

*Sana Drake
Dept of Justice
ML1581*



United States Department of the Interior

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

IN REPLY REFER TO:
Real Estate Services

OCT - 2 2009

NOTICE OF DECISION

CERTIFIED MAIL-RETURN RECEIPT REQUESTED 7001 0360 0003 4283 4643

Mr. Virgil Moorehead, Chairman
Big Lagoon Rancheria
P. O. Box 3060
Trinidad, California 95570

Dear Mr. Moorehead:

This is notice of our decision upon the application by the Big Lagoon Rancheria to have the below-described real property accepted by the United States of America in trust for the Big Lagoon Rancheria. The land referred to herein is that real property situate in the County of Humboldt, State of California, described as follows:

Lot 4 as shown on Tract No. 420, on file in the Office of the Humboldt County Recorder in Book 21 of Maps, Pages 18 and 19.

The above-described real property is identified in Humboldt County records as Assessor's parcel No. 517-281-04, containing 5.01 acres, more or less. Said property is approxi-mately ¼ mile from the existing Big Lagoon Rancheria.

Federal law authorizes the Secretary of the Interior, or an 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 exterior boundaries of the tribe's reservation, or adjacent thereto, or within a tribal 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. The applicable regulations are set forth in the Code of Federal Regulations (CFR), Title 25, INDIANS, Part 151, as amended.

In this particular instance, the authorizing Act of Congress is the Indian Land Consolidation Act of 1983 (25 U.S.C. § 2202), which amends the Indian Reorganization Act of 1934 (25 U.S.C. § 465). As stated above, the subject lands are in close proximity to the existing trust land base, and the record reflects that the land is currently owned by the Big Lagoon Rancheria.



BGL 4548

On January 24, 2008, we issued notice of, and sought comments, regarding the proposed fee-to-trust application from the California State Clearinghouse; Sara J. Drake, Deputy Attorney General; Paul Dobson, Deputy Legal Affairs Secretary, Office of the Governor; James Peterson, District Director, Office of the Honorable Dianne Feinstein; Mark Delaplaine of the California Coastal Commission; the Humboldt County Board of Supervisors; the Humboldt County Public Works Department; the Humboldt County Planning Department; the Humboldt County Assessor; and the Chairpersons for the following federally-recognized tribes: Blue Lake Rancheria, Hoopa Valley Tribe, Karuk Tribe of California, the Rohnerville Rancheria, the Table Bluff Rancheria, the Trinidad Rancheria, and the Yurok Tribe. As we were advised by the Humboldt County Treasurer-Tax Collector that a portion of tax assessments were directed to the Blue Lake Fire Department, an additional notice of the land acquisition application was directed to the Blue Lake Fire Department on February 8, 2008.

In response to our notice, we did receive responses from the following: (1) a request for an extension to the comment deadline by Patty Brandt, Senior Legal Analyst, California Department of Justice (on behalf of the Governor's Office); (2) Andrea Lynn Hoch, Legal Affairs Secretary, Office of the Governor; (3) the Federal Consistency Coordinator for the California Coastal Commission; (4) Katy Sanchez as Program Analyst for the State Native American Heritage Commission; (5) Jill Geist as Chair for the Humboldt County Board of Supervisors; and (6) Deputy Spellenberg on behalf of the Humboldt County Treasurer-Tax Collector. The State Native American Heritage advised that it had no comments, the Treasurer-Tax Collector just requested notice to the Blue Lake Fire Department (which was done on February 8, 2008), and no additional comments were submitted by the California Department of Justice.

The objections set forth by the Office of the Governor are generally as follows:

- The housing should be built on the 11.1 acres accepted into trust in 1994 (the site of the uncompleted gaming facility).
- The environmental assessment did not discuss or analyze what other uses were considered for the 5-acre parcel.
- Additional trust land is not necessary for the Tribe's economic or political development (i.e., the Tribe receives \$1.1 million from the State's [Gaming] Revenue Sharing Trust Fund and various grant funds from the Federal Government).
- The Tribe has a successful hotel business in Arcata and a new Health Fitness Center in McKinleyville, both on nontrust lands.

The objections set forth by the Coastal Commission are as follows:

- The proposed project is inconsistent with the California Coastal Management Plan.
- BIA must inform the Commission if it intends to accept or reject the Commission's two project modifications, i.e., (1) prepare a revised site plan that only provides for one single-family home with driveway, wastewater leach field

& utility connections, and that the residence will not exceed 25 feet in height, the no-development zone extending 165 feet from the watercourse at the western end of parcel will be maintained, vegetation clearing will be minimized, the forest strip along Highway 101 will be undisturbed and construction and post-construction BMPs will be implemented; and (2) BIA will ensure that the Tribe enacts appropriate mechanisms which restricts future development and prohibits alterations unless authorized by the Commission and that the Tribe will waive its sovereign immunity.

In response to our request for a “Consistency Determination” by the California Coastal Commission, the Commission issued a notice regarding a public meeting to be held on December 15, 2006 in San Francisco at the Hyatt Regency, As a result of that public notice and circulation of the environmental assessment, we did receive comments at this office from private citizens, as well as the Big Lagoon Park Company, setting forth their objections to the proposed trust land acquisition for the following reasons: possible change in land use from housing to a gas station, restaurant, and/or casino; desired retention of local jurisdiction in order to maintain pristine environment; and possible adverse traffic impacts if commercial development occurs.

The objections set forth by the Humboldt County Board of Supervisors are as follows:

- The construction of three homes is inconsistent with current county zoning of one house per five acres.
- Current zoning also requires design review and protection of adjacent riparian corridor.
- Project needs consistency with visual resource protection policies, i.e., retain forest adjacent to Highway 101.
- Require that no new signage or other appurtenances are to be visible from the highway [Highway 101].
- The County will lose control over other types of land use, e.g., gas station, casino, hotel, etc., which could adversely impact traffic and/or require additional county services from the County General Fund.

Accordingly, the comments on behalf of the Governor’s Office, the California Coastal Commission, and the County Board of Supervisors will be addressed herein.

Pursuant to 25 CFR 151.10 and 151.11, the following factors were considered in formulating this decision: (1) the need of the Tribe for additional land; (2) the purposes for which the land will be used; (3) the impact on the State and its political subdivisions resulting from 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 the land into trust status; (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 [previously, 516 DM 6, Appendix 4], and 602 DM 2, Land Acquisitions: Hazardous Substances Determination; and (7) the location of the land

relative to State boundaries, and its distance from the boundaries of the Tribe's reservation.

Factor 1 – Need of the Tribe for Additional Land.

The Tribe's present trust land base consists of two contiguous tracts of land, consisting of approximately 25 acres. The initial land base was purchased in 1918 by the United States and the second tract was accepted into trust in 1994. The land use on the existing trust lands consists of eight homes, a community water treatment building and storage tank, a tribal cemetery, with a need for an additional area for water system expansion and designations for recreational, cultural and economic development purposes. The terrain consists of second growth Douglas Fir and Sitka Spruce primarily along the outskirts but with trees scattered in the interior along with lush grasses and brush consistent with the northern coastal area.

There is a large cement foundation also existing on the subject trust property that was proposed for a casino. The Tribe and the State of California were in agreement for a number of years that the foundation would be removed and the site restored to its previous condition as well as to locate a casino development at an alternate site. Much of the State's concern has been the possible adverse impacts on the water quality within the Big Lagoon and surrounding area. The Tribe and the State signed a Settlement Agreement in 2005 that called for location of a casino site in Barstow, California, but it also placed limits on development of the existing trust lands. Secretarial approval of that agreement was contingent upon the State Legislature's approval of a gaming compact, but that did not occur and the agreement is not in effect.

We believe that the State continues to have concerns about development on the existing Rancheria property, yet it has taken the position that the Tribe needs no additional land for its residential development. In its responses to such comments, the Tribe has stated it has been trying to obtain funds for more housing developments there. The Tribe has additionally stated that the location of homes on land further away from the lagoon area would be more consistent with the Coastal Commission's policies.

In response to the State's comments that the Tribe already has a successful hotel business in Arcata and a health fitness center in McKinleyville, we can state that many tribes throughout the country purchase off-reservation properties for economic purposes. Generally, this occurs in California when the existing trust land base is remote, limited in size, or development is not feasible because of insufficient potable water, mountainous or timbered terrain, preservation of cultural or gathering areas, or other physical situations exist that make the property unsuitable for development. These same factors can also make residential development elsewhere more desirable or necessary. It has been a long-standing policy with the Interior Department to accept lands into trust for Indian housing purposes to enable tribal governments to provide low-income housing, provide tribal governmental control, and to enable participation in, and administration of, federal or other programs designed specifically for tribes. For these reasons and in light of uncertainty in the present economy, we cannot conclude that the Tribe's off-reservation

economic projects should be considered as a reason to deny the subject application. If anything, the current economy and the private-sector housing situation further justify the Tribe's need to obtain trust status for housing purposes.

Factor 2 – The Purpose(s) for Which the Land Will be Used.

As indicated herein, the 5-acre site is proposed for development of three tribal-member single-family two-story homes on concrete foundations, each on approximately 1.67 acre and not exceeding 25' in height. The proposal includes water well and septic systems designed with oversight and certification by the U.S. Indian Health Service (IHS).

Factor 3 – Impact on State and Its Political Subdivisions Resulting From the Removal of the Land from the Tax Rolls.

While neither Humboldt County nor the State have specifically identified adverse financial impacts specifically as a result of removal of the subject 5-acre parcel from the tax roll, the County has expressed concerns that adverse impacts will result from commercial development due to increased traffic and need for increased county services (gas station, casino or hotel) (annual taxes on the subject property in 2008 were \$1,541.40). Again, the Tribe proposes only residential development for the site, not commercial development. Thus, the comments received did not specifically address the project, so we cannot conclude that trust status for the land will significantly result in adverse impacts. We do anticipate, however, that the Tribe may be required to seek road encroachment permits for access into the parcel from Big Lagoon Park Road.

Factor 4 – Jurisdictional Problems & Potential Conflicts of Land Use Which May Arise.

The County and Coastal Commission have both stated that the subject proposal to construct three homes is contrary to existing zoning (one home per each 5-acre parcel). The subject site is surrounded by housing development, so the stated intended use is consistent in that respect. The question then becomes is the construction of three homes vs. one consistent within the area? In its responses to comments, the Tribe stated that in 1994, a second home was permitted and constructed on a 3/4-acre site overlooking the bluffs above the ocean shoreline and that additional housing and other developments are being planned by the Big Lagoon Park Company. The Tribe has also stated that there are two other pre-1994 housing projects with the density of one home per 3/4 acre.

If the Tribe is correct, we cannot conclude that the subject project would necessarily result in jurisdictional or land use conflicts. Additionally, we have not been provided with any documentation from any party that would establish that the Tribe has more than residential development planned for the 5-acre parcel.

The Coastal Commission has taken the position that we must ensure that the Tribe enacts mechanisms to restrict future development and prohibit future alternations as well as waive its sovereign immunity. Our fiduciary role is to assist tribes in providing housing for their members and to enable and allow tribes to make their own governmental

decisions, including adoption of land use or related ordinances. We neither require nor encourage tribes to waive sovereign immunity.

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.

At present, the Big Lagoon Rancheria assumes day-to-day management of its tribal lands and the Bureau of Indian Affairs only becomes involved in approval or disapproval of transactions that require Secretarial review or approval pursuant to a federal statute, e.g., leases, rights of way, timber harvesting. When a transaction requires our action, the Tribe assembles the proposal and submits it to this office for the appropriate federal review. With the addition of the subject property, we do not anticipate a notable increase in our services. Immediate services may include review and approval of residential leases, preparation of a timber inventory, and addition of the subject 5 acres to the Tribe's land inventories, including its fire management plan.

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.

A second on-site inspection of the subject parcel was conducted on September 26, 2006 for the purpose of determining the possible presence of contaminants or hazardous substances. No evidence of contaminants or obvious signs of contamination was observed, and a Phase I Contaminant Survey Checklist was approved on October 4, 2006. Before the subject parcel is accepted into trust, appropriate staff from the Bureau of Indian Affairs will conduct an additional on-site inspection to make sure that the status has not changed. Any inspection that results in adverse findings would postpone or prohibit any final action to accept the 5-acre parcel into trust.

An additional requirement which must 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 NEPA Handbook, 59 IAM 3. The proposed action herein has been determined not to require the preparation of an Environmental Impact Statement (EIS). In this particular proposal, an Environmental Assessment (EA) was prepared and circulated. As a result, it was our determination that the project would not adversely affect the human environment, and a Finding of No Significant Impact (FONSI) was issued on July 17, 2007. Our FONSI did include the statement that our responsibilities under the Coastal Zone Management Act (CZMA) had been fulfilled.

As indicated above, the California Coastal Commission has taken the position that we have not fulfilled our responsibilities under CZMA because we have not properly advised them or our intent to accept or reject the Commission's above-described two project modifications. The Commission and this office agreed that the Commission would be advised of our intent when a final decision was made on the land acquisition proposal.

Accordingly, we are now issuing our decision upon the subject trust application, and all parties, including the Commission, are being afforded a 30-day period in which to file an administrative appeal. By copy of this letter, and pursuant to 15 CFR 930.43(d) and (e), we hereby advise the California Coastal Commission that we reject their two project modifications.

It is our position with the FONSI statement that the project is both “consistent to the maximum extent practicable” and fully “consistent” with the California Coast Management Plan (CCMP). See 15 CFR 930.43(d)(1). The proposed trust acquisition and related housing development is not only fully consistent with the CCMP, but the plain language of the CCMP and existing application of that language demonstrate the proposed acquisition is, in fact, consistent with section 30250(a) and 30253(5) of the CCMP, which the Commission cites as grounds for its objection to the consistency determination submitted by the BIA, 15 CFR 930.43(d) (2).

The Tribe has applied to have the parcel accepted into trust to facilitate Indian housing in conformance with 25 CFR 151.3(a) (3). Federal trust acquisition regulations, such as those at 25 CFR 151, do not allow the BIA to dictate the manner in which tribes proposed to use property that is submitted for acceptance into trust. The BIA’s role is to determine whether property may be acquired in trust for purposes proposed by a tribe. (See Caricieri v. Kempthorne, No. 03-2647, Lexis 17628, July 20, 2007, First Circuit (The Rhode Island Coastal Resources management Council correctly recognized that the development of the Parcel, which required its own federal consistency determination, was a separate matter from the trust acquisition, and properly found that the Tribe’s application for trust status was consistent with the RICZMP.)

Here, the Tribe, rather than the BIA, would determine whether the proposed development should be modified to accommodate the Commission’s determination that only one home should be constructed on the 5-acre parcel. The BIA also cannot agree, on behalf of the Tribe, to the Commission’s determination that the Tribe should waive sovereign immunity before the parcel is accepted into trust. As stated above, the BIA’s trust obligations to assist the Tribe in providing its members with adequate housing, as expressed in Federal law and regulations that provide authority for acceptance of the parcel into trust, are consistent to the maximum extent practicable with the Commission’s interpretation of the CCMP.

Pursuant to 30250(a), a new residential development must be located in close proximity to existing developed areas able to accommodate it, or in other areas where it will not have significant adverse effects on coastal resources. As noted, no adverse effects on coastal resources have been identified and the parcel to be acquired is located near other more densely developed parcels, including the Big Lagoon Park Company, a 28-acre site with 76 housing units less than ¼ mile away, a nearby 8 home 20-acre development, and the nearby Rancheria development with 8 residences. Section 30250(a) also provides that land divisions outside existing developed areas are only permitted where 50% of the usable parcels in the area have been developed and the created parcels would be no smaller than the average size of surrounding parcels. However, the proposed acquisition

(1) is not a “land division;” (2) is not outside an existing developed area; and (3) will not create parcels smaller than the average size of surrounding parcels.

Pursuant to 30253(5), new development shall “[w]here appropriate protect special communities and neighborhoods which, because of their unique characteristics, are popular visitor destination points for recreational uses.” As noted, the development is consistent with developed lands in the area. Moreover, if the development were not to proceed, the Tribe would likely be forced to more densely develop the existing Rancheria, which is located in closer proximity to the lagoon.

Consequently, it is not appropriate to restrict the proposed development in favor of additional development on the Rancheria.

Factor 7 – The Location of the Land Relative to State Boundaries, and Its Distance from the Boundaries of the Tribe’s Reservation.

The subject parcel is located near the Pacific Coast in northwestern California, within the administrative jurisdiction of the Pacific Regional Office. As indicated above, the parcel is approximately ¼ mile from the existing Big Lagoon Rancheria. The parcel is over 60 miles from the Oregon-California border. Based on its proximity to the existing trust land base, we cannot conclude that it will be burdensome for the Tribe to manage the property, and its location does not constitute any administrative burden on this office.

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 Big Lagoon Rancheria pursuant to the Indian Land Consolidation Act of 1983 (25 U.S.C. § 2202).

Should any of parties included on the enclosed Distribution List 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 North Quincy Street, Suite 300, Arlington, Virginia 22203, in accordance with the regulations at 43 CFR 4.320-4.340 (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 appeal must be mailed within 30 days of the day of receipt of this notice. The notice of appeal should clearly identify the decision being appealed. A copy of this decision should be attached to the notice. Any appellant must send copies of the notice of appeal to (1) the Assistant Secretary-Indian Affairs, U.S. Department of the Interior, 1849 C Street, N.W., MS-4140-MIC, Washington, D.C. 20240; (2) each interested party know to the appellant; and (3) this office. Any notice of appeal sent to the Board of Indian Appeals must include a certification 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 Pacific Regional Director 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 copies of this notice to said party or immediately provide our office with the name and address of said party.

Sincerely,

A handwritten signature in black ink, appearing to read "D. M.", with a long horizontal flourish extending to the right.

Regional Director

Enclosures
Distribution List
43 CFR 4.310-4.340

Distribution List

CERTIFIED MAIL-RETURN RECEIPT(S) REQUESTED

California State Clearinghouse (10 copies for distribution) Z 155 874 786
Office of Planning & Research
P. O. Box 3044
Sacramento, CA 95812-3044

~~Sara J. Drake, Deputy Attorney General State of California Z 155 874 787~~
Department of Justice
P. O. Box 944255
Sacramento, CA 94244-2550

Ms. Andrea Lynn Hoch, Deputy Legal Affairs Secretary Z 155 874 788
Office of the Governor of California
State Capitol Building
Sacramento, CA 95814

California Coastal Commission Z 155 874 789
Attention: Mark Delaplaine, Federal Consistency Supervisor
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

Board of Supervisors Z 155 874 790
County of Humboldt
825 5th Street
Eureka, CA 95501

Department of Public Works Z 155 874 791
County of Humboldt
1106 2nd Street
Eureka, CA 95501

Humboldt County Planning Department Z 155 874 775
315 H Street
Eureka, CA 95501

Humboldt County Assessor Z 155 874 774
825 5th Street
Eureka, CA 95501

Chairperson, Blue Lake Rancheria Z 155 874 773
P. O. Box 428
Blue Lake, CA 95525

Chairperson, Hoopa Valley Tribe Z 155 874 772
P. O. Box 1348
Hoopa, CA 95546

Chairperson, Karuk Tribe of California Z 155 874 771
P. O. Box 1016
Happy Camp, CA 96039

Chairperson, Rohnerville Rancheria Z 155 874 785
32 Bear River Drive
Loleta, CA 95551

Chairperson, Table Bluff Reservation Z 155 874 784
1000 Wiyot Drive
Loleta, CA 95551

Chairperson, Trinidad Rancheria Z 155 874 783
P. O. Box 630
Trinidad, CA 95570

Chairperson, Yurok Reservation Z 155 874 782
P. O. Box 1027
Klamath, CA 95548

James Peterson, District Director Z 155 874 776
Office of Senator Dianne Feinstein
750 B Street, Suite 1030
San Diego, CA 92101

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Office of the Secretary, Interior

§4.310

Payment must be made within 2 years
 from the date of decedent's death or
 within 1 year from the date of notice of
 purchase, whichever is later.

§4.307 Title.

(a) Upon payment by the tribe of the
 interests purchased, the Super-
 intendent must:

(1) Issue a certificate to the adminis-
 trative law judge or Indian probate
 judge that payment has been made; and

(2) File with the certificate all sup-
 porting documents required by the ad-
 ministrative law judge or Indian pro-
 bate judge.

(b) After receiving the certificate and
 supporting documents, the administra-
 tive law judge or Indian probate judge
 will:

(1) Issue an order that the United
 States holds title to the interests in
 trust for the tribe;

(2) File the complete record, includ-
 ing the decision, with the LTRO as pro-
 vided in §4.236(b);

(3) Furnish a duplicate copy of the
 record to the Superintendent; and

(4) Mail a notice of the action to-
 gether with a copy of the decision to
 each interested party.

§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 in-
 come 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 Di-
 rectors and to the Director of the Bu-
 reau of Indian Affairs.

**GENERAL RULES APPLICABLE TO PRO-
 CEEDINGS ON APPEAL BEFORE THE IN-
 TERIOR BOARD OF INDIAN APPEALS**

SOURCE: 70 FR 11825, Mar. 9, 2005, 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:

(1) For most documents, the date of
 mailing or the date of personal deliv-
 ery; or

(2) For a motion for the Board to as-
 sume jurisdiction over an appeal under
 25 CFR 2.20(e), the date that the Board
 receives the motion.

(b) *Serving notices of appeal and plead-
 ings.* Any party filing a notice of appeal
 or pleading before the Board must
 serve copies on all interested parties in
 the proceeding. Service must be accom-
 plished by personal delivery or mail-
 ing.

(1) Where a party is represented in an
 appeal by an attorney or other rep-
 resentative authorized under 43 CFR
 1.3, service of any document on the at-
 torney or representative is service on
 the party.

(2) Where a party is represented by
 more than one attorney, service on any
 one attorney is sufficient.

(3) The certificate of service on an at-
 torney or representative must include
 the name of the party whom the attor-
 ney 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 doc-
 ument:

(1) The day upon which the decision
 or document to be appealed or an-
 swered was served or the day of any
 other event after which a designated
 period of time begins to run is not to
 be included;

(2) The last day of the period is to be
 included, unless it is a nonbusiness day
 (e.g., Saturday, Sunday, or Federal hol-
 iday), in which event the period runs
 until the end of the next business day;
 and

(3) When the time prescribed or al-
 lowed is 7 days or less, intermediate
 Saturdays, Sundays, Federal holidays,
 and other nonbusiness days are ex-
 cluded from the computation.

(d) *Extensions of time.* (1) The Board
 may extend the time for filing or serv-
 ing any document except a notice of
 appeal.

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

§ 4.311

(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 receiving the notice of docketing. The 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 receiving the appellant's brief to file answer briefs, copies of which must be served upon the appellant or counsel and all other interested parties. A certificate showing service of the answer brief upon all parties or counsel must be attached to the answer filed with the Board.

(b) The 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) BIA is considered an interested party in any proceeding before the Board. The Board may request that 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 Board decisions.

Decisions of the Board will be made in writing and will set forth findings of

43 CFR Subtitle A (10-1-06 Edition)

fact and conclusions of law. The decision may adopt, modify, reverse, or set aside any proposed finding, conclusion, or order of an administrative law judge, Indian probate judge, or BIA 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, to join other parties, 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. The Board may grant the permission or relief requested for specified purposes and subject to limitations it established. 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 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.

(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 of a Board decision.

(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

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(b) A party may
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§ 4.316 Remands

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§ 4.317 Standards.

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§ 4.318 Scope of rev

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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 remand the matter to an administrative law judge, an Indian probate judge, or BIA. In the alternative, to the extent the court's directive and time limitations 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 about 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 this action appropriate. If, before 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 OHA Director will determine the matter of disqualification.

§ 4.318 Scope of review.

An appeal will be limited to those issues that were before the administrative law judge or Indian probate judge 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: 70 FR 11826, Mar. 9, 2005, unless otherwise noted.

§ 4.320 Who may appeal.

(a) *Right of appeal.* An interested party has a right to appeal to the Board from an order of an administrative law judge or Indian probate judge on a petition for rehearing or 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 the appellant, the 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.

(1) A 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.

(2) The notice of appeal must include the names and addresses of parties served.

(3) 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.

(1) A copy must be served upon the administrative law judge or Indian probate judge whose decision is appealed as well as all interested parties.

(2) 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 administrative law judge or Indian probate judge; record inspection.* The administrative law judge or Indian probate judge, upon receiving a copy of the notice of appeal, must notify the Superintendent concerned to return the duplicate record filed under

§4.321

§§ 4.236(b), 4.241(d), or 4.242(f) to the LTRO designated under §4.236(b). The duplicate record must be conformed to the original by the LTRO and will thereafter be available for inspection either at the LTRO or at the office of the Superintendent. If a transcript of the hearing was not prepared, the administrative law judge or Indian probate judge will have a transcript prepared that must be forwarded to the Board within 30 days from receiving a copy of the notice of appeal.

§4.321 Notice of transmittal of record on appeal.

The original record on appeal must be forwarded by the LTRO to the Board by certified mail. Any objection to the record as constituted must be filed with the Board within 15 days of receiving the notice of docketing issued under §4.332.

§4.322 Docketing.

The appeal will be docketed by the Board upon receiving the administrative record from the LTRO. 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.

(a) After the Board makes a decision other than a remand, it must forward to the LTRO designated under §4.236(b):

- (1) The record filed with the Board; and
- (2) All documents added during the appeal proceedings, including any transcripts prepared because of the appeal and the Board's decision.

(b) The LTRO must conform the duplicate record required by §4.320(d) to the original sent under paragraph (a)(1) of this section and forward the conformed record to the Superintendent concerned.

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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: 54 FR 6487, Feb. 10, 1989, 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;

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(b) Where the decision is approved in writing by the Assistant Secretary prior to promulgation.

(c) Where otherwise provided by regulation.

§4.332 Appeal to the Board of Indian Appeals: Preparation of record on appeal.

(a) A notice of appeal, signed by the appellant or his attorney or other authorized representative, shall be filed with the Board of Indian Appeals, Office of Indian Affairs, U.S. Department of the Interior, 801 North Quince Street, Arlington, Virginia 22203, with a receipt by the appellant from which the appeal of the notice of appeal shall be filed with the Secretary—Indian Affairs. A copy of this part, the notice of appeal, shall be sent to the Board of Indian Affairs. A copy of the notice of appeal shall be sent to the Secretary—Indian Affairs by special delegation or request, the Board shall not adjudicate:

- (1) A full identification of the parties to the appeal and of the relief sought;
- (2) A statement of the facts and circumstances of the appeal;
- (3) The names and addresses of all interested parties, including tribes, tribal corporations, and individuals having rights or privileges which may be affected by a change in the decision, whether or not they are parties to the appeal.

(b) In accordance with the regulations, a notice of appeal shall be filed with the Board of Indian Affairs within 20 days from receipt of the notice of appeal during which time the appellant shall review the appeal. If the appellant does not review the appeal, the Board may, at its discretion, review the appeal, any documents filed with the case, and the case shall be transmitted to the Board of Indian Appeals.

(c) When the appellant is an individual from an Indian tribe not represented by the Assistant Secretary, the official who issued the decision shall, upon request,

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§ 4.335

- (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 ap-

pellant, 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.

(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

§ 4.336

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 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 au-

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thority 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.

Office of the Secretary

WHITE EARTH RESIDUARY SETTLEMENT ACT OF 1985
ADMINISTRATIVE APPEALS
DECISIONS OF THE HEARINGS AND APPEALS OFFICE
DIED ENTITLED TO

SOURCE: 56 FR 6138 otherwise noted.

§ 4.350 Authority and scope of rules.

(a) The rules and procedures in §§ 4.350 through 4.359 of this part are the determination of the succession of the decedent under the White Earth Land Settlement Act, Public Law 99-264 (100 Stat. 1537-12), Public Law 100-153 (101 Stat. 719), and Public Law 100-212 (101 Stat. 1045).

(b) Whenever required by the Project Director, the administrative law judge shall determine the inheritance of interests with the White Earth Settlement Act of 1985, notwithstanding the decedent's will.

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

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

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

(3) The term *Project* means the Superintending Agency, Bureau of Indian Affairs, or other Bureau of Indian Affairs office with delegated authority to the Minneapolis Area Director, or a federal officer in charge of the White Earth Residuary Settlement Act of 1985 Project.

(4) The term *party* means the Project Director, the decedent, the presumptive or actual heir, or of any issue of the decedent, or any person who is a claimant or beneficiary of the decedent's estate.

(5) The term *competent monetary sum* means the monetary sum as determined by the Project Director pursuant to § 8(c) of the Act.

(6) The term *admiral* means an administrative law judge.