



# United States Department of the Interior

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

IN REPLY REFER TO:

OCT 16 2014

## NOTICE OF DECISION

Certified Mail – Return Receipt Requested – 7013 2630 0001 5558 0961

Mr. Robert Pinto, Sr., Chairman  
Ewiiapaayp Band  
4054 Willows Road  
Alpine, California 91901

Dear Mr. Pinto:

This is notice of our proposed decision upon the Ewiiapaayp Band's application to have the below described off-reservation real property accepted by the United States of America in trust for the Ewiiapaayp Band of Kumeyaay Indians, California.

The land referred to herein is situated in the unincorporated area of the County of San Diego, State of California, and is described as follows:

All that portion of the Southeast Quarter of the Southeast Quarter of Section 25, Township 15 South, Range 2 East, San Bernardino Meridian, in the County of San Diego, State of California, according to Official Plat thereof, described as follows:

Beginning at the Southeast corner of said Southeast Quarter of the Southeast Quarter; Thence South  $88^{\circ} 58' 35''$  West along the Southerly line thereof 60.00 feet more or less to a line which is parallel with and 60.00 feet westerly of, measured at right angles to the Easterly line of said Southeast Quarter of the Southeast Quarter and its Southerly prolongation, being the true Point of Beginning; thence continuing South  $88^{\circ} 58' 35''$  West along said Southerly line 815.00 feet; thence North  $1^{\circ} 29' 32''$  West parallel with the Easterly line of said Southeast Quarter of the Southeast Quarter 940 feet, more or less, to the Southerly line of land described in deed to the State of California, recorded May 11, 1966 as Instrument No. 78689 of Official Records of County Recorder of said San Diego County; thence Easterly along said Southerly line to the aforesaid parallel line; thence South  $1^{\circ} 29' 32''$  East along said parallel line to the True Point of Beginning.

TAKE PRIDE  
IN AMERICA 

The above-described parcel is referred to as San Diego County Assessor's Parcel Number 404-090-07-00, containing 18.95 acres, more or less.

The Salerno site is located on Alpine Boulevard in Alpine, California, approximately 40 miles west of the main Ewiiapaayp Reservation and 0.23 miles (1,215 feet) southeast of Ewiiapaayp trust property which is the site of the Band's tribal headquarters and the Southern Indian Health Council, Inc., health clinic.<sup>1</sup> The properties adjoining the subject site to the north are Alpine Boulevard and Interstate 8, beyond which is undeveloped land. Properties adjoining the subject site to the east, south and west are primarily undeveloped land with a couple of residential structures. The Band does not have any planned development, physical alteration or change in land use for the Salerno Site acquisition.

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

On February 14, 2002 and November 8, 2012, by certified mail, return receipt requested, we issued notice of and sought comments regarding the proposed fee-to-trust application from the California State Clearinghouse; Legal Affairs Secretary, Office of the Governor; Sara Drake, Deputy Attorney General, State of California; James Peterson, District Director, Office of Senator Diane Feinstein; House of Representatives; Honorable Duncan Hunter; San Diego County Assessor; San Diego Treasurer and Tax Collector; County of San Diego, Office of the Chief Administrator; San Diego County Sheriff's Department; San Diego County Department of Public Works; San Diego County Department of Planning and Land Use; Chairperson, Barona Band; Chairperson, Campo Band; Chairperson, Jamul Indian Village; Chairperson, La Jolla Band; Chairperson, La Posta Band; Chairperson, Los Coyotes Band of Cahuilla & Cupeno Indians; Chairperson, Manzanita Band; Chairperson, Mesa Grande Band; Chairperson, Pala Band; Chairperson, Pauma Band; Chairperson, Rincon Band; Chairperson, San Ysabel Band; Chairperson, Sycuan Band; Chairperson, Viejas Band; Chairperson, Pechanga Indian Reservation; and Chairperson, Inaja-Cosmit Band of Mission Indians.

Our analysis, contained within this notice, includes and considers the comments received on behalf of the San Diego County Assessor/Recorder/County Clerk; Soboba Band of Luiseno Indians; Viejas Band of Kumeyaay Indians; Chief Administrative Office, County

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<sup>1</sup> On July 8, 2013, in their response to comments on the Salerno parcel application, the Ewiiapaayp Band of Kumeyaay Indians stated that the Salerno parcel is actually 19 miles from the main Ewiiapaayp Reservation, not 40 miles as stated in their original trust application.

of San Diego; Attorney General, State of California; Board of Supervisors, San Diego County; Planning & Development Services, San Diego County; and Duncan Hunter, U.S. House of Representatives, in addition to the applicant's responsive information.

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In response to the above notices, we received the following comments:

1. Letter dated February 21, 2002 from Robert Salgado, Sr., Tribal Chairman, Soboba Band of Luiseno Indians, in which he expressed support and agreement of this fee-to-trust application.
2. Letter dated February 25, 2002 from Gregory J. Smith, County Assessor, County of San Diego, stating the total taxes for the 2001-2002 tax roll was \$3,076.08.
3. Letter dated March 12, 2002 from Chantal Saipe, Tribal Liaison, Chief Administrative Office, County of San Diego, summarized as follows:
  - a. In the absence of negotiated agreements with the Band, the County opposes this application to place additional land into trust.
  - b. The Band has no plans for developing the parcel; however, the potential future land uses, which the Band could decide to build without review by the County, may be more intensive than uses allowed by the current General Plan and zoning designations.
  - c. It is noted that in the vicinity of the subject parcel are two parcels identified for (1) a potential casino; and (2) the proposed Alpine South Health Clinic. The subject parcel could easily be used in conjunction with either of these two developments.
  - d. Zoning on this parcel allows light agricultural uses and a very low residential density. The lot is currently subject to the provisions of the Forest Conservation Initiative, which set the low density on this site. This is not inconsistent with the zoning.
  - e. The parcel fronts on Alpine Boulevard and has a private road easement, Star Valley Lane, along its eastern boundary. If the parcel was to be developed and work performed on Alpine Boulevard, the County would require construction and encroachment permits for the work.
  - f. Exhibit 2 of the application shows the parcel as containing an easement for a public riding and hiking trail granted to the State of California. . . If your agency considers granting the Band's request, the County urges you to condition the approval of the request on this easement remaining in force.
4. Letter dated March 15, 2002, from Peter H. Kaufman, Deputy Attorney General, for Bill Lockyer, Attorney General, Department of Justice, State of California, with objections summarized as follows:
  - a. This application has been submitted while there is pending: (1) another fee to trust application on which the Band proposed to relocate the health clinic; (2) an application to proclaim the health clinic site a reservation

under 25 USC §467; (3) an application to approve a lease modification between the Band and the California non-profit operating the health clinic; and (4) proposals to place a casino on a portion of the health clinic site.

- b. The property is located miles from the Band's existing reservation, is not needed to support the use occurring on its health clinic site and the Band has no immediate need for this property to be taken into trust.
  - c. Nothing in 25 USC § 465 suggests that the fee to trust process should be utilized for the purpose of acquiring land just for the sake of making it sovereign Indian territory. The acquisition must serve a larger goal consistent with the objectives of federal law and the United States Constitution.
  - d. The Band has not identified any harm which might occur to a particular legitimate tribal interest if the trust acquisition is rejected at this time or any specific tribal social or economic objective which might be achieved if the application were approved.
5. Letter dated April 8, 2002, from Steven F. TeSam, Tribal Chairman, Viejas Band of Kumeyaay Indians, with objections summarized as follows:
- a. The Cuyapaipe Band, consisting of ten members has not demonstrated a need for additional trust or reservation lands, particularly where those lands are located a great distance (40 miles) from the original Cuyapaipe reservation and less than a mile from the Viejas reservation and within the ancestral homelands of the Viejas Band.
  - b. This FTT application and reservation proclamation will impact the Viejas Tribe's territorial jurisdiction within its aboriginal territory, and will impact the Viejas community and Viejas tribal self-determination.
  - c. This application is the latest in a series of actions the Cuyapaipe Band is taking in an attempt to not only replace the Southern Indian Health Council ("SIHC") clinic with a casino, but also to create a second reservation less than a mile from the Viejas Reservation.
  - d. The Cuyapaipe Band is also seeking approval of: (1) a lease relinquishment for the current SIHC clinic site; (2) approval of a reservation proclamation for the current SIHC clinic site; and (3) approval of a FTT application for San Diego County APN 406-080-24 (Walker property) located in close proximity to the Salerno property. Each of these actions is interrelated and all are part of the Band's plan to build a casino on the current SIHC clinic site. The Cuyapaipe Band has packaged this deal as the "Ewiiapaayp Casino and Healthcare Project."
  - e. Although the Cuyapaipe Band contends their reservation is too remote and without the services needed to sustain their members, the Band appears, to be developing their reservation. The Band is seeking funding to improve the roads at their reservation and has constructed the first building for a water bottling plant, to make use of the sole source aquifer located on their original reservation.

- f. The Cuyapaipe Band contends that their current trust land in Alpine is inadequate for their future goals and objectives. This site, the location of the current SIHC clinic, was never intended to be placed in trust to support the future goals and objective of the Cuyapaipe Band. The land was purchased and placed in trust for the sole purpose of housing a health clinic that would serve members of seven Southern California tribes.
  - g. The Cuyapaipe Band has requested a CATEX from the NEPA, stating the NEPA should not apply because the Cuyapaipe Band has proposed no change in use for this vacant land. However, this statement does not ring true. In attempting to gain support to replace the SIHC clinic with a casino, the Cuyapaipe Band has promised the local community not only money and a replacement clinic, but also land for such amenities as a new high school, a Sheriff substation and a Fire Department facility. Whether these goals and objectives are a casino at the current SIHC site or the creation of a second reservation, it is highly unlikely that the Salerno property will remain vacant land. Thus, the BIA must consider the cumulative environmental impact of this FTT application. Likewise, the BIA must consider the cumulative impacts of the reservation proclamation requested as part of the Salerno property application.
6. Letter dated November 26, 2012, from the Assessor's Office, County of San Diego, states that the total 2012-2013 tax bill for APN 404-090-07-00 was \$4,285.12 and the assessed value was \$360,975.
7. Letter dated December 4, 2012, from Dianne Jacob, Supervisor, Second District, San Diego County Board of Supervisors, with comments as follows:
  - a. As a member of the San Diego County Board of Supervisors with eleven Indian reservations in my Supervisorial District, I am writing to express opposition to the Ewiiapaayp Band of Kumeyaay Indians 2012 application to place land into federal trust.
  - b. The County of San Diego opposes proposals by Tribes in the region to place additional land into federal trust unless there is a negotiated agreement to mitigate impacts to the surrounding area.
  - c. Although the Notice is for a non-gaming acquisition and the tribe says they have no plans for future uses on site, this does not preclude development from taking place after it is placed into trust. Until more information is received about the future use of the property, the potential impacts of this action cannot be properly assessed.
  - d. Ewiiapaayp's application to place additional property into trust would result in a current loss of property and school district taxes totaling \$4,285 annually. The County would lose the additional tax revenue from the future facilities and businesses that may be developed on this parcel.
8. Letter dated December 7, 2012, from Duncan Hunter, Member of Congress, U.S. House of Representatives, with comments as follows:

- a. The current application is the renewal of an effort originally initiated in 2002. At that time, the Tribe applied to have the Salerno site placed into trust along with additional sites known as the Walker parcel and the Willow Road parcels as part of a larger plan to build a casino on land presently leased to the Southern Indian Health Clinic (SIHC).
  - b. The Tribe has stated that it does not anticipate any development, physical alteration or change in land use after acquisition of the Salerno site. At the same time, it is incumbent upon the BIA to take into account prior efforts regarding this property in its review of this matter and to determine for what specific purpose the land will be used.
  - c. The stated primary goal in obtaining federal trust status for this property is listed as "long-term socio-economic security." The Salerno site, however, is located more than 40 miles from the Tribe's reservation boundaries, is vacant and has no redeeming value if left undeveloped.
  - d. There remain unresolved administrative appeals regarding the SIHC lease and the trust status of the Walker Parcel, any action regarding the Salerno site would be premature and unnecessary.
9. Letter dated December 14, 2012, from Mark Wardlaw, Director, Planning & Development Services, County of San Diego, with comments as follows:
- a. There are 19 reservations and 18 tribal governments within the County. The San Diego County Board of Supervisors opposes the taking of additional lands into trust. The County has urged the Secretary of the Interior to decline to designate as "tribal land" newly purchased land acquired for the purpose of Indian gaming and related uses.
  - b. The County appealed the prior BIA (Walker) decision to approve a transfer to trust in June 2011. There has been no decision on that appeal.
  - c. Subject parcel is undeveloped and is currently designated by the County General Plan for residential use at a density of one dwelling per 4, 8 or 20 acres, depending on the slope of the property.
  - d. The application should explain how the transfer of undeveloped property achieves the goal of long-term socio-economic security and to benefit the Ewiiapaayp Band's efforts of enhancing tribal self-determination.
  - e. The County is opposed to the proposed action because there is no assurance that the land use on the subject property will not change in the future.
  - f. Infrastructure necessary to support development may adversely affect County resources and the surrounding environment.
  - g. The County collects \$4,285.12 per year of taxes and special assessments. This action proposes a transfer of 18.95 acres of land with current land and improvements valued at \$360,975. This annual loss will be further compounded based on the assessed value of the property projected in future years.

- h. This application in combination with other approved and pending applications for local tribal nations has a cumulative fiscal impact on the County that should be analyzed as part of any BIA application that proposes to acquire land under the jurisdiction of the County.
  - i. Loss of tax revenue may affect public services in the area. Fire protection services and emergency medical services are funded through property taxes.
  - j. The subject parcel is not developed and is separated from the existing trust lands by I-8. Alpine Boulevard runs adjacent to the parcel proposed for acquisition into trust. Proposed transfer of the parcel into trust will remove the County's ability to collect revenue sources to maintain public roadways. The Ewiiapaayp should be required to enter into an agreement with the County to mitigate any offsite impacts that may result from future development.
  - k. Current zoning is A-70, Limited Agriculture. The property is currently undeveloped... If the property was to be developed, subject to the County's land use authority, the following regulations, analyses, monitoring and mitigation programs would be required. (A) Land Resources; (B) Traffic/Transportation; (C) Fire Safety and Emergency Medical Services; (D) Water Supply; (E) Air Quality; (F) Biological Resources; (G) Noise; (H) Water Quality; (I) Visual Resources; and (J) Cultural Resources.
10. Letter dated January 9, 2013, from Donald C. Baur, Counsel to Viejas Band of Kumeyaay Indians, comments submitted on behalf of the Viejas Band are summarized as follows:
- a. The current request reactivates review of a 2001 Ewiiapaayp application ...Ewiiapaayp's 2001 proposal involved an elaborate scheme to develop an off-reservation casino within the ancestral homeland of Viejas, rather than the Ewiiapaayp's own reservation located approximately 38 miles away.
  - b. The Ewiiapaayp Band has tried to avoid fully disclosing its development plans... There is only one reason that the five-member Ewiiapaayp Band is requesting trust land near the existing SIHC clinic - gaming. Beginning in 2000, Ewiiapaayp filed a number of requests with BIA, including: (1) a request for approval of a lease relinquishment between the SIHC and the Band for the 10 acre parcel of land on which the health clinic is located (Dec. 21, 2000); (2) designation of that 10 acre parcel of land as a satellite reservation to the Band's existing 5,465 acre reservation (Dec. 11, 2001); (3) trust acquisition of the 16.69 acre Walker parcel (Mar. 21, 2001); (4) trust acquisition and reservation designation of an additional 18.95 acre parcel, the Salerno Parcel (Sept. 13, 2001); and (5) five additional fee-to-trust requests (the "Willows Road Parcels") for approximately 10.5 acres of land located adjacent to the 10 acre clinic site (July 1, 2002). Each

request was directly related to the Band's plan to develop a casino in Alpine on the grounds of the current SIHC clinic.

- c. The Ewiiapaayp Band has applied under 25 CFR 151.10 to have the Salerno parcel acquired in trust. The current proposal does not involve land adjacent to or contiguous with the Band's reservation land, which is located nearly 40 miles away. Even the SIHC land is non-contiguous and 1.5 miles away. The application must therefore be processed under the more rigorous standards applicable to off-reservation trust acquisition requests under 25 CFR § 151.11.
- d. The Ewiiapaayp Band cannot reasonably claim that it needs the Salerno parcel for any of the reasons articulated in the IRA. Under the Revenue Sharing Trust Fund, the Ewiiapaayp are entitled to receive \$1.1 million per year. Access to this sum of money affords the Band with additional economic options.
- e. The five-member Band has an existing reservation of 5,465 acres. The Ewiiapaayp's reservation is suitable for numerous alternative uses, all of which would promote tribal economic prosperity. The Band has successfully included its reservation as part of the Tule Wind Project.
- f. Viejas commissioned a study in 2003 by Alfred Gobar Associates of possible alternative uses of the Ewiiapaayp's land. The study demonstrated numerous non-gaming uses could be made of the reservation including vacation housing, RV campgrounds, and corporate and cultural retreats. In addition, the 2003 NIGC EA identified the development of a drinking water facility as among the several long-term programs for economic development. Finally, the Ewiiapaayp Reservation can be used for gaming.
- g. BIA must take into account the potential for this trust acquisition to impact negatively Viejas' territorial jurisdiction within its aboriginal territory, the impacts upon the Viejas community and Viejas tribal self-determination, and the potential for other conflicts under federal Indian law...there is significant potential for harm to Viejas and inter-tribal conflict should BIA choose to acquire in trust a parcel of land that is located within the Viejas people's ancestral territory and so close to the existing Viejas reservation. BIA has a fiduciary obligation to Viejas, thus, if the BIA exercises its trust responsibility in a way that will create conflict and problems for the beneficiaries, it will breach this obligation.
- h. BIA has not released an EA or EIS to support the Ewiiapaayp's Salerno request. One of the most obvious deficiencies with BIA's review of the Salerno parcel is its failure to consider all of the Ewiiapaayp's proposed actions together. BIA is well aware of the several actions pending on behalf of the Ewiiapaayp...all deal with land within the vicinity of the Walker parcel and all are designed to allow the Ewiiapaayp to operate a class III casino on off-reservation land located in Alpine. A Categorical Exclusion cannot be used. Viejas must be included as a Cooperating Agency for purposes of NEPA compliance.



11. Letter dated January 11, 2013, from Peter H. Kaufman, Deputy Attorney General for Kamala D. Harris, Attorney General, Department of Justice, State of California, comments are summarized as follows:

- a. The Band's principal contentions in support of this application (that its existing reservation has "no reasonable possibility of economic development") and that its existing 10 acre trust site is "inadequate for the Band's future goals and objectives" are demonstrably false.
- b. The Ewiiapaayp's request that the Salerno site be proclaimed its reservation completely ignores the fact that as recently as March 27, 2012, the Band acknowledged that the area in which the Salerno site is located is not part of the Ewiiapaayp's historic territory.
- c. Section 465 was intended to restore tribal land lost through the federal allotment process and to allow for the acquisition of land in trust until such time as a tribe had sufficient land to be economically self-sufficient. The Salerno site does not constitute land lost to the Band as a result of the federal government's allotment process. It was never part of the Band's historic territory. Further, nothing in the record supports the notion that this seven-member band is not economically self-sufficient or that its current over 4,000 acre reservation does not have the potential to make the Band economically self-sufficient.
- d. The Band currently receives \$1.1 million annually from the State's Revenue Sharing Trust fund and is currently seeking the BIA's approval for an agreement with Iberdrola Renewables allowing use of a portion of its reservation for the location of 20 large wind turbines as part of the Tule Wind Power Project in return for lease and royalty payments that have the potential to be substantial.
- e. The Band concedes in its application that it is seeking "to secure a new site for the Southern Indian Health Council, Inc." health care facility currently located on its 10 acres trust land belying the notion that this trust land would be unavailable to fulfill its future goals and objectives.

12. Supplemental Comments of the Viejas Band of Kumeyaay Indians, letter dated January 29, 2013, from Donald C. Baur, Counsel to the Viejas Band of Kumeyaay Indians, comments are summarized as follows:

- a. All Ewiiapaayp requests for trust land acquisition, reservation designation, and lease termination must be considered together. Such a review is necessary due to the close proximity of the affected lands; the intent by Ewiiapaayp to connect these actions as part of a unified reservation in Alpine; the intent of the Ewiiapaayp to use all of these lands for its own unified socioeconomic and tribal self-sufficiency purposes; the fact that they are "connected actions" for purposes of NEPA; the fact that the activities undertaken on each parcel will be cumulative impacts for purposes of the NEPA; and will give rise to indirect effects for

purposes of NEPA. Documents released under FOIA that confirm the need to consider all of these requests together for the reasons noted are:

- Initial Salerno trust land requests as of September 13, 2001, which were pending at time of SIHC lease relinquishment and initial Walker and Willows Road trust land requests.
  - September 7, 2010, Ewiiapaayp letter confirming the desire to move forward with the Salerno request at least as early as August 4, 2010, *while* the Walker request was under active review.
  - March 21, 2011, Ewiiapaayp email chain again confirming that the Salerno request was pending during the Walker request review.
  - December 8, 2011, Ewiiapaayp letter asking for action on the Salerno request which has “languished at BIA for that [sic] past 3 years without apparent progress.” If the reinitiated Salerno request had “languished for 3 years” as of December 2011, it would have been reactivated at about the same time Assistant Secretary Artman directed renewed consideration of the Walker request (May 16, 2008), confirming that both requests should have been considered together.
  - Internal BIA documents confirm that Ewiiapaayp was lobbying the Assistant Secretary for Indian Affairs office for action on the Walker parcel request at the same time the Salerno request was being processed by the Regional Office for reinitiated review.
  - Maps included in the FOIA release show the existence of a Ewiiapaayp “project” in Alpine. These maps identify what appear to be three separate locations for the “project” – SIHC parcel; Walker parcel; Salerno parcel. The existence of a singular “project” with three locations under contemporaneous consideration by BIA confirms the need for a unified review of all parcels and a single NEPA environmental impact review document, as an EIS.
- b. BIA should confirm that the reservation request is *not* under review. The record provided under FOIA indicates that Ewiiapaayp is seeking to have the Salerno parcel declared its reservation. BIA’s re-initiation notice makes no reference to this request. Viejas has received no notice that it is under active review. As a result, Viejas understands that BIA is not considering such action...If at any time BIA proceeds with consideration of any Ewiiapaayp reservation designation request, Viejas asks for advance notice that such a review is underway and direct government-to-government consultation. No such consultation has occurred to date on any Ewiiapaayp reservation designation request.
- c. BIA must comply with Section 106 of the National Historic Preservation Act (NHPA). In its February 6, 2002 letter to Viejas, in accordance with Section 106 of NHPA, BIA sought comments on the archaeological sites or traditional cultural properties that Viejas considered important and that

the potential to be affected by the proposed federal trust acquisition for the Salerno parcel. To comply with Section 106, BIA must re-engage in this discussion with Viejas as soon as possible. BIA cannot rely on a record that is over ten years old. As indicated in the January 9, 2013 Viejas comments on the renewed application, there is likelihood that cultural resources are present on the Salerno parcel.

Responses by the Ewiiapaayp Band of Kumeyaay Indians to the above comments are as follows:

1. Ewiiapaayp Band's response dated March 25, 2002, to comments received in a letter dated March 15, 2002, from the Department of Justice, State of California, summarized as follows:
  - a. The State incorrectly asserts that the criteria for acquiring land in trust requires the avoidance of harm to a particular tribal interest if the trust acquisition is rejected or to any specific tribal social or economic objective which might be achieved if the application was approved. To the contrary, there is nothing in federal law which required the Tribe to prove harm to the Tribe's interests or objectives if the application is rejected. Instead, federal regulations provide that land may be accepted in trust status if, among other reasons, the tribe owns an interest in the land or the acquisition of land is necessary to facilitate tribal self-determination. See 25 CFR § 151.3.
  - b. Federal policy seeks to promote tribal self-determination. The acquisition of a sufficient land base to carry out such a policy is reason in and of itself to accept the land in trust. Likewise, Indian tribes such as the Ewiiapaayp Band are sometimes without financial resources to develop definitive plans for physical use of land that is the subject of a fee-to-trust application.
  - c. Finally, the Tribe is actively exploring the possibility of "using" the land to preserve open space or possibly for restoration of endangered critical habitat, if necessary. The use of the property as open space will facilitate the Tribe's self-determination as such a "use" may allow the Tribe to finance or otherwise conduct economic development activities on other lands – to the benefit of the Tribe. Furthermore, the "use" of the property as open space is consistent with the property's current status – open space.
2. Ewiiapaayp Band's response dated April 29, 2002, to comments from Viejas Tribal Government, in a letter dated April 8, 2002, summarized as follows:
  - a. Viejas' conclusion that the proposed acquisition of the Salerno property is related to the casino project, lease relinquishment, reservation proclamation and proposed acquisition of the Walker parcel in trust for the Tribe is merely speculation and lacks merit. The actions are not interrelated and should be separately considered.

- b. Viejas asserts that, in its opinion, the Tribe does not need additional land. In light of the fact that the Cuyapaipe Indian Reservation is nearly impossible to use for economic development, Viejas' conclusion is unsupported by the facts. Rather, the Tribe requests that federal policy promoting self-determination and economic development of Indian tribes be upheld.
  - c. Viejas asserts that acquisition of the Salerno parcel will "impact the Viejas Tribe's territorial jurisdiction within its aboriginal territory." Viejas' position is neither legally nor factually correct. Viejas does not exercise territorial jurisdiction outside the Viejas Indian Reservation, and perhaps, on its second reservation – the Capitan Grande Indian Reservation – to which Viejas is a successor in interest. Instead, the Salerno parcel is proposed to be proclaimed part of the Cuyapaipe Indian Reservation – an already existing reservation. Likewise, Viejas' assertion of territorial jurisdiction over its aboriginal territory is flawed. Viejas' claims to title or jurisdiction over its aboriginal territory were extinguished by force of federal law. Therefore, there is no impact on Viejas' territorial jurisdiction.
  - d. Viejas asserts that the Tribe must comply with NEPA by completing an environment assessment in support of the acquisition of the Salerno parcel in trust. Because the Tribe has no plans to change the current use of the Salerno parcel, the proposed acquisition will satisfy the requirements of NEPA through the use of a categorical exclusion.
  - e. Viejas' position regarding the tribal-state gaming compact is unsupported by the substantive portions of the tribal-state gaming compact between the Tribe and the State of California. Viejas is free to interpret its tribal-state gaming compact as it deems fit. However, the Tribe and the State of California agree that the Tribe's 8.6 acres trust land in Alpine, California qualifies as "Indian lands" pursuant to the Indian Gaming Regulatory Act. Therefore, Viejas' concerns are unwarranted and unsupported by law or fact.
3. Ewiiapaayp Band's response dated July 8, 2013, to comments received in a letter dated November 26, 2012, from the Assessor's Office, County of San Diego, summarized as follows:
- a. The annual parcel tax loss to County by establishment of the Salerno parcel in trust is not significant and in fact is negligible to the annual County parcel tax assessments. Further, the County amendment to its General Plan (Update) imposes upon itself a down-zoning of 20 percent of all properties and a decrease to parcel tax values subject to annual parcel tax assessment of over \$600 million. An objective analysis by the firm of Rea and Parker holds that the County analysis is flawed and the actual decrease affects 60 percent of all properties and results in a decrease in parcel values of \$1.8 billion. The County's voluntary reduction of its annual parcel tax revenues of between 20 percent to 60 percent makes

implausible its complaint that the loss of the less than \$4,300 per year is significant or conflicts with its own policy that results in self-imposed tax revenue reductions.

4. Ewiiapaayp Band's response dated July 8, 2013, to comments received in a letter dated December 4, 2012, from Dianne Jacob, San Diego County Board of Supervisors, summarized as follows:
  - a. Supervisor Jacob's statement it "opposes proposals by Tribes in the region to place additional land into Federal Trust unless there is a negotiated agreement to mitigate impacts to the surrounding area" is false. The County Resolution opposes all tribal fee-to-trust acquisitions with or without mitigations offered by a tribe.
  - b. Supervisor Jacob's request that the BIA compel the Ewiiapaayp Band of Kumeyaay Indians to enter into an agreement with the County to mitigate any offsite impacts that may result from the development is unnecessary, because there will be no impacts from the proposed no change in use.
  - c. Further, the Tribe previously sought a cooperative agreement with the County and was rebuffed by it. The Tribe's letters dated October 14, 2002 and December 9, 2002 document the County refused the repeated attempts of the Tribe to negotiate a cooperative agreement for its various projects, including its FTT applications. The County's refusals to consider a cooperative agreement despite the Tribe's repeated requests, and the Tribes successful request of the Alpine Community Planning Group to approve a resolution calling upon the County to do so, and the County's report "Update on Impacts of Tribal Economic Development Projects in San Diego County: on page 135, § 6.5.2. "FTT Applications by San Diego Tribes that states, "It would therefore be beneficial for the County to hold consultations with Tribes desiring to place land in trust to resolve conflicts..." The County refused the Tribe's many entreaties to consult despite requests by the Alpine Planning Group and the County's own report, therefore, a request to compel the Tribe to enter into an agreement concerning a FTT application with no impacts rings hollow and should be ignored. Bad faith on the part of the County should be appropriately weighed.
  - d. Supervisor Jacob's wishes to substitute her speculation about the future use of the Salerno parcel for the Tribe's proposed use. Such speculation is not contemplated by the requirements of 25 CFR Part 151, or any other federal statute, regulation or federal Indian policy. The Supervisor's speculation has no basis in fact. The Department is under no obligation to engage in speculation.
  - e. The annual parcel tax loss to County by establishment of the Salerno parcel in trust is not significant and in fact is negligible to the annual County parcel tax assessments. Further, the County amendment to its General Plan (Update) imposes upon itself a down-zoning of 20 percent of all properties and a decrease to parcel tax values subject to annual parcel

tax assessment of over \$600 million. An objective analysis by the firm of Rea and Parker holds that the County analysis is flawed and the actual decrease affects 60 percent of all properties and results in a decrease in parcel values of \$1.8 billion. The County's voluntary reduction of its annual parcel tax revenues of between 20 percent to 60 percent makes implausible its complaint that the loss of the less than \$4,300 per year is significant or conflicts with its own policy that results in self-imposed tax revenue reductions.

- f. The Supervisor errs in suggesting the County "would lose the additional tax revenue from the future facilities and business that may be developed on" the Salerno parcel. Tribal trust land and tribally owned improvements thereon are exempt from county taxation. Non-tribally owned improvements subject to a federal lease agreement are also exempt from county taxation. On December 5, 2012, the Bureau of Indian Affairs (BIA) published the final version of regulations codified at 25 CFR Part 162 governing the leasing of Indian lands. 77 Fed. Reg. 72440 (Dec. 5, 2012). The final lease regulations prohibit state or local government taxation of permanent improvements and activities on the leased premises and the leasehold interests itself.
5. Ewiiapaayp Band's response dated July 8, 2013, to comments received in a letter dated December 7, 2012, from Duncan D. Hunter, Member of Congress, U.S. House of Representatives, summarized as follows:
- a. The Ewiiapaayp Band of Kumeyaay Indians' Salerno FTT application was never part of a "part of a larger plan to build a casino..." Congressman Hunter's request for the BIA to "take into account prior efforts regarding this parcel in its review" of the Salerno FTT application must find that the Salerno FTT application was never associated with the Tribe's former tribal gaming project or its Walker FTT application, and that the former tribal gaming project was terminated in 2004.
  - b. Congressman Hunter errs in the distance of the Salerno parcel from the Tribe's Big Ewiiapaayp section of it Ewiiapaayp Indian Reservation, which is 19 miles and not 40 miles. The Salerno parcel is 0.23 miles or 1,215 feet southeast of the Tribe's Little Ewiiapaayp.
  - c. The Congressman errs in suggesting the Salerno parcel "has no redeeming value if left undeveloped." State and local governments, as well as tribal governments, recognize the value of open space and regularly use undeveloped lands to mitigate the impacts of other future projects.
  - d. The Congressman errs in suggesting that "leaving the parcel in its current condition directly contradicts the stated purpose of placing the land into trust." A tribe's use of trust land to preserve environmental and aesthetic values or to mitigate the impacts of other future projects improves a tribe's governance and authority, just as it does for all state and local governments.

- e. The Congressman's concern that the "Tribe has not disclosed any other economic initiatives" for the Salerno parcel is answered by this review of the proposed use, which is no change in use.
  - f. The Congressman's concern that "final decisions must be made regarding the SIHC lease" was answered by the Interior Board of Indian Appeals (IBIA) decision to uphold the renewal of the SIHC, Inc., lease of Little Ewiiapaayp for an additional 25 years through 2037.
  - g. The Congressman's concern that the IBIA appeal by the Viejas Group and San Diego County concerning the BIA notice to approve the Tribe's Walker FTT application is baseless because it is unrelated to the Salerno FTT application.
6. Ewiiapaayp Band's response dated July 8, 2013, to comments received in a letter dated December 14, 2012 from Planning and Development Services, San Diego County, summarized as follows:
- a. The County letter errs in that the Salerno parcel is 0.23 miles or 1,215 feet southeast of the Ewiiapaayp Band of Kumeyaay Indians' Little Ewiiapaayp section of its Ewiiapaayp Indian Reservation. The County's confirmation that the San Diego County Board of Supervisors approved a standing resolution (Resolution No. 94-115 dated March 29, 1994 and November 1, 2000) that opposes all fee-to-trust applications by all Indian tribes in San Diego County...this Resolution make meaningless the County letter because its interpretation and analysis of the facts is fore-ordained by the Resolution. The County analysis is more than suspect, it is meaningless, and should be disregarded as lacking the credibility required for objective analysis.
  - b. The Department should decline the County's invitation to engage in speculation as to the alternatives to the stated use for the Salerno parcel. The Tribe plainly stated its intended use of the parcel in the application and a May 5, 2003 letter. The County's speculation has no basis in fact and contradicts both good business judgment and plain reading of the facts. The Tribe's former tribal gaming project on Little Ewiiapaayp was terminated in 2004, and any new use is not permitted by approval of the Salerno fee-to-trust application. The Department is under no obligation to engage in speculation. *See e.g., Carcieri v. Norton, 423 F.3d 45 (1<sup>st</sup> Cir. 2005); and Town of Charlestown v. E. Area Dir., Bureau of Indian Affairs, IBIA 98-88-A and 98-89A, 35 IBIA 93, 101-103 (2000).*
  - c. The annual parcel tax loss to County by establishment of the Salerno parcel in trust is not significant and in fact, is negligible to the annual County parcel tax assessments. Further, the County amendment to its General Plan (Update) imposes upon itself a down-zoning of 20 percent of all properties and a decrease to parcel tax values subject to annual parcel tax assessment of over \$600 million. The Ewiiapaayp Band of Kumeyaay Indians' proposed no change in use for the Salerno parcel helps the County achieve the stated goals of its General Plan Update.

- d. The County's request that the BIA compel the Ewiiapaayp Band of Kumeyaay Indians to enter into an agreement with the County to mitigate any offsite impacts that may result from the development is unnecessary because there will be no impacts from the proposed no change in use. Further, the Tribe previously sought a cooperative agreement with the County and was rebuffed by it. The Tribe's letters dated October 14, 2002 and December 9, 2002 document the County refused the repeated attempts of the Tribe to negotiate a cooperative agreement for its various projects, including its FTT applications. The County's refusals to consider a cooperative agreement despite the Tribe's repeated requests, and the Tribes successful request of the Alpine Community Planning Group to approve a resolution calling upon the County to do so, and the County's report "Update on Impacts of Tribal Economic Development Projects in San Diego County: on page 135, § 6.5.2. "FTT Applications by San Diego Tribes that states, "It would therefore be beneficial for the County to hold consultations with Tribes desiring to place land in trust to resolve conflicts..." The County refused the Tribe's many entreaties to consult despite requests by the Alpine Planning Group and the County's own report, therefore, a request to compel the Tribe to enter into an agreement concerning a FTT application with no impacts rings hollow and should be ignored. Bad faith on the part of the County should be appropriately weighed.
- e. All of the environmental resource areas identified by County for potential impacts are premised upon some future speculative development, and are inapplicable to the BIA review of the Tribe's Salerno parcel FTT application. The County section J. refers to cultural resources. The prior cultural resources review did not identify any significant cultural resources. Any cultural resources of any significance are best protected under the care of the Ewiiapaayp Band of Kumeyaay Indians rather than the County.
- f. It is truly ironic that the County asserts that the Tribe's use of the Salerno parcel will be inconsistent with current County of San Diego zoning. Of course, the proposed use is less intensive than the current permitted land use. Second, the Viejas group's use of its trust land is likewise inconsistent with County of San Diego zoning that would otherwise be applicable to all land in the area but for its trust status, yet the County did not oppose the Viejas Group's many non-gaming fee-to-trust applications (of over 814 acres) since 2002. Nor did the County appeal the BIA approvals of the Viejas Group's FTT applications.
- g. The County statement it "opposes the expansion of tribal lands without appropriate mitigation for the community form resulting impacts" is false. The County Resolution opposes all tribal fee-to-trust acquisitions with or without mitigations offered by a tribe.



7. Ewiiapaayp Band's response dated July 8, 2013, to comments received in a letter dated January 9, 2013 from the Viejas Group of the Capitan Grande Band of Mission Indians, California, summarized as follows:

- a. The Viejas Group's reference to "Ewiiapaayp's own reservation" identifies the Big Ewiiapaayp section of the Ewiiapaayp Indian Reservation at 5,460.13 acres, which is 19 miles east (not 38 miles) of the Little Ewiiapaayp section at 10.02 acres. Little Ewiiapaayp is 0.23 miles or 1,215 feet northwest of the Salerno parcel.
- b. The Viejas Group claims the Ewiiapaayp Band "grossly mischaracterizes its plans" and refers to an overall Ewiiapaayp development scheme." Section 465 of the IRA and 25 CFR Part 151 do not countenance a third party from substituting, without one fact or shred of evidence, its own speculations upon another tribe in a fee-to-trust application. Mere speculation of future use for the Salerno parcel, other than proposed by the Ewiiapaayp Band of Kumeyaay Indians, and the lack of any description of the alleged interrelationship between the Tribe's former tribal gaming project and other fee-to-trust request applications, is baseless.
- c. On Dec. 26, 2000, the Ewiiapaayp Band of Kumeyaay Indians requested approval of a voluntary mutual partial lease relinquishment agreement executed between the Tribe and the Southern Indian Health Council, Inc. (SIHC, Inc.). The subject lease was a business lease of the 8.6 acre parcel that is one of two land parcels comprising Little Ewiiapaayp. The partial lease relinquishment of a portion of the leased premises would have been the early return of 2.6 acres of the leased premises to the exclusive use and occupancy of the Ewiiapaayp Band of Kumeyaay Indians as the tribal beneficiary, leaving the remaining 6.2 acres for exclusive use by the SIHC, Inc. Little Ewiiapaayp's 10.02 acre tribal lands parcel was established by fee-to-trust acquisition of an 8.6 acre fee land parcel in 1986 (this parcel being the subject of the partial lease relinquishment agreement) and by fee-to-trust acquisition of a 1.42 acres fee land parcel in 1997.

Under the former partial lease relinquishment agreement and other side agreements, the Ewiiapaayp Band and SIHC, Inc. proposed to relocate the existing health clinic operations to the upper 2.6 acre portion of the 8.6 acre leased premises. The SIHC, Inc., would relinquish its right to a portion of the leased parcel, i.e., approximately 6 acres, and would retain the right to operate a new, improved health clinic on the remaining 2.6 acres of leased parcel until 2036. The new, improved and larger health clinic would have been funded entirely by the Ewiiapaayp Band of Kumeyaay Indians at a cost of \$6.5 million. After construction of the new clinic facility, relocation by the SIHC, Inc., thereto, and approval by the National Indian Gaming Commission (NIGC) of a proposed gaming management agreement between the Ewiiapaayp Band and its tribal gaming development partner, the Ewiiapaayp Band expected to demolish the existing clinic and construct a casino. The proposed casino would be

located on the relinquished 6.2 acres but could not be built unless and until the new SIHC, Inc. clinics were built and occupied.

Despite the Viejas Group allegations otherwise, the agreements between the Ewiiapaayp Band of Kumeyaay and the SIHC, Inc. were the product of bilateral negotiations and were voluntarily entered into by the SIHC, Inc. and the Tribe was not unilaterally rescinding, terminating or "breaking" the lease. The Ewiiapaayp Band of Kumeyaay Indians' Walker parcel (16.69 acres) FTT application was a separate action unrelated to the partial lease relinquishment agreement of Little Ewiiapaayp.

Only after the BIA failed to act upon the Ewiiapaayp Band of Kumeyaay Indians' request for approval of the partial lease relinquishment and litigation whereby the Viejas Group filed suit against the SIHC, Inc. and its Board members individually, did the Ewiiapaayp Band of Kumeyaay Indians and the SIHC, Inc. amend their partial lease relinquishment agreement to add an option for the SIHC, Inc. to lease the Tribe's Walker parcel for twenty-five years and the Tribe to fund the construction of a \$5 million new clinic on that parcel from revenues from the operation of a future tribal gaming enterprise in exchange for the SIHC, Inc.

relinquishing the remainder of the Ewiiapaayp Band of Kumeyaay Indians' Little Ewiiapaayp lease premises for 2.6 acres and the health care facility thereon. Please note, the entire discussion of the Ewiiapaayp Band of Kumeyaay Indians' former tribal gaming project does not at any point, or in any document, then or today, refer to or is associated in any way with the ... Salerno fee-to-trust application.

- d. The Viejas Group alleges that there is only one reason the Ewiiapaayp Band is requesting trust land – gaming. The Viejas Group allegation fails due to the insufficiency of the Tribes Ewiiapaayp Indian Reservation for tribal housing, government operations or economic development. Big Ewiiapaayp's 5,460.13 acres is dominated by 3 ridgelines, east, west and north, and lies at elevations between 4,800 feet and 6,300 feet. Less than 2% of these lands are arable, or less than 110 acres. The San Diego County land use regulations zoning for fee lands surround the Reservation is one dwelling unit to 40 acres. A comparable application of such zoning would limit Big Ewiiapaayp to housing to two dwelling units. Although San Diego County has no jurisdiction on the Reservation, the reasons for its low density zoning are meaningful to the Reservation, such as steeply graded land, low percolation levels for soil, high erosion levels for soil, etc. Further land use restrictions on Big Ewiiapaayp are due to the woodland and wilderness area in the northern extent of its narrow valley between the ridgelines, the many sacred places in the valley that are protected by the Tribe, and the flood zone and wetlands on either side of the La Posta Creek that runs the extent of the narrow valley and the reservation from the south boundary to the northwest boundary. These factors severely reduce the area within Big Ewiiapaayp available for

housing and administration. Therefore, Big Ewiiapaayp holds insufficient land to provide adequate housing for its tribal citizens.

- e. Further, there are no utilities on Big Ewiiapaayp. No electricity services. No telephone services. No water treatment services. No waste water or solid waste treatment services that are today accommodated with inadequate septic systems. The cost of extending electrical or telephone services to the reservation are many hundreds of thousands of dollars, and are not affordable by the Tribe or funded by the federal government.
- f. There is inadequate road access to Big Ewiiapaayp. There is no legal access, as the only access road to Big Ewiiapaayp is a twelve mile dirt road that is without a right-of-way or easement for use of the road in crossing fee properties. The road itself is a narrow single lane dirt road, sharply winding against steep drop-offs, and climbing over 1,800 feet over 12 miles. The access road is inadequately maintained by any of the jurisdictions it crosses, including San Diego County, US Forest Service, Bureau of Land Management, or private fee owners. The road is rated by CalTrans, San Diego Association of Governments and the BIA as "failed." Inadequate funds are provided by the BIA to the Tribe for road maintenance on Big Ewiiapaayp, and new road construction funds do not approach even a small percentage of the amount necessary to rebuild the failed roads on the reservation, and none for the access road approaching Big Ewiiapaayp.
- g. Big Ewiiapaayp is not readily defensible against wildfire, subjecting the Tribe's improvements and trust resources to the threat of destruction each wildfire season. Wildfires have burned Big Ewiiapaayp every decade since the early 1930's when wildfire became pervasive due to ill-advised fire suppression practices.
- h. The SIHC, Inc. in an April 26, 2013 letter to the Ewiiapaayp Band of Kumeyaay Indians stated presence of the Tribe's tribal office on the leased premises of Little Ewiiapaayp is a breach of the lease agreement. The Tribe disagrees, but may have no option but to relocate its tribal office to Big Ewiiapaayp, despite the obstacles of a reservation without infrastructure if removed from Little Ewiiapaayp and no other trust land is available.
- i. The Viejas Group is actually asking for disapproval of the Ewiiapaayp Band of Kumeyaay Indians' Salerno FTT application because of some future use that could impact their Viejas Casino. There is nothing in federal statute, regulation, common law or federal Indian policy that grants them such protection.
- j. The Viejas Group represents that its Viejas Reservation is its "historic lands." The Salerno parcel lies within the traditional and historical aboriginal territory of the modern day tribes of the Tipai, or Southern Diegueno, that are the Ewiiapaayp Band of Kumeyaay Indians, the Campo Band of Mission Indians, the La Posta Band of Mission Indians, and the Manzanita Band of Mission Indians. The Viejas Group is of the Ipai or North Diegueno. The Ewiiapaayp Band of Kumeyaay Indians'

Tipai territory extends from the Pacific Ocean to the Cocopah Tribe's territory at the far eastern boundary of present day Imperial County near the California – Arizona border, and from the San Diego River south to present day northern Baja Mexico. The Viejas Group's Ipai territory was from the San Diego River to the north and from the head of the San Diego River west to the Pacific Ocean. The course of the San Diego River remains as it has been for many tens of thousands of years, which is north of the Salerno parcel and the community of Alpine in east San Diego County. The Viejas Group's Baron Long Reservation is in Tipai territory because in 1934-36 the Viejas Group was compelled to relocate from the Capitan Grande Reservation, on and north of the San Diego River, due to the condemnation by San Diego County of a portion of the Capitan Grande Reservation. Settlement monies were used by the Viejas Group to acquire the Baron Long Ranch east of the Alpine community and there relocated.

- k. The Viejas Group demands “the Ewiiapaayp must submit binding and enforceable commitments that the Salerno parcel will in no way be used in furtherance of the off-reservation casino plan...” The Viejas Group proposes the Tribe Salerno FTT application be rejected for failure to submit additional information for economic development plans the Tribe does not have. There is no basis in statute, regulation, common law, or federal Indian policy that would support this demand from the Viejas Group.
- l. The BIA's re-issue Notice for the Tribe's Salerno parcel land acquisition application inadvertently cited the applicable regulation as 26 CFR § 151.10. The BIA will correct this by citing the appropriate regulation of 25 CFR § 151.11 in the Final Notice. All relevant information included in the Tribe's Salerno parcel FTT land acquisition application to allow for consideration of said application in accordance with 25 CFR § 151.11 as an “off-reservation” acquisition.
- m. The Viejas Group claims the Salerno parcel is “far removed from the Band's reservation and therefore must pass a very high standard justifying the anticipated benefits of the trust acquisition.” The Salerno parcel is but 0.23 miles or 1,215 feet southeast of Little Ewiiapaayp. The actual 25 CFR Part 151 regulation is 25 CFR § 151.11(b)...The standard of review is “greater scrutiny” as the distance between the tribe's reservation and the land to be acquired increases. One thousand two hundred fifteen (1,215) feet requires a minimum of greater scrutiny. The definition of “Indian Reservation”...is specified in 25 CFR § 151.2(f) Unless another definition is required by the act of Congress authorizing a particular trust acquisition, **Indian reservation means that area of land over which the tribe is recognized by the United States as having governmental jurisdiction**, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished, Indian reservation means that area of land constituting the former reservation of the tribe as defined by the Secretary. [emphasis

added] There is no reasonable dispute that Little Ewiiapaayp conforms to the definition of Indian reservation in 25 CFR Part 151. The Viejas Group's claim is baseless. The Viejas' Group's cite of CalTrans removal of a highway sign does not inform its arguments. CalTrans removed the sign depicting "Ewiiapaayp Indian Reservation" because Little Ewiiapaayp was not the beneficiary of a reservation proclamation under 25 USC 476.

- n. The Viejas Group errs in suggesting a business plan is required under 25 CFR § 151.11(c). This subsection states, "**Where land is being acquired for business purposes**, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use." [emphasis added] The Tribe's proposed use of the Salerno parcel is no change in use.
- o. The Viejas Group misinterprets the Indian Reorganization Act (IRA) 25 USC § 465 and its associated Congressional record and court rulings, to mean that BIA approval of the Salerno FTT applications would be inconsistent with the purposes of the IRA. The remedy of the IRA in re-establishing tribal homelands was needed in large part due to the significant impacts of the Dawes Act, however, tribal land losses are not limited to the Dawes Act period of 1887-1934, but have occurred both before 1887 and after 1934. The restoration of tribal land lost due to allotment policies is not the only purpose of the IRA. Transfer of the Salerno parcel into trust status is consistent with federal policy to promote tribal self-government and self-determination and Congressional intent to restore the Tribe's land base. It is unreasonable for the Viejas Band to require that the Department detail specifically why trust status is more beneficial than fee status in a particular circumstance. Rather, it is sufficient for the Department to express that the IRA purposes are served by the proposed acquisition as such will clarify governmental jurisdiction and further federal policy of tribal self-governance. *See South Dakota v. United States Department of the Interior*, 423 F.3d 790, 801 (8<sup>th</sup> Cir. 2005). The Tribe's stated purpose for acquisition of the Salerno parcel will further the Tribe's attempt to achieve self-sufficiency. The resulting federal protections offered by trust status will facilitate the Tribe's effort to develop its tribal governance and a tribal economy and allow future generations the use of its tribal trust lands in ways that further tribal values, including land preservation with no development.
- p. The Viejas Group claims the BIA must disapprove the Salerno FTT application because of the Tribe's receipt of Indian Gaming Revenue Sharing Trust Fund (RSTF) distributions. The economic and social need provisions of 25 CFR § 151 and the purposes of the IRA are not achieved by the Ewiiapaayp Band of Kumeyaay Indians' receipt of RSTF distributions to any reasonable degree such that it would make the Tribe ineligible to acquire trust land under the IRA. The high costs for the Tribe to live and operate its Indian tribal government on Big Ewiiapaayp, the jeopardy to and limits on its sole economic resource of wind energy

development, the lack of other viable economic opportunities, and the significant reductions in annual federal Indian funds refutes this argument, all argue for approval of the Tribe's Salerno FTT application.

In the event that insufficient revenues are available from the RSTF to distribute the intended amount of \$1.1 million to each "non-compact" tribe, the California Gaming Control Commission is directed in the 2006 (tribal-state compact) Amendments to re-direct a portion of the contribution to the State's General Fund to the RSTF for distribution to non-compact tribes. However, in a significant economic recession/depression and state budget crisis, politicians will be forced to decide between competing interests, i.e., funding state and local government programs versus funding revenue sharing with non-compact tribes. Based upon even a cursory review of history, we may assume that Indian tribes will lose that funding. Hence, it is unreasonable for the Viejas Band to suggest and for the Department to conclude that the RSTF will be a sufficient source of revenue for the Tribe to rely upon for future generations' economic livelihood and economic self-determination.

- q. The Viejas Group cites the Tribe's renewable wind energy project with Iberdrola Renewables' Tule Wind Energy Project as evidence of tribal economic self-sufficiency and a basis for BIA disapproval of the Salerno FTT application. There was no Tule Wind Energy Project when the Tribe submitted its Salerno FTT application. . . The outcome of the Tule Wind Energy Project on Big Ewiiapaayp is currently in serious doubt. The Bureau of Land Management Record of Decision (ROD) approved in 2012 for the Tule Wind Energy Project disapproved and deleted from the Project the wind turbines intended to operate on Big Ewiiapaayp. The Tribe appealed to the BIA for BIA consideration of a ROD...BIA agreed to consider a ROD for the portion of the Tule Wind Energy Project on Big Ewiiapaayp, however, the Fish and Wildlife Service is opposed to BIA approval of the ROD due to its concerns with the potential for incidental take of golden eagles protected by the Bald and Gold Eagle Protection Act and the Migratory Bird Treaty Act. BIA consideration of the Tribal ROD has been postponed; however, postponement of the decision much longer will mean Iberdrola Renewables could not exercise wind energy production tax credits by the end of 2013, which would cancel the project on Big Ewiiapaayp.
- r. The Viejas Group's commissioned study by Alfred Gobar Associates is laughable. Mr. Gobar and his associates never contacted the Ewiiapaayp Band of Kumeyaay Indians or visited the Big Ewiiapaayp, nor could he, without keys to the two locked gates that bar the twelve mile dirt road, nor permission from the private land owners for a road without right-of-way or easement. Mr. Gobar would also need to time his visit outside of the winter and spring storm seasons when the road on Big Ewiiapaayp is impassable... We would like to hear just how to insure his hypothetical businesses without any utilities, including no adequate or legal access, or

how to develop a corporate or education retreat without electricity or communications. This study is without merit.

- s. The Viejas Group's idea for a drinking water bottling facility is equally without merit. The Ewiiapaayp Band of Kumeyaay Indians made significant efforts to develop a bottled water facility, or even to simply extract and sell ground water in the 1990's. The business model failed due to high expenses...and suffered additional losses with the commodization of the drinking water industry in the intervening years.
- t. The Viejas Group's assertions of jurisdiction arising from 25 CFR § 151.11 misinterprets the regulation. Subsection (b) greater scrutiny to the concerns raised by subsection (d) "state and local governments" does not identify tribal governments. A tribal government is not a state government or a subdivision of state government that is a local government or a municipality. The Viejas Group has no jurisdiction over the Salerno parcel either now or deriving from the Viejas Group's "territorial jurisdiction within its aboriginal territory."...Furthermore, there exists no such jurisdiction in 25 CFR Part 151, or in any other federal regulation or statute to give effect to such jurisdiction if in fact it existed.
- u. The Viejas Group claims the Ewiiapaayp Band of Kumeyaay Indians is proposing related actions that require NEPA review of its Salerno FTT application. These "related actions" exist only in the mind of the Viejas Group, as shown by a review of their claims as follows: 1) A fee-to-trust request for the 16.69 acre Walker parcel. (An Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) were issued for the Walker FTT application.) 2) A fee-to-trust acquisition and reservation proclamation request for the 18.95 acres Salerno parcel. (The Salerno FTT application proposes no change in use, therefore, a Phase 1 Environmental Site Assessment (ESA) was conducted and a categorical exclusion to NEPA requirements resulted. The BIA has not proposed a reservation proclamation for the Salerno parcel.) 3) A reservation designation request for the Joint Clinic Parcel. (There is no Joint Clinic Parcel. The Tribe's former tribal gaming project was terminated in 2004.) 4) A fee-to-trust acquisition and reservation proclamation request for the approximately 10.45 acres called the Willows Road parcels. (No such fee-to-trust applications exist.) 5) The attempted lease relinquishment of the SIHC lands. (The partial lease relinquishment agreements were rescinded by action of the SIHC, Inc. Board of Directors on April 4, 2005. The Ewiiapaayp Band of Kumeyaay Indians' tribal gaming project was terminated by mutual agreement with the Viejas Group by a Joint Venture Term Sheet executed on January 8, 2004.)  
Clearly there are no other actions "connected" to the Salerno FTT application (the only other action pending being the Walker FTT application).
- v. The Viejas Group's claims that a Categorical Exclusion does not apply fails the test of the actual standard for such designations. The Ewiiapaayp Band of Kumeyaay Indians' proposed use of the Salerno

parcel is no change in use. The Tribe made clear this proposed use in the letter to the BIA dated May 5, 2003. The Viejas Group's request for cooperating agency fails utterly due to the fact that the Viejas Reservation is within the Ewiiapaayp Band of Kumeyaay Indians' aboriginal territory, not its own, as described in detail above. (See Section "j".) BIA and the Tribe's review of the designation determined the no change in use for the Salerno parcel means the trust acquisition will have no impact that "may affect" the Arroyo toad. In fact, FWS's revision to its designation of the Arroyo Toad's critical habitat actually undermines the Viejas Group's request to open section 7 consultation because this revision *reduced* the amount of critical habitat for the Arroyo toad.

- w. The Viejas Group's complaints of a flawed NHPA process are baseless. The BIA and the Ewiiapaayp Band of Kumeyaay Indians conducted an NHPA review of the Salerno parcel and the findings were negative. Further...the Salerno parcel is in the aboriginal territory of the Ewiiapaayp Band of Kumeyaay Indians and not the Viejas Group. The Viejas Group has no affiliation to historic properties or cultural resources if any were present on the Salerno parcel.
8. Ewiiapaayp Band's response dated July 8, 2013, to comments received in a letter dated January 11, 2013, received from the Office of the Attorney General, State of California, summarized as follows:
- a. The AG's letter errs in representing the size of the Ewiiapaayp Indian Reservation as 4,000 acres. The Reservation is 5,470.15 acres. The Reservation is in two (2) Sections: Big Ewiiapaayp is 5,460.13 acres; Little Ewiiapaayp is 10.02 acres.
  - b. The AG's letter errs in representing the distances between Big and Little Ewiiapaayp at 40 miles, and between Little Ewiiapaayp and the Salerno parcel at 1.5 miles. Little Ewiiapaayp is 19 miles west of Big Ewiiapaayp, and is 0.23 miles or 1,214 feet northwest of the Salerno parcel.
  - c. The AG misinterprets the Indian Reorganization Act (IRA) 25 USC § 465, and its associated Congressional record and court rulings, to mean that BIA approval of the Salerno FTT applications would be inconsistent with the purposes of the IRA, including the narrow argument that the IRA provides narrow authority to the Secretary of Interior to approve only a FTT application from a tribe in order to restore land lost through the allotment policy. The history of the Ewiiapaayp Band of Kumeyaay Indians land losses, as well as that for all California tribes did not begin with or were limited to the Dawes Act of 1887.
  - d. The Ewiiapaayp Band of Kumeyaay Indians need for a "sufficient land for beneficial use" is well documented, if not well understood by the AG. The Ewiiapaayp Indian Reservation is 5,470.15 acres. Big Ewiiapaayp's 5,460.13 acres is dominated by 3 ridgelines, east, west and north, and lies at elevations between 4,800 feet and 6,300 feet. Less than



2% of these lands are arable, or less than 110 acres. The San Diego County land use regulations zoning for fee lands surround the Reservation is one dwelling unit to 40 acres. A comparable application of such zoning would limit Big Ewiiapaayp to housing to two dwelling units. Although San Diego County has no jurisdiction on the Reservation, the reasons for its low density zoning are meaningful to the Reservation, such as steeply graded land, low percolation levels for soil, high erosion levels for soil, etc. Further land use restrictions on Big Ewiiapaayp are due to the woodland and wilderness area in the northern extent of its narrow valley between the ridgelines, the many sacred places in the valley that are protected by the Tribe, and the flood zone and wetlands on either side of the La Posta Creek that runs the extent of the narrow valley and the reservation from the south boundary to the northwest boundary. These factors severely reduce the area within Big Ewiiapaayp available for housing and administration. Therefore, Big Ewiiapaayp holds insufficient land to provide adequate housing for its tribal citizens.

- e. There are no utilities on Big Ewiiapaayp. No electricity services. No telephone services. No water treatment services. No waste water or solid waste treatment services that are today accommodated with inadequate septic systems. The cost of extending electrical or telephone services to the reservation are many hundreds of thousands of dollars, and are not affordable by the Tribe or funded by the federal government.
- f. There is inadequate road access to Big Ewiiapaayp. There is no legal access, as the only access road to Big Ewiiapaayp is a twelve mile dirt road that is without a right-of-way or easement for use of the road in crossing fee properties. The road itself is a narrow single lane dirt road, sharply winding against steep drop-offs and climbing over 1,800 feet over 12 miles. The access road is inadequately maintained by any of the jurisdictions it crosses, including San Diego County, US Forest Service, Bureau of Land Management or private fee owners. The road is rated by CalTrans, San Diego Association of Governments and the BIA as "failed." Inadequate funds are provided by the BIA to the Tribe for road maintenance on Big Ewiiapaayp and new road construction funds do not approach even a small percentage of the amount necessary to rebuild the failed roads on the reservation, and none for the access road approaching Big Ewiiapaayp.
- g. Big Ewiiapaayp is not readily defensible against wildfire, subjecting the Tribe's improvements and trust resources to the threat of destruction each wildfire season... Wildfires have burned Big Ewiiapaayp every decade since the early 1930's when wildfire became pervasive due to ill-advised fire suppression practices.
- h. Little Ewiiapaayp is leased in its entirety to the Southern Indian Health Council, Inc., a consortium of seven federally recognized Indian tribes including the Ewiiapaayp Band of Kumeyaay Indians, as the site for Indian Health Service contract health care provided to tribal citizens of the seven member tribes and non-Indian patrons.

- i. The SIHC, Inc. in a recent letter to the Ewiiapaayp Band of Kumeyaay Indians stated presence of the Tribe's Ewiiapaayp Tribal Office on the leased premises of Little Ewiiapaayp is a breach of the lease agreement. The Tribe disagrees, but may have no option but to relocate its tribal office to Big Ewiiapaayp despite the obstacles if removed from Little Ewiiapaayp and no other trust land is available.
- j. The AG cites the Tribe's renewable wind energy project on Big Ewiiapaayp with Iberdrola Renewables' Tule Wind Energy Project as evidence of tribal economic self-sufficiency and as a basis for BIA disapproval of the Salerno FTT application. There was no Tule Wind Energy Project when the Tribe submitted its Salerno FTT application in 2002. The outcome of the Tule Wind Energy Project...is currently in serious doubt. The Bureau of Land Management Record of Decision (ROD) approved in 2012 for the Tule Wind Energy Project disapproved and deleted from the Project the wind turbines intended to operate on Big Ewiiapaayp. The Tribe appealed to the BIA for BIA consideration of a ROD for the portion of the...Project on Big Ewiiapaayp. BIA agreed, however, the Fish and Wildlife Service is opposed to BIA approval of the ROD due to its concerns with the potential for incidental take of golden eagles protected by the Bald and Golden Eagle Protection Act and the Migratory Bird Treaty Act. Should the Tule Wind Energy Project succeed on Big Ewiiapaayp, the earnings projected for the Tribe will not be sufficient to provide for tribal economic self-sufficiency. The high costs of construction for the Tule Wind Energy Project on Big Ewiiapaayp diminish the net revenues available from operations on Big Ewiiapaayp. The projected revenues, if any, are not enough to overcome the high costs of living on Big Ewiiapaayp for tribal citizens, the high cost of operating Indian tribal government or to suffice as the sole source for enterprise revenues with the lack of other viable economic opportunities.
- k. Economic self-sufficiency must also consider the current context of federal funding available to the Ewiiapaayp Band of Kumeyaay Indians. Federal funds have been and continue to be reduced. The "sequester" reduced the Tribe's Fiscal Year (FY13) funds by 5%. FY14 funds are expected to also require a 5% "sequester" along with reduced funding levels.
- l. The AG speculates that Little Ewiiapaayp is available for economic opportunity. The lease agreement binding Little Ewiiapaayp to exclusive use by the SIHC, Inc. until 2037 refutes such speculation.
- m. The AG argues against BIA approval of the Salerno FTT application is the Tribe's receipt of Indian Gaming Revenue Sharing Trust Fund (RSTF) distributions. The economic and social need provisions of 25 CFR § 151 and the purposes of the IRA are not achieved by the Ewiiapaayp Band of Kumeyaay Indians' receipt of RSTF distributions to any reasonable degree such that it would make the Tribe ineligible to acquire trust land under the IRA. The high costs for the Tribe to live and operate its Indian tribal government on Big Ewiiapaayp, the jeopardy to and limits on its sole

economic resource of wind energy development, the lack of other viable economic opportunities, and the significant reductions in annual federal Indian funds refutes this argument. In the event that insufficient revenues are available from the RSTF to distribute the intended amount of \$1.1 million to each "non-compact" tribe, the California Gaming Control Commission is directed in the 2006 (tribal-state compact) Amendments to re-direct a portion of the contribution to the State's General Fund to the RSTF for distribution to non-compact tribes. However, in a significant economic recession/depression and state budget crisis, politicians will be forced to decide between competing interests, i.e., funding state and local government programs versus funding revenue sharing with non-compact tribes. Based upon even a cursory review of history, we may assume that Indian tribes will lose that funding. Hence, it is unreasonable for the AG to suggest that for the Department to conclude that the RSTF will be a sufficient source of revenue for the Tribe to rely upon for future generations' economic livelihood and economic self-determination.

- n. The AG errs in reading the Tribe's March 27, 2012 letter to President Obama that clarified the Tribe's historical eastern lands in its aboriginal territories. The AG misreads both the Tribe's letter and the maps attached. Due to the AG founding its primary argument against BIA approval of the Tribe's Salerno FTT application, additional anthropological and ethnological authorities and associated maps are provided to make clear the error in the AG's interpretation that the Salerno parcel is not within the Ewiiapaayp Band of Kumeyaay Indians' aboriginal territory, when clearly it does lie well within its Tipai territory. The Tribe's letter and the maps clearly show the Ewiiapaayp Band of Kumeyaay Indian's Tipai territory extends from the Pacific Ocean to the Cocopah Tribe's territory at the far eastern boundary of present day Imperial County near the California - Arizona border, and from the San Diego River south into present day northern Baja Mexico. The Viejas Group's Ipai Band territory was from the San Diego River to the north and west. The Salerno parcel lies within the Ewiiapaayp Band of Kumeyaay Indians' aboriginal Tipai territory is an indisputable fact not subject to interpretation by the AG.

Pursuant to 25 CFR § 151.10 and 25 CFR § 151.11, the following factors were considered in formulating our recommendation: (1) need of the tribe for additional land; (2) the purpose for which the land will be used; (3) impact on the State and its political subdivisions resulting from removal of the land from the tax rolls; (4) jurisdictional problems and potential conflict 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) and whether or not contaminants or hazardous substances may be present on the property; (7) the location of the land relative to state boundaries of the tribe's reservation; and (8) where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use.

### Factor 1 – Need for Additional Land

The Ewiiapaayp Reservation, is located in Pine Valley in southeastern San Diego County in the Laguna Mountains. It is approximately 47 miles east of the City of San Diego and 12 miles north of Interstate 8. The reservation was established by Executive Order dated December 29, 1891 under the authority of the Act of Congress of January 12, 1891 (26 Stat. 712-714 c. 65). Of the tribal trust lands established under the aforementioned authority, approximately 4,100 acres remain in trust.

An additional 1,360 acres were added to the Tribe's reservation land base under the California Indian Land Transfer Act, Public Law 106-568, December 27, 2000, located adjacent to the Band's reservation lands in Pine Valley. The additional tribal lands are on ridges in the southwest of the East area of the Ewiiapaayp Indian Reservation at an altitude of between 5,000 and 5,500 feet. These are steep, rocky mountainous area composed of narrow ridgelines and steep slopes. Its current use is the same use since time immemorial, unsuitable for residential or commercial development.

The Band also has land that is held in trust near Alpine, California. An 8.6 acre parcel was purchased by the Tribe in 1985 and subsequently accepted into trust by the United States for the Ewiiapaayp Band in 1986. The proposed and current use of this property was/is the development/construction of a permanent and adequate health center to meet current and unmet needs for health care services for the Indians within southern San Diego County. The Band is a member tribe of the Southern Indian Health Council, Inc. (SIHC), a nonprofit tribal health care organization, now serving the Indians of the Cuyapaipe, Manzanita, La Posta, Viejas, Sycuan, Jamul and Barona Reservations. Services from this facility are currently provided to non-Indians of the community as well.

In 1997, a 1.42 acre parcel, located adjacent to the 8.6 acre trust parcel near Alpine, was accepted into federal trust for the Ewiiapaayp Band. The proposed use of the 1.42 acre parcel at the time of acceptance was to expand the existing health care and social services already provided by SIHC, specifically for use as the Pinto Home for Girls, Group Home Site. The current use of the 1.42 acre parcel is the Ewiiapaayp Band's Tribal Office.

The Ewiiapaayp Band of Kumeyaay Indians state that their reservation consists of two sections. The original reservation, located in Pine Valley in southeastern San Diego County in the Laguna Mountains, contains of a total of 5,460.13 acres and is hereinafter identified as "Big Ewiiapaayp." The two trust parcels located in Alpine, California, identified above contain a total of 10.02 acres and are hereinafter referred to as "Little Ewiiapaayp."

According to the Band's application, "present trust land in Alpine, California, has proven to be inadequate for the Band's future goals and objectives. The Band's present trust lands in Alpine, California are located at 4054 and 4058 Willows Road. Since 1986, SIHC has constructed three health clinic buildings with Department of Housing and Urban Development Indian Community Development Block Grant funds obtained by the

Band and the La Posta Band of Mission Indians. The SIHC's long-term goals include construction and operation of a permanent health facility, retirement center, and museum/cultural center.

Little Ewiiapaayp is leased in its entirety to the SIHC, Inc., until the year 2037. The Tribe disputed the SIHC, Inc. unilateral exercise of an option to renew the lease agreement for an additional 25 years from 2012 to 2037; however, the BIA determined the lease term renewal option exercised by the SIHC, Inc. did not require the Tribe's approval. The Interior Board of Indian Appeals (IBIA) court upheld the BIA ruling upon the Tribe's appeal.

In an April 26, 2013 letter to the Ewiiapaayp Band of Kumeyaay Indians, the SIHC, Inc. stated the presence of the Tribe's Ewiiapaayp Tribal Office on the leased premises is a breach of the lease agreement. The Tribe disagrees, but may have no option but to relocate its tribal office to Big Ewiiapaayp, despite the obstacles of a reservation without infrastructure if removed from Little Ewiiapaayp and no other trust land is available. This places the Band in a dire need for tribal trust land. In order for the Band to meet their needs, it is necessary to acquire land in trust in an easily accessible location central to the membership.

The proposed 18.95 acre Salerno parcel will provide the Tribe with sufficient space to pursue its long-term goals to be used as tribal headquarters, open space preservation, housing, utility storage or yet undetermined tribal need.

#### Factor 2 – Proposed Land Use

The Salerno site is currently vacant land as stated above and the Band does not have any immediate development, physical alteration or land use changes planned for the parcel after acquisition. The primary goal in acquiring this parcel is to provide long-term socio-economic security for the Band through land consolidation, thus, enhancing the Band's self-determination.

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

The 2012-2013 taxes collected for the subject parcel total \$4,285.12 dollars. The projected loss of revenue to the County and other local governmental agencies in the amount of \$4,285.12 represents less than 0.0000884% is insignificant when compared to San Diego County's 2012-13 adopted budget of \$4,845,238,142 dollars. 25 CFR 151.10(e) does not require the Secretary to consider the cumulative impact of all trust lands on the tax rolls.

In response to lost revenues the Band stated in their application letter dated September 13, 2001, that they will enter into discussions with the County and local government agencies and will attempt to resolve any reasonable financial issues by, among other things, making payments in lieu of taxes to offset the County's losses.

Based on the relatively insignificant amount of taxes collected on the subject property, it does not appear that removal of the Salerno parcel from the tax rolls will cause a major impact on the County's financial situation.

#### Factor 4 – Jurisdictional Problems/Potential Conflicts

In their comments, the Viejas Group stated that the BIA must take into account the potential for this trust acquisition to negatively impact Viejas' territorial jurisdiction within its aboriginal territory, including the impacts on the Viejas community and as well as Viejas tribal self-determination. However, the Ewiiapaayp Band responded by providing documents to corroborate that the Salerno parcel is indeed within the aboriginal and ancestral territory of the Ewiiapaayp Band's Tipai Clan.

Tribal jurisdiction in California is subject to Public Law 83-280, as such, there will be no change to criminal jurisdiction. Civil jurisdiction will fall under the authority of the Ewiiapaayp Band.

The San Diego County Sheriff's Department provides police services for Alpine, California, including the Salerno Site. The Sheriff's Alpine Substation is located within the Alpine Creek Shopping Center. The Alpine Substation is responsible for approximately 135 square miles in eastern San Diego County. Due to the proximity of the site to the Community of Alpine, the change in land status from fee-to-trust is not anticipated to have an adverse impact on police demand or response times. Additionally, on October 31, 2002, the Sheriff's Department sent a letter to the Ewiiapaayp Band of Kumeyaay Indians indicating the Sheriff Department's intent to provide law enforcement services to the Tribe's trust lands located in Alpine, California.

The subject property is currently undeveloped. According to the County, the proposed land is designated as A-70 (Limited Agriculture Use Regulations). The Salerno site is subject to the Forest Conservation Initiative ("FCI") whereby the County of San Diego imposed limitation on growth in certain areas of the county until December 31, 2010. The purpose of this designation is to provide lands for limited residential, civic and agricultural use. The Band has no planned change in use for the Salerno site, thus, application of the FCI is not relevant.

San Diego County has developed and adopted "Fire Safe Standards" that have been incorporated into the San Diego County Fire Code. The San Diego Fire Code sets standards for on-site water storage, width and surface materials for roadways, and vegetation clearance from structure and serves to mitigate the threat of a major wildland fire. The Band will comply with similar stringent tribally-adopted standards as necessary.

As the Band has no planned change in use for the Salerno site, there will not be any significant impacts arising from the acquisition of the land in trust. The Band will attempt to mitigate any significant potential impacts arising from this project.

#### Factor 5 – Whether the BIA is Equipped to Discharge the Additional Responsibilities

The Bureau of Indian Affairs has a trust responsibility for all lands held in trust by the United States for Tribes. This acquisition anticipates the land use will remain the same; therefore, any additional responsibilities resulting from this transaction will be minimal. Accepting the property into trust would not impose any significant additional burdens on the BIA beyond those already inherent in the Federal trust relationship between BIA and the Tribe. As such, it is our determination that the BIA is equipped to provide the trust services that are anticipated by approval of this action.

#### Factor 6 – The extent to which the applicant has provided information that allows the Secretary to comply with 516 DM6, Appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations

The Viejas Group commented that “One of the most obvious deficiencies with BIA’s review of the Salerno parcel is its failure to consider all of the Ewiiapaayp’s proposed actions together.” The Viejas Group went on to say that all of the Ewiiapaayp’s proposed actions are related, all deal with land located within the vicinity of the Walker parcel; and all are designed to allow the Ewiiapaayp to operate a class III casino on off-reservation land located in Alpine.

In our review of the Salerno trust application and the Ewiiapaayp Band’s response to the above comments, we have determined that there is no basis in such speculation. The Band has reiterated that there will be no change in use.

Therefore, in accordance with Interior Department Policy (602 DM 2), the Bureau of Indian Affairs is 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. We have determined that no hazardous substances, or other environmental hazards, are present on the subject parcel. The record includes a negative Phase 1 “Contaminant Survey Checklist” dated February 21, 2003, reflecting no hazardous materials or contaminants on the subject property.

#### National Environmental Policy Act Compliance

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 either an Environmental Assessment (EA) or an Environmental Impact Statement (EIS). A Categorical Exclusion requires a qualifying action in this case, 516 DM 10.5I, Land Conveyance and Other Transfers, where no immediate change in land use is planned. A Categorical Exclusion for the acquisition for the subject property was approved by this Agency on May 10, 2002, and compliance with NEPA has been completed.

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

The Salerno site is located on Alpine Boulevard in Alpine, California. The original application indicated that the property is located approximately 40 miles west of the main Ewiiapaayp Reservation and 1.5 miles from the Bands existing trust lands (Little Ewiiapaayp) which is the site of the Band’s Tribal Headquarters and the Southern Indian Health Council, Inc. health clinic. The properties adjoining the subject site to the north are Alpine Boulevard and Interstate 8, beyond which is undeveloped land.

The Viejas Group, County of San Diego, and Duncan Hunter of the US House of Representatives stated in their comments that the current proposal does not involve land adjacent to or contiguous with the Band’s reservation land, which is nearly 40 miles away, and the application must be processed under the more rigorous standards applicable to off-reservation trust acquisition standards under 25 CFR § 151.11. The Viejas Group also contends that the Joint Clinic Parcel, also known as the Southern Indian Health Clinic, Inc. (SIHC), is not a “reservation” of the Ewiiapaayp as it was never designated as reservation land.

In our analysis, we have determined that “Little Ewiiapaayp” qualifies as “Indian Reservation” according to the below definition as set forth in 25 CFR § 151.2(f).

(f) Unless another definition is required by the act of Congress authorizing a particular trust acquisition, Indian reservation means that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished, Indian reservation means that area of land constituting the former reservation of the tribe as defined by the Secretary.

The Ewiiapaayp Band contends that San Diego County and Viejas Group’s assertion that the subject parcel is located forty (40) miles from the Ewiiapaayp Band of Kumeyaay Indian Reservation is in error. In their July 8, 2013 response to comments, the Band indicates that the actual distance between Big Ewiiapaayp (located in the Laguna Mountains) and Little Ewiiapaayp (located in Alpine, California) is 19 miles apart and not 40 miles apart. The Ewiiapaayp Band also clarified that the Salerno parcel is but 0.23 miles or 1,215 feet southeast of the 10.02 acres trust parcel which is leased by the SIHC, Inc. clinic.

In our analysis we have reviewed the concerns voiced by the Viejas Group, State of California, and County of San Diego and have made the determination that acquisition of the Salerno parcel is justified and supported federal law which authorizes the Secretary of the Interior, or his authorized representative, to acquire title on behalf of the United States of America in trust for the Ewiiapaayp Band of Kumeyaay Indians, California. Our



decision is based on the fact that the Tribe already owns a fee interest in the land and the land is necessary to facilitate tribal self-determination.

Factor 8 – Where the Land is Being Acquired for Business Purposes, the Tribe Shall Provide a Plan Which Specifies the Anticipated Economic Benefits Associated with the Proposed Use

While the Salerno parcel is considered an off-reservation acquisition, we have determined that based on the fact that the parcel is only 0.23 miles from the Ewiiapaayp Band's trust parcel identified as "Little Ewiiapaayp" and that the Salerno site will not be used for business purposes, the Band is not required to submit a business plan. The Band's stated purpose for acquiring the Salerno parcel in trust is to provide long-term socio-economic security through land consolidation and to enhance self-determination.

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 Ewiiapaayp Band of Kumeyaay Indians, California in accordance with the Act of Congress is the Indian Reorganization Act (IRA) of June 18, 1934 (48 Stat. 984; 25 U.S.C. 465).

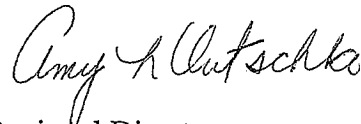
Should any of the below listed known interested parties feel adversely affected by this decision, an appeal may be filed within thirty (30) days of receipt of this notice with the Interior Board of Indian Appeals, U.S. Department of the Interior, 801 North Quincy St., Suite 300, Arlington, Virginia 22203,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

If possible, a copy of this decision should be attached. Any appellant must send copies of the notice of appeal to: (1) the Assistant Secretary of Indian Affairs, U.S. Department of Interior, 1849 C. Street, N.W., MS-3071-MIB, Washington, D.C. 20240; (2) each interested party known to the appellant; and (3) this office. Any notice of appeal sent to the Board of Indian Appeals must certify that copies have been sent to interested parties. If a notice of appeal is filed, the Board of Indian Appeals will notify appellant of further appeal procedures.

If no appeal is timely filed, further notice of a final Agency action will be issued by the undersigned pursuant to 25 CFR.151.12(b). No extension of time may be granted for filing a notice of appeal.

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

Sincerely,



Regional Director

Enclosure:

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Escondido, CA 92025

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

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

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

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

#### §4.306 Time for payment.

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

#### §4.307 Title.

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

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

#### §4.308 Disposition of income.

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

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

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

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

#### §4.310 Documents.

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

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

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

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

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

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

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

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

#### §4.311 Briefs on appeal.

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

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

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

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

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

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

#### §4.312 Decisions.

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

#### §4.313 Amicus Curiae; intervention; joinder motions.

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

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

**§ 4.314 Exhaustion of administrative remedies.**

(a) No decision of an OHA deciding official or a BIA official, which at the time of its rendition is subject to appeal to the Board, will be considered final so as to constitute agency action subject to judicial review under 5 U.S.C. 704, unless made effective pending decision on appeal by order of the Board.

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

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

**§ 4.315 Reconsideration.**

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

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

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

**§ 4.316 Remands from courts.**

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

**§ 4.317 Standards of conduct.**

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

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

**§ 4.318 Scope of review.**

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

APPEALS TO THE BOARD OF INDIAN  
APPEALS IN PROBATE MATTERS

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

**§ 4.320 Who may appeal.**

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

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



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

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

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

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

#### § 4.321 Notice of transmittal of record on appeal.

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

#### § 4.322 Docketing.

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

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

#### § 4.323 Disposition of the record.

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

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

SOURCE: 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;

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(2) Matters decided by the Bureau of Indian Affairs through exercise of its discretionary authority; or

(3) Appeals from decisions pertaining to final recommendations or actions by officials of the Minerals Management Service, unless the decision is based on an interpretation of Federal Indian law (decisions not so based which arise from determinations of the Minerals Management Service, are appealable to the Interior Board of Land Appeals in accordance with 43 CFR 4.410).

**§ 4.331 Who may appeal.**

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

(a) To the extent that decisions which are subject to appeal to a higher official within the Bureau of Indian Affairs must first be appealed to that official;

(b) Where the decision has been approved in writing by the Secretary or Assistant Secretary—Indian Affairs prior to promulgation; or

(c) Where otherwise provided by law or regulation.

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

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

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

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

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

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

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

**§ 4.333 Service of notice of appeal.**

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

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

**§ 4.334 Extensions of time.**

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

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

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

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

(1) The decision appealed from;

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

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

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

**§ 4.336 Docketing.**

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

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

**§ 4.337 Action by the Board.**

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

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

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

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

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

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

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

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

**§ 4.340 Disposition of the record.**

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

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

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

**§ 4.350 Authority and scope.**

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

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

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

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

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

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

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

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

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

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

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

**§ 4.351 Commencement of the determination process.**

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

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