



IN REPLY REFER TO:

United States Department of the Interior

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

JAN 4 - 2011

NOTICE OF DECISION

CERTIFIED MAIL-RETURN RECEIPT REQUESTED – 7010 1670 0001 7431 3124

Honorable Allen Lawson
Chairperson, San Pasqual Band of Mission Indians
P.O. Box 365
Valley Center, CA 92082

Dear Mr. Lawson:

This is notice of our decision upon the application of the San Pasqual Band of Diegueno Mission Indians to have the below described real property accepted by the United States of America in trust for the San Pasqual Band of Diegueno Mission Indians of California. The land referred to herein is situated in the State of California, County of San Diego, being more particularly described as follows:

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

That portion of the Northwest Quarter of the Northwest Quarter of Section 15, Township 11 South, Range 1 West, San Bernardino Meridian, in the County of San Diego, State of California, according to official plat thereof, described as follows:

BEGINNING at the Southwest corner of said Northwest Quarter of the Northwest of Section 15; thence along the southerly line of said Northwest Quarter of Northwest Quarter, North 89°57'20" East, 1366.60 feet to the Southeast corner of said Northwest Quarter of the Northwest Quarter; thence along the easterly line of said Northwest Quarter of the Northwest Quarter, North 00°20'40" East 1023.76 feet to the true point of beginning; thence North 89°35'50" West, 1361.35 feet more or less, to the westerly line of said Section 15; thence North 00°38'00" East to the Northwest corner of said Section 15; thence South 89°34'00" East along the North line of said Section 15; to the Northeast corner of the Northwest Quarter of the Northwest Quarter of said Section 15; thence South 00°20'40" West to the true point of beginning.

Excepting therefrom the westerly 235.00 feet thereof.

**TAKE PRIDE
IN AMERICA** 

The above described real property is identified in San Diego County records as Assessor's Parcel Number 189-051-02, containing 9.08 acres, more or less. Based on a legal opinion obtained from our Office of Solicitor, the subject parcel is not contiguous to the San Pasqual Reservation.

Federal Law authorizes the Secretary of the Interior, or his authorized representatives, to acquire title on behalf of the United States of America for the benefit of tribes when such acquisition is authorized by an Act of Congress and (1) when such lands are within the exterior boundaries of an Indian reservation, or adjacent thereto, or within a tribal consolidation area; or (2) when the tribe already owns an interest in the land; or (3) when the Secretary determines that the land is necessary to facilitate tribal self-determination, economic development, or tribal housing. In this particular instance, the authorizing Act of Congress is the Indian Reorganization Act (IRA) of June 18, 1934 (48 Stat. 984; 25 U.S.C. 465). The applicable regulations are set forth in the Code of Federal Regulations (CFR), Title 25, INDIANS, Part 151, as amended.

On May 28, 2010, 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; Ms. Andrea Lynn Hoch, Deputy Legal Affairs Secretary, Office of the Governor; Sara Drake, Deputy Attorney General, State of California Department of Justice; James Peterson, District Director, Office of Senator Diane Feinstein; U.S. House of Representatives, 52nd District; San Diego County Assessor; San Diego County Board of Supervisors; San Diego County Treasurer and Tax Collector; County of San Diego, Office of the Chief Administrative Officer; San Diego County Sheriff's Department; Chairperson, Barona Band of Mission Indians; Chairperson, Campo Band of Mission Indians; Chairperson, Ewiiapaayp Band of Kumeyaay Indians; Chairperson, Inaja-Cosmit Band of Mission Indians; Chairperson, Jamul Indian Village; Chairperson, La Jolla Band of Luiseno Indians; Chairperson, La Posta Band of Mission Indians; Chairperson, Los Coyotes Band of Chauilla & Cupeno Indians; Chairperson, Manzanita Band of Mission Indians; Chairperson, Mesa Grande Band of Mission Indians; Chairperson, Pala Reservation; Chairperson, Pauma Band of Mission Indians; Chairperson, Rincon Band of Mission Indians; Chairperson, Santa Ysabel Band of Mission Indians; Chairperson, Sycuan Band of Mission Indians; and Chairperson, Viejas Band of Mission Indians.

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

1. Letter dated June 17, 2010 from the County of San Diego Assessor's Office providing a copy of the Assessor's master Property Record, a tax bill from the Tax Collector's Office, and a list of taxes due for the 2009-2010 roll.
2. Letter dated June 24, 2010 from the County of San Diego Land Use and Environmental Group that expressed concern regarding project issues, water resources, air quality, biological resources, cultural resources, socioeconomic impacts, transportation and circulation, land use, agricultural, public services, noise, hazardous materials, fire safety impacts and visual resources. Additionally, it was stated that there is an acreage discrepancy between the Environmental Assessment and the Notice of Application.

The concerns stated above by the County of San Diego have been addressed in the Finding of No Significant Impact (FONSI) dated September 22, 2010, which was published on September 28, 2010 and October 14, 2010. The acreage was originally stated as 9.08 acres. After a legal description review

was completed by our GIS Cartographer, it was concluded that the actual acreage was 9.86 acres and the legal description was sufficient.

Pursuant to CFR 151.10, the following factors were considered in formulating our decision: (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 conflicts of land use which may arise; (5) whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status; and (6) the extent to which the applicant has provided information that allows the Secretary to comply with the implementing procedures of the Department of the Interior, 516 DM 1-7, and 602 DM 2, Land Acquisitions: Hazardous Substances Determination. Accordingly, the following analysis of the application is provided.

Factor 1 - Need for Additional Land

The San Pasqual Band of Diegueno Mission Indians was originally established by Secretarial request of January 27, 1870 and the Executive Order dated January 31, 1870 authorizing reservations for Mission Indians. Additionally, the Tribe has adopted a Constitution and By Laws dated January 14, 1971.

The San Pasqual Reservation is relatively small, and opportunities for using existing Tribal lands for economic development are constrained by the Reservation's geography. The Reservation consists of approximately 1,380 acres situated on three separate parcels of land, primarily on steep and rolling hills. About 15 percent, or 207 acres, of the Reservation is considered appropriate for development. Because of this limitation, in 2001 the Tribe began purchasing additional lands contiguous to and surrounding the Reservation in order to provide an economically viable land base for its membership and to increase opportunities for economic development and tribal self-determination.

The subject parcel is close to several tribal government buildings and the Tribe's Valley View Casino. It is currently used as a parking lot for tribal employees and for the storage and maintenance of buses. The provisions of trust status would permit the Tribe to exercise jurisdiction over a site upon which significant tribal economic activities occur. Additionally, the Tribe has a strong connection to the parcel, having occupied the surrounding area since 1911.

Factor 2 - Proposed Land Use

The subject parcel is currently used as a parking lot. Approximately 50 percent of the parcel is either paved or covered with gravel, and the remaining 50 percent exists as a vacant lot and contains no unique vegetation or wildlife.

The parking facility will continue to be used as additional employee parking for the Valley View Casino and as storage and maintenance for buses. The Tribe will enter into a lease with the Casino Board for the use of this land, which the San Diego County Board of Supervisors has recently re-zoned for parking use. In the future, the Tribe intends to build a small shopping plaza on the subject parcel. The shopping plaza is expected to contain at least one retail tenant, a restaurant and a gas station.

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

Parcels accepted into federal trust status are exempt from taxation and would be removed from the County’s taxing jurisdiction. In the 2009-2010 tax years, the total tax assessed on the subject parcels was \$1,777.72. During the comment period, none of the solicited agencies indicated that any adverse impacts would result from the removal of the subject parcel from the tax rolls.

It is our determination that no significant impact will result from the removal of this property from the county tax rolls given the relatively small amount of tax revenue assessed on the subject parcel.

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

The acceptance of the property into federal trust status for the benefit of the Tribe will remove the property from State and local laws concerning real property taxation and other land use regulations. Tribal law will govern these activities after the property is accepted into trust, to much the same extent that it does now on existing trust lands.

San Diego County now has jurisdiction over the land use zoning of the subject parcel. On January 28, 2009, the San Diego County Board of Supervisors adopted Ordinance No. 9967 (New Series), which reclassified the zoning of the parcel from A70 (“Limited Agricultural Use Regulation”) to S86 (“Parking Use Regulation”).

There will be no change in criminal jurisdiction as jurisdiction in California is subject to 18 U.S.C. § 1163 and 28 U.S.C. § 1360 (P.L. 83-280). The State of California would retain its jurisdiction to enforce its criminal/prohibitory laws against all persons and conduct occurring on the land.

The Tribe has a history of cooperation with the State and local government on mitigation of any negative effects from tribal developments. For example, the Tribe developed a Dust Control Plan, which included increased frequency of watering the graveled areas and the construction of barriers to limit traffic to the improved areas. Finally, the Tribe has entered into a Cooperative Agreement with the County of San Diego regarding road improvements associated with the Casino. Together, these documents evidence the tribe’s commitment to working with the surrounding community.

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

The Bureau of Indian Affairs has a trust responsibility for all lands held in trust by the United States for Tribes. Emergency services, such as fire support, will be provided by the Tribe. The parcel is not currently nor will it in the future be used for mining of natural resources or forestry requiring BIA management. The Tribe expects that the Bureau will be able to discharge any responsibilities that may arise in connection with the acquisition.

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

In accordance with Interior Department Policy (602 DM 2), we are charged with the responsibility of conducting a site assessment for the purposes of determining the potential of, and extent of liability from hazardous substances or other environmental remediation or injury. The record includes a negative Phase 1 "Contaminant Survey Checklist" dated April 2, 2010, reflecting that there were no hazardous materials or contaminants.

National Environmental Policy Act Compliance

An additional requirement that has to be met when considering land acquisition proposals is the impact upon the human environment pursuant to the criteria of the National Environmental Policy Act of 1969 (NEPA). The BIA's guidelines for NEPA compliance are set forth in the Bureau of Indian Affairs Manual (59 IAM).

The Final Environmental Assessment (FES) identifies potential impacts to land resources, water resources, air quality, biological resources, cultural resources, socioeconomic conditions, resource use patterns (transportation, land use and agriculture), public services, public health/hazardous materials, and other values (noise and visual resources). The Final Environment Assessment (FEA) and Finding of No Significant Impact (FONSI), dated August 2010 and September 22, 2010 respectively, were distributed concurrently for public review and comment during the period beginning May 10, 2010, and ending July 11, 2010. Nine comment letters were received on the EA during the public review period from the County of San Diego, Land Use and Environmental Group; Valley Center Design Review Board; Valley Center Pauma Unified School District; Native American Heritage Commission; Valley Center Community Planning District; and four individuals.

The concerns that were raised include: Project issues, water resources, air quality, biological resources, cultural resources, socioeconomic impacts, transportation and circulation, land use, agricultural, public services, noise, hazardous materials, fire safety impacts and visual resources. Additionally, it was stated that there was an acreage discrepancy between the Environmental Assessment and the Notice of Application.

The concerns stated above have been addressed in the Finding of No Significant Impact (FONSI) dated September 22, 2010. To obtain a copy of the FONSI, please contact Patrick O'Mallan, Environmental Protection Specialist, at (916) 978-6044. An electronic version of the FONSI is also available online at www.analyticalcorp.com.

Based on the analysis disclosed in the EA, the Tribe's response to comments and our review, the Bureau of Indian Affairs has determined that the proposed federal action is not a major federal action significantly affecting the quality of human environment within the meaning of NEPA of 1969.

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 San Pasqual Band of Diegueno Mission Indians of California in accordance with the Indian Reorganization Act of (IRA) of June 18, 1934 (48 Stat. 984; 25 U.S.C. §465). The applicable regulations are set forth in the Code of Federal Regulations, Title 25, INDIANS, Part 151, as amended.

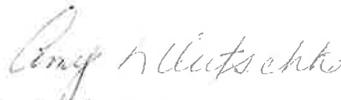
Should any of the below-listed known interested parties feel adversely affected by this decision, an appeal may be filed within (30) days of receipt of this notice with the Interior Board of Indian Appeals, U.S. Department of the Interior, 801 N. Quincy St., Suite 300, Arlington, Virginia 22203, in accordance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

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

If possible, a copy of this decision should be attached. Any appellant must send copies of the notice of appeal to: (1) the Assistant Secretary of Indian Affairs, U.S. Department of Interior 1849 C Street, N.W., MS-4140-MIB, Washington, D.C. 20240; (2) each interested party known to the appellant; and (3) this office. Any notice of appeal sent to the Board of Indian Appeals must certify that copies have been sent to interested parties. If a notice of appeal is filed, the Board of Indian Appeals will notify appellant of further appeal procedures. If no appeal is timely filed, further notice of a final agency action will be issued by the undersigned pursuant to 25 CFR 151.12(b). 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:

43 CFR 4.310, et seq.

cc: Distribution List

DISTRIBUTION LIST

cc: BY CERTIFIED MAIL – RETURN RECEIPTS REQUESTED TO:

California State Clearinghouse (10 copies) - 7010 1670 0001 7431 3131
Office Planning and Research
P.O. Box 3044
Sacramento, CA 95814

Ms. Andrea Lynn Hoch - 7010 1670 0001 7431 3148
Legal Affairs Secretary
Office of the Governor
State Capitol Building
Sacramento, CA 95814

Deputy Attorney General - 7010 1670 0001 7431 3155
State of California
Department of Justice
P.O. Box 944255
Sacramento, CA 94244-2550

Mr. James Peterson, District Director - 7010 1670 0001 7431 3162
Office of the Honorable Dianne Feinstein
750 "B" Street, Suite 1030
San Diego, CA 92101

U.S. House of Representatives - 7010 1670 0001 7431 3179
52nd District
1870 Cordell Court, Suite 206
El Cajon, CA 92020

San Diego County Assessor - 7010 1670 0001 7431 3186
600 Pacific Highway, Suite 162
San Diego, CA 92101

San Diego Treasurer & Tax Collector - 7010 1670 0001 7431 3193
1600 Pacific Highway, Suite 162
San Diego, CA 92101-2480

County of San Diego - 7010 1670 0001 7431 3209
Office of the Chief Administrative Officer
1600 Pacific Highway
San Diego, CA 92101-2480

San Diego County Sheriff's Department - 7010 1670 0001 7431 3216
9621 Ridge Haven Court
San Diego, CA 92120

San Diego County Department of Public Works - 7010 1670 0001 7431 3377
5555 Overland, Suite 6101, MS O-340
San Diego, CA 92123

Department of Planning and Land Use - 7010 1670 0001 7431 3384
5201 Ruffin Road, Suite B, MS O-650
San Diego, CA 92123

San Diego Chief Administrative Office - 7010 1670 0001 7431 3391
1600 Pacific Highway, Room 212, MS O-336
San Diego, CA 92101

Chairperson - 7010 1670 0001 7431 3223
Campo Band of Mission Indians
36190 Church Rd., Suite 1
Campo, CA 91906

Chairperson - 7010 1670 0001 7431 3230
Ewiiapaayp Band of Kumeyaay Indians
4054 Willows Road
Alpine, CA 91901

Chairperson - 7010 1670 0001 7431 3247
Inaja-Cosmit Band of Mission Indians
309 S. Maple Street
Escondido, CA 92025

Chairperson - 7010 1670 0001 7431 3254
Jamul Indian Village
P.O. Box 612
Jamul, CA 91935

Chairperson - 7010 1670 0001 7431 3261
La Jolla Band of Luiseno Indians
22000 Highway 76
Pauma Valley, CA 92061

Chairperson - 7010 1670 0001 7431 3278
La Posta Band of Mission Indians
P.O. Box 1120
Boulevard, CA 91905

Chairperson - 7010 1670 0001 7431 3285
Los Coyotes Band of Chauilla & Cupeno Indians
P.O. Box 189
Warner Springs, CA 92086

Chairperson - 7010 1670 0001 7431 3292
Manzanita Band of Mission Indians
P.O. Box 1302
Boulevard, CA 91905

Chairperson - 7010 1670 0001 7431 3308
Mesa Grande Band of Mission Indians
P.O. Box 270
Santa Ysabel, CA 92070

Chairperson – 7010 1670 0001 7431 3315
Pala Reservation
35008 Pala Temecula Rd. PMB 50
Pala, CA 92059

Chairperson - 7010 1670 0001 7431 3322
Pauma Band of Mission Indians
P. O. Box 369
Pauma Valley, CA 92061

Chairperson - 7010 1670 0001 7431 3346
Rincon Band of Mission Indians
P.O. Box 68
Valley Center, CA 92082

Chairperson - 7010 1670 0001 7431 3351
Santa Ysabel Band of Mission Indians
P.O. Box 130
Santa Ysabel, CA 92070

Chairperson – 7010 1670 0001 7431 3353
Sycuan Band of Mission Indians
5459 Sycuan Road
El Cajon, CA 92021

Chairperson - 7010 1670 0001 7431 3360
Viejas (Baron Long) Band of Mission Indians
P.O. Box 908
Alpine, CA 91903

Regular Mail:

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

Office of the Secretary, Interior

§ 4.310

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

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

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

§ 4.306 Time for payment.

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

§ 4.307 Title.

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

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

§ 4.308 Disposition of income.

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

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

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

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

§ 4.310 Documents.

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

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

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

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

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

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

§ 4.323 Disposition of the record.

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

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

SOURCE: 54 FR 6487, Feb. 10, 1989, unless otherwise noted.

§ 4.330 Scope.

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

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

- (1) Tribal enrollment disputes;

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

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

§ 4.331 Who may appeal.

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

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

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

(c) Where otherwise provided by law or regulation.

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

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

(1) A full identification of the case;

(2) A statement of the reasons for the appeal and of the relief sought; and

(3) The names and addresses of all additional interested parties, Indian tribes, tribal corporations, or groups having rights or privileges which may be affected by a change in the decision, whether or not they participated as interested parties in the earlier proceedings.

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

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

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

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

§ 4.333 Service of notice of appeal.

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

§ 4.334

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

§ 4.334 Extensions of time.

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

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

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

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

- (1) The decision appealed from;
- (2) The notice of appeal or copy thereof; and

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

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

§ 4.336 Docketing.

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

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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: