



United States Department of the Interior

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

Governor's Office of Planning & Research

APR 23 2019

APR 25 2019

STATE CLEARINGHOUSE

NOTICE OF DECISION

CERTIFIED MAIL – RETURN RECEIPT REQUESTED – 7019 0140 0000 7335 8125

Mr. Robert Pinto, Sr., Chairman
Ewiiapaayp Band of Kumeyaay Indians, California
4054 Willows Road
Alpine, California 91901

Re: County of San Diego, California; Viejas Band of Kumeyaay Indians; and Sycuan Band of the Kumeyaay Nation, v. Pacific Regional Director, Bureau of Indian Affairs, Docket Nos. IBIA 17-033; IBIA 17-038 and IBIA 17-042

Dear Mr. Pinto:

On April 20, 2018 the Interior Board of Indian Appeals (IBIA or Board), issued an Order Vacating Decision and Remanding County of San Diego, California; Viejas Band of Kumeyaay Indians; and Sycuan Band of the Kumeyaay Nation, (Appellants) v. Pacific Regional Director, Bureau of Indian Affairs, Docket Nos. IBIA 17-033; IBIA 17-038 and IBIA 17-042 concerning the acquisition of land into trust for the Ewiiapaayp Band of Kumeyaay Indians, California (Ewiiapaayp Band). The Board granted the Pacific Regional Director's (Regional Director) request to vacate the Decision of December 23, 2016 and remanded back to the Regional Director for further consideration and issuance of a new decision.

Appellants challenged the December 23, 2016, Decision by the Acting Regional Director, Bureau of Indian Affairs (BIA), Pacific Region's intent to approve the 16.69 acre parcel known as the "Walker Parcel" into trust by the United States for the Tribe. Appellants asserted the Decision should be reversed on grounds that the Walker property should not have been acquired as property that is "contiguous" to an existing reservation pursuant to 25 C.F.R. § 151.10, purportedly because the Tribe's existing trust property was never proclaimed to be reservation land in accordance with 25 U.S.C. § 5110 (previously § 467), and purportedly because the Walker property is not contiguous to the Tribe's existing reservation land. Additionally, Appellants challenged the acquisition on grounds that the environmental impacts analysis allegedly was inadequate.

Upon remand, the Regional Director reconsidered the following issues before reissuing a Decision:

- 1) More fully develop the reasoning and analysis as to how the Walker Parcel is contiguous to the Tribe's reservation in Alpine, California and constitutes an on-reservation acquisition; and
- 2) Further develop and clarify the record as to the proposed use of the Walker Parcel and, if necessary, modify the Supplemental Environmental Assessment (EA) consistent with the proposed use.

This is notice of our decision upon the Ewiiapaayp Band's application to have the below-described real property accepted by the United States of America in trust for the Ewiiapaayp Band of Kumeyaay Indians, California.

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

Parcel 1:

Parcel A as shown on Certificate of Compliance as evidenced by document recorded June 1, 2001 as Instrument No. 2001-0359315 of Official Records, being more particularly described as follows:

Being a portion of the Southeast quarter of Section 25, Township 15 South, Range 2 East, San Bernardino Meridian, in the County of San Diego, State of California, according to the official plat thereof, described as follows:

Beginning at a point on the Southerly line of said Southeast Quarter, distant South 89°14'02" West; record S88°58'36" West per deed recorded January 8, 2001 as Document No. 2001-0010304 of Official Records (deed), 126.03 feet from the Southeast corner of land described in said deed; Thence continuing along said Southerly line South 89°14'02" West (S88°58'36"W per deed) 619.97 feet to a point distant thereon North 89°14'02" East (N88°58'36"E per deed) 413.79 feet from the South quarter of said Section 25; Thence North 45°42'22" West 580.90 feet to a point on the Westerly line of the Southeast Quarter of said Section 25 distant thereon North 00°17'00" West (N01° 51' 00"W) 411.20 feet from said South quarter corner; Thence along said Westerly line North 00°17'00" West 121.39 feet (N01°51'00"W, 121.42' per deed); Thence North 56°56'50" East 264.05 feet (N57°15'00"E, 264.00' per deed); Thence North 00°17'00" West (N01° 51' 00"W per deed) 166.32 feet; Thence North 80°31'53" East 236.22 feet (80°45'00"E, 236.28' per deed); Thence North 64°07'47" East 131.95 feet (N64°30'00"E, 132.00' per deed); Thence North 80°11'55" East 71.22 feet (N80°30'00"E, 71.25 per deed) to the Southwesterly corner of land described in deed to Henry Marshall Dobbs, Et Ux., recorded February 13, 1945 in Book 1813, Page 362 of official records; Thence along the Westerly line of said Dobbs land North 09°37'21" West 127.64 feet (N09°30'00"W, 135.00' per deed) to a point on the Southerly line of land described in deed to the State of California, Recorded May 11, 1966 as File No. 78689 of Official Records, said point

being on the arc of a 3970.45 foot (3970.00' grid per deed to the State of California) radius curve, concave Southerly, a radial to said point bears North 03°32'54" East (N03°34'35" East per deed); Thence Easterly along said Southerly line of land described in deed to the State of California 306.24 feet (306.51' per deed) through a central angle 04°25'09" (04°25'25" per deed); Thence South 75°25'33" East per deed) 111.92 feet; Thence leaving said Southerly line of land described in deed to the State of California South 80°15'30" West 262.32 feet (S80°30'10"E, 262.08' per deed); Thence South 08°15'27" East 225.28 feet (S08° 20'29"E, 225.40 per deed); Thence South 22°09'45"E 287.13 feet (S22°19'35"E, 287.15' per deed); Thence North 89°22 '30" East per deed) 124.47 feet to the intersection with a line parallel with and 126.00 feet westerly, measured at right angles, of the easterly line of said land in said deed to Cuyapaip; Thence along said parallel line South 00°31 '14" West 472.45 feet to the point of beginning.

Parcel 2:

An easement for road, ingress and egress and utility purposes lying within a portion of the southeast quarter of Section 25, Township 15 South, Range 2 East, San Bernardino Meridian, in the County of San Diego, State of California, being 60 feet wide and more particularly described and designated in grant of easement recorded January 8, 2001 as File No. 2001-0010305 of Official Records and as reserved in deed recorded May 15, 2001 as instrument no. 2001-0307433 of official records.

The above-described Parcel is referred to as San Diego County Assessor's Parcel Number 404-080-26, containing approximately 16.69 acres, more or less (Walker Parcel).

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. § 5108). The applicable regulations are set forth in the Code of Federal Regulations (CFR), Title 25, INDIANS, Part 151, as amended. This land acquisition falls within the land acquisition policy as set forth by the Secretary of the Interior.

The Ewiiapaayp Band of Kumeyaay Indians is not affected by the United States Supreme Court decision in the case of Carcieri v. Salazar, Circuit No. 07-526. The Tribe is listed in the Haas Report on page 14 in Table C, of the Ten Years of Tribal Government under the I.R.A. by Theodore H. Haas. The Tribe was originally established by Executive Order on December 29, 1891 pursuant to the Act for the Relief of the Mission Indians in the State of California (26 Stat. 712-714, Fifty-First Congress, Session II, Chapter 65) dated January 12, 1891.

On October 20, 2008, by certified mail, return receipt requested, we issued notice of and sought comments regarding the proposed fee-to-trust application from the California State Clearinghouse; Legal Affairs Secretary, Office of the Governor; Sara Drake, Deputy Attorney General, State of California; James Peterson, District Director, Office of Senator Diane Feinstein; Honorable Barbara Boxer; Honorable Duncan Hunter; Honorable Charlene Zettel, California Legislature; County of San Diego, Board of Supervisors; San Diego County Assessor; County of San Diego, Office of Planning and Land Use; San Diego Treasurer and Tax Collector; San Diego County, Department of Public Works; Chantal Saïpe, Tribal Liaison, San Diego County; Chairperson, Barona Band; Chairperson, Campo Band; Chairperson, Inaja-Cosmit Reservation; Chairperson, Jamul Indian Village; Chairperson, La Jolla Band; Chairperson, La Posta Band; Chairperson, Los Coyotes Band of Cahuilla Mission Indians; Chairperson, Manzanita Band; Chairperson, Mesa Grande Band; Chairperson, Pala Band; Chairperson, Pauma Band; Chairperson, Chairperson, Rincon Band; San Pasqual Band; Chairperson, San Ysabel Band; Chairperson, Sycuan Band; Chairperson, Viejas Band; Daniel Harrington, a neighboring property owner.

In response to our 2008 notification, we received the below listed comments, which were considered in the Regional Directors Notice of Decision dated May 31, 2011, that was appealed by the County of San Diego and Viejas Band.

1. Letter dated October 30, 2008, from Gregory Smith, County Assessor, San Diego County, stating that total taxes collected for the subject Parcel for the 2008-2009 tax roll was \$7,624.58.
2. Letter dated November 20, 2008, from the Native American Heritage Commission stating that they have no objections or concerns regarding the pending action.
3. Letter dated November 21, 2008, from Dianne Jacob, Vice Chairwoman, Supervisor Second District, San Diego County Board of Supervisors, stating, "I oppose Ewiiapaayp's continued attempts to acquire additional land into trust in order to construct a new casino on land which is currently occupied by the Southern Indian Health Clinic. This clinic continues to be an important asset in the community and serves Indian as well as non-Indian residents."
4. Letter dated November 24, 2008, from Chandra Wallar, Deputy Chief Administrative Officer, Land Use and Environment Group, County of San Diego, strongly opposing the Application for the reasons of jurisdiction, environmental impact, and zoning.
5. Letter dated November 24, 2008, from Andrea Lynn Hoch, Legal Affairs Secretary, Office of the Governor, comments on the Parcel is not contiguous, SIHC lease for a dollar a year (there would be no financial incentive), and possible gaming.

6. Letter dated December 11, 2008, from Daniel and Gloria Harrington, stating that, "This property being considered is zoned for residential/agricultural use and any other use will devalue our property and destroy the peaceful use of our residence. Access to this property is currently over an easement on our property. Any use other than residential or agriculture should not be allowed on this easement. The purchased easement to this property crosses the water line to our water well/tank, and loss of access to this water pipe for maintenance will cut off water to the three homes on this property. Water use, sewage disposal, traffic, lighting, and all other environmental concerns must be addressed on the specific land use intended of this property."
7. Letter dated December 11, 2008, from Viejas Tribal Government opposing the Ewiiapaayp Band's application because the NEPA, the wrong authority, the need, the jurisdictional, the land use the zoning and gaming.
8. Letter dated January 22, 2009, from the Viejas Tribal Government opposing the Ewiiapaayp Band's Fee-to-Trust application. Supplemental documents released by the BIA to Viejas relevant to the Walker Parcel.
9. Wunderlin Report dated July 14, 2009, prepared for Viejas Tribal Government by Wunderlin Engineering, Inc. that presents and historic boundaries of Assessor's Parcel Number 404-061-01 (SIHC) and 404-080-26 (Walker Parcel), Alpine, California.
10. Viejas Band's rebuttal letter dated December 17, 2009, to the Ewiiapaayp responses to comments on the Ewiiapaayp proposal to have the Walker Parcel taken into trust, submitted for the record to the Central Office on November 24.
11. Letter dated December 21, 2009, from the Ewiiapaayp Band to Larry Echo Hawk, Assistant Secretary-Indian Affairs, requesting him to withdraw the Regional Director's decision and take authority by issuing the decision on the Walker Parcel.

By correspondence dated April 21, 2009 and August 4, 2009, the Ewiiapaayp Band responded to the above comments with regards to:

- San Diego County tax assessments for 2008-2009 \$157.32;
- Proposed use, County's General Plan and Zoning, off reservation, business plan;
- Additional healthcare and childcare facility on project site;
- Contiguous to the Ewiiapaayp Band's reservation;
- Joint venture regarding the Gaming and SIHC lease with Viejas;
- Regulatory Authority of 25 C.F.R. §151.10;
- Additional NEPA is due to an inadequate project description;
- No casino will be build; and
- NEPA compliance with regards to the Environmental Assessment.

On September 6, 2013, the Office of Hearings and Appeals, Interior Board of Indian Appeals, issued an Order Vacating Decision and Remanding the 2011 Decision.

After the IBIA remand, the following letters were received:

1. Letter dated October 1, 2013, the Ewiiapaayp Band submitted a summary of IBIA Decision and requested actions upon remand. The summary addresses the appellants concerns on the Walker Parcel for the contiguity and the Environmental Assessment supplement for additional clinic and daycare center.
2. Letter dated November 20, 2014, from the Ewiiapaayp Band providing additional documentation on the contiguity of the Walker Parcel.
3. Letter dated December 8, 2014, from Bradley Downes (Tribal Attorney) providing the Ewiiapaayp Band's response to the Assignment of Error in the Matter of *County of San Diego, California and Viejas Band of Kumeyaay Indians v. Pacific Regional Director, Bureau of Indian Affairs*. Mr. Downs responds to the September 6, 2013 IBIA remand for further consideration on the contiguity, the Wunderlin Report and the NEPA impact.
4. By letter dated May 26, 2015, the Viejas Band submitted a response to Mr. Downes submission by providing the supplemental Wunderlin 2015 Report.
5. By letter dated June 8, 2015, the Ewiiapaayp Band responded to Viejas Band Erroneous Assertions on contiguity.
6. By letter dated January 7, 2016, the Viejas Band responded to Ewiiapaayp Band's response to contiguity.
7. Viejas Band's letter dated June 27, 2016, supplement the record for the FTT for the Walker Parcel upon a recent decision by the IBIA in an integrally related matter, the Salerno Parcel.

Pursuant to 25 CFR §151.10, the following factors were considered in formulating our recommendation: (1) need of the tribe for additional land; (2) the purpose for which the land will be used; (3) impact on the State and its political subdivisions resulting from removal of the land from the tax rolls; (4) jurisdictional problems and potential conflict of land use which may arise; (5) whether the Bureau of Indian Affairs is equipped to discharge the additional responsibilities resulting from the acquisition of the land in trust status, (6) and whether or not contaminants or hazardous substances may be present on the property.

Factor 1 – Need for Additional Land

The Ewiiapaayp Band's Reservation is located in Pine Valley in southeastern San Diego County in the Laguna Mountains. It is approximately 32 miles east of the City of San Diego and 12 miles north of Interstate 8. The reservation was established by Executive

Order dated December 29, 1891 under the authority of the Act of Congress of January 12, 1891 (26 Stat. 712-714 c. 65). Of the tribal trust lands established under the aforementioned authority, approximately 4,100 acres remain in trust.

An additional 1,360 acres were added to the Tribe's reservation land base under the California Indian Land Transfer Act, Public Law 106-568 dated December 27, 2000, located adjacent to the Band's reservation lands in Pine Valley. The additional tribal lands are on ridges in the southwest of the East area of the Ewiiapaayp Indian Reservation at an altitude of between 5,000 and 5,500 feet. These are steep, rocky mountainous areas composed of narrow ridgelines and steep slopes. Its current use is the same use since time immemorial, unsuitable for residential or commercial development.

The Tribe also has land that is held in trust near Alpine, California. An 8.6 acres Parcel was purchased by the Tribe in 1985 and subsequently accepted into trust by the United States for the Ewiiapaayp Band in 1986. The proposed and current use of this property was/is the development/construction of a permanent and adequate health center to meet current and unmet needs for health care services for the Indians within southern San Diego County. The Ewiiapaayp Band is a member tribe of the Southern Indian Health Council (SIHC), a nonprofit tribal health care organization, now serving the Indians of the Ewiiapaayp, Manzanita, La Posta, Viejas, Sycuan, Jamul and Barona Reservations. Services from this facility are currently provided to non-Indians of the community as well.

In 1997, a 1.42 acre Parcel, located adjacent to the 8.6 acre Parcel near Alpine, was accepted into Federal trust for the Ewiiapaayp Band. The proposed use of the 1.42 acres Parcel at the time of acceptance was to expand the existing health care and social services already provided by SIHC, specifically for use as the Pinto Home for Girls, Group Home Site. The current use of the 1.42 acres Parcel is the Ewiiapaayp Band's Tribal Office.

According to the Tribe's application, "present trust land in Alpine, California, has become inadequate for the SIHC's future goals and objectives... since 1986, SIHC has constructed three health clinic buildings with Department of Housing and Urban Development Indian Community Development Block Grant funds obtained by the Ewiiapaayp Band and the La Posta Band of Mission Indians." The SIHC's long-term goals include construction and operation of a permanent health facility, retirement center, and museum/cultural center. The proposed Walker Parcel will provide the Ewiiapaayp Band with sufficient space to pursue its long-term goals to be used for a healthcare facility. Thus, the proposed clinic could still be leased wholly or in part to the SIHC; however the Ewiiapaayp Band could lease it to other similar health service providers as well. This minor change to broaden the potential lessees of clinic space would not affect the overall design or operation of the current clinic. The intended purpose was to provide for the expansion needs of the SIHC, Inc. at a below market rate that yet provides some income for the Ewiiapaayp Band, or, should the SIHC, Inc. not wish to expand to the Walker Parcel, income would be earned from a commercial tenant.

The Tribe states this economic development will allow future generations the continued use of its existing reservation. Such goals are consistent with the legislative history of the Indian Reorganization Act (25 U.S.C. § 5108), i.e., to rehabilitate Tribal economic life, conserve and develop Indian lands and resources, preserving and increasing the amount of Indian lands, and for the economic advancement and self-determination of Indian communities.

We have determined that placing the land into trust and the resulting federal protection of the land that this affords will facilitate the Ewiiapaayp Band's need for the Walker Parcel land to achieve self-sufficiency and economic development.

Factor 2 – Proposed Land Use

The current Proposed Action is identical to the Proposed Action analyzed in the Supplemental EA and 2016 FONSI. A Supplemental Information Report was prepared June 2018 for the Walker Parcel. The proposed land uses does not include a day care center. In fact, day care facilities has never been specifically mentioned in the Ewiiapaayp Band's application as a proposed land use for the Walker Parcel; rather the intended use of the Walker Parcel as described in the original 2001 fee-to-trust application submitted by the Band was for the operation of a health clinic by the Southern Indian Health Council (SIHC). Day care facilities were first introduced as a potential land use on the Walker Parcel in the 2001 Environmental Assessment (EA) prepared to address the environmental consequences of the Band's application.

In, the Ewiiapaayp Band's letter dated July 15, 2018, they stated that "the initial Walker Parcel application the SIHC clinic was operating a day care facility; thus it was assumed that this day care facility would also be a component of the SIHC clinic when it was relocated to the Walker Parcel. Since that time, the day care facilities at the SIHC clinic have closed; thus it is not reasonable to expect that if and when the SIHC clinic is relocated, that day care facilities would be reintroduced. Further, since the 2001 EA, the Band has modified its application to allow for two development scenarios: 1) relocation of the SIHC health Clinic to the Walker Parcel, or 2) operation of a new, independent health clinic facility on the Walker Parcel with continued operation of the SIHC health clinic on the existing site. Under the second scenario, the Tribe has no plans to develop a day care facility, nor has it ever stated otherwise. The mention of the daycare facilities in the 2016 Notice of Decision was an administrative error.

Therefore, we are clarifying the Ewiiapaayp Band has no plans to develop a day care facility on the Walker Parcel.

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

According the County Assessor, total taxes collected for the subject Parcel for the 2018-2019-tax roll is \$9,687.80.

The projected lost revenues to the county and other local governments agencies is less than \$9,687.80 per year and is therefore not considered significant. The Band stated in its application it would enter into discussions with the county and local government agencies as the project progresses and would attempt to resolve any reasonable financial issues, by, among other things, making payments in lieu of the taxes to offset the County's losses. If the land is leased to a non-Indian entity, the San Diego County could generate some income for possessory interest. Furthermore, the benefit of the increased access to health care for the general public more than offsets the projected financial loss to the County of San Diego.

It does not appear that removal from the tax rolls will cause a major impact on the County's financial situation.

Factor 4 – Jurisdictional Problems/Potential Conflicts

Tribal jurisdiction in California is subject to Public Law 83-280, as such, there will be no change to criminal jurisdiction. Civil jurisdiction will fall under the authority of the Ewiiapaayp Band and other existing authorities.

The subject property is currently undeveloped. According to the County, the proposed land is designated as A-70 (Limited Agriculture Use Regulations). The Walker property is subject to the Forest Conservation Initiative ("FCI") whereby the County of San Diego imposed limitation on growth in certain areas of the county. The purpose of this designation is to provide lands for limited residential, civic and agricultural use. Also, the healthcare facility is classified as a commercial use that is not allowed use and therefore is not consistent with current zoning.

The County of San Diego is currently undergoing a comprehensive updated General Plan. "The San Diego County General Plan Amendment for the Alpine Planning Area (1) zoning" of nearby parcels for rural commercial use designation for the Walker Parcel (2) provides for "spot zoning" of nearby parcels for rural commercial uses that (3) permits environmental impacts such as traffic and noise.

A letter from Daniel and Gloria Harrington, stating that this property being considered is zoned for residential/agricultural use and any other use will devalue our property and destroy the peaceful use of our residence. Access to this property is currently over an easement on our property. Any use other than residential or agriculture should not be allowed on this easement. The purchased easement to this property crosses the water line to our water well/tank, and loss of access to this water pipe for maintenance will cut off water to the three homes on this property. Water use, sewage disposal, traffic, lighting, and all other environmental concerns must be addressed on the specific land use intended of this property."

Once in trust, the land will still be subject to legally authorized encumbrances located on the property that are recorded with the County and those encumbrances may still legally be enforced. Moreover, the Ewiiapaayp Band response is that they will not use the

Harrington/Walker access road during construction on the Walker property. If the Harrington/Walker road is damaged through the fault of the Tribe or its contractors, the Tribe will repair the road and restore it to its pre-damaged condition. The Ewiiapaayp Band has also committed to pay for and build a fence on the Ewiiapaayp Band's easement property between the Harrington/Walker easement roads. The additional request for a gate in the fence-line is acceptable to the Ewiiapaayp Band.

In the past, commenters have raised the possibility that tribal government gaming under the Indian Gaming Regulatory Act might occur on the Walker Parcel. Nothing in the record suggests that the Walker Parcel will be used for gaming purposes. "[M]ere speculation that gaming may occur at some future time does not require BIA to consider gaming as a possible use of land being considered for trust acquisition." *Thurston County (Scott I)*, 56 IBIA at 75 n.15.

In the Section 3.0 of the 2014 EA Supplement provides a discussion of past, present, and reasonably foreseeable future development projects in the vicinity of the Walker Parcel, and includes the grocery store approximately 1.3 miles west of the Walker Parcel and the Alpine Sheriff's Station approximately 1.5 miles west of the Walker Parcel. These two projects were considered in the updated description of the affected environment in Section 3.0, and updated cumulative effects analysis provided in Section 4.0 of the 2014 Supplement. No new effects were identified as a result of the updated analysis.

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. Therefore, administratively there will be little change to existing BIA functions. Any additional responsibilities resulting from this transaction will be minimal. Anticipated workload to BIA (Real Estate and Environmental staff) would result should there be a lease to an outside entity.

Factor 6 – Whether or not Contaminants or Hazardous Substances are Present

In accordance with Interior Department Policy (602 DM 2), the Bureau of Indian Affairs is charged with the responsibility of conducting a site assessment for the purposes of determining the potential of, and extent of liability for, hazardous substances or other environmental remediation or injury. We have determined that no hazardous substances, or other environmental hazards, are present on the subject Parcel. The record includes a negative Phase 1 "Contaminant Survey Checklist" dated January 16, 2013, reflecting "no hazardous materials or contaminants".

National Environmental Policy Act Compliance

Pursuant to the September 6, 2013, remand, the IBIA directed the BIA to supplement its 2001 Environmental Assessment to consider: 1) potential impacts of simultaneous operation of both a new healthcare facility on the Walker Parcel and the existing SIHC

Clinic, and 2) potential impacts associated with past, present, and reasonably foreseeable future actions.

Based on the July 2015 Supplemental EA, it has been determined that the proposed action will not have significant impact on the quality of the human environment, and therefore, an Environmental Impact Statement is not required. In accordance with Section 102 (2)(c) of the National Environmental Policy Act of 1969, as amended, an Environmental Impact Statement will not be required. A Finding of No Significant Impact (FONSI), dated January 4, 2016, was distributed on January 20, 2016.

Based upon a 2018 Supplemental Information Report, the 2001 EA and the July 2015 Supplemental EA, the current conditions of the Walker Parcel remain similar to the conditions at the time of the preparation of the Supplemental EA, and no changes are planned to the Proposed Action as it was described in the Supplemental EA. As analyzed within **Section 2.0 of the Supplemental Report**, the conclusions and mitigation measures for the Walker Parcel set forth in the Supplemental EA and 2001 EA remain adequate to mitigate environmental impacts from the Proposed Action. There are no significant new circumstances or information relevant to environmental concerns that would have bearing on the Proposed Action and its impacts; therefore, no additional mitigation is warranted. The Supplemental EA and 2001 EA appear adequate to meet the BIA's NEPA compliance requirements for evaluating the Proposed Action, and further environmental analysis is not needed.

In response to the IBIA Order dated April 20, 2018 (Docket No. IBIA 17-033, 17-038 and 17-042) Vacating and Remanding the Decision, the following letters were received:

- Letter dated July 15, 2018, from the Ewiiapaayp Band responding to the Principal Deputy Assistant Secretary Indian Affairs Memorandum dated February 14, 2018 to reconsider the continuity of the Walker Parcel and the Proposed Land Use. The Band's letter addressed/clarified the proposed land use to the Walker Parcel, which does not include a day care center. Also, the Band states, the mentioning of the daycares facilities in the 2016 Notice of Decision was an administrative error, that was carried over from the previous 2011 Decision.
- Letter dated July 30, 2018, from the Ewiiapaayp Band addressing and clarifying the contiguity of the Walker Parcel to the Ewiiapaayp Tribe's reservation and that the Walker Parcel satisfies all applicable definitions of contiguity.
- Letter dated October 16, 2018, from the Viejas Band responding to the recent IBIA remand of the Walker Parcel and the Principal Deputy Assistant Secretary of Indian Affairs' Memo dated February 14, 2018 directed the Regional Director to request a vacate/remand of the 2016 Notice of Decision of the Walker Parcel. In the letter it was stated that Viejas strongly disagree with the finding of contiguity. Additionally, they have provided documents from Caltrans to assist the Region in making the determination of contiguity, or lack thereof.

- Letter dated November 19, 2018, from Viejas Band supplementing their comments to the October 16, 2018 letter regarding Caltrans' Ownership Rights Analysis to the Walker Parcel.

Letter dated December 12, 2018, from San Diego County submitting comments regarding the Caltrans' ownership rights analysis.

In response to the IBIA's Remand Order, the BIA is providing our clarification of findings regarding the contiguity and the consistency of the proposed use.

Contiguity Analysis

The authority to bring land into trust for Indian tribes is authorized by Section 5 of the Indian Reorganization Act, 25 U.S.C. § 5108 (previously 465), and is governed by regulations at 25 C.F.R. § 151. In acquiring property in trust, the BIA must consider whether the application to take land into trust is processed pursuant to the criteria that applies to "on-reservation acquisitions" at § 151.10, or "off-reservation acquisitions" at § 151.11. Criteria for "on-reservation" acquisitions pursuant to § 151.10 apply when "the land is located within or contiguous to an Indian reservation".

In Order dated September 6, 2013 (*County of San Diego, California and Viejas Band of Kumeyaay Indians v. Pacific Regional Director, Bureau of Indian Affairs*) the IBIA noted: "'Indian reservation' is defined to include 'that area of land over which the tribe is recognized by the United States as having governmental jurisdiction.'" In the 2013 Order, the IBIA established the Tribe's existing trust lands in Alpine, consisting of approximately 10 acres, more or less, and recorded under Tract 573 T1123 and 573 T5210 (trust land) constitutes a "reservation" for the purpose of trust acquisition pursuant to 25 C.F.R. § 151, even though the Alpine trust land has not been proclaimed a formal reservation under 25 U.S.C. § 5125 (previously 467).

Appellants assert the Walker Parcel is not contiguous to tribal trust property. The Walker Parcel is separated from existing trust land by roads with differing ownership interests. Access to the trust lands from the Walker Parcel can only be obtained by driving over the intervening roads. The Appellants note there are three public roadways separating the Walker Parcel from the existing trust land consisting of a State highway (Interstate 8) and two County roads (Willows Road and Alpine Boulevard), which are contiguous to each other.

In the briefs dated May 31, 2017 by Appellants in *County of San Diego, California and Viejas Band of Kumeyaay Indians v. Pacific Regional Director, Bureau of Indian Affairs*, IBIA 11-136; 11-137, the Appellants observe the right-of-way corridors for the roadways are not merely surface easements, also, the State of California and the County of San Diego own the underlying fee property upon which the roadways are located. As clarified below, trust properties may be contiguous in accordance with Department regulations regardless of whether ownership interests in roads separating the properties are held as public easements or in public fee.

The Board had previously noted that the definition of "contiguous" is not defined by the 25 C.F.R. § 151 regulations, *see Jefferson County v. Northwest Regional Director*, 47 IBIA 187 (September 2, 2008), and at one time, the definition was not found anywhere in Department regulations despite incorporation of the term "contiguous" in 25 C.F.R. § 151. In 2008, Department regulations implementing the Indian Gaming Regulatory Act (IGRA) defined "contiguous" as "two parcels of land having a common boundary notwithstanding the existence of non-navigable waters or a public road or right-of-way and includes parcels that touch at a point". 73 Fed. Reg. 29354, 29376, May 20, 2008 ("*Gaming on Trust Lands Acquired After October 17, 1988*") (Gaming Rules). The commentary section of the published Gaming Rules does not elaborate further on the definition discussed at page 29355 of the Federal Register:

Section 292.2 How are key terms defined in this part?

Contiguous

Several comments related to the definition of contiguous. One comment suggested removing the definition from the section. A few other comments suggested keeping the definition, but removing the second sentence that specifies that contiguous includes parcels divided by non-navigable waters or a public road or right-of-way. A few comments suggested including both navigable and non-navigable waters in the definition. Many comments regarded the concept of "corner contiguity." Some comments suggested including the concept, which would allow parcels that only touch at one point, in the definition. Other comments suggested that the definition exclude parcels that only touch at a point.

Response: The recommendation to remove the definition was not adopted. Likewise, the recommendation to remove the qualifying language pertaining to non-navigable waters, public roads or right-of-ways was not adopted. Additionally, the suggestion to include navigable waters was not adopted. The concept of "corner contiguity" was included in the definition. However, to avoid confusion over this term of art, the definition uses the language "parcels that touch at a point."

Although the commentary section of the Gaming Rules does not elaborate on the meaning of the definition of contiguous, it clarifies the Department's intent to define "contiguous" to include parcels of land separated by non-navigable waters or a public road or right-of-way.

In *Jefferson County, supra*, the Board held that lands which are contiguous under 25 C.F.R. § 151 are lands which adjoin or abut, as those terms are commonly defined. Although, the Board expressly did not address whether contiguous lands include those that touch at a corner. The Department's 2008 Gaming Rules definition of contiguous includes land that touches at a point. In *Jefferson County*, the Board also noted the definition of contiguous was previously addressed by the Board and the Wisconsin District Court in *County of Sauk v. Midwest Regional Director*, 45 IBIA 201 (2007), *aff'd*, *Sauk County v. U.S. Department of the Interior*, No. 07-cv-543-bbc (W.D. Wisc.

May 29, 2008). In the *Sauk* case, parcels were found to be contiguous despite surface easements for public roads that separated the land surfaces of the properties. Although, in *Jefferson County*, the Board referenced the *Sauk* case as an example of a prior instance where the term “contiguity” had been defined, the Board did not consider the definition of “contiguous” incorporated in the Gaming Rules, which suggests the *Jefferson County* decision was published before the Board could consider the definition of “contiguous” adopted by the Department in the Gaming Rules.

The definition of contiguous established by the Department in the Gaming Rules is significant because the IGRA provides that gaming may only be conducted on land located within or contiguous to the boundaries of a reservation of an Indian tribe. 25 U.S.C. § 2719 (a)(1). Therefore, the definition of contiguous established by the Department in the Gaming Rules speaks to the contiguity of trust land, which is exactly what is at issue when the Department acquires land in trust pursuant to 25 C.F.R. §151. As the regulations in Part 151, the Gaming Rules concern land that has been or will be acquired for Indian tribes and whether that land is contiguous to existing land held in trust. Because the Gaming Rules define the term contiguous in the context of trust acquisition, the definition may be reasonably, rationally, and appropriately applied to trust acquisitions pursuant to Part 151, when that term was not defined at the time the regulations for acquiring land in trust were promulgated.

The extension of the term contiguous to include “two parcels of land having a common boundary notwithstanding the existence of non-navigable waters or a public road or right-of-way and includes parcels that touch at a point” must have been intended to encompass these features when they are located on fee property that separates trust lands because if a road, right-of-way, or body of water is owned as an easement that encumbers otherwise contiguous property held in fee, the underlying, or servient, property would remain contiguous to adjoining or abutting property and it would not be necessary for the definition of contiguous to include properties that are separated by a road, right-of-way, or body of water on the boundary of trust property – to that end, it is instructive to note the Gaming Rules do not define contiguous properties to include land that is separated by an “easement”. Moreover, the inclusion of “water bodies” as an acceptable ownership interest separating contiguous trust properties indicates the Department did not intend for the term “contiguous” to be limited to properties separated only by surface easements, in as much as water bodies generally include both surface and subsurface ownership interests and because water bodies generally are not defined as surface easements.

The term “notwithstanding” is defined by both Black’s Law Dictionary and Webster’s, to mean “in spite of”. In other words, the Gaming Rules define contiguity to include two land parcels with a common boundary “in spite of” the existence of a public road, right-of-way, or body of water along such boundaries. It is a common practice, as evidenced by public land records, for public roads to be located along township section lines and property boundaries to avoid interference by the roadway with landowner property use. Hence, Department Gaming Rules address use of neighboring properties that are acquired in trust, despite separation of those properties by public roads, right-of-ways, or bodies of

water, by establishing a definition of contiguous that encompasses land parcels with a common boundary in spite of public roads located on boundaries.

Here, the Walker Parcel is separated from the existing trust land by three public roads and nothing else. The fact that there are three roads located between the properties rather than one should make no more difference to a contiguity analysis than if a multi-lane highway was located on property boundaries instead of a one lane County road. In either of those hypothetical scenarios or the case here, the properties are contiguous as that term is defined in the Gaming Rules. Applying the same definition of contiguity the Department adopted in the Gaming Rules to Part 151 acquisitions, the parcels here are contiguous. Because the term contiguous is not defined by Department trust acquisition regulations at Part 151, and because both the Gaming Rules and Part 151 concern the acquisition of trust land, we reasonably and rationally determine the term "contiguous" under Part 151 may be defined in the same manner as it was defined by the Department in the Gaming Rules. Applying the definition of contiguous incorporated in the Gaming Rules to Part 151, lands acquired in trust are contiguous to existing trust lands if the lands are separated by public roads or right-of-ways located along property boundaries.

Additionally, the Pacific Region received a memorandum dated December 19, 2018 from the Bureau of Land Management Indian Land Surveyor (BILS) stating the Walker Parcel is considered contiguous to the Alpine trust land. The BILS contiguous determination was based on possible future public right-of-way vacations by the State of California and the County of San Diego. The common rule of vacation of a right-of-way, is that when current ownership of each parcel adjoining the public right-of-way is held by two different persons/entities, the right-of-way is split at the centerline and each property owner would be granted their perspective part and would cause the new boundary line to be common and touching. If the property on both sides of the right-of-way to be vacated is owned by the same person/entity, the entire right-of-way would be granted to the person/entity and the new boundary line would be common and touching.

As noted above, the Walker Parcel is separated by three public road ways consisting of State Highway (Interstate 8) and two County roads (Willows Road and Alpine Boulevard), which are contiguous to each other. It is our determination the Walker Parcel is contiguous to existing trust land, known as the Alpine property, which the Secretary has recognized the Ewiiapaayp Band as having governmental jurisdiction over.

National Environmental Policy Act (NEPA)-Environmental Assessment

A Supplemental Environmental Assessment (SEA) and Finding of No Significant Impact (FONSI) were completed in 2015 and 2016, respectively on remand from IBIA to consider 1) the potential impacts of simultaneous operation of both a new healthcare facility on the Walker Parcel and the existing Southern Indian Health Council Clinic and 2) potential impacts associated with past, present, and reasonably foreseeable future actions. The 2016 FONSI concluded that no operational scenario of the Proposed Action would have a significant impact on the human environment.

Based on the Pacific Region's 2018 request, the IBIA remanded the fee-to-trust decision back to the Regional Director for further consideration and issuance of a new decision. Additional information was obtained from the Tribe to confirm that a day care facility is not planned for development on the Walker property as part of the Proposed Action, which is consistent with the analysis in the 2015 SEA. In addition, a Supplemental Information Report (SIR) was completed in June 2018, concluding that there is no significant new information or circumstances relevant to environmental concerns that would have bearing on the Proposed Action and its impacts. The Pacific Region independently reviewed the 2018 SIR and concluded that no additional National Environmental Policy Act supplementation is necessary.

Conclusion

Based on the foregoing, the Pacific Region, at this time, issues this 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 Ewiiapaayp Band of Kumeyaay Indians, California in accordance with the Act of Congress is the Indian Reorganization Act (IRA) of June 18, 1934 (48 Stat. 984; 25 U.S.C. 5108).

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

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

If possible, a copy of this decision should be attached. Any appellant must send copies of the notice of appeal to: (1) the Assistant Secretary of Indian Affairs, U.S. Department of Interior 1849 C Street, N.W., MS-3071-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,

A handwritten signature in cursive script, appearing to read "Amy R. White".

Regional Director

Enclosure:

43 CFR 4.310, et seq.

cc: Distribution List

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Sara Drake, Deputy Attorney General - 7019 0140 0000 7335 8101
State of California
Department of Justice
P.O. Box 944255
Sacramento, CA 94244-2550

U.S. Senator Dianne Feinstein - 7019 0140 0000 7335 8118
331 Hart Senate Building
Washington, DC 20510

U.S. House of Representatives - 7019 0140 0000 7335 7791
50th District
1611 N. Magnolia Ave., Ste. 310
El Cajon, CA 92020

San Diego County Assessor - 7019 0140 0000 7335 7807
1600 Pacific Highway, Suite 103
San Diego, CA 92101

Deputy Chief Administrative Officer - 7019 0140 0000 7335 7821
County of San Diego, Land Use and Environment Group
1600 Pacific Highway, Room 212
San Diego, CA 92101

County of San Diego- 7019 0140 0000 7335 7838
Planning & Land Use
1600 Pacific Highway
San Diego, California 92101-2472

San Diego Treasurer & Tax Collector - 7019 0140 0000 7335 7845
1600 Pacific Highway, Suite 162
San Diego, CA 92101-2474

County of San Diego - 7019 0140 0000 7335 7852
Office of the Chief Administrative Officer
1600 Pacific Highway, Room 209
San Diego, CA 92101

San Diego County Sheriff's Department - 7019 0140 0000 7335 7869
P.O. Box 939062
San Diego, CA 92193-9062

San Diego County Department of Public Works - 7019 0140 0000 7335 7876
5510 Overland Avenue, Suite 410
San Diego, CA 92123

Department of Planning and Development Services - 7019 0140 0000 7335 7883
5510 Overland Ave. Suite 310
San Diego, CA 92123

Chairperson - 7019 0140 0000 7335 7890
Barona Reservation
1095 Barona Road
Lakeside, CA 92040

Chairperson - 7019 0140 0000 7335 7906
Campo Band of Mission Indians
36190 Church Rd., Suite 1
Campo, CA 91906

Chairperson - 7019 0140 0000 7335 8125
Ewiiapaayp Band of Kumeyaay Indians
4054 Willows Road
Alpine, CA 91901

Chairperson - 7019 0140 0000 7335 8132
Jamul Indian Village
P.O. Box 612
Jamul, CA 91935

Chairperson - 7019 0140 0000 7335 8149
La Jolla Band of Luiseno Indians
22000 Highway 76
Pauma Valley, CA 92061

Chairperson - 7019 0140 0000 7335 8156
La Posta Band of Mission Indians
8 Crestwood Road, Box 1
Boulevard, CA 91905

Chairperson - 7019 0140 0000 7335 8163
Los Coyotes Band of Cahuilla & Cupeno Indians
P.O. Box 189
Warner Springs, CA 92086

Chairperson - 7019 0140 0000 7335 8170
Manzanita Band of Mission Indians
P.O. Box 1302
Boulevard, CA 91905

Chairperson - 7019 0140 0000 7335 8187
Mesa Grande Band of Mission Indians
P.O. Box 270
Santa Ysabel, CA 92070

Chairperson - 7019 0140 0000 7335 8194
Pauma Band of Mission Indians
P. O. Box 369
Pauma Valley, CA 92061

Chairperson – 7019 0140 0000 7335 8262
Pala Band of Mission Indians
35008 Pala Temecula Rd. PMB 50
Pala, CA 92059

Chairperson – 7019 0140 0000 7335 8200
Pechanga Band of Mission Indians
P.O. Box 1477
Temecula, CA 92593

Chairperson - 7019 0140 0000 7335 8217
Rincon Band of Mission Indians
1 West Tribal Road
Valley Center, CA 92082

Chairperson – 7019 0140 0000 7335 8224
San Pasqual Band of Mission Indians
P.O. Box 365
Valley Center, CA 92082

Chairperson - 7019 0140 0000 7335 8231
Santa Ysabel Band of Mission Indians
P.O. Box 130
Santa Ysabel, CA 92070

Chairperson - 7019 0140 0000 7335 8248
Sycuan Band of Mission Indians
1 Kumeyaay Court
El Cajon, CA 92019

Chairperson - 7019 0140 0000 7335 8255
Viejas (Baron Long) Band of Mission Indians
P.O. Box 908
Alpine, CA 91903

Regular Mail:

Chairperson - Fax
Inaja-Cosmit Band of Mission Indians
2005 S. Escondido Blvd.
Escondido, CA 92025

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

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Office of the Secretary, Interior

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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;

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

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

§4.331 Who may appeal.

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

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

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

(c) Where otherwise provided by law or regulation.

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

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

(1) A full identification of the case;

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

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

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

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

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

[54 FR 6497, Feb. 10, 1989, as amended at 67 FR 4366, Jan. 30, 2002]

§4.333 Service of notice of appeal.

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

§4.334

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

§4.334 Extensions of time.

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

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

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

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

- (1) The decision appealed from;
- (2) The notice of appeal or copy thereof; and
- (3) Certification that the record contains all information and documents utilized by the deciding official in rendering the decision appealed.

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

§4.336 Docketing.

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

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by the record on appeal upon receipt of the administrative record. Any objection to the record as constituted shall be filed with the Board within 15 days of receipt of the notice of docketing. The docketing notice shall specify the time within which briefs shall be filed, cite the procedural regulations governing the appeal and include a copy of the Table of Contents furnished by the deciding official.

§4.337 Action by the Board.

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

(b) Where the Board finds that one or more issues involved in an appeal or a matter referred to it were decided by the Bureau of Indian Affairs based upon the exercise of discretionary authority committed to the Bureau, and the Board has not otherwise been permitted to adjudicate the issue(s) pursuant to §4.330(b) of this part, the Board shall dismiss the appeal as to the issue(s) or refer the issue(s) to the Assistant Secretary—Indian Affairs for further consideration.

§4.338 Submission by administrative law judge of proposed findings, conclusions and recommended decision.

(a) When an evidentiary hearing pursuant to §4.337(a) of this part is concluded, the administrative law judge shall recommend findings of fact and conclusions of law, stating the reasons for such recommendations. A copy of the recommended decision shall be sent to each party to the proceeding, the Bureau official involved, and the Board. Simultaneously, the entire record of the proceedings, including the transcript of the hearing before the administrative law judge, shall be forwarded to the Board.

(b) The administrative law judge shall advise the parties at the conclusion of the recommended decision of their right to file exceptions or other

comments regarding the recommended decision with the Board in accordance with §4.339 of this part.

§4.339 Exceptions or comments regarding recommended decision by administrative law judge.

Within 30 days after receipt of the recommended decision of the administrative law judge, any party may file exceptions to or other comments on the decision with the Board.

§4.340 Disposition of the record.

Subsequent to a decision by the Board, the record filed with the Board and all documents added during the appeal proceedings, including the Board's decision, shall be forwarded to the official of the Bureau of Indian Affairs whose decision was appealed for proper disposition in accordance with rules and regulations concerning treatment of Federal records.

WHITE EARTH RESERVATION LAND SETTLEMENT ACT OF 1985; AUTHORITY OF ADMINISTRATIVE JUDGES; DETERMINATIONS OF THE HEIRS OF PERSONS WHO DIED ENTITLED TO COMPENSATION

SOURCE: 56 FR 61383, Dec. 3, 1991, unless otherwise noted.

§4.350 Authority and scope.

(a) The rules and procedures set forth in §§4.350 through 4.357 apply only to the determination through intestate succession of the heirs of persons who died entitled to receive compensation under the White Earth Reservation Land Settlement Act of 1985, Public Law 99-264 (100 Stat. 61), amended by Public Law 100-153 (101 Stat. 886) and Public Law 100-212 (101 Stat. 1433).

(b) Whenever requested to do so by the Project Director, an administrative judge shall determine such heirs by applying inheritance laws in accordance with the White Earth Reservation Settlement Act of 1985 as amended, notwithstanding the decedent may have died testate.

(c) As used herein, the following terms shall have the following meanings:

(1) The term *Act* means the White Earth Reservation Land Settlement Act of 1985 as amended.

(2) The term *Board* means the Board of Indian Appeals in the Office of Hearings and Appeals, Office of the Secretary.

(3) The term *Project Director* means the Superintendent of the Minnesota Agency, Bureau of Indian Affairs, or other Bureau of Indian Affairs official with delegated authority from the Minneapolis Area Director to serve as the federal officer in charge of the White Earth Reservation Land Settlement Project.

(4) The term *party (parties) in interest* means the Project Director and any presumptive or actual heirs of the decedent, or of any issue of any subsequently deceased presumptive or actual heir of the decedent.

(5) The term *compensation* means a monetary sum, as determined by the Project Director, pursuant to section 8(c) of the Act.

(6) The term *administrative judge* means an administrative judge or an administrative law judge, attorney-advisor, or other appropriate official of the Office of Hearings and Appeals to whom the Director of the Office of Hearings and Appeals has redelegated his authority, as designee of the Secretary, for making heirship determinations as provided for in these regulations.

(7) The term *appellant* means a party aggrieved by a final order or final order upon reconsideration issued by an administrative judge who files an appeal with the Board.

[56 FR 61383, Dec. 3, 1991; 56 FR 65782, Dec. 18, 1991, as amended at 64 FR 13363, Mar. 18, 1999]

§4.351 Commencement of the determination process.

(a) Unless an heirship determination which is recognized by the Act already exists, the Project Director shall commence the determination of the heirs of those persons who died entitled to receive compensation by filing with the administrative judge all data, identifying the purpose for which they are being submitted, shown in the records relative to the family of the decedent.

(b) The data shall include but are not limited to:

