INTERIOR BOARD OF INDIAN APPEALS

United Auburn Indian Community v. Sacramento Area Director,
Bureau of Indian Affairs

24 IBIA 33 (05/28/1993)

Tribal recognition restored by:
P.L. 103-434, 108 Stat. 4533 (Oct. 31, 1994)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

UNITED AUBURN INDIAN COMMUNITY
v.
SACRAMENTO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 92-186-A Decided May 28, 1993

Appeal from the failure of the Sacramento Area Director, Bureau of Indian Affairs, to respond to a request for administrative restoration of Federal recognition of the Auburn Rancheria.

Dismissed for lack of authority to grant the relief requested.

1. Administrative Procedure: Burden of Proof--Bureau of Indian Affairs: Administrative Appeals: Generally--Indians: Generally

   In cases arising under 25 CFR 2.8, challenging the failure of a Bureau of Indian Affairs official to issue a decision, the burden is on the Bureau either to show that the failure was justified or to present and support a position that the official could have taken.

2. Indians: Federal Recognition of Indian Tribes: Resumption of Trust Relationship

   The Department of the Interior lacks authority to administratively restore recognition of an Indian tribe that was lawfully terminated pursuant to legislation.

APPEARANCES: Stephen V. Quesenberry, Esq., Oakland, California, for appellant; William Wirtz, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

The United Auburn Indian Community seeks review of the failure of the Sacramento Area Director, Bureau of Indian Affairs (BIA; Area Director), to respond to its request for administrative restoration of Federal recognition of the Auburn Rancheria. 1/ For the reasons discussed below, the Board

_____

1/ In order to distinguish between the United Auburn Indian Community and the group affected by the Rancheria Act, cited infra, the Board will refer to the United Auburn Indian Community as "appellant" and to the pre-Rancheria Act group as "the Auburn Rancheria." The use of these terms does not connote any judgment about these entities.

of Indian Appeals (Board) dismisses this appeal based upon its conclusion that the Department of the Interior lacks the authority to grant the relief requested.

Background

The Auburn Rancheria was included as a California rancheria under section 1 of the Act of August 18, 1958, P.L. 85-671, 72 Stat. 619, as amended by the Act of August 11, 1964, P.L. 88-419, 78 Stat. 390 (Rancheria Act). The Rancheria Act provided procedures for terminating the Federal trust relationship between the rancherias and the Federal Government, and the individual Indian status of members of the tribes, bands, and communities occupying rancheria lands.

Regulations implementing the Rancheria Act were published at 24 FR 4653 (June 9, 1959). The regulations appeared in 25 CFR Part 242 (1960). The Auburn Rancheria was named in 25 CFR 242.1 (1960) as an entity affected by the regulations. 25 CFR 242.10 (1960) provided that

> [w]hen the provisions of a plan [for distributing the assets of the rancheria or reservation] have been carried out to the satisfaction of the Secretary, he shall publish in the Federal Register a proclamation declaring that the special relationship of the United States to the rancheria or reservation and to the distributees and the dependent members of their immediate families is terminated. The proclamation shall list the names of the distributees and dependent members of their immediate families who are no longer entitled to any services performed by the United States for Indians because of their status as Indians.

A "Notice of Termination of Federal Supervision Over Property and Individual Members Thereof" for the "Auburn Rancheria in California" was published in the Federal Register on August 13, 1967. The notice stated that "[t]itle to the land on the Auburn Rancheria has passed from the U.S. Government under distribution plan dated August 28, 1959, for the above-named rancheria," and listed the individual members. 32 FR 11964.

On April 7, 1970, five residents of the Auburn Rancheria 2/ filed suit in Federal District court, on behalf of themselves and all other similarly situated persons, seeking (1) a declaration that the Rancheria Act had been violated as to the Auburn Rancheria by termination of Federal status prior to the provision of an adequate water system as required by section 3(c) of the Rancheria Act (section 3(c)), 3/ (2) issuance of preliminary

---

2/ According to the plan for the distribution of the assets of the Auburn Rancheria, two of the named plaintiffs in Taylor, Eunice Jordan and Cleve Rey, were distributees, and three, Audrey Taylor, Dearstin Starkey, and Mary Frost, were dependent members. See Appellant's Exh. 11, Tab A-1.

3/ Section 3, as amended, provides:

"Before making the conveyances authorized by this Act on any rancheria or reservation, the Secretary of the Interior is directed:

and permanent injunctions directing the provision of such a system, and (3) damages of $5,000 for each plaintiff. Taylor v. Hickel, Civ. No. C-70-719 SAW (N.D. Calif.).

A stipulation for judgment was filed with the court on January 14, 1972. The stipulation provided that the United States would pay $92,000 "in favor of the named individual plaintiffs to be used by them for the construction and installation of a water distribution system for all the homes now owned by Indians at the Auburn Rancheria" (Stipulation, ¶ 2). In a judgment entered on February 3, 1972, 4/ the court stated that the suit was brought by "those certain named plaintiffs on behalf of themselves and all others similarly situated who reside on the Auburn Rancheria" (Judgment, ¶ 1), and that upon payment of the agreed amount to plaintiffs "the performance of all responsibilities and duties to plaintiffs and their class or (sic, should be "by"] the UNITED STATES OF AMERICA precedent to termination set forth and defined by Section 3(c) * * * shall be deemed completed and discharged" (Judgment, ¶ 3; emphasis in original).

Various disputes among rancheria residents resulted in a delay in implementation of the judgment and further hearings by the court. A final order confirming judgment was entered on April 25, 1973. This order provided that the money was to be paid to four trustees, and specified the duties of those trustees, but repeated that payment discharged all of the Federal Government's responsibilities to the Auburn Rancheria under the Rancheria Act.

Knight v. Kleppe Civ. No. C-74-0005 WTS (N.D. Calif.), was filed on January 2, 1974. Knight was a class action on behalf of the dependent members of the terminated rancherias, seeking to reverse their termination. The dependent members of the Auburn Rancheria were included as members of

---

fn. 3 (continued)

* * * * * *

"(c) To construct, improve, install, extend, or otherwise provide, by contract or otherwise, sanitation facilities (including domestic and community water supplies and facilities, drainage facilities, and sewage- and waste-disposal facilities, together with necessary appurtenances and fixtures) and irrigation facilities for Indian homes, communities, and lands, as he and the Indians agree, within a reasonable time, should be completed by the United States; Provided, That with respect to sanitation facilities, as hereinbefore described, the functions specified in this paragraph, including agreements with Indians with respect to such facilities, shall be performed by the Secretary of Health, Education, and Welfare in accordance with the provisions of section 7 of the Act of August 4, 1954 (58 Stat. 674), as amended (42 U.S.C. 2004a)."

4/ Another judgment had been entered on Jan. 14, 1972. The initial judgment spoke only of the actual plaintiffs, but was otherwise substantially identical to the Feb. 3, 1972, judgment. The Feb. 3 judgment states that the suit was a class action.

the class in Knight. There is no evidence that the United States objected to the inclusion of the dependent members of the Auburn Rancheria in the class.

A final declaratory judgment and permanent injunction was entered in Knight on February 20, 1976. The judgment provided:

> B. As to all named plaintiffs * * * and as to the class of similarly situated Indians which they represent, the court makes the following declaratory judgment pursuant to 28 U.S.C. § 2201:
>
> (1) This judgment affects all of the named plaintiffs and all Indians whose names have been listed or otherwise included in California rancheria distribution plans and/or in termination notices published in the Federal Register pursuant to 25 CFR § 242.10 (1959) as dependent members of the immediate families of distributees.
>
> (2) The status of the plaintiffs and of the class members as Indians under federal law is a valuable interest entitled to protection from summary deprivation by both the Due Process Clause of the Fifth Amendment to the United States Constitution, and by Section 8 of the California Rancheria Act * * *. [5/] Before being listed on California rancheria distribution plans and/or termination notices as "dependent members" of the immediate families of distributees, plaintiffs and their class are entitled to contest the correctness of the proposed listing of their names.
>
> (3) Before including individual Indians as "dependent members" on rancheria distribution plans or termination notices, [the Department of the Interior] must, at a minimum, adhere to the following procedures:
>
> * * * * * *
>
> C. [The Department] and all persons acting in concert with [it] are permanently enjoined from treating any Indian, heretofore listed in a California termination roll as a "dependent member" of a distributee's immediate family, as a terminated Indian

_____

5/ Section 8 provides:

"Before conveying or distributing property pursuant to this Act, the Secretary of the Interior shall protect the rights of individual Indians who are minors, non compos mentis, or in the opinion of the Secretary in need of assistance in conducting their affairs, by causing the appointment of guardians for such Indians in courts of competent jurisdiction, or by such other means as he may deem adequate, without application from such Indians, including but not limited to the creation of a trust for such Indians' property with a trustee selected by the Secretary, or the purchase by the Secretary of annuities for such Indians."

> pursuant to Section 10(b) of the California Rancheria Act, [6/] until such time as that Indian has been given full notice and afforded an opportunity for a hearing as set forth in Paragraph B(3), supra, and, if a hearing is requested in a timely manner, until such time as a written decision based upon the evidence adduced at such hearing has been rendered.

According to appellant's undisputed statement of facts, in November 1988, attorneys now representing appellant and attorneys representing the Federal Government met regarding settlement of Scotts Valley Band of Pomo Indians v. United States, No. Civ-86-3660 VRW (N.D. Calif.). Scotts Valley Band sought restoration of Federal recognition of several rancherias. During those discussions, the topic of restoration of the Auburn Rancheria was raised. Counsel apparently agreed that the legal and factual circumstances involving the Auburn Rancheria were different from those involving the other rancherias participating in Scotts Valley Band, and perhaps also agreed to follow a different procedure in seeking restoration of Federal recognition of the Auburn Rancheria.

From November 1988 through June 3, 1992, the date appellant filed the present appeal, the parties engaged in a course of dealing which, at least to appellant, appeared intended to result in an administrative determination by the Area Director concerning restoration of Federal recognition of the Auburn Rancheria. However, based upon the protracted nature of the discussions and BIA's failure to give a definite response, appellant became convinced that no administrative decision would be forthcoming. Consequently, it filed this appeal pursuant to 25 CFR 2.8, which provides that "(a) person or persons whose interests are adversely affected, or whose ability to protect those interests is impeded by the failure of an official [of BIA] to act on a request to the official, can make the official's inaction the subject of appeal."

6/ Section 10(b), as amended, provides:

"After the assets of a rancheria or reservation have been distributed pursuant to this Act, the Indians who receive any part of such assets, and the dependent members of their immediate families who are not members of any other tribe or band of Indians, shall not be entitled to any of the services performed by the United States for Indians because of their status as Indians, all restrictions and tax exemptions applicable to trust or restricted land or interests therein owned by them are terminated, all statutes of the United States which affect Indians because of their status as Indians shall be inapplicable to them, and the laws of the several states shall apply to them in the same manner as they apply to other citizens or persons within their jurisdiction. Nothing in this Act, however, shall affect the status of such persons as citizens of the United States. The provisions of this subsection, as amended, shall apply in the case of a distribution of assets made either before or after the amendment of the subsection."

The appeal has been briefed by both parties. The Area Director has filed a motion to dismiss; appellant has filed a motion, in the alternative, for discovery and for an evidentiary hearing, and two motions to supplement the administrative record.

Jurisdiction

Board jurisdiction over this matter is based upon 25 CFR 2.8. The Area Director has not contested the Board's jurisdiction under section 2.8. The Board finds that it has jurisdiction over this appeal.

The Area Director, however, seeks dismissal of the appeal on two other grounds. First, he argues that the appeal must be dismissed because a decision was rendered in this matter by the Deputy to the Assistant Secretary - Indian Affairs (Tribal Services) 7/ on June 9, 1992, and the Board lacks authority to review that decision because it was rendered by the Office of the Secretary of the Interior. No copy of this alleged decision was furnished to the Board.

Appellant contends that the Director, Tribal Services, did not decide anything on June 9, 1992, but rather expressed an opinion that appellant could only be recognized through legislation, although inviting appellant to submit further historical material to BIA. Appellant contends that the Director, Tribal Services, "did not indicate any intent to preempt the appeal process or render a final decision" (Reply to Motion to Dismiss at 10).

The Board's authority to review decisions of specific BIA officials is set forth in 25 CFR 2.4, which provides:

> The following officials may decide appeals:
>
> * * * * * *
>
> (e) The Interior Board of Indian Appeals, pursuant to the provisions of 43 CFR part 4, subpart D, if the appeal is from a decision made by an Area Director or a Deputy to the Assistant Secretary - Indian Affairs other than the Deputy to the Assistant Secretary - Indian Affairs/Director (Indian Education Programs).

The Board has authority to review a decision issued by the Director, Tribal Services.

Furthermore, on June 9, 1992, the Board already had jurisdiction over this matter. Appellant's notice of appeal to the Board was postmarked

_____

7/ The title of this position has been changed to Director, Office of Tribal Services. The Board will refer to the incumbent of this position as "Director, Tribal Services."

June 3, 1992. Under 43 CFR 4.310(a), "[t]he effective date for filing a notice of appeal * * * with the Board * * * is the date of mailing or the date of personal delivery."

The Board has consistently held that once an appeal has been filed with it, BIA loses jurisdiction over the matter except to participate in the appeal as a party. The reasons for this rule were extensively discussed in Five Sandoval Indian Pueblos, Inc. v. Deputy Commissioner of Indian Affairs, 21 IBIA 17, 18-19 (1991), and will not be repeated here, except to comment that the rule is part of any orderly review process and is intended to ensure that only one forum at a time has authority to act in a matter. See also Cherokee Nation of Oklahoma v. Muskogee Area Director, 22 IBIA 240, 244 (1992).

The Board holds that the Director, Tribal Services, lacked authority to issue a decision in this matter on June 9, 1992, and any decision issued by him is without effect. The Area Director's motion to dismiss this appeal on the grounds that a binding decision was issued by the Director, Tribal Services, on June 9, 1992, is denied.

The Area Director also seeks dismissal on the grounds that this appeal must be considered under the Federal acknowledgement regulations in 25 CFR Part 83, and that the Board does not have jurisdiction to review BIA decisions under Part 83. Because the Board concludes that the question of whether this matter is governed by Part 83 is directly at issue in the appeal, it declines to grant a summary dismissal and instead reaches this question on the merits.

Issues on Appeal

In its request for administrative action made to the Area Director, appellant asked:

> 1. That [BIA] formally recognize the United Auburn Indian Community of the Auburn Rancheria, as organized under its Constitution adopted on July 20, 1991.
>
> 2. That [BIA] agree to accept back into trust status (a) any lands within the original Auburn Rancheria, held in the name of a dependent member or his/her lineal descendant, or by a tribal entity formed by them; and (b) any fee interest in trust or former trust allotments currently held in the name of a dependent member or his/her lineal descendants.
>
> 3. That [BIA] conduct a comprehensive needs assessment for the Auburn Indian Community and use this assessment as a basis for requesting New Tribes' funding for a three-year funding cycle commencing in fiscal year 1993, or earlier, if possible.

(Aug. 30, 1991, Letter to Area Director at 4-5; repeated in Opening Brief at 7). At page 8 of its opening brief, appellant limited the issues on which it was seeking a decision from the Board:

> Issue No. 1 concerning recognition of the Community is, for the reasons discussed below, a mixed question of fact and law that is properly before the Board for decision. However, both Issue No. 2 and Issue No. 3 would have involved the exercise of some discretion by the Area Director, or the Assistant Secretary, had a decision been rendered thereon. For this reason, and in consideration of [43] CFR §4.330(b) governing the scope of the Board's review authority, [appellant] hereby withdraws these two issues from this appeal.
>
> It would be appropriate, however, should the Board rule in favor of [appellant] on Issue No. 1, for it to refer Issues No. 2 and No. 3 to the Assistant Secretary for further consideration pursuant to [43] CFR § 4.337(b).

Discussion and Conclusions 8/

[1] The Area Director has raised the issue of the burden of proof. An appellant ordinarily bears the burden of proving that the agency action or decision complained of is erroneous or not supported by substantial evidence. See, e.g., Schwan v. Aberdeen Area Director, 23 IBIA 10 (1992); Navajo Precision Built Systems, Inc. v. Acting Navajo Area Director, 22 IBIA 153 (1992). However, in an appeal brought under 25 CFR 2.8, the appellant is challenging the failure of the agency to act: there is no decision whose error the appellant can demonstrate. Under these circumstances, the burden must be placed on the agency either to prove that its failure to act was justified or to present and support a position that could have been taken.

The Area Director contends that this matter is governed by 25 CFR Part 83, concerning Federal acknowledgement of Indian tribes, and that appellant has attempted to circumvent these procedures. Section 83.3(a) states:

> This part is intended to cover only those American Indian groups indigenous to the continental United States which are ethnically and culturally identifiable, but which are not currently acknowledged as Indian tribes by the Department. It is intended to apply to groups which can establish a substantially continuous tribal existence and which have functioned as autonomous entities throughout history until the present.

8/ Many of the arguments raised by the parties are interrelated. The Board's analysis does not follow the same logical progression as the briefs of either party. Those arguments which are not addressed in this opinion have been considered and rejected.

The Area Director's argument for the application of Part 83 begins with the premise that the Auburn Rancheria was not a Federally recognized Indian tribe prior to enactment of the Rancheria Act. 9/ He contends that appellant cannot be "restored" to a position the Auburn Rancheria did not have (i.e., status as a Federally recognized tribe), and must, therefore, seek to be acknowledged for the first time under the procedures established in Part 83. 10/

The Board cannot accept the Area Director's argument. The record and appellant's filings indicate that relationships between the Federal Government and the Auburn Rancheria were minimal, haphazard, and sporadic, and that the Auburn Rancheria did not have an organized political structure. These same facts were true of virtually all of the rancherias. Despite this, the Board finds numerous examples in the record that the Auburn Rancheria was treated as a Federally recognized tribe. However, it finds one fact significant enough to be dispositive of the issue of whether the Auburn Rancheria was considered to be a Federally recognized tribe prior to the enactment of the Rancheria Act.

In 1935, BIA allowed the Auburn Rancheria to vote on the question of whether it wished to organize under the Indian Reorganization Act of 1934, 25 U.S.C. § 476 (1988) (IRA). Section 476 provides that

> [a]ny Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may

---

9/ The Area Director asserts that this is shown, inter alia, by the fact that there is no evidence of "any political relationship between the United States Government and the Auburn Rancheria" prior to termination (Answer Brief at 7), and that the group was disorganized and lacked leadership until 1990.

10/ In a similar vein, in testimony before the House Committee on Interior and Insular Affairs (House Interior Committee) on May 28, 1992, the Director, Tribal Services, stated:

"The [Rancheria Act] provided for the termination of the Federal trust relationship for 41 rancherias or small reservations, and did not specify the tribal groups, if any, living on those lands. In most instances, these rancherias did not represent tribes, but were collections or remnants of homeless Indian groups for whom the United States had purchased homesites under various statutes.

"Prior to termination, most of these rancherias did not function as self-governing entities. They were not considered tribes by the Federal Government and they received no Federal services other than those associated with holding the land in trust. The rancherias were merely used as homesites. With termination, the assets of the rancherias were distributed to those individuals determined to have an interest in the rancheria who were termed 'distributees.' Some of the rancherias had only one or two distributees."

California Tribal Status Act: Hearing on H.R. 2144 Before the House Committee on Interior and Insular Affairs, 102nd Cong., 2nd Sess., 50 (1992) (1992 Hearings).

> adopt an appropriate constitution and bylaws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior * * *.

Section 479 defines "tribe" to mean "any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." 11/ By an election held on June 14, 1935, the Auburn Rancheria decided not to organize under the IRA by a vote of 5 to 16. 12/

In his May 1992 testimony before the House Interior Committee, the Director, Tribal Services, opposed a provision of H.R. 2144, the "California Tribal Status Act of 1991," which would have restored recognition of the Ione Band of Miwok Indians, on the grounds that "this group has never attained Federal tribal status and is not, therefore, eligible for restoration" (1992 Hearings at 51). He further stated that "the Ione band was never considered to be a federally recognized tribal entity. It never appeared on any lists of federally recognized tribes and was not asked to vote on acceptance of the [IRA] as were the federally recognized tribes." Ibid. 13/ Although restoration of the Auburn Rancheria was also addressed

---

11/ See also I Op. Sol. 484, 487, "Wheeler-Howard Act--Interpretation," M-27810, Dec. 13, 1934:

"It is clear that the act contemplates two distinct and alternative types of tribal organization. In the first place, it authorizes the members of a tribe (or a group of tribes located upon the same reservation) to organize as a tribe without regard to any requirements of residence. In the second place, this section authorizes the residents of a single reservation (who may be considered a tribe for purposes of this act, under [25 U.S.C. § 479]) to organize without regard to past tribal affiliations."

12/ Of the 41 rancherias and small reservations listed in section 1 of the Rancheria Act, at least 33 voted on whether to organize under the IRA. Of those 33 rancherias and reservations, 15 voted to organize, 14 voted not to organize, and 4 came under the IRA for other reasons. Section 11 of the Rancheria Act provides: "The constitution and corporate charter adopted pursuant to the [IRA], by any rancheria or reservation subject to this Act shall be revoked by the Secretary of the Interior when a plan is approved by a majority of the adult Indians thereof pursuant to subsection 2(b) of this Act."

13/ In light of this statement, the Director's earlier assertion that "most" of the rancherias were not considered tribes may be overly broad. See note 10, supra.

The Board notes that the Auburn Rancheria was listed in section 1 of the Rancheria Act as an entity subject to the Act. In contrast, the Ione Band of Miwok Indians was not named in the Rancheria Act. The Board's reference to differences between the Auburn Rancheria and the Ione Band of Miwok Indians implies no judgment on the question of whether BIA's position regarding Federal recognition of the Ione Band is correct. See Ione Band of Miwok Indians v. Sacramento Area Director, 22 IBIA 194 (1992).

in H.R. 2144, the Director, Tribal Services, did not contend that it had not been a Federally recognized tribe prior to termination. 14/

Having concluded that the Auburn Rancheria was a Federally recognized Indian tribe prior to enactment of the Rancheria Act, the Board rejects the Area Director's major premise for asserting that appellant is required to seek Federal recognition under 25 CFR Part 83, and, therefore, holds that this matter is not governed by Part 83. The Area Director's motion to dismiss this appeal on the grounds that the Board lacks jurisdiction to consider BIA action pursuant to 25 CFR Part 83 is denied.

In challenging the Area Director's argument for the application of Part 83, appellant cited 25 CFR 83.3(e), which provides that Part 83 "does not apply to groups which are, or the members of which are, subject

_____

14/ As to restoration of the Auburn Rancheria, the Director testified at pages 49-50 of the 1992 Hearings:

"The Department [of the Interior] is supportive of legislative efforts aimed at revoking the discredited termination policies of the 1950's and we are willing to work with Congress to determine which terminated California groups could be recognized by the Federal Government if it is demonstrated they meet certain criteria. Accordingly, we could support restoration of the Auburn * * * Rancheria[] under certain conditions.

* * * * * *

"Regarding the group[] who would claim to be successors in interest to the Auburn * * * Rancheria[] , we would ask, as a prerequisite to our potential support for restoration, that detailed information be provided us regarding their current status and historic relationship with the terminated rancheria[]. The Auburn Rancheria had a population of 80 in 1951 and 22 distributees when terminated in 1964. * * * The [BIA] has not had regular contact with people from [this] terminated rancheria[] since Federal services were withdrawn so very little is known about the size and composition of the group[] that would claim restoration and even less about their history during the intervening years. At a minimum, we would request that they demonstrate to us that they have maintained continued socio-political interaction and have reasonable social, political, and kinship ties to the people considered to be part of [this] rancheria communit[y] prior to termination. If the present groups have a large proportion of members who cannot connect either to each other or to the historic rancheria, then we would not support their restoration."

After this testimony, by letter dated Sept. 18, 1992, the Acting Director, Tribal Services, wrote counsel for appellant, asking for additional information of the type mentioned in the testimony: "The information we request need not approach the evidentiary requirement of a documented petition for Federal acknowledgement. Aside from our demand for complete membership lists, we are merely asking for descriptive statements which might easily be derived from tribal members and/or documentation which is readily accessible."

to congressional legislation terminating or forbidding the Federal relationship. The reason for the exclusion in section 83.3(e) is stated in the preamble to the Federal Register publication of Part 83: "It must again be emphasized that terminated groups, bands, or tribes are not entitled to acknowledgement under these regulations. Even though many of these groups would be able to easily meet the criteria, the Department cannot administratively reverse legislation enacted by Congress" (43 FR 39361 (Sept. 5, 1978)). Although appellant does not carry its argument to this conclusion, if the Auburn Rancheria was lawfully terminated pursuant to the Rancheria Act, it may be that only Congress has the authority to restore recognition.

The parties disagree as to whether the Auburn Rancheria was lawfully terminated because of their divergent interpretations of the Rancheria Act and of the effect of the decisions in Taylor and Knight.

Appellant contends that the tribal organization of the Auburn Rancheria was not terminated regardless of any actions taken under the Rancheria Act. It argues that the Rancheria Act merely provided a legislative mechanism for terminating the trust status of rancheria lands and the Indian status of individuals occupying rancheria lands, but did not specifically provide for terminating the tribes themselves. Appellant asserts that the dependent members of the Auburn Rancheria, who constituted a majority of the members, never consented to termination or abandoned the tribe, and were "unterminated" by the decision in Knight. It argues that the tribe continued to exist through its "unterminated" dependent members. In the absence of any express language in the Rancheria Act terminating the tribal, as opposed to the Indian, status of the Indians residing on rancheria lands, or to the extent there is any ambiguity on this point, appellant argues that the Act must be narrowly construed in favor of the Indians.

The Area Director admits that Knight "reinstate[d] the dependent members' status as Indians entitled to services from the United States because of their status as Indians" (Answer Brief at 10). However, he contends that Knight did not affect the decision in Taylor that the Auburn Rancheria was terminated.

The Board has compared the Rancheria Act with other termination legislation of the same era, which it construes to be in pari materia. Termination legislation was based upon the principles set forth in House Concurrent Resolution 108 (HCR 108). Although HCR 108 was a general policy statement of the 83rd Congress, its philosophy dominated Indian policy for over a decade. HCR 108 stated:

> Whereas it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States, and to grant them all of the rights and prerogatives pertaining to American citizenship; and

> Whereas the Indians within the territorial limits of the United States should assume their full responsibilities as American citizens: Now, therefore, be it
>
> Resolved by the House of Representatives (the Senate concurring), That it is declared to be the sense of Congress that, at the earliest possible time, all of the Indian tribes and the individual members thereof located within the States of California, Florida, New York, and Texas, and all of the following named Indian tribes and individual members thereof, should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians * * *. [Emphasis in original.]

67 Stat. B132 (1953). Numerous acts terminating individual tribes and groups of tribes were passed in furtherance of this policy. 15/

Parts of appellant's argument suggest that the intended effect of termination was to destroy a tribe as an entity. However, as stated in Cohen, Handbook of Federal Indian Law (1982 ed.) at page 815: "Termination legislation did not literally terminate the existence of the affected tribes." See also Menominee Tribe v. United States, 388 F.2d 998, 1000 (Ct. Cl. 1967), aff'd, 391 U.S. 404 (1968) ("The [Menominee] Termination Act [25 U.S.C. §§ 891-901 (1958)] did not abolish the tribe or its membership. It merely terminated Federal supervision over and responsibility for the property and members of the tribe." (Emphasis in original.) The termination acts expressed, however, with greater or lesser degrees of clarity, an intent to terminate the government-to-government relationship between the Federal Government and the affected tribe.

The Board finds no valid basis for concluding that the Rancheria Act abolished whatever tribal organization existed at the Auburn Rancheria. It thus agrees with appellant that the tribal organization of the Auburn Rancheria survived the termination of Federal supervision over and responsibility for the tribe's property and members. This agreement, however, does not equate with a conclusion that the Auburn Rancheria was not terminated. It merely concedes that the tribe did not cease to exist when Federal recognition was withdrawn. 16/

15/ See, e.g., termination acts relating to the tribes in Western Oregon, 25 U.S.C. §§ 691-708 (1958); the Alabama and Coushatta Tribes of Texas, 25 U.S.C. §§ 721-727 (1958); certain Paiute Tribes in Utah, 25 U.S.C. §§ 741-775 (1958); the Wyandotte Tribe of Oklahoma, 25 U.S.C. §§ 791-807 (1958); the Peoria Tribe of Oklahoma, 25 U.S.C. §§ 821-826 (1958); the Ottawa Tribe of Oklahoma, 25 U.S.C. §§ 841-853 (1958); and the Menominee Tribe of Wisconsin, 25 U.S.C. §§ 891-901 (1958).

16/ Appellant's argument suggests that it construes the Rancheria Act to be permissive, rather than mandatory. See, e.g., Opening Brief at 9: "Sections 1 and 2(a) of the Rancheria Act make the formulation of a termination plan for the rancherias mandatory, but section 2(b) gives the Indians the choice of either accepting or rejecting it." (Emphasis in original.)

The inquiry, therefore, is whether the requirements for termination set forth in the Rancheria Act were fulfilled in regard to the Auburn Rancheria. If the Federal Government fulfilled its responsibilities under the Rancheria Act, the Auburn Rancheria was lawfully terminated. See section 10(b) of the Rancheria Act, quoted supra, note 6.

In Taylor, the court accepted a compromise settlement under which the United States agreed to pay $92,000 to certain trustees who would then construct the facilities which the Federal Government was required to provide under section 3(c). The court held that "[u]pon payment * * * of said sum, the performance of all responsibilities and duties to plaintiffs and their class or [sic, should be "by"] the UNITED STATES OF AMERICA precedent to termination set forth and defined by Section 3(c) * * * shall be deemed completed and discharged" (Orders of Feb. 3, 1972, and Apr. 25, 1973). Taylor thus found that the Auburn Rancheria had originally been unlawfully terminated because of the Federal Government's failure to fulfill its responsibilities under section 3(c), but set forth those grounds upon which the Federal Government's responsibilities would be fulfilled. Fulfillment of those obligations ratified the termination of the Auburn Rancheria under section 9 of the Act and 25 CFR Part 242 (1960).

The Board finds support for this conclusion in two other rancheria cases. In Smith v. United States, No. C-74-1016 WTS (N.D. Calif. Mar. 29, 1978), reprinted in part in 5 Indian L. Repr. F-73, the court found that the Hopland Rancheria had not been lawfully terminated because of the failure of the Federal Government to fulfill its responsibilities under section 3(c). The court concluded that "the conveyance of certain Rancheria lands to plaintiff was unlawful since the Rancheria was unlawfully terminated. * * * Accordingly, plaintiff Smith is entitled to recover damages

---

fn. 16 (continued)

Although section 2(b) of the Rancheria Act requires that the plan for distribution of each rancheria's assets must be approved by a majority vote of the adult Indians who would participate in the distribution, the Board declines appellant's invitation to construe the Rancheria Act as "permissive." Section 1 provides "[t]hat the lands, including minerals, water rights, and improvements located on the lands, and other assets of the following rancherias and reservations in the State of California shall be distributed in accordance with the provisions of this Act." (Emphasis added.) Section 1 of the Act was amended to provide that distribution of the assets would be made "when * * * requested by a majority vote." This amendment, however, did "not apply to the rancherias and reservations that were at any time named in this section."

Based upon the historical context of the Rancheria Act, the Board finds that the Act required a plan to be devised that would receive a majority vote from the distributees. To the extent appellant bases its arguments on an interpretation of the Rancheria Act as being permissive, or requiring the consent of the tribal members to termination, the Board rejects those arguments.

for the loss by forced tax sale of two parcels of Rancheria, land distributed to him." 5 Indian L. Repr. at F-75--F-76.

In contrast, in Taylor v. Hearne, 637 F.2d 689 (9th Cir. 1981), the circuit court upheld a forced tax sale of parcel 24 on the Auburn Rancheria. 17/ The court rejected arguments that compliance with section 3(c) was a condition precedent to conveyance of rancheria lands, and cited Taylor v. Hickel in holding that plaintiff had received title to the parcel when it was distributed to him on March 30, 1961.

The Board agrees with the Area Director that Taylor v. Hickel held that the Auburn Rancheria was lawfully terminated in accordance with the Rancheria Act.

Appellant objects to the conclusion that Taylor is still good law on the grounds that the United States did not raise Taylor as res judicata in Knight, 18/ and that BIA treated the dependent members of the Auburn Rancheria as persons affected by the Knight decision. These actions are not incompatible with a conclusion that Taylor is good law as to the termination of the Auburn Rancheria. Taylor and Knight did not deal with the same issues. Knight, which determined that the rights of dependent rancheria members had been violated in the termination process, applies to the dependent members of all rancherias terminated, or attempted to be terminated, under the Rancheria Act. Taylor determined that the Federal Government had fulfilled its responsibilities to the Auburn Rancheria under section 3(c). As the Area Director argues, and is shown by other rancheria decisions, this judicial determination distinguishes the Auburn Rancheria from those rancherias where it was found, either by judicial decision or admission by the United States, that the Federal Government had failed to fulfill its pre-termination responsibilities to individual rancherias, and had, consequently, failed to terminate them. This distinction places the Auburn Rancheria is a separate class, apart from those rancherias which were not lawfully terminated.

Because the Auburn Rancheria was lawfully terminated in accordance with the congressional mandate established in the Rancheria Act, the

_____

17/ The plan for the distribution of assets of the Auburn Rancheria, appellant's Exh. 11, Tab A-1, shows that parcel 24 was to be distributed to Earl Taylor, husband of Audrey Taylor, plaintiff in Taylor v. Hickel.

18/ The Taylor decision was raised as res judicata in Hardwick v. United States, No. C-79-1710-SW (N.D. Calif. Aug. 3, 1983). Paragraph 16 of the stipulation for entry of judgment in Hardwick states: "The claims of all the named and unnamed class members represented in Taylor et al. v. Hickel, C-70-719 SAW (N.D. Cal.) from the Auburn Rancheria shall be dismissed on grounds of res judicata." Hardwick restored Federal recognition of 17 rancherias. The claims of several additional rancherias, including the Auburn Rancheria, were dismissed on grounds of res judicata or because separate suits were pending.

Department of the Interior lacks authority to restore recognition. The relief appellant seeks can only be given by Congress:

> Congress has the authority to reestablish the federal-tribal relationship with terminated tribes. Congress' power extends to all Indian communities in the United States, including terminated and non-federally recognized tribes. The relationship need not be continuous. The relevant question is whether and to what extent Congress has chosen to exercise its authority with respect to a particular tribe. Congress can terminate the federal-tribal relationship, but then fully restore that relationship, as it did when it passed the Menominee Restoration Act of 1973 [25 U.S.C. §§ 903-903f (1988)]; the Siletz Restoration Act of 1977 [25 U.S.C. §§ 711-711f (1988)]; the Oklahoma Indians Restoration Act of 1977 [25 U.S.C. §§ 861-861c) (1988)), which restored the Wyandotte, Peoria, and Ottawa Tribes of Oklahoma; and the Paiute Indian Tribe of Utah Restoration Act of 1980 [25 U.S.C. §§ 761-768 (1988)].

Cohen, supra, at 817-18.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, this appeal from the inaction of the Sacramento Area Director is dismissed because the Department of the Interior lacks the authority to grant the relief requested. 19/

//original signed
Kathryn A. Lynn
Chief Administrataive Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

19/ Appellant's motions to supplement the record are granted to the extent of those materials included in the motions upon which the Board has relied in this opinion. All other outstanding motions are denied.