



IN REPLY REFER TO:

United States Department of the Interior

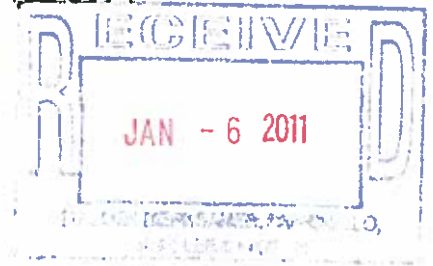
BUREAU OF INDIAN AFFAIRS
Pacific Regional Office
2800 Cottage Way
Sacramento, California 95825

11-3-2010

NOTICE OF DECISION

CERTIFIED MAIL RECEIPT REQUESTED – 7010 1670 0001 7402 5171

Honorable, Ryan Garfield
Chairman, Tule River Reservation
P.O. Box 589
Porterville, CA 93258



Dear Chairman Garfield:

This is notice of our decision upon the Tule River Tribe's application to have the below described real property accepted by the United States of America in trust for the Tule River Indian Tribe of the Tule River Reservation, California.

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

Parcel No's 1 through 17 inclusive, of Parcel Map No. 4343, in the City of Porterville, County Tulare, State of California, according to the map thereof recorded in Book 44, Page 47 of Parcel Map, in the office of the County Recorder of said County and by certificates of correction recorded 118, 1982 as Instrument No. 51166, June 1, 1999 as Instrument No. 99-0041612 and August 12, 1999 as Instrument No. 99-0061851.

Excepting therefrom all oil, gas, minerals and other hydrocarbon substances, in on, or under said land, as reserved by the City of Porterville, a Municipal Corporation, in a Deed recorded October 29, 1990 as file No. 71536 of Official Records.

Said lands comprise approximately 40.00 acres.

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

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25, INDIANS, Part 151, as amended. This land acquisition falls within the land acquisition policy as set forth by the Secretary of the Interior.

On December 28, 2009, by certified mail, return receipt requested, we issued notice of, and sought comments regarding the proposed fee to trust application from the following: California State Clearinghouse; Sara J. Drake, Deputy Attorney General; Ms. Andrea Lynn Hoch, Deputy Legal Affairs Secretary, Office of the Governor; James Peterson, District Director, Office of Senator Feinstein; Tulare County Office of Public Works; Tulare County Board of Supervisors; Tulare County Tax Assessor; Tulare County Fire Department; Tulare County Sheriff's Department; and California Department of Forestry & Fire Protection.

In response to our notification dated December 28, 2009 for Assessor's Parcel Numbers 302-400-001 through 302-400-017, we received the following comments:

- Facsimile from Cal Trans dated January 26, 2010 with no comments to the Notice of Application dated December 28, 2009.
- Via e-mail from the State of California, Department of Justice, dated January 22, 2010, requesting a seven day extension (February 11, 2010) to comment on the Notice of Application.
- Letter from City of Porterville dated February 4, 2010 requesting a 30 day extension.
- Letter from the Office of the Governor dated February 10, 2010, stating concerns with the Tribes application, which include: (1) the Tribe's application does not demonstrate that, absent approval, the Tribe will be unable to provide housing for its members, facilitate tribal self-determination or economic development. (2) it does not provide any intergovernmental agreements reached with the City; (3) there is no analysis of how future commercial activities on the undeveloped 15 parcels would be consistent with the surrounding City land uses; and (4) based on new reports regarding the potential relocation of its casino the Tribe's plans for the subject property may have changed during the interim and may plan to utilize this land for gaming and/or other commercial development.

By letter dated April 20, 2010, the Tule River Tribe response was as follows:

(1) The Secretary of the interior may take land into trust when the "acquisition is necessary to facilitate tribal self-determination," 25 C.F.R. Sec. 151.3(a)(3). The Porterville Airpark is within the historical (sometimes called "aboriginal") lands of the Tribe. The Porterville Airpark is less than 20 miles from the Tribe's current Reservation as established by Executive Order in 1873. There are several ways in which the Airpark fits within the history, and they include but are not limited to: Historical Yokuts Bands, The Treaty of Guadalupe Hidalgo and the 18 Unratified Treaties; (2) the development of the industrial park at the Porterville Airport has so far taken

over 20 years. This project pre-dates the passage of the Indian Gaming Regulatory Act (IGRA) in 1988 and has required hundreds of thousands of tribal man hours and the investment of tribal funds. It took three years, but the Tribe and the City of Porterville entered into a Purchase Agreement dated May 9, 1989 and closed with a Corporation Grant Deed dated September 27, 1990 and recorded October 29, 1990. In 1992, the Tribe and the City of Porterville were joint applicants for a grant from the Economic Development Administration of the U.S. Department of Commerce to fund infrastructure development for the industrial Park on the subject site. In 1992, the EDA awarded money in support of the construction program. In 1994, this grant was amended in support of the construction project. In 1993, an engineering firm engaged in the design of sewer, water, storm drainage facilities, and road improvements with connection to the City or Porterville existing systems. To date, the Tribe has invested over 20 years in its plan to use the Porterville Airpark as an industrial park pursuant to 25 C.F.R. 151.11(c) which economic benefits to date include, leases for Indian Health Services, the USDA Forest Service, the Tule River Economic Development Corporation separately and as the manager for Tule River Aero-Industries; (3) additionally, the Tribe and the city have entered into a Cooperation Agreement effective April 1, 2010. In that Agreement, the Tribe agrees to follow the City of Porterville's General Plan and zoning in effect for the Porterville Airport and to obtain the written approval of the City before initiating any development project at the Porterville Airpark; and (4) the Tribe has never submitted any request to the Office of the Governor for any consideration of off-reservation gaming at the Porterville Airport. The Tribe has submitted an Environmental Assessment (EA) to the Office of Indian Gaming for a different location. The Tribe's application has never mentioned gaming nor has ever been amended to include gaming.

Additionally, the application now provides an "intergovernmental agreement reached with the City that "analyzes how future commercial activities on the undeveloped 15 parcels would be consistent with surrounding City land uses as requested by the Office of the Governor.

- Letter from Nielsen, Merksamer, Parrinello, Mueller & Naylor, LLP, for the County of Tulare, Board of Supervisors, dated April 28, 2010, stating: (1) that Tulare County never received proper notice of the BIA notice; (2) they are concerned that the fee-to-trust application would likely be deemed subject to a categorical exclusion from the requirements of the National Environmental Policy Act (NEPA) because it is alleged by the Tribe that there is no planned change of use for the airport parcels; (3) the MOU in March of 2008 between the Tule River Indian Tribe and the City of Porterville which specifically commits the Tribe to use the airport parcels for "gaming and resort use."

By letter dated May 11, 2010, the Tule River Tribe response was as follows: (1) The County received a copy of the notice through the State Clearinghouse dated January 15, 2010; various departments within the

County received notice; contact was made from the County to the Bureau of Indian Affairs (BIA) staff on February 16, 2010 and February 24, 2010; the County did not respond until April 28, 2010 after receipt from the Clearinghouse on January 15, 2010. The comments were received after the comment period ended; (2) the BIA and the IBIA have consistently decided that "mere speculation by a third party that a tribe might, at some future time, attempt to use trust land for gaming purposes does not require BIA to consider gaming as a use of the property in deciding whether to acquire the property in trust." *Town of Charston, R.I. v. E. Area Dir., BIA*, 35 IBIA 93, 103 (2000), *aff'd sub nom. Carcieri v. Norton*, 290 F. Supp. 2d 167 OD.R.I. 2003), *aff'd sub nom. Carcieri v. Kempthorne*, 597 F. 3d 15 (1st Cir. 2007) (*en band*), *rev'd on other grounds sub nom. Carcieri v. Salazar*, 129 S. Ct. 1058 (2009); (3) Section 9 of the Cooperation Agreement with the City of Porterville expressly terminates the MOU as follows: "That the MOU entered into in and around March 2008 by and between the City and the Tule River Indian Tribe is of no further force or effect and no provisions or obligations contained in the MOU shall be binding upon or inure to the benefit of either party." The fee-to-trust application that was submitted in 2002 never mentioned gaming or has never been amended to include or even mention gaming to this date. The Tribe has submitted an EA to the BIA Office of Indian Gaming (OIG) for a different off-reservation parcel located east of the City of Porterville along State Highway 190 or just west of the Lake Success Reservoir (the "Highway 190 Property"). The Highway 190 Parcel is not the same and the Porterville Airport parcel and they should not be confused.

Pursuant to 25 CFR 151.10, the following factors were considered in formulating our decision: (1) the need of the tribe for additional land; (2) the purposes for which the land will be used; (3) impact on the State and its political subdivisions resulting from the 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 land in trust status; (6) the extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, Appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions; Hazardous Substances Determinations. Accordingly, the following analysis of the application is provided.

Factor 1 – Need for additional land

The current reservation was established by Executive Orders of January 9, 1873, October 3, 1873, and August 3, 1878. The current acreage of the reservation covers 55,396 acres, which is held in trust by the United States. The reservation is located in south-central California, approximately 75 miles southeast of Fresno in Tulare County. The reservation is situated on the western slope of the Sierra Nevada Mountains and lies almost entirely within the South Fork Tule River drainage basin. The topography is generally steep, with elevations from about 1,000 to 7,500 feet. Most of the inhabited

land is along the lower head of the South-fork Tule River on the western side of the reservation.

Factor 2- Proposed Land Use

Currently, there are two buildings on the property which are used for the Tule River Economic Development Corporation (TREDC) and the U.S. Department of Agriculture (USDA) warehouse for distributing food to low-income families. There is no planned change in land use.

The Industrial Park property is located approximately 20 miles from the Tribe's current Reservation.

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

Assessed property taxes for 2009-2010:

302-400-001 - \$	11,115.72
302-400-002 - \$	5,757.68
302-400-003 - \$	419.44
302-400-004 - \$	726.74
302-400-005 - \$	2,101.44
302-400-006 - \$	2,080.68
302-400-007 - \$	2,105.64
302-400-008 - \$	730.92
302-400-009 - \$	423.60
302-400-010 - \$	423.60
302-400-011 - \$	834.70
302-400-012 - \$	834.70
302-400-013 - \$	830.60
302-400-014 - \$	415.22
302-400-015 - \$	415.22
302-400-016 - \$	830.60
302-400-017 - \$	834.70

Total - \$36,292.54

In the Cooperation Agreement between the City of Porterville and the Tule River Indian Tribe states, that in any such agreement any and all appropriate monetary and community contributions shall be committed to the City to account for the City's share of lost revenues related to taxes, licenses, and developments fee.

Factor 4 – Jurisdictional Problems/Potential Conflicts

As California is a P.L. 93-280 State, California will still retain State criminal law enforcement jurisdiction after the land is taken into trust status. However, State civil regulatory laws will not apply.

In the Cooperation Agreement between the City of Porterville and the Tule River Indian Tribe states that the Tribe will not engage in any new development, construction or new operation of any land use unless a written agreement is executed by the parties in effect at the time of the proposed development.

Factor 5 – Whether the BIA is equipped to discharge the additional responsibilities

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

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

In accordance with the 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 November 19, 2003, reflecting that there are no hazardous materials or contaminants.

National Environmental Policy Act Compliance

An additional requirement which must be met when considering land acquisition proposals is the impact upon the human environment pursuant to the criteria of the National Environmental Policy Act of 1969 (NEPA). The BIA's guidelines for NEPA compliance are set forth in NEPA Handbook 59 IAM 3.

The Environment Assessment (EA) 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 Environment Assessment (EA) and Amended Finding of No Significant Impact (FONSI), dated June 2010 and September 17, 2010 respectively, were distributed concurrently for public review and comment during the period beginning June 24, 2010, and ending July 26, 2010. Comments were also solicited directly from the Caltrans District 6, Legal Affairs Secretary of the Office of the Governor, Tulare County, Tulare County Airport Land Use Commission and four individuals.

After review and independent evaluation, the BIA has determined that the proposed federal action, to approve the Tule River Indian Tribe's request to take the proposed 40.00-acre site into trust for the purpose of operating the Porterville Airpark, does not constitute a major federal action that would significantly affect the quality of the human environment within the meaning of NEPA. Therefore, an Environmental Impact Statement is not required.

Factor 7 – The location of the land relative to state boundaries, and its distance from the boundaries of the Tribe's reservation

The subject parcels are approximately located approximately 20 miles from the Tribe's current reservation trust land of 55,395.93 acres, 140 miles from the west coast ocean line and 150 miles from the Nevada state line.

Factor 8 – Where land is being acquired for business purposes, the tribe shall provide a plan which specifies the anticipated economic benefits associated with the proposed use.

The original 40 acre parcel was also divided into 17 lots for industrial development through a parcel map approved by the City of Porterville in 1995. Since that time, industrial development has been gradual but ongoing on the subject site. To date, two large buildings have been constructed on two parcels out of the 17 total parcels at the Porterville Airpark.

The Office of the Governor requests "a plan which specifies the anticipated economic benefits associated with the proposed use" pursuant to 25 C.F.R. 151.11(c). To date, the Tribe has invested over 20 years in its plan to use of the Porterville Airpark as an industrial park pursuant to 25 C.F.R. 151.11(c) which economic benefits to date include, as stated in the letter from the Office of the Governor, leases for Indian Health Services, the USDA Forest Service, the Tule River Economic Development Corporation separately and as the manager for Tule River Aero-Industries. This is consistent with Tule River Tribal Council Resolution No. 83-94 adopted on September 27, 1994 which recognized that "the Tule River Tribal Council has approved a thirty (30) year Economic Development Plan," and which same Tribal Council Resolution approved ANA Grant application 93612-951 dated October 21, 1994 and its attached Business Plans No. 1 and No. 2 for the Airport Industrial Park.

In the Cooperation Agreement between the City of Porterville and the Tule River Indian Tribe states, that in any such agreement any and all appropriate monetary and community contributions shall be committed to the City to account for the City's share of lost revenues related to taxes, licenses, and developments fee, that the Tribe will not engage in any new development, construction or new operation of any land use unless a written agreement is executed by the parties in effect at the time of the proposed development, and that in the event the proposed development is not consistent with the City's applicable regulations, development will not proceed unless and unit a written agreement between the parties is executed addressing any additional impacts.

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 Tule River Indian Tribe of the Tule River Reservation, California in accordance with the Indian Reorganization Act of 1934 (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 thirty (30) days of receipt of this notice with the Interior Board of Indian Appeals, U.S. Department of the Interior, 801 North Quincy St., Suite 300, Arlington, Virginia 22203, in accordance with the regulations in 43 CFR 4.310-4.340 (copy enclosed).

If possible, a copy of this decision should be attached. Any appellant must send copies of the notice of appeal to: (1) the Assistant Secretary of Indian Affairs, U.S. Department of Interior, 1849 C. Street, N.W., MS-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

cc: Distribution List
43 CFR 4.310-4.340

DISTRIBUTION LIST

California State Clearinghouse (ten copies) - 7010 1670 0001 7402 5072
Office of Planning and Research
P.O. Box 3044
Sacramento, CA 95812-3044

Ms. Sarah J. Drake, Deputy Attorney General - 7010 1670 0001 7402 5089
State of California
Department of Justice
P.O. Box 944255
Sacramento, CA 94244-2550

Ms. Andrea Lynn Hoch, Legal Affairs Secretary - 7010 1670 0001 7402 5096
Office of the Governor of California
State Capitol Building
Sacramento, CA 95814

James Peterson, District Director – 7010 1670 0001 7402 5102
Office of U.S. Senator Feinstein
750 "B" Street, Suite 1030
San Diego, CA 92101

Tulare County Office of Public Works – 7010 1670 0001 7402 5119
291 N. Main St.
Porterville, CA 93257

Tulare County Board of Supervisors – 7010 1670 0001 7402 5126
2800 W. Burrel Avenue
Visalia, CA 93291

Tulare County Tax Assessor – 7010 1670 0001 7402 5133
221 S. Mooney Blvd., 104E
Visalia, CA 93291

Tulare County Fire Department – 7010 1670 0001 7402 5140
1968 S. Lover's Lane
Visalia, CA 93292

Tulare County Sheriff's Department – 7010 1670 0001 7402 5157
County Civic Center
Visalia, CA 93291

California Department of Forestry & Fire Protection – 7010 1670 0001 7402 5164
P.O. Box 798
Springville, CA 93265

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Sacramento, CA 95814**

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

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

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

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

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

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

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

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

§4.311 Briefs on appeal.

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

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

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

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

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

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

§4.312 Decisions.

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

§4.313 Amicus Curiae; intervention; joinder motions.

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

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

§ 4.314 Exhaustion of administrative remedies.

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

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

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

§ 4.315 Reconsideration.

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

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

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

§ 4.316 Remands from courts.

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

§ 4.317 Standards of conduct.

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

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

§ 4.318 Scope of review.

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

**APPEALS TO THE BOARD OF INDIAN
APPEALS IN PROBATE MATTERS**

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

§ 4.320 Who may appeal.

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

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

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

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

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

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

§ 4.321 Notice of transmittal of record on appeal.

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

§ 4.322 Docketing.

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

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

§ 4.323 Disposition of the record.

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

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

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

§ 4.330 Scope.

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

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

- (1) Tribal enrollment disputes;

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

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

§ 4.331 Who may appeal.

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

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

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

(c) Where otherwise provided by law or regulation.

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

(a) A notice of appeal shall be in writing, signed by the appellant or by his attorney of record or other qualified representative as provided by 43 CFR 1.3, and filed with the Board of Indian Appeals, Office of Hearings and Appeals, U.S. Department of the Interior, 801 North Quincy Street, Arlington, Virginia 22209, 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: