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# United States Department of the Interior

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

AUG 29 2003

IN REPLY REFER TO:

## NOTICE OF DECISION

CERTIFIED MAIL – RETURN RECEIPT REQUESTED – 7003 1680 0002 3878 9350

Harvey Hopkins, Chairperson  
Dry Creek Rancheria  
P.O. Box 607  
Geysersville, CA 95441

Dear Mr. Hopkins:

This is notice of our decision upon the application of the Dry Creek Rancheria, to have the below-described real property, accepted by the United States of America in trust for the Dry Creek of Pomo Indians of California. The land referred to herein is situated in the State of California, County of Sonoma, Unincorporated Area, and is described as follows:

*That portion of the following described land lying Northeasterly of the Centerline of State Highway 128 as said Highway existed on April 16, 1971. Beginning at an iron pin driven in the ground in the middle of the County Road leading from Alexander Valley to Geysersville, on the East side of the Russian River, in the Northwesterly line of the Land of Frederick and Emma Drake, thence along said Northwesterly line South 47 1/2° West, 31.07 chains to a station in the Bed of Russian River; thence up and along said Bed of the Russian River, North 49 3/4° West, 15.84 chains to a station; thence leaving the Bed of said River North 48 1/4° East, 28.90 chains along the Easterly line of the Land of William Smith to an iron pin driven in the ground in the middle of said Road; thence along the middle of said Road, South 54 1/2° East, 6.11 chains; thence South 62 1/2° East, 5.67 chains to an iron pin driven in the ground; thence North 26° East 23.03 chains to an iron pin driven in the ground in the Southwesterly line of the Caslamayomi Rancho (United States Indian Reservation); thence along said line South 46 1/2° East, 12.55 chains to a post, being the most Northerly corner of the Land of said Frederick and Emma Drake; thence along the Northwesterly line of said land, South 47 3/4° West, 19.58 chains to an iron pin driven in the ground; thence South 54° East, 0.83 chains to an iron pin driven in the ground; thence South 20 1/2° West, 1.69 chains to an iron pin driven in the ground, in the middle of said road; thence along the middle of said Road North 57 3/4° West, 1.63 chains to the place of beginning and being a portion of the Sotoyome Rancho.*

The above-described real property contains approximately 18.03 acres, more or less and is contiguous to the exterior boundaries of the Dry Creek Rancheria.

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DCR 4388

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 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 USC §2202 et seq). As previously stated, the lands that are the subject of this decision notice are contiguous to the exterior boundaries of the Dry Creek Rancheria.

On April 20, 2005, we issued notice of, and sought comments regarding the fee-to-trust application from the California Office of Planning and Research; State of California, Deputy Attorney General; State of California, Deputy Legal Affairs; State of California, Department of Conservation; Department of Alcoholic Beverage Control; James Peterson, District Director, Office of Dianne Feinstein; Bruce Goldstein, Deputy Counsel, Sonoma County; Sonoma County Board of Supervisors; Sonoma County Department of Public Works; Sonoma County Fire Protection District; Sonoma County Assessor; Sonoma County Sheriff's Dept; Chairperson, Cloverdale Rancheria; Chairperson, Lytton Rancheria; Chairperson, Stewarts Point Rancheria; Chairperson, Graton Rancheria; Alexander Valley Association.

In response to our notification, we received the following comments:

- A letter dated June 1, 2005 from the Department of Transportation stating they have no comments to offer.
- A letter dated June 6, 2005 from the Alexander Valley Association stating that the proposed acquisition should be processed under the provisions of the Indian Gaming Regulatory Act (IGRA) and that the Dry Creek Rancheria is held in fee, and not in trust.
- A 138-page packet dated June 21, 2005 from the County of Sonoma, Board of Supervisors, stating that the County is concerned that accepting the land into trust will create jurisdictional problems and land use conflicts with the Sonoma County General Plan, Zoning Ordinance, and contract between the County and Tribe under the Williamson Act, Govt. Code § 51200 et seq. The County is further concerned that the purposes for which the land will be used have not been adequately defined, and appear to necessitate review by the Office of Indian Gaming Management.

In response to the County's comments, the Tribe responded by letter dated October 28, 2005, summarized as follows:

- The Supervisors surprisingly state in their introduction that the Tribe intends to engage in "potential mining activities," which will "create a serious jurisdictional conflict." County officials know (or could have easily determined), however, that the reference to such activities in an earlier environmental document was just about a possible short-term surface use that would have taken place, if at all, well before the Parcel was taken into trust, and thus would have been subject to County permitting if it were to occur. It was

disclosed out of an abundance of caution in anticipation of a possible temporary use of a portion of the Parcel for providing and preparing materials for some hillside stabilization and road and parking surfacing that was taking place next door on the Reservation. That activity, which was ultimately carried out without use of the Parcel, has long since been completed. There is no plan for using the Parcel for any kind of batch plant, surface mining or any other similar use, and the County should know, or could have easily determined, that fact.

- The County also states...and the Tribe acknowledges that the Parcel is subject to a Williamson Act contract. However, the Williamson Act is not necessarily inconsistent with the proposed uses, and in any event its continued application is doubtful once the land is taken into federal trust. *See Cal. Gov. Code §51295.*
- The County also alleges that a lack of regulation on the Reservation, asserting that the supposed lack of controls has led to various environmental issues on the Reservation, and that the claim is somehow relevant to the Application. The Tribe's activities on the Reservation are compliant with all applicable laws, including but certainly not limited to those related to the environment. The Tribe has spent considerable resources to ensure that it continues to be in compliance with all laws. Indeed, the County has been directly involved in court and other tests of such allegations and knows that the Tribe has been found to be in compliance time after time.
- The County is incorrect in its analysis of the intended future uses of the Parcel. The same can be said of the County's allegation that the planned irrigation ponds are effluent storage from the casino. The casino is fully contained on the Reservation and utilizes the Tribe's wastewater treatment facility. The road is intended primarily for the vineyard, tribal governmental offices, and emergency services building. In addition, the proposed road will provide additional access to the Reservation. The road will have a closed gate and will not be used by casino patrons for non-emergency purposes.
- The County again questions...whether the tribal housing proposed in the application will satisfy the housing needs for all 869 members of the Tribe. The application does not claim that the planned housing will satisfy the housing needs of every member of the Tribe. But housing eight families who are in need, particularly given the high cost of housing in Sonoma County generally, is not insignificant to those families, and should not be to the County, which does not provide for that shelter now.

In addition to the above correspondences, we received a letter dated June 20, 2005, from the Honorable Mike Thompson, through George T. Skibine, Acting Deputy Assistant Secretary-Indian Affairs, advocating that the Bureau conduct a thorough review of this application and set conditions on the type of use that will be allowed, with serious consequences if those terms are violated. Representative Thompson further acknowledges the Bureau's position that, under 40 U.S.C. 3111, it lacks the authority to impose deed restrictions. Mr. Skibine assured Representative Thompson that a final decision to take land in trust is made only after an exhaustive and deliberative review of all relevant criteria, factual information, and legal requirements.

In support of the Tribe's acquisition, we received the following:

- Four letters of support dated August 23, 2006 from residents of Sonoma County.

- A petition signed by seventy-seven (77) supporters of the Tribe's efforts to place the subject property into trust.

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) 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 in trust status; (6) the extent to which the applicant has provided information that allows the Secretary to comply with the implementing procedures of the Department of the Interior, 516 DM 1-7, and 602 DM 2, Land Acquisitions: Hazardous Substances Determination.

#### Factor 1 – Need of the Tribe for Additional Land

The Dry Creek Rancheria was established under the authority of the Act of June 21, 1906, which established a tribal trust land base of 75 acres. The subject acquisition request consists of land that is contiguous to the Tribe's reservation. The current trust land base is comprised largely of land that is a hillside with extremely limited buildable terrain. Land suitable for development on the reservation houses the Dry Creek Rancheria's casino, parking garage and other associated infrastructure.

The additional land contemplated in this land acquisition request will address some of the Tribe's housing and economic development needs. The Tribe currently has 869 members, none of which live on the Reservation due to previously stated limitations. It is our determination that the Dry Creek Tribe has an established need for additional trust land in order to facilitate tribal housing, self-determination and economic development.

#### Factor 2 – The Purposes for Which the Land Will be Used

The proposed land use for the subject acquisition includes residential, emergency services, and agricultural development. Development plans provide for eight tribal residences, an emergency services building, approximately 4.1-acres of vineyards, and a winery with tribal office space. Native plant use areas would also be identified and protected for use by tribal members. Lastly, several infrastructure projects are proposed to make developments on the proposed trust parcels possible. Each of the proposed developments is detailed further below.

#### **Residential Development**

Eight tribal residences are proposed for construction at the southeast corner of the subject parcel at approximately 2,000 square feet per unit. Water will be supplied by existing ground water wells located on the site and wastewater will be disposed of through individual septic systems. All grading for the residences (as well as all other site development) will be completed under the direction of a Storm Water Pollution Prevention Plan.

## **Emergency Services Building**

The Tribe is proposing to construct an 8,000 square-foot emergency services building near the northeast corner of the parcel. The station will provide tribal security, fire suppression, and emergency services for the Tribe. Proposed staffing at the facility will include approximately five firefighters, five security officers and a licensed paramedic. Water will be supplied by existing groundwater wells located on the site and wastewater will be treated through a septic system.

## **Agricultural Development**

Two vineyard areas, totaling approximately 4.1 acres (2.5-acre and 1.6-acre fields), are proposed for development. Water will be supplied to the vineyards by onsite groundwater wells and/or by tertiary-treated recycled water from the Tribe's existing wastewater treatment plant. Irrigation will be provided through a drip system. All grading and infrastructure for these practices will be completed under the direction of a Storm Water Pollution Prevention Plan.

Once planted, vineyards will be regularly maintained with fertilizers, herbicides, and/or pesticides that will be applied at the manufacturer's recommended rates. Only those chemicals approved for use within the State of California will be used for vineyard maintenance. Tertiary-treated recycled water used for irrigation will meet the definition of "disinfected tertiary recycled water" as provided within Title 22 of the California Code of Regulations.

## **Winery and Tribal Offices**

A 5,600 square-foot structure is proposed where roughly half of the structure will be dedicated to wine production and the remainder committed to tribal office space. The facility will provide processing and storage for harvested grapes and wine and office space for tribal government functions. A gravel parking lot and loading area will be constructed adjacent to this building. Water will be supplied through existing groundwater wells and wastewater will be treated through a septic system. The Tribe is proposing to contract grape harvesting and wine production with local wineries.

## **Native Plant Use Areas**

The proposed trust parcel has native plants that have traditional cultural uses by the Tribe. These areas will be protected from development and used by the Tribe in accordance with cultural traditions.

## **Infrastructure**

Development of the proposed trust parcel will require the construction of paved roadways, water lines, and other utilities. The primary access road to the parcel will be approximately 35 feet wide (to allow truck traffic) and paved with asphalt. The lower portion of the roadway will provide tribal access from State Route 128 to tribal residences, vineyards, and winery. The interchange with State Route 128 will be built within an existing road encroachment and shall be

designed in accordance with the California Department of Transportation's design standards for commercial driveways as described in the Highway Design Manual.

The upper portion of the access road will be restricted to tribal and emergency use. A gate will be installed at the north end of the warehouse parking to limit public access to the existing Rancheria. The emergency access road will then continue to the emergency services building and the existing Rancheria to provide an escape route in the event of an emergency on the Rancheria.

An existing water line serving the Rancheria from a well on the proposed trust parcel will be replaced and rerouted within the proposed roadway. The water line will also provide potable water to the proposed residences, tribal offices, emergency services building, and may be used for irrigation. New power lines providing service to housing and associated facilities are proposed within the access road right-of-way. Retaining walls, storm drains and curbs will be constructed to minimize erosion.

Also proposed are up to three irrigation storage ponds to provide a reliable irrigation source for the vineyards. The ponds will be constructed near the northwest corner of the parcel and will hold recycled water from the Tribe's wastewater treatment plant located on the existing Rancheria.

The Sonoma County Board of Supervisors raised several concerns with regard to the proposed land uses, specifically: (1) that the Tribe's Application fails to disclose any potential future industrial uses of the property; (2) the proposed batch plant further indicates that the Tribe may conduct mining operations on the Property to produce gravel aggregate for batch plant processing; (3) the Tribe lacks a proper disposal site for the effluent generated at its casino site, and has acquired the instant Property to serve that end; (4) the proposed parking and loading area appears oversized and far larger than necessary for the adjacent proposed office building/winery...the obvious implication is that the parking and loading area will be used in association with the adjacent casino; (5) the Tribe has proposed a 5,600 square foot winery and tribal office building...but it appears unlikely that the Tribe will actually process wine in that space...the County requests that the BIA require the Tribe to disclose whether the winery will actually be used for wine production, and identify how much of the 5,600 square feet will be used for tribal offices; and (6) the County requests that the BIA conduct further investigation to determine whether the proposed future uses of the Property truly satisfy the Tribe's alleged need for additional affordable housing.

Each of the above issues has been formally addressed by the Tribe. With regard to items 1 and 2, the Tribe provided that the temporary batch plant was considered in 2004 to support the construction of the Tribe's new parking structure. This temporary use is no longer being considered by the Tribe as construction of the parking structure is now complete.

With regard to items 3 and 4, the County has requested that BIA fully investigate the proposed use and comply with all Federal laws and regulations governing the permitting of tribal gambling activities. In accordance with the Department of Interior's March 2005 Checklist for Gaming Acquisitions, the acquisition is gaming related (1) if the land and the improvements on the land

are going to be used exclusively for the gaming facility or (2) if the land and the improvements on the land are not used exclusively to support the gaming facility, but the gaming facility cannot operate without it. The land uses herein proposed by the Tribe clearly do not meet either criterion for gaming related acquisitions. As a result, the subject acquisition will not be governed by the land acquisition provisions of the Indian Gaming Regulatory Act of 1988, 25 U.S.C. §§2701-2721.

Items 5 and 6 have been satisfactorily addressed by the Tribe, and previously addressed in this Notice.

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

The total real property taxes for fiscal year 2004 were \$13,356.74. The Property was previously used for agricultural purposes, and is covered by a Williamson Act contract with Sonoma County. As such, the Property was unlikely to appreciate measurably and generate greater property taxes. Its condition would also not have generated collateral tax benefits through sales of goods and services, or payroll taxes from residents of the property. There were virtually none and no prospects in sight.

The Tribe's plans, on the other hand, do just the opposite. The local community will benefit from the Tribe's proposed development of the Property because the Tribe's use of the Property will stimulate construction activity, including the purchase of materials and services, and will keep payroll dollars in the community by housing Tribal residents who would otherwise have to commute into the area (and leave at night) in order to work on the Reservation. The surrounding community will be benefited from the added dollars in circulation, which will more than offset the loss of relatively insignificant property tax revenues.

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

The County of Sonoma had several concerns with regard to potential conflicts of land use, specifically that the Tribe's proposed uses conflict with the uses permitted under their voluntary agricultural preservation contract under the Williamson Act, Govt. Code §51200 et seq. It is the Bureau's position that acceptance of land by the federal government effectively causes the contract to become null and void pursuant to Govt. Code §51295 (Barnidge v. United States, 101 F. 2d 295, 298 and State of Minnesota v. United States, 125 F. 2d 640 [11]).

Additionally, the County stated that the proposed uses would conflict with the Sonoma County General Plan and Zoning Ordinance which provides that:

*The primary use of any parcel shall be agricultural production and related processing, support services, and visitor serving uses. Residential uses in these areas shall recognize that the primary use of the land may create agricultural "nuisance" situations, such as flies, noise, odors, and spraying of chemicals.*

and that:

*Local concentrations of commercial or industrial uses, even if related to surrounding agricultural activities, are detrimental to the primary use of the land for the productions of food, fiber and plant materials and shall be avoided.*

The gist of the above concerns is the loss of jurisdiction over the subject property. The County will in fact lose jurisdictional control with an approved trust acquisition. However, the very essence of a "trust" acquisition is to enable tribes, in this case, the Dry Creek Rancheria, the opportunity to plan and implement programs for the benefit of its community. The United States recognizes the right of Indian tribes to self-government and supports tribal sovereignty and self-determination. It does not appear that the Tribe's proposed uses in any way conflict with the County's General Plan and Zoning Ordinance; however, it is our determination that the needs of the Tribe in this case outweigh any jurisdictional conflicts that may arise.

**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**

The Bureau of Indian Affairs has a trust responsibility for all lands held in trust by the United States for tribes. The Tribe currently accepts little assistance from the Bureau of Indian Affairs and anticipates even less as its gaming and other economic development projects grow. Accepting the property into trust should not impose any material additional responsibilities or burdens on the BIA beyond those already inherent in the Federal trust relationship between BIA and the Tribe. It is anticipated that any costs other than those already included in the Tribe's Tribal Priority Allocation will be borne by the Tribe, and that the Tribe will have adequate resources to assume that burden. The Tribal housing program that is anticipated is intended to be primarily based upon tribally obtained and guaranteed financing, and not as a burden on the Federal Government.

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

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 for, hazardous substances or other environmental remediation or injury. The record includes a negative Phase 1 "Contaminant Survey Checklist" dated September 28, 2005, for the subject parcel, reflecting that there were no hazardous materials or contaminants.

**National Environmental Policy Act Compliance**

An additional requirement that 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.



In this particular instance, a Draft Environmental Assessment (DEA), documenting and analyzing the potential impacts of the proposed project, was completed in May 2005. The DEA was distributed for public review and comment during the period beginning May 6, 2005 and ending June 6, 2005. As a result of the comments received on the Draft ED, revisions to the document were made, including two additional mitigation measures for air quality and biological resources. The Final Environment Assessment (FEA) dated August 2005 identifies potential impacts to land resources, water resources, air quality, biological resources, cultural resources, socioeconomic conditions, resource use patterns (transportation, land use and agriculture), public services, public health/hazardous materials, and other values (noise and visual resources). After review and independent evaluation, the BIA has determined that the proposed federal action, to approve the Dry Creek Rancheria's request to take the proposed 18-acre site into trust for the purpose of developing the site (tribal housing, emergency service, office space and agriculture), does not constitute a major federal action that would significantly affect the quality of the human environment within the meaning of NEPA. This conclusion is based on the analysis contained in the FEA, public comments made in response to the DEA, the Tribe's response to those comments, and the mitigation imposed. Therefore, an Environmental Impact Statement is not required, and the BIA issued a Finding of No Significant Impact (FONSI) on November 9, 2005. The FONSI was distributed to all persons and agencies known to be interested in the proposed action as indicated by the comments on the DEA.

### 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 Dry Creek Rancheria of Pomo Indians of California in accordance with the Indian Land Consolidation Act of January 12, 1983 (25 U.S.C. §2202). The applicable regulations are set forth in the Code of Federal Regulations, Title 25, INDIANS, Part 151, as amended.

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 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-4140-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).

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

Sincerely,

  
Acting Regional Director

Enclosures  
Distribution List  
43 CFR 4.310-4.340

## DISTRIBUTION LIST

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Sara J. Drake, Deputy Attorney General – 7005 2570 0000 6695 0495  
State of California  
Department of Justice  
P.O. Box 944255  
Sacramento, CA 94244-2550

Paul Dobson – 7005 2570 0000 6695 0501  
Deputy Legal Affairs Secretary  
Office of the Governor of California  
State Capitol Building  
Sacramento, CA 95814

James Peterson, District Director – 7005 2570 00006695 0518  
Office of Senator Diane Feinstein  
750 B Street, Suite 1030  
San Diego, CA 92101

Board of Supervisors – 7005 2570 6695 0525  
Sonoma County  
575 Administrative Drive  
Santa Rosa, CA 95403

Public Works – 7005 2570 0000 6695 0549  
Sonoma County  
2300 County Center Drive, Suite B-100  
Healdsburg, CA 95448

Sonoma County Fire Protection District – 7005 2570 0000 6695 0532  
P.O. Box 217  
Geyserville, CA 95441

Sonoma County Assessor – 7005 2570 0000 6695 0556  
585 Fiscal Drive, Room 104F  
Santa Rosa, CA 95403

Sonoma County Sheriff's Dept. – 7005 2570 0000 6695 0563  
2796 Ventura Ave.  
Santa Rosa, CA 95403

Bruce D. Goldstein – 7005 2570 0000 6695 0617  
Deputy County Counsel  
575 Administration Drive, Room 105A  
Santa Rosa, CA 95403

State of California – 7005 2570 0000 6695 0624  
Department of Conservation  
Attn: Stephen E. Oliva, Esq.  
801 K Street  
Sacramento, CA 95814

Department of Alcoholic Beverage Control – 7003 1680 0002 3878 9336  
Attn: Michael Mann, District Administrator  
50 "D" Street, Suite 130  
Santa Rosa, CA 95404

Chairperson – 7005 2570 0000 6695 0570  
Cloverdale Rancheria  
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Cloverdale, CA 95425

Chairperson – 7005 2570 0000 6695 0587  
Lytton Rancheria  
1250 Coddington Center, Suite 1  
Santa Rosa, CA 95401

Chairperson – 7005 2570 0000 6695 0594  
Stewarts Point Rancheria  
3535 Industrial Drive, Suite B-2  
Santa Rosa, CA 95403

Chairperson – 7005 2570 0000 6695 0600  
Graton Rancheria  
P.O. Box 14428  
Santa Rosa, CA 95402

Carl Winter – 7003 1680 0002 3878 9343  
3189 Cactus Circle  
Highland, CA 92346

Regular Mail:

Superintendent  
Bureau of Indian Affairs  
Central California Agency  
650 Capital Mall, Suite 8-500  
Sacramento, CA 95814

Title 43, Code of Federal Regulations, Administrative  
Appeals to the Interior Board  
of Indian Appeals  
§4.306

43 CFR Subtitle A (10-1-94 Edition)

tate in one-half of the interests. The decision shall 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 administrative law judge shall 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.

[36 FR 7186, Apr. 15, 1971, as amended at 55 FR 43133, Oct. 26, 1990]

§4.306 Time for payment.

A tribe shall pay the full fair market value of the interests purchased, as set forth in the appraisal 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 shall issue a certificate to the administrative law judge that this has been done and file therewith such documents in support thereof as the administrative law judge may require. The administrative law judge shall 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 shall 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: Sections 4.310 through 4.318 appear at 54 FR 6485, Feb. 10, 1989, 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) shall be effective the date it is received by the Board.

(b) Service. Notices of appeal and pleadings shall 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 shall 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 representative shall 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

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nonbusiness days shall be 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 shall 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 shall have 30 days from receipt of appellant's brief to file answer briefs, copies of which shall 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 shall 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 shall 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 Bureau of Indian Affairs shall be considered an interested party in any proceeding before the Board. The Board may request that the Bureau 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 shall 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 an official of the Bureau of Indian Affairs or an administrative law judge. Distribution of decisions shall 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 shall 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 shall 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 shall 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 shall be served in the same manner as appeal briefs.

§4.314 Exhaustion of administrative remedies.

(a) No decision of an administrative law judge or an official of the Bureau of Indian Affairs, which at the time of its rendition is subject to appeal to the Board, shall 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.

#### §4.315

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

[54 FR 6485, Feb. 10, 1989; 54 FR 7504, Feb. 21, 1989]

#### §4.316 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 shall 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 shall not stay the effect of any decision or order and shall 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 court to the Board for further proceedings, the Board will either remand the matter to an administrative law judge or to the Bureau of Indian Affairs, or to the extent the court's directive and time limitations will permit, the parties shall 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 shall 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

#### 43 CFR Subtitle A (10-1-94 Edition)

Hearings and Appeals shall determine the matter of disqualification.

#### §4.318 Scope of review.

An appeal shall be limited to those issues which were before the administrative law judge upon the petition for rehearing, reopening, or regarding tribal purchase of interests, or before the official of the Bureau of Indian Affairs on review. However, except as specifically limited in this part or in title 25 of the Code of Federal Regulations, the Board shall 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: Sections 4.320 through 4.323 appear at 54 FR 6487, Feb. 10, 1989, unless otherwise noted.

#### §4.320 Who may appeal.

A party in interest shall have a right of appeal to the Board of Indian Appeals from an order of an administrative law judge on a petition for rehearing, a petition for reopening, or regarding tribal purchase of interests in a deceased Indian's trust estate.

(a) *Notice of Appeal.* Within 60 days from the date of the decision, an appellant shall 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, 4015 Wilson Boulevard, Arlington, Virginia 22203. A statement of the errors of fact and law upon which the appeal is based shall be included in either the notice of appeal or in any brief filed. The notice of appeal shall include the names and addresses of parties served. A notice of appeal not timely filed shall be dismissed for lack of jurisdiction.

(b) *Service of copies of notice of appeal.* The appellant shall personally deliver or mail the original notice of appeal to the Board of Indian Appeals. A copy shall be served upon the administrative law judge whose decision is appealed as well as all interested parties. The notice of appeal filed with the Board shall

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include a copy made as required by (c) Action record in law judge, notice of superintendent duplicate and 4.241(c) part. to the Office deal part. The formed to ties and B after be at or at the Law or at the In those c the hearit ministrati transcript warded to from recei appeal.

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Within 60 days sion, an appel- notice of ap- it, appellant's ed representa- R 1.3, with the ls. Office of S. Department ion Boulevard. A statement nd law upon d shall be in- ce of appeal or tice of appeal and addresses ce of appeal dismissed for

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include a certification that service was made as required by this section.

(c) Action by administrative law judge; record inspection. The administrative law judge, upon receiving a copy of the notice of appeal, shall 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 shall be conformed to the original by the Land Titles and Records Office and shall 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 administrative law judge shall have a transcript prepared which shall be forwarded to the Board within 30 days from receipt of a copy of the notice of appeal.

§4.321 Notice of transmittal of record on appeal.

The original record on appeal shall be forwarded by the Land Titles and Records Office to the Board by certified mail. Any objection to the record as constituted shall 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 shall be docketed by the Board upon receipt of the administrative record from the Land Titles and Records Office. All interested parties as shown by the record on appeal shall be notified of the docketing. The docketing notice shall specify the time within which briefs may be filed and shall 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, shall 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

54.331

Titles and Records Office, the duplicate record required by §4.320(c) of this part shall 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: Sections 4.330 through 4.340 appear at 84 FR 6487, Feb. 10, 1969, 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



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§ 4.340

taken: all original documents, peti-  
tions, or applications by which the pro-  
ceeding was initiated; all supplemental  
documents which set forth claims of in-  
terested 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 con-  
tains all information and documents  
utilized by the deciding official in ren-  
dering the decision appealed.

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

§ 4.338 Docketing.

An appeal shall be assigned a docket  
number by the Board 20 days after re-  
ceipt of the notice of appeal unless the  
Board has been properly notified that  
the Assistant Secretary—Indian Affairs  
has assumed jurisdiction over the ap-  
peal. 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 objec-  
tion 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 govern-  
ing 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 deci-  
sion, 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 hear-  
ings shall be conducted by an adminis-  
trative law judge of the Office of Hear-  
ings and Appeals. The Board may, in  
its discretion, grant oral argument be-  
fore 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-  
thority committed to the Bureau, and  
the Board has not otherwise been per-  
mitted to adjudicate the issue(s) pursu-  
ant 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 As-  
sistant Secretary—Indian Affairs for  
further consideration.

§ 4.338 Submission by administrative  
law judge of proposed findings, con-  
clusions and recommended deci-  
sion.

(a) When an evidentiary hearing pur-  
suant to § 4.337(a) of this part is con-  
cluded, 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 ad-  
ministrative law judge, shall be for-  
warded to the Board.

(b) The administrative law judge  
shall advise the parties at the conclu-  
sion 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 re-  
garding recommended decision by  
administrative law judge.

Within 30 days after receipt of the  
recommended decision of the adminis-  
trative 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 ap-  
peal proceedings, including the Board's  
decision, shall be forwarded to the offi-  
cial of the Bureau of Indian Affairs  
whose decision was appealed for proper  
disposition in accordance with rules

#### § 4.350

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, administrative judges shall determine such heirs by applying inheritance laws in accordance with the White Earth Reservation Land 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 officer in charge of the White Earth Reservation Land Settlement Branch of the Minneapolis Area Office, Bureau of Indian Affairs, at Cass Lake, Minnesota.

(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 of the

#### 43 CFR Subtitle A (10-1-94 Edition)

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]

#### § 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:

(1) A copy of the death certificate if one exists. If there is no death certificate, then another form of official written evidence of the death such as a burial or transportation of remains permit, coroner's report, or church registry of death. Secondary forms of evidence of death such as an affidavit from someone with personal knowledge concerning the fact of death or an obituary or death notice from a newspaper may be used only in the absence of any official proof or evidence of death.

(2) Data for heirship finding and family history, certified by the Project Director. Such data shall contain:

(1) The facts and alleged facts of the decedent's marriages, separations and divorces, with copies of necessary supporting documents;

(11) The names and last known addresses of probable heirs at law and other known parties in interest;

(111) Information on whether the relationships of the probable heirs at law to the decedent arose by marriage, blood, or adoption.

(3) Known heirship determinations, including those recognized by the Act determining the heirs of relatives of

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the decedent, as ordered by court other states, by bunals author countries.

(4) A report of the decedent, related to the decedent, and an of such comp real property sion of the ce ceased, citing heirs at law, and the amou tributed to eac

(5) A cerific rector or his de es provided for were furnished and diligent se: [56 FR 61383, Dec 1991]

#### § 4.352 Determinative judge

(a) Upon revl by the Project trative judge w not there are fact that need

(b) If there quiring determ tive judge will termination o itance laws in Such prelimi be entered v when possible furnished anc mentary the names, birth c decedent, and the fact that heirs.

(1) Upon iss mination, th shall issue a shall mail a gether with a determination est allowing f show cause i mination who administrativ tificate to be manner of suc

(2) The Pr cause, within