction will be minimal.

Factor 6 – The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 1-7, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determination

In accordance with Interior Department Policy (602 DM 2), we are charged with the responsibility of conducting a site assessment for the purposes of determining the potential of, and extent of liability from hazardous substances or other environmental remediation or injury. The record includes a negative Phase 1 "Contaminant Survey Checklist" dated January 31, 2014, reflecting that there were no hazardous materials or contaminants.

National Environmental Policy Act Compliance

An additional requirement, which has to be met when considering land acquisition proposals, is the impact upon the human environment pursuant to the criteria of the National Environmental Policy Act of 1969 (NEPA). The BIA's guidelines for NEPA compliance are set forth in Part 30 of the Bureau of Indian Affairs Manual (30 BIAM), Supplement 1. An Environmental Assessment was prepared in April 2013, and a Finding of No Significant Impact (FONSI) was issued on April 22, 2013. The comment review period expired on May 22, 2013. No substantive objecting comments were received on the Environmental Assessment or the FONSI. Compliance with NEPA has been completed.

Conclusion

Based on the foregoing, we at this time issue notice of our intent to accept the subject real property into trust. The subject acquisition will vest title in the United States of America in trust for the Barona Group of the Capitan Grande Band of Mission Indians of the Barona Reservation, California, in accordance with the Indian Land Consolidation Act of January 12, 1983, (25 U.S.C. §2202).

Should any of the below-listed known interested parties feel adversely affected by this decision, an appeal may be filed within thirty (30) days of receipt of this notice with the Interior Board of Indian Appeals, U.S. Department of the Interior, 801 N. Quincy St., Suite 300, Arlington, Virginia 22203, in accordance with the regulations in 43 CFR 4.310-4.340 (copy enclosed).

Any notice of appeal to the Board must be signed by the appellant or the appellant's legal counsel, and the notice of the appeal must be mailed within thirty (30) days of the date of receipt of this notice. The notice of appeal should clearly identify the decision being appealed.

If possible, a copy of this decision should be attached. Any appellant must send copies of the notice of appeal to: (1) the Assistant Secretary of Indian Affairs, U.S. Department of Interior 1849 C Street, N.W., MS-3071-MIB, Washington, D.C. 20240; (2) each interested party known to the appellant; and (3) this office. Any notice of appeal sent to the Board of Indian Appeals must certify that copies have been sent to interested parties. If a notice of appeal is filed, the Board of Indian Appeals will notify appellant of further appeal procedures. If no appeal is timely filed, further notice of a final agency action will be issued by the undersigned pursuant to 25 CFR 151.12(b). No extension of time may be granted for filing a notice of appeal.

If any party receiving this notice is aware of additional governmental entities that may be affected by the subject acquisition, please forward a copy of this notice to said party or timely provide our office with the name and address of said party.

Sincerely,

Handwritten signature of Amy H. Cluttschke in cursive script.

Regional Director

Enclosure:

43 CFR 4.310, et seq.

cc: Distribution List

DISTRIBUTION LIST

cc: BY CERTIFIED MAIL – RETURN RECEIPTS REQUESTED TO:

California State Clearinghouse (10 copies) – 7011 1570 0000 4227 8012
Office Planning and Research
P.O. Box 3044
Sacramento, CA 95814

Mr. Daniel Powell – 7011 1570 0000 4227 8029
Legal Affairs Secretary
Office of the Governor
State Capitol Building
Sacramento, CA 95814

Ms. Sara Drake – 7011 1570 0000 4227 8036
Deputy Attorney General
State of California
Department of Justice
P.O. Box 944255
Sacramento, CA 94244-2550

U.S. Senator Dianne Feinstein- 7011 1570 0000 4227 8043
331 Hart Senate Office Building
Washington, DC 20510

U.S. House of Representatives – 7011 1570 0000 4227 8050
52nd District
4350 Executive Drive, Suite 105
San Diego, CA 92121

San Diego County Assessor - 7012
600 Pacific Highway, Suite 103
San Diego, CA 92101

San Diego Treasurer & Tax Collector – 7011 1570 0000 4227 8067
1600 Pacific Highway, Suite 162
San Diego, CA 92101-2480

County of San Diego – 7011 1570 0000 4227 8074
Office of the Chief Administrative Officer
1600 Pacific Highway #209
San Diego, CA 92101-2480

San Diego County Sheriff's Department – 7011 1570 0000 4227 8081
P.O. Box 939062
San Diego, CA 92193-9062

San Diego County Department of Public Works – 7011 1570 0000 4227 8098
5510 Overland Avenue, Suite 410
San Diego, CA 92123

Department of Planning and Land Use – 7011 1570 0000 4227 8104
5510 Overland Ave, Suite 310
San Diego, CA 92123

Chairperson – 7011 1570 0000 4227 8111
Campo Band of Mission Indians
36190 Church Rd., Suite 1
Campo, CA 91906

Chairperson – 7011 0470 0000 4878 7504
Ewiiapaayp Band of Kumeyaay Indians
4054 Willows Road
Alpine, CA 91901

Chairperson – 7012 0470 0000 4879 4724
Jamul Indian Village
P.O. Box 612
Jamul, CA 91935

Chairperson – 7012 0470 0000 4879 4731
La Jolla Band of Luiseno Indians
22000 Highway 76
Pauma Valley, CA 92061

Chairperson – 7012 0470 0000 4879 4748
La Posta Band of Mission Indians
8 Crestwood Road, Box 1
Boulevard, CA 91905

Chairperson – 7012 0470 0000 4879 4755
Los Coyotes Band of Cahuilla & Cupeno Indians
P.O. Box 189
Warner Springs, CA 92086

Chairperson – 7012 0470 0000 4879 4762
Manzanita Band of Mission Indians
P.O. Box 1302
Boulevard, CA 91905

Chairperson – 7012 0470 0000 4879 4779
Mesa Grande Band of Mission Indians
P.O. Box 270
Santa Ysabel, CA 92070

Chairperson – 7012 0470 0000 4879 4786
Pala Reservation
P. O. Box 369
Pauma Valley, CA 92061

Chairperson – 7012 0470 0000 4879 4793
Pauma Band of Mission Indians
P. O. Box 369
Pauma Valley, CA 92061

Chairperson – 7012 0470 0000 4879 4809
Pechanga Band of Mission Indians
P.O. Box 1477
Temecula, CA 92593

Chairperson – 7012 0470 0000 4879 4816
Rincon Band of Mission Indians
1 West Tribal Road
Valley Center, CA 92082

Chairperson – 7012 0470 0000 4879 4823
San Pasqual Band of Mission Indians
P.O. Box 365
Valley Center, CA 92082

Chairperson – 7012 0470 0000 4879 4830
Santa Ysabel Band of Mission Indians
P.O. Box 130
Santa Ysabel, CA 92070

Chairperson – 7012 0470 0000 4879 4847
Sycuan Band of Mission Indians
1 Kumeyaay Court
El Cajon, CA 92019

Chairperson – 7012 0470 0000 4879 4854
Viejas (Baron Long) Band of Mission Indians
P.O. Box 908
Alpine, CA 91903

Regular Mail:

Chairperson
Inaja-Cosmit Band of Mission Indians
2005 S. Escondido Blvd.
Escondido, CA 92025

Superintendent, Southern California Agency, BIA
1451 Research Park Drive, Suite 100
Riverside, California 92507-2154

Email:

Assistant Secretary- Indian Affairs

Office of the Secretary, Interior

§ 4.310

state specifically and concisely the grounds upon which it is based.

(b) *Notice; burden of proof.* The OHA deciding official will, upon receipt of a demand for hearing, set a time and place therefor and must mail notice thereof to all parties in interest not less than 30 days in advance; provided, however, that such date must be set after the expiration of the 60-day period fixed for the filing of the demand for hearing as provided in § 4.305(a). At the hearing, each party challenging the tribe's claim to purchase the interests in question or the valuation of the interests as set forth in the valuation report will have the burden of proving his or her position.

(c) *Decision after hearing; appeal.* Upon conclusion of the hearing, the OHA deciding official will issue a decision which determines all of the issues including, but not limited to, a judgment establishing the fair market value of the interests purchased by the tribe, including any adjustment thereof made necessary by the surviving spouse's decision to reserve a life estate in one-half of the interests. The decision must specify the right of appeal to the Board of Indian Appeals within 60 days from the date of the decision in accordance with §§ 4.310 through 4.323. The OHA deciding official must lodge the complete record relating to the demand for hearing with the title plant as provided in § 4.236(b), furnish a duplicate record thereof to the Superintendent, and mail a notice of such action together with a copy of the decision to each party in interest.

§ 4.306 Time for payment.

A tribe must pay the full fair market value of the interests purchased, as set forth in the valuation report or as determined after hearing in accordance with § 4.305, whichever is applicable, within 2 years from the date of decedent's death or within 1 year from the date of notice of purchase, whichever comes later.

§ 4.307 Title.

Upon payment by the tribe of the interests purchased, the Superintendent must issue a certificate to the OHA deciding official that this has been done and file therewith such documents in

support thereof as the OHA deciding official may require. The OHA deciding official will then issue an order that the United States holds title to such interests in trust for the tribe, lodge the complete record, including the decision, with the title plant as provided in § 4.236(b), furnish a duplicate record thereof to the Superintendent, and mail a notice of such action together with a copy of the decision to each party in interest.

§ 4.308 Disposition of income.

During the pendency of the probate and up to the date of transfer of title to the United States in trust for the tribe in accordance with § 4.307, all income received or accrued from the land interests purchased by the tribe will be credited to the estate.

CROSS REFERENCE: See 25 CFR part 2 for procedures for appeals to Area Directors and to the Commissioner of the Bureau of Indian Affairs.

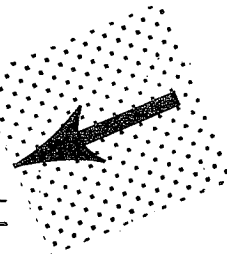
GENERAL RULES APPLICABLE TO PROCEEDINGS ON APPEAL BEFORE THE INTERIOR BOARD OF INDIAN APPEALS

SOURCE: 66 FR 67656, Dec. 31, 2001, unless otherwise noted.

§ 4.310 Documents.

(a) *Filing.* The effective date for filing a notice of appeal or other document with the Board during the course of an appeal is the date of mailing or the date of personal delivery, except that a motion for the Board to assume jurisdiction over an appeal under 25 CFR 2.20(e) will be effective the date it is received by the Board.

(b) *Service.* Notices of appeal and pleadings must be served on all parties in interest in any proceeding before the Interior Board of Indian Appeals by the party filing the notice or pleading with the Board. Service must be accomplished upon personal delivery or mailing. Where a party is represented in an appeal by an attorney or other representative authorized under 43 CFR 1.3, service of any document on the attorney or representative is service on the party. Where a party is represented by more than one attorney, service on any one attorney is sufficient. The certificate of service on an attorney or



§4.311

representative must include the name of the party whom the attorney or representative represents and indicate that service was made on the attorney or representative.

(c) *Computation of time for filing and service.* Except as otherwise provided by law, in computing any period of time prescribed for filing and serving a document, the day upon which the decision or document to be appealed or answered was served or the day of any other event after which a designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, Federal legal holiday, or other nonbusiness day, in which event the period runs until the end of the next day which is not a Saturday, Sunday, Federal legal holiday, or other nonbusiness day. When the time prescribed or allowed is 7 days or less, intermediate Saturdays, Sundays, Federal legal holidays, and other nonbusiness days are excluded in the computation.

(d) *Extensions of time.* (1) The time for filing or serving any document except a notice of appeal may be extended by the Board.

(2) A request to the Board for an extension of time must be filed within the time originally allowed for filing.

(3) For good cause the Board may grant an extension of time on its own initiative.

(e) *Retention of documents.* All documents received in evidence at a hearing or submitted for the record in any proceeding before the Board will be retained with the official record of the proceeding. The Board, in its discretion, may permit the withdrawal of original documents while a case is pending or after a decision becomes final upon conditions as required by the Board.

§4.311 Briefs on appeal.

(a) The appellant may file an opening brief within 30 days after receipt of the notice of docketing. Appellant must serve copies of the opening brief upon all interested parties or counsel and file a certificate with the Board showing service upon the named parties. Opposing parties or counsel will have 30 days from receipt of appellant's brief

43 CFR Subtitle A (10-1-03 Edition)

to file answer briefs, copies of which must be served upon the appellant or counsel and all other parties in interest. A certificate showing service of the answer brief upon all parties or counsel must be attached to the answer filed with the Board.

(b) Appellant may reply to an answering brief within 15 days from its receipt. A certificate showing service of the reply brief upon all parties or counsel must be attached to the reply filed with the Board. Except by special permission of the Board, no other briefs will be allowed on appeal.

(c) The BIA is considered an interested party in any proceeding before the Board. The Board may request that the BIA submit a brief in any case before the Board.

(d) An original only of each document should be filed with the Board. Documents should not be bound along the side.

(e) The Board may also specify a date on or before which a brief is due. Unless expedited briefing has been granted, such date may not be less than the appropriate period of time established in this section.

§4.312 Decisions.

Decisions of the Board will be made in writing and will set forth findings of fact and conclusions of law. The decision may adopt, modify, reverse or set aside any proposed finding, conclusion, or order of a BIA official or an OHA deciding official. Distribution of decisions must be made by the Board to all parties concerned. Unless otherwise stated in the decision, rulings by the Board are final for the Department and must be given immediate effect.

§4.313 Amicus Curiae; intervention; joinder motions.

(a) Any interested person or Indian tribe desiring to intervene or to join other parties or to appear as amicus curiae or to obtain an order in an appeal before the Board must apply in writing to the Board stating the grounds for the action sought. Permission to intervene, to join parties, to appear, or for other relief, may be granted for purposes and subject to limitations established by the Board. This section will be liberally construed.

(b) Motions to intervene, to appear as *amicus curiae*, to join additional parties, or to obtain an order in an appeal pending before the Board must be served in the same manner as appeal briefs.

§ 4.314 Exhaustion of administrative remedies.

(a) No decision of an OHA deciding official or a BIA official, which 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 made effective pending decision on appeal by order of the Board.

(b) No further appeal will lie within the Department from a decision of the Board.

(c) The filing of a petition for reconsideration is not required to exhaust administrative remedies.

§ 4.315 Reconsideration.

(a) Reconsideration of a decision of the Board will be granted only in extraordinary circumstances. Any party to the decision may petition for reconsideration. The petition must be filed with the Board within 30 days from the date of the decision and must contain a detailed statement of the reasons why reconsideration should be granted.

(b) A party may file only one petition for reconsideration.

(c) The filing of a petition will not stay the effect of any decision or order and will not affect the finality of any decision or order for purposes of judicial review, unless so ordered by the Board.

§ 4.316 Remands from courts.

Whenever any matter is remanded from any federal court to the Board for further proceedings, the Board will either remand the matter to an OHA deciding official or to the BIA, or to the extent the court's directive and time limitations will permit, the parties will be allowed an opportunity to submit to the Board a report recommending procedures for it to follow to comply with the court's order. The Board will enter special orders governing matters on remand.

§ 4.317 Standards of conduct.

(a) *Inquiries about cases.* All inquiries with respect to any matter pending before the Board must be made to the Chief Administrative Judge of the Board or the administrative judge assigned the matter.

(b) *Disqualification.* An administrative judge may withdraw from a case in accordance with standards found in the recognized canons of judicial ethics if the judge deems such action appropriate. If, prior to a decision of the Board, a party files an affidavit of personal bias or disqualification with substantiating facts, and the administrative judge concerned does not withdraw, the Director of the Office of Hearings and Appeals will determine the matter of disqualification.

§ 4.318 Scope of review.

An appeal will be limited to those issues which were before the OHA deciding official upon the petition for rehearing, reopening, or regarding tribal purchase of interests, or before the BIA official on review. However, except as specifically limited in this part or in title 25 of the Code of Federal Regulations, the Board will not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate.

APPEALS TO THE BOARD OF INDIAN APPEALS IN PROBATE MATTERS

SOURCE: 66 FR 67656, Dec. 31, 2001, unless otherwise noted.

§ 4.320 Who may appeal.

(a) A party in interest has a right to appeal to the Board from an order of an OHA deciding official on a petition for rehearing, a petition for reopening, or regarding tribal purchase of interests in a deceased Indian's trust estate.

(b) Notice of appeal. Within 60 days from the date of the decision, an appellant must file a written notice of appeal signed by appellant, appellant's attorney, or other qualified representative as provided in 43 CFR 1.3, with the Board of Indian Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203. A

§ 4.321

statement of the errors of fact and law upon which the appeal is based must be included in either the notice of appeal or in any brief filed. The notice of appeal must include the names and addresses of parties served. A notice of appeal not timely filed will be dismissed for lack of jurisdiction.

(c) Service of copies of notice of appeal. The appellant must personally deliver or mail the original notice of appeal to the Board of Indian Appeals. A copy must be served upon the OHA deciding official whose decision is appealed as well as all interested parties. The notice of appeal filed with the Board must include a certification that service was made as required by this section.

(d) Action by the OHA deciding official; record inspection. The OHA deciding official, upon receiving a copy of the notice of appeal, must notify the Superintendent concerned to return the duplicate record filed under §§ 4.236(b) and 4.241(d), or under § 4.242(f) of this part, to the Land Titles and Records Office designated under § 4.236(b) of this part. The duplicate record must be conformed to the original by the Land Titles and Records Office and will thereafter be available for inspection either at the Land Titles and Records Office or at the office of the Superintendent. In those cases in which a transcript of the hearing was not prepared, the OHA deciding official will have a transcript prepared which must be forwarded to the Board within 30 days from receipt of a copy of the notice of appeal.

[66 FR 67656, Dec. 31, 2001, as amended at 67 FR 4368, Jan. 30, 2002]

§ 4.321 Notice of transmittal of record on appeal.

The original record on appeal must be forwarded by the Land Titles and Records Office to the Board by certified mail. Any objection to the record as constituted must be filed with the Board within 15 days of receipt of the notice of docketing issued under § 4.332 of this part.

§ 4.322 Docketing.

The appeal will be docketed by the Board upon receipt of the administrative record from the Land Titles and

43 CFR Subtitle A (10-1-03 Edition)

Records Office. All interested parties as shown by the record on appeal must be notified of the docketing. The docketing notice must specify the time within which briefs may be filed and must cite the procedural regulations governing the appeal.

§ 4.323 Disposition of the record.

Subsequent to a decision of the Board, other than remands, the record filed with the Board and all documents added during the appeal proceedings, including any transcripts prepared because of the appeal and the Board's decision, must be forwarded by the Board to the Land Titles and Records Office designated under § 4.236(b) of this part. Upon receipt of the record by the Land Titles and Records Office, the duplicate record required by § 4.320(c) of this part must be conformed to the original and forwarded to the Superintendent concerned.

APPEALS TO THE BOARD OF INDIAN APPEALS FROM ADMINISTRATIVE ACTIONS OF OFFICIALS OF THE BUREAU OF INDIAN AFFAIRS: ADMINISTRATIVE REVIEW IN OTHER INDIAN MATTERS NOT RELATING TO PROBATE PROCEEDINGS

SOURCE: 64 FR 6487, Feb. 10, 1999, unless otherwise noted.

§ 4.330 Scope.

(a) The definitions set forth in 25 CFR 2.2 apply also to these special rules. These regulations apply to the practice and procedure for: (1) Appeals to the Board of Indian Appeals from administrative actions or decisions of officials of the Bureau of Indian Affairs issued under regulations in 25 CFR chapter 1, and (2) administrative review by the Board of Indian Appeals of other matters pertaining to Indians which are referred to it for exercise of review authority of the Secretary or the Assistant Secretary—Indian Affairs.

(b) Except as otherwise permitted by the Secretary or the Assistant Secretary—Indian Affairs by special delegation or request, the Board shall not adjudicate:

- (1) Tribal enrollment disputes;

- (2) Matters decided by the Bureau of Indian Affairs through exercise of its discretionary authority; or
- (3) Appeals from decisions pertaining to final recommendations or actions by officials of the Minerals Management Service, unless the decision is based on an interpretation of Federal Indian law (decisions not so based which arise from determinations of the Minerals Management Service, are appealable to the Interior Board of Land Appeals in accordance with 43 CFR 4.410).

§4.331 Who may appeal.

Any interested party affected by a final administrative action or decision of an official of the Bureau of Indian Affairs issued under regulations in title 25 of the Code of Federal Regulations may appeal to the Board of Indian Appeals, except—

- (a) To the extent that decisions which are subject to appeal to a higher official within the Bureau of Indian Affairs must first be appealed to that official;
- (b) Where the decision has been approved in writing by the Secretary or Assistant Secretary—Indian Affairs prior to promulgation; or
- (c) Where otherwise provided by law or regulation.

§4.332 Appeal to the Board; how taken; mandatory time for filing; preparation assistance; requirement for bond.

(a) A notice of appeal shall be in writing, signed by the appellant or by his attorney of record or other qualified representative as provided by 43 CFR 1.3, and filed with the Board of Indian Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22203, within 30 days after receipt by the appellant of the decision from which the appeal is taken. A copy of the notice of appeal shall simultaneously be filed with the Assistant Secretary—Indian Affairs. As required by §4.333 of this part, the notice of appeal sent to the Board shall certify that a copy has been sent to the Assistant Secretary—Indian Affairs. A notice of appeal not timely filed shall be dismissed for lack of jurisdiction. A notice of appeal shall include:

- (1) A full identification of the case;
- (2) A statement of the reasons for the appeal and of the relief sought; and
- (3) The names and addresses of all additional interested parties, Indian tribes, tribal corporations, or groups having rights or privileges which may be affected by a change in the decision, whether or not they participated as interested parties in the earlier proceedings.

(b) In accordance with 25 CFR 2.20(c) a notice of appeal shall not be effective for 20 days from receipt by the Board, during which time the Assistant Secretary—Indian Affairs may decide to review the appeal. If the Assistant Secretary—Indian Affairs properly notifies the Board that he has decided to review the appeal, any documents concerning the case filed with the Board shall be transmitted to the Assistant Secretary—Indian Affairs.

(c) When the appellant is an Indian or Indian tribe not represented by counsel, the official who issued the decision appealed shall, upon request of the appellant, render such assistance as is appropriate in the preparation of the appeal.

(d) At any time during the pendency of an appeal, an appropriate bond may be required to protect the interest of any Indian, Indian tribe, or other parties involved.

[54 FR 6487, Feb. 10, 1989, as amended at 67 FR 4368, Jan. 30, 2002]

§4.333 Service of notice of appeal.

(a) On or before the date of filing of the notice of appeal the appellant shall serve a copy of the notice upon each known interested party, upon the official of the Bureau of Indian Affairs from whose decision the appeal is taken, and upon the Assistant Secretary—Indian Affairs. The notice of appeal filed with the Board shall certify that service was made as required by this section and shall show the names and addresses of all parties served. If the appellant is an Indian or an Indian tribe not represented by counsel, the appellant may request the official of the Bureau whose decision is appealed to assist in service of copies of the notice of appeal and any supporting documents.

§ 4.334

(b) The notice of appeal will be considered to have been served upon the date of personal service or mailing.

§ 4.334 Extensions of time.

Requests for extensions of time to file documents may be granted upon a showing of good cause, except for the time fixed for filing a notice of appeal which, as specified in § 4.332 of this part, may not be extended.

§ 4.335 Preparation and transmittal of record by official of the Bureau of Indian Affairs.

(a) Within 20 days after receipt of a notice of appeal, or upon notice from the Board, the official of the Bureau of Indian Affairs whose decision is appealed shall assemble and transmit the record to the Board. The record on appeal shall include, without limitation, copies of transcripts of testimony taken; all original documents, petitions, or applications by which the proceeding was initiated; all supplemental documents which set forth claims of interested parties; and all documents upon which all previous decisions were based.

(b) The administrative record shall include a Table of Contents noting, at a minimum, inclusion of the following:

(1) The decision appealed from;

(2) The notice of appeal or copy thereof; and

(3) Certification that the record contains all information and documents utilized by the deciding official in rendering the decision appealed.

(c) If the deciding official receives notification that the Assistant Secretary—Indian Affairs has decided to review the appeal before the administrative record is transmitted to the Board, the administrative record shall be forwarded to the Assistant Secretary—Indian Affairs rather than to the Board.

§ 4.336 Docketing.

An appeal shall be assigned a docket number by the Board 20 days after receipt of the notice of appeal unless the Board has been properly notified that the Assistant Secretary—Indian Affairs has assumed jurisdiction over the appeal. A notice of docketing shall be sent to all interested parties as shown

43 CFR Subtitle A (10-1-03 Edition)

by the record on appeal upon receipt of the administrative record. Any objection to the record as constituted shall be filed with the Board within 15 days of receipt of the notice of docketing. The docketing notice shall specify the time within which briefs shall be filed, cite the procedural regulations governing the appeal and include a copy of the Table of Contents furnished by the deciding official.

§ 4.337 Action by the Board.

(a) The Board may make a final decision, or where the record indicates a need for further inquiry to resolve a genuine issue of material fact, the Board may require a hearing. All hearings shall be conducted by an administrative law judge of the Office of Hearings and Appeals. The Board may, in its discretion, grant oral argument before the Board.

(b) Where the Board finds that one or more issues involved in an appeal or a matter referred to it were decided by the Bureau of Indian Affairs based upon the exercise of discretionary authority committed to the Bureau, and the Board has not otherwise been permitted to adjudicate the issue(s) pursuant to § 4.330(b) of this part, the Board shall dismiss the appeal as to the issue(s) or refer the issue(s) to the Assistant Secretary—Indian Affairs for further consideration.

§ 4.338 Submission by administrative law judge of proposed findings, conclusions and recommended decision.

(a) When an evidentiary hearing pursuant to § 4.337(a) of this part is concluded, the administrative law judge shall recommend findings of fact and conclusions of law, stating the reasons for such recommendations. A copy of the recommended decision shall be sent to each party to the proceeding, the Bureau official involved, and the Board. Simultaneously, the entire record of the proceedings, including the transcript of the hearing before the administrative law judge, shall be forwarded to the Board.

(b) The administrative law judge shall advise the parties at the conclusion of the recommended decision of their right to file exceptions or other

comments regarding the recommended decision with the Board in accordance with § 4.339 of this part.

§ 4.339 Exceptions or comments regarding recommended decision by administrative law judge.

Within 30 days after receipt of the recommended decision of the administrative law judge, any party may file exceptions to or other comments on the decision with the Board.

§ 4.340 Disposition of the record.

Subsequent to a decision by the Board, the record filed with the Board and all documents added during the appeal proceedings, including the Board's decision, shall be forwarded to the official of the Bureau of Indian Affairs whose decision was appealed for proper disposition in accordance with rules and regulations concerning treatment of Federal records.

WHITE EARTH RESERVATION LAND SETTLEMENT ACT OF 1985; AUTHORITY OF ADMINISTRATIVE JUDGES; DETERMINATIONS OF THE HEIRS OF PERSONS WHO DIED ENTITLED TO COMPENSATION

SOURCE: 56 FR 61383, Dec. 3, 1991, unless otherwise noted.

§ 4.350 Authority and scope.

(a) The rules and procedures set forth in §§ 4.350 through 4.357 apply only to the determination through intestate succession of the heirs of persons who died entitled to receive compensation under the White Earth Reservation Land Settlement Act of 1985, Public Law 99-264 (100 Stat. 61), amended by Public Law 100-153 (101 Stat. 886) and Public Law 100-212 (101 Stat. 1433).

(b) Whenever requested to do so by the Project Director, an administrative judge shall determine such heirs by applying inheritance laws in accordance with the White Earth Reservation Settlement Act of 1985 as amended, notwithstanding the decedent may have died testate.

(c) As used herein, the following terms shall have the following meanings:

(1) The term *Act* means the White Earth Reservation Land Settlement Act of 1985 as amended.

(2) The term *Board* means the Board of Indian Appeals in the Office of Hearings and Appeals, Office of the Secretary.

(3) The term *Project Director* means the Superintendent of the Minnesota Agency, Bureau of Indian Affairs, or other Bureau of Indian Affairs official with delegated authority from the Minneapolis Area Director to serve as the federal officer in charge of the White Earth Reservation Land Settlement Project.

(4) The term *party (parties) in interest* means the Project Director and any presumptive or actual heirs of the decedent, or of any issue of any subsequently deceased presumptive or actual heir of the decedent.

(5) The term *compensation* means a monetary sum, as determined by the Project Director, pursuant to section 8(c) of the Act.

(6) The term *administrative judge* means an administrative judge or an administrative law judge, attorney-advisor, or other appropriate official of the Office of Hearings and Appeals to whom the Director of the Office of Hearings and Appeals has redelegated his authority, as designee of the Secretary, for making heirship determinations as provided for in these regulations.

(7) The term *appellant* means a party aggrieved by a final order or final order upon reconsideration issued by an administrative judge who files an appeal with the Board.

[56 FR 61383, Dec. 3, 1991; 56 FR 65782, Dec. 18, 1991, as amended at 64 FR 13363, Mar. 18, 1999]

§ 4.351 Commencement of the determination process.

(a) Unless an heirship determination which is recognized by the Act already exists, the Project Director shall commence the determination of the heirs of those persons who died entitled to receive compensation by filing with the administrative judge all data, identifying the purpose for which they are being submitted, shown in the records relative to the family of the decedent.

(b) The data shall include but are not limited to:

2014 MAY 27 AM 11:31

STATION: 1111

1111