



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
SUITE 300
ARLINGTON, VA 22203

STATE OF CALIFORNIA; TAHA)	Pre-Docketing Notice, Order
SALEH, SHOP N SAVE MARKET,)	Consolidating Appeals, Order
AND THE COALITION OF)	Concerning Stay Request, Order
RETAILERS; AND TULARE)	Concerning Service, and Order
COUNTY, CALIFORNIA,)	for Administrative Record
Appellants,)	
)	
v.)	Docket Nos. IBIA _____
)	_____
PACIFIC REGIONAL DIRECTOR,)	_____
BUREAU OF INDIAN AFFAIRS,)	
Appellee.)	February 15, 2011

On February 7, 2011, the Board of Indian Appeals (Board) received a notice of appeal from the State of California (State), through Jennifer T. Henderson, Deputy Attorney General for the State; on February 8, 2011, the Board received a notice of appeal from Taha Saleh, Shop N Save Market, and the Coalition of Retailers, through Michael V. Brady, Esq. of Scharff, Brady & Vinding; and on February 10, 2011, the Board received a notice of appeal from Tulare County, California (County), through Nina F. Dong, Esq., Deputy County Counsel. The State; Taha Saleh, Shop N Save Market, and the Coalition of Retailers; and the County (collectively, Appellants) seek review of a January 4, 2011,¹ decision of the Pacific Regional Director (Regional Director), Bureau of Indian Affairs

¹ None of the copies of the decision that are attached to the various appeals contain a legible date stamp for the date of issuance; all contain a "received" date stamp of January 6, 2011, but the identity of the recipient for that date stamp is illegible. The State identifies the date of the decision as January 4, 2011, but asserts, without explanation, that it was "incorrectly stamped" with that date. See State's Notice of Appeal at 1, n.1. The other Appellants identify the date of the decision as January 6, 2011. The Board's staff contacted the Regional Director's office and was informed that the date of issuance was January 4, 2011. Regardless of the date of a decision, the timeliness of appeals is determined in relation to an appellant's date of receipt of that decision, see 43 C.F.R. § 4.332, and in the present case all of the appeals appear to be timely.

(BIA), to approve the acceptance into trust of approximately 40.00 acres of land² located in Tulare County, California, by the United States for the Tule River Indian Tribe of the Tule River Reservation, California.

Procedural regulations governing administrative appeals to the Board are found in 43 Code of Federal Regulations (C.F.R.) Part 4. A copy of these regulations is enclosed for non-Federal parties.

Order Consolidating Appeals

Because Appellants challenge the same decision of the Regional Director, the Board consolidates these appeals.

Order Concerning County's Request for Stay Pending Appeal

The County's notice of appeal requests a "stay pending appeal" pursuant to 43 C.F.R. § 4.21. That provision is contained in the general rules relating to procedures and practice within the Office of Hearings and Appeals (OHA) of the Department of the Interior, and provides that once an appeal is filed, a decision becomes effective unless a stay is granted. *See* 43 C.F.R. § 4.21(a)(2). Although the Board is part of OHA, for appeals to the Board from a decision of a BIA official, the more specific provisions of 25 C.F.R. § 2.6 and 43 C.F.R. § 4.314 apply. Those provisions automatically stay the effectiveness of a decision while an appeal is pending, unless the Board places the decision into immediate effect. *See Yakama Nation v. Northwest Regional Director*, 47 IBIA 117, 119 (2008). Therefore, the County's request for a stay pending appeal is moot because the effectiveness of the Regional Director's decision is already automatically stayed as a matter of law during the pendency of this appeal, unless the Board were to provide otherwise.

² The land at issue is more particularly described in the Regional Director's decision as:

Parcel No's [sic] 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.

Order Concerning Service List

“Interested parties” are entitled to participate in an appeal and such parties, or their representatives, are entitled to receive service of all orders and pleadings. *See* 25 C.F.R. § 2.2; 43 C.F.R. § 4.310(b). In addition, an “interested person” or Indian tribe desiring to intervene or to appear as amicus curiae may file a motion to appear pursuant to 43 C.F.R. § 4.313.

The Board notes that the Regional Director’s decision, and the notices of appeal, were served on numerous individuals and entities, sometimes including multiple officials or apparent sub-units within the same government or entity, and not all of whom appear to be “interested parties,” or distinct and separate interested parties, within the meaning of the regulations. The Board’s service list for this order consists of a compilation of the individuals, officials, and entities who were included on the distribution lists used by the Regional Director or the Appellants. However, except as provided herein, the Board’s future distribution list will be limited to those individuals, officials, or entities who appear to be interested parties within the meaning of the regulations, and to any additional individuals, officials, or entities who have sought and been granted intervention or amicus curiae status. In order to avoid imposing an unnecessary service burden on the parties, future distribution list used by the Board will omit all individuals, officials, and entities who are marked with an asterisk (*) on the attached distribution list, unless intervention or amicus status is granted.³ Any individual, official, or entity who is marked with an asterisk may, pursuant to 43 C.F.R. § 4.313, file a motion to intervene or to appear as amicus curiae, and if the motion is granted, they will remain on the list, if service would not result in duplicate service for the same party in interest. Any such motion shall be filed with the Board on or before March 4, 2011.

Relevant to the issue of duplicate service for the same party in interest, the Board notes that counsel for the County also identified private co-counsel and requested service on

³ The Board’s placement of an asterisk next to particular individuals, officials, or entities, is intended solely for purposes of case management and in the interest of ensuring that service requirements are not unnecessarily burdensome, by limiting service requirements to those who are interested parties or who have sought to appear and have been granted intervention or amicus status. Nothing in the Board’s attempt to refine the list should be construed as an actual adjudication of “interested party” status. Parties may, of course, voluntarily service their pleadings on additional individuals, officials, or entities, but the Board’s future distribution list will serve as the reference for compliance with the regulatory requirements of service.

co-counsel as well. As a general rule, and absent agreement of the parties, the Board only requires service on a single representative for a party. Specifically, when a party is represented by multiple counsel, the Board's practice is to require that party to designate the lead counsel for purposes of service, who then is expected to coordinate with co-counsel as appropriate.⁴ Therefore, the Board requests the County to designate which counsel should be included on the distribution list for purposes of future service.

Order for Administrative Record

The Regional Director is requested to take the following steps in accordance with the procedural regulations in 43 C.F.R. § 4.335. Within 20 days after receipt of a copy of the notice of appeal or after receipt of this notice from the Board:

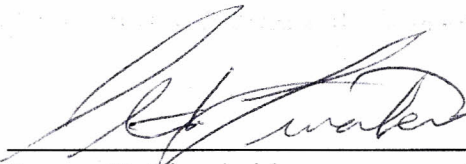
1. Assemble and transmit the administrative record to the Board. The administrative record shall include, but not be limited to, a copy of the decision being appealed; all documents that were considered by the deciding official when he or she issued the decision; all documents, petitions, or applications by which the appeal was initiated or which set forth claims, arguments, or evidence presented by interested parties; and copies of any transcripts of testimony taken;
2. Prepare a table of contents to serve as an index to the record; and
3. Include as part of the record a written confirmation that it contains all information and documents utilized by the deciding official in rendering the decision appealed.

If the Regional Director is unable to transmit the record within 20 days, she should inform the Board and the parties when the record will be sent.

⁴ The same rule applies to the Office of the Solicitor in representing BIA. The Board's pre-docketing notices are sent to both headquarters and regional officials within the Solicitor's office, but future orders and service requirements are limited to a single office for counsel representing BIA.

Further Proceedings

In accordance with 43 C.F.R. § 4.336, these cases will be assigned docket numbers 20 days after the date of receipt noted above unless the Board has been properly notified before that date that the Assistant Secretary - Indian Affairs has assumed jurisdiction over the appeal. Upon receipt of the record, a Notice of Docketing, setting forth a briefing schedule or other procedures, will be sent to all interested parties as shown by the administrative record. If the Assistant Secretary - Indian Affairs properly notifies the Board of an assumption of jurisdiction under 25 C.F.R. § 2.20(c) and 43 C.F.R. § 4.332(b), the parties will be so informed, and the appeal will be transmitted to him.



Steven K. Linscheid
Chief Administrative Judge

Enclosure (for non-Federal parties)

Distribution: See attached list.

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