



# United States Department of the Interior

ML13178

IN REPLY REFER TO:

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

FEB 1 - 2013

## NOTICE OF DECISION

CERTIFIED MAIL – RETURN RECEIPT REQUESTED – 7012 2210 0002 1441 6225

Ms. Kara Miller, Chairperson  
Smith River Rancheria  
140 Rowdy Creek Road  
Smith River, CA 95567-9446

Dear Ms. Miller:

This is notice of our decision upon the Smith River Rancheria's application to have the below-described real property accepted by the United States of America in trust for the Smith River Rancheria. The land referred to herein is in the County of Del Norte, State of California, being more particularly described as follows:

*Beginning at a point 1163.02 feet south and 413.38 feet east of the north quarter section corner of Section 17, Township 18 North, Range 1 West, Humboldt Meridian; and running thence north 1 degree 43 minutes 40 seconds east, 200.30 feet; thence south 87 degrees 26 minutes east, 587.49 feet to former Highway 101; thence along said highway south 31 degrees 40 minutes west, 195.54 feet; thence south 31 degrees 49 minutes west, 25.70 feet to a point from which the point of beginning bears north 88 degrees 16 minutes 20 seconds west; and thence north 88 degrees 16 minutes 20 seconds west 476.95 feet to the point of beginning. APN: 101-070-21, aka Keeter Property.*

The Keeter parcel is located on the east side of State Route 101 in the unincorporated town of Smith River, Del Norte County, California. The parcel is contiguous to Smith River Rancheria trust lands, with the property containing 2.44 acres, more or less.

The applicable regulations are set forth in the Code of Federal Regulations, Title 25, INDIANS, Part 151, as amended. The regulations specify that it is the Secretary's policy to accept lands "in trust" for the benefit of tribes when such acquisition is authorized by an Act of Congress, and (1) when such lands are within the exterior boundaries of the tribe's reservation, or adjacent thereto, or within a tribal consolidation area, or (2) when the tribe already owns an interest in the land, or (3) when the Secretary determines that the land is necessary to facilitate tribal self-determination, economic development, or tribal housing.

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In this particular instance, the authorizing Act of Congress is the Indian Land Consolidation Act of 1983 (25 U.S.C. §2202). The proposed land acquisition of 2.44 acres contains lands that are contiguous to the exterior boundaries of the Smith River Reservation. This acquisition, therefore, falls within the land acquisition policy as set forth by the Secretary of Interior.

On May 14, 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, Office of Planning & Research; Sara J. Drake, Deputy Attorney General, State of California; Mr. Jacob Appelsmith, Legal Affairs Secretary, Office of the Governor of California; Office of the Honorable Dianne Feinstein; Ms. Heidi Kunstal, Deputy Director of Building and Planning, Del Norte County; Del Norte County Board of Supervisors; Del Norte County Treasurer and Tax Collector; Smith River Fire Protection District; Gretchen Stuhr, County Counsel, County of Del Norte; Honorable Mike Thompson, House of Representatives; Chairperson, Elk Valley Rancheria. The May 14, 2012 Notice superseded a Notice of Application issued by the Bureau of Indian Affairs, Northern California Agency, dated August 4, 2004.

No comment letters were received in response to the May 14, 2012 Notice. Two letters were received in response to the August 4, 2004 Notice of Application, which were informational. They are as follows:

1. Letter dated August 16, 2004 from the County of Del Norte, Office of the Assessor, stating the current tax information.
2. Letter dated August 17, 2004 from the County of Del Norte Community Development Department, stating that the subject property is contiguous to the Smith River Rancheria and currently zoned Rural Residential 1-acre minimum (RRA-1). Additionally, the property is within the boundaries of the California Coastal Zone, and the boundary of the Smith River Community Service District.

Pursuant to 25 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 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) whether or not contaminants or hazardous substances may be present on the property. Accordingly, the following analysis of the application is provided.

#### Factor 1 – Need for Additional Land

The Smith River Reservation was originally established by Secretarial Order of May 3, 1862 and consisted of 69,120 acres. On July 27, 1869, Congress discontinued the original reserve (15 Stat. 221). On June 6, 1908, the U.S. purchased 163.96 acres for the Smith River Rancheria under the Act of June 21, 1906 (34 Stat. 325, 333). Additionally, Prince Island (14.25 acres) was set-aside for the Tribe by Executive Order dated March 11, 1912.

On November 9, 1960, the Secretary of the Interior gave final approval for the termination of the Smith River Rancheria and its members under the authority of the Act of August 18, 1958 (72 Stat. 619). The 163.96 acres was subdivided and distributed in accordance with the Distribution Plan of the Smith River Rancheria.

On December 22, 1983, the Smith River Rancheria, along with 16 other tribes, was reinstated to its status as a federally recognized tribal entity under the U.S. District Court Order in Tillie Hardwick vs. U.S., No. C-79-1710-SW. In addition, the 1983 Order gave the tribe and its members the right to have their lands restored to trust. On March 2, 1987, Del Norte County stipulated in the Hardwick case to the restoration of the Rancheria boundaries as "Indian Country" status. However, only three parcels and Prince Island remained in communal ownership at the time, and said lands, comprising 24.27 acres, more or less, were restored to tribal trust status. Subsequently, a total of 18.56 acres, all located within the restored Smith Rancheria boundaries, have been restored to tribal trust.

The Tribe's purpose and need for the land into trust is to provide essential services for Tribal members and economic development. The Tribe's existing land base is currently inadequate to accommodate existing needs and future growth. The Tribe has over 1,500 enrolled members, yet only a fraction of the tribe's original Rancheria is held in federal trust status on behalf of the Tribe. Taking the land into trust would provide for the following Tribal needs:

- Economic development – construction of the proposed recreational vehicle parking lot would promote tourism and use of Tribal enterprises, such as the Lucky 7 Fuel Mart providing diversification of the Tribe's revenue base.
- Reclaim tribal land – the parcel proposed for trust status is located within the aboriginal ancestral lands of the Smith River Rancheria; and
- Self Determination – allow the Tribal Government to exercise their sovereign authority over their land and exercise self-determination.

It is the goal of the Smith River Rancheria to assume governmental jurisdiction over all their lands in order to exercise tribal sovereignty. It is our determination that the Smith River Rancheria has an established need for additional land in order to facilitate tribal self-determination and ensure a land base for future generations.

#### Factor 2 - Proposed land Use

Existing land uses on this parcel are as follows: the western half of the parcel (1.21 acres) is used as an overflow automobile parking area (103 parking spaces) with carports and a back-up generator facility for the Lucky 7 Casino, and the eastern half of the parcel is used as a single-family residence, with a chain-link fence separating the two halves of the parcel. The proposed development project is a recreational vehicle parking lot on the eastern half of the parcel. Only overnight, or weekend occupancy, will be allowed; no long-term or residential use will be allowed. Twenty five parking stalls are proposed: 9 full length stalls to accommodate Class A recreational vehicles (large motor homes often called "diesel pushers"); and 16 compact stalls to accommodate Class B and C recreational vehicles (motor homes mounted to van or truck chassis, fifth wheel trailers, pop-up trailers, etc.)

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

APN: 102-070-21, aka Keeter property: assessed property taxes for this parcel in FY 12/13 were \$3,260.88.

Accepting the Property into trust will currently result in the diminution of \$3,260.88 of County property tax receipts annually. The loss of \$3,260.88 in County property tax revenues as a result of this transfer will be more than mitigated. If the Property is accepted into trust, and the Tribe is able to develop and operate the proposed uses, the County and other local jurisdictions that already benefit enormously under the terms of the Tribe's Compact with the State of California would not lose from the loss of property taxes. Additionally, agreed upon payment from the Tribe to local governmental units in consideration of certain municipal services the County or such other governmental units provide to the Tribe or the Property will more than offset the de minimus impact on County tax receipts resulting from removal of the Property from the tax roll.

The Smith River Rancheria has a significant positive impact on the local economy through its government and economic development activities in Del Norte County. These activities include the following:

1. Between the economic enterprises owned by the Rancheria and government employment, the combined employment by SRR is over 200 employees which make SRR one of the top 10 employers in the County. The approximately \$8,000,000 in personnel incomes filters into the county through services rendered, purchases, rent, housing purchases (including tax on employee housing to the County), etc. that far surpasses the loss of tax base from these specific properties and would have a major impact if the Rancheria and enterprises did not exist.
2. Government services provided by the Rancheria include: Education supplement, Indian Child Welfare, Domestic Violence, Head Start and Daycare, Burial expense, nutritional programs for Elders and kids, Donations to community partners, Fire protection to the Smith River and Fort Dick Fire Districts, Health and Dental services through United Indian Health Services, a police officer for the County, and other incidental services. The value of these services provided totals over \$1,500,000 annually. This burden is provided by the Rancheria and alleviates services that would be required from the County if the Rancheria did not exist. In addition, the tax bill collects taxes for Smith River Fire Protection yet the Tribe pays for fire services under a separate MOU.
3. The Rancheria also provides a wide list of community based services that provide value to the County and these are: The Lucky 7 Casino attracts visitors to the region through their marketing efforts as a destination to visit; the development of a regional wastewater treatment plant that provides the ability to develop other properties, alleviate failed septic tanks and eliminate health hazards; a water system that provides potable water to the community; Tribal funds for the improvement of the transportation network in the County; and participation with the airport district; Economic Development Councils; Chambers of Commerce; and other venues. These

opportunities would not exist or financial and political support is possible without the participation of the Rancheria.

Given the nominal amount collected on the Keeter property, it does not appear that removal from the tax rolls will cause an adverse impact.

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

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. Police services would continue to be the responsibility of the Del Norte County Sheriff's Department and the California Highway Patrol. The Smith River Fire Protection District serves the project area and other urbanized areas around Smith River.

The current General Plan land use designation for the Keeter parcel is Rural Residential – 1 dwelling unit per acre (RR 1). The current County zoning for the Keeter parcel is Rural Residential Agricultural (RRA).” The specific zoning for the parcel is “RRA-1.” This indicates a minimum parcel size of one acre. When the Smith River Rancheria was terminated, this reservation was divided into a number of fee parcels, and brought under County jurisdiction as the Smith River Rancheria Subdivision in 1961. The original subdivision consisted of 52 parcels. This subdivision has a mixture of zoning categories, ranging from residential to commercial. The Tribe is currently in discussions with Del Norte County to update the County General Plan designation and zoning for the Keeter Parcel to be consistent with the Tribe's land use master plan and intended use of the parcel.

Based on the foregoing, it does not appear that transfer of the subject land to trust status would result in jurisdictional conflict.

#### 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. 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 the BIA and the tribe. The Department also acknowledges that this whole exercise would not be required if not for the wrongful termination of the Smith River Rancheria. As such, the Bureau of Indian Affairs will administer any additional responsibilities that may result from this acquisition.

#### Factor 6 – Whether or not contaminants or hazardous substances are present

In accordance with Interior Department Policy (602 DM 2), we are charged with the responsibility of conducting a site assessment for the purposes of determining the potential of, and extent of liability for, hazardous substances or other environmental remediation or injury. The record includes a negative Level 1 “Contaminant Survey Checklist” dated January 7, 2013 reflecting that there were no hazardous materials or contaminants.

## National Environmental Policy Act Compliance

An additional requirement, which has to be met when considering land acquisition proposals, is the impact upon the human environment pursuant to the criteria of the National Environmental Policy Act of 1969 (NEPA). The BIA's guidelines for NEPA compliance are set forth in Part 30 of the Bureau of Indian Affairs Manual (30 BIAM), Supplement 1. An Environmental Assessment (EA), documenting and analyzing the potential impacts of the proposed project, was completed in April 2012. The EA was distributed for public review and comment for the period beginning April 23, 2012 and ending May 24, 2012. The EA identified potential impacts to land resources, water resources, air quality, cultural resources, noise, and hazardous materials. In letter dated June 18, 2012, the California Coastal Commission concurred with the consistency determination for the placement of the 2.44-acre (Keeter Property) parcel into federal trust status for the Smith River Rancheria. After review and independent evaluation, the BIA has determined that the proposed federal action, to approve the Smith River Rancheria's request to take the proposed 2.44 acres project site for the purpose of recreational vehicle parking lot, does not constitute a major federal action that would significantly affect the quality of the human environment within the meaning of NEPA. This conclusion is based on the analysis contained in the EA, consideration of public comments received, the response to those comments, and the mitigation imposed. Therefore, an Environmental Impact Statement is not required and the BIA has approved a Finding of No Significant Impact (FONSI).

## Conclusion

Based on the foregoing, we at this time issue notice of our intent to accept the proposed acquisition into trust. Subject acquisition will vest title in the United States of America in trust for the Smith River Rancheria in accordance with the Indian Land Consolidation Act of January 12, 1983 (25 U.S.C. §2202).

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

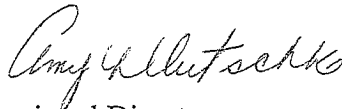
Any notice of appeal to the Board must be signed by the appellant or the appellant's legal counsel, and the notice of the appeal must be mailed within 30 days of the date of receipt of this notice. The notice of appeal should clearly identify the decision being appealed.

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,

Handwritten signature of Amy W. Luttschke in cursive script.

Regional Director

Enclosure

cc: Distribution List

## DISTRIBUTION LIST

cc: BY CERTIFIED MAIL – RETURN RECEIPTS REQUESTED TO:

California State Clearinghouse (10 copies) – 7012 1010 0000 9237 3936  
Office of Planning and Research  
P.O. Box 3044  
Sacramento, CA 95812-3044

Sara J. Drake, Deputy Attorney General – 7012 1010 0000 9237 3943  
State of California  
Department of Justice  
P.O. Box 944255  
Sacramento, CA 94244-2550

Jacob Appelsmith – 7012 1010 0000 9237 3950  
Legal Affairs Secretary  
Office of the Governor of California  
State Capitol Building  
Sacramento, CA 95814

Devin Rhinerson, District Director – 7012 1010 0000 9237 3967  
Office of U.S. Senator Diane Feinstein  
331 Hart Senate Office Building  
Washington, DC 20510

Del Norte County Assessor – 7012 1010 0000 9237 3981  
981 H Street, Suite 110  
Crescent City, CA 95531

Del Norte Board of Supervisors – 7012 2210 0002 1441 6157  
981 H Street, Suite 200  
Crescent City, CA 95531

Del Norte Planning – 7012 2210 0002 1441 6164  
981 H Street, Suite 110  
Crescent City, CA 95531

Del Norte County – 7012 2210 0002 1441 6171  
Sheriff Department  
650 Fifth Street  
Crescent City, CA 95531



Del Norte County Tax Collector – 7012 2210 0002 1441 6188  
981 H Street, Suite 150  
Crescent City, CA 95531

Mr. Larry Simon, Federal Consistency Coordinator  
California Coastal Commission  
45 Fremont Street, Suite 2000  
San Francisco, CA 94105-2219

Elk Valley Rancheria – 7012 2210 0002 1441 6195  
2332 Howland Hill Road  
Crescent City, CA 95531

Resighini Rancheria – 7012 2210 0002 1441 6201  
P.O. Box 529  
Klamath, CA 95548

Yurok Tribe – 7012 2210 0002 1441 6218  
P.O. Box 1027  
Klamath, CA 95548

Regular Mail:

Superintendent  
Bureau of Indian Affairs  
Northern California Agency  
1900 Churn Creek Rd., Suite 300  
Redding, CA 96002

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.

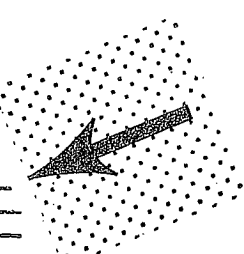
GENERAL RULES APPLICABLE TO PROCEEDINGS ON APPEAL BEFORE THE INTERIOR BOARD OF INDIAN APPEALS

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

#### § 4.321

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

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

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

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

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

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

#### § 4.322 Docketing.

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

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

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

#### § 4.323 Disposition of the record.

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

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

SOURCE: 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.

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(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.

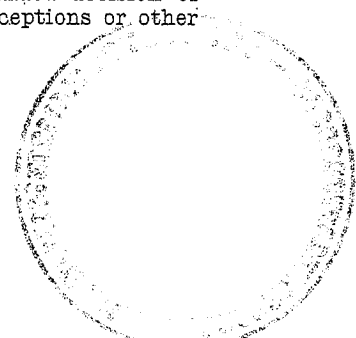
(a) The Board may make a final decision, or where the record indicates a need for further inquiry to resolve a genuine issue of material fact, the Board may require a hearing. All hearings shall be conducted by an administrative law judge of the Office of Hearings and Appeals. The Board may, in its discretion,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

