August 13, 2013

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COUNTY OF SANTA BARBARA
CLERK OF THE
BOARD OF SUPERVISORS

Supervisor Salud Carbajal, Chair
105 E. Anapamu St.
Santa Barbara, CA 93101
Phone: 805-568-2186 FAX: 805-568-2534

Re: Request for postponement of August 20th Meeting regarding dialogue with the Santa Ynez Band of Mission Chumash Indians (Santa Ynez Band)

Dear Supervisor Carbajal,

In light of the Santa Ynez Band's recent application to the Bureau of Indian Affairs for fee to trust on their privately owned 1,400 acres, and Third District Supervisor Doreen Farr's continued opposition of fee-to-trust in her district, Preservation of Los Olivos, P.O.L.O., a grass roots citizen group representing thousands of Santa Barbara citizens, requests that you cancel, or at a minimum continue/postpone, the August 20th meeting regarding the Santa Ynez Band. Setting a special dialogue for the Santa Ynez Band creates a process no other person or group is entitled to violating the equal protection rights of all other citizens of Santa Barbara County.

In addition, we recommend that the County Counsel be given time to research the following new developments. County Counsel, must be able to provide the Board of Supervisors with counsel to prevent the Board of Supervisors from inadvertently suggesting County cooperation or approval of the Santa Ynez Band's stated purpose to take this 1,400 acres, and future lands from Morro Bay to Malibu, into its jurisdiction. The following are the new developments and why we urge you to cancel, or postpone the August 20th meeting:

1. Impact on property owners, Santa Ynez Valley Community Plan, the County: The Santa Ynez Band's application to take 1,400 acres into federal trust – County only receiving notification from the Santa Ynez Band of this application on August 7th, 2013. (The application is currently under review by the Bureau of Indian Affairs).
2. Unrestricted development: The Secretary will not restrict development use on land in trust: 25 CFR 151: "..current land acquisition regulations in 25 CFR Part 151 do not authorize the Department to impose restrictions on a Tribe's future use of land which has been taken into trust." (Enclosed letter from Assistant Secretary Carl Artman, May 12, 2008)
3. Despite their assurances, the only necessary reason to place land into trust is to ensure the opportunity for gaming. (Enclosed letter, Memorandum from Assistant Secretary Carl Artman, January 3, 2008)
4. Impact on property values and water: Summer, 2013 U.C. Hastings College of Law Review article entitled: "Reservation and Quantification of Indian Groundwater Rights in California" that states: "This note will lay out

arguments the Santa Ynez Chumash Band of Indians could use *to secure a right to groundwater* on their reservation in Santa Barbara County as their successful casino brings in more and more visitors at the same time *that groundwater beneath their reservation is depleted by non-Indian users*." (Enclosed)

5. Fee-to-trust litigation pending: 6.9: P.O.L.O.'s ongoing litigation on the 6.9 acre fee-to-trust application where P.O.L.O. states the following:
   a. The Santa Ynez Band is not eligible for fee to trust land transfer
   b. Land under State jurisdiction cannot be turned back into federal land
   c. Rights to entitlement of aboriginal land were extinguished in California
   d. The Santa Ynez Band's assertion that land in trust is exempt from state and local regulations is false (P.O.L.O. filings enclosed)
6. Equal protection: Special preference dialogue with the Santa Ynez Band regarding fee owned property violates equal protection of all other landowners
7. Equal protection: County Counsel must be in a position to ensure equal protection for all citizens, and to ensure the Board's well meaning intentions of dialogue may not be used against them. As P.O.L.O.'s research has uncovered, the Santa Ynez Band is an entity that opens the door as a constituent and then acts as a government entitled to federal rights. For them to gain federal rights means they have to take away the rights of others that should be protected by the State and County: property rights, civil rights, process rights, water rights - all rights – creating preferences that violate equal protection and elevating them above all of the rules that everyone else has to obey. (Enclosed, Santa Ynez Band Motion to Strike, see page 15 and footnote 45, Feinstein letter.)

For the above reasons the Board of Preservation of Los Olivos, requests that you cancel, or at the minimum continue/postpone, the August 20th Meeting.

Respectfully,

The Board of Preservation of Los Olivos

Cc: Supervisors Doreen Farr, Janet Wolf, Peter Adam, Steve Lavagnino, Santa Barbara County Clerk of the Board

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

TAKE PRIDE IN AMERICA

MAY 12 2008

The Honorable Duncan Hunter
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Hunter:

Thank you for your letter of April 1, 2008, regarding a dispute between the Sycuan Band of the Kumeyaay Nation (Tribe) and the Dehesa Valley Community Council (Dehesa Community) concerning a Tribe's land acquisition program. You have enclosed with your letter copies of a January 10, 2006, letter from the Dehesa Community, and of a January 29, 2007, letter from the Tribe. These letters address the issues of concern that the Dehesa Community has raised with you.

The Dehesa Community would like the Department of the Interior to re-examine a fee-to-trust application for an 82.85-acre parcel of land that was taken into trust for the Tribe in 2004 because the actual use of the land (parking lot for casino) is different from the proposed use at the time of acquisition (housing). We understand that the Dehesa Community is very unhappy with what it is calling the "bait and switch" tactic employed by the Tribe. Although we understand the Community's concern, once land is taken into trust, the Department is not authorized to reconsider its decision because land cannot be taken out of trust without Congressional authorization. In addition, current land acquisition regulations in 25 CFR Part 151 do not authorize the Department to impose restrictions on a Tribe's future use of land which has been taken into trust. *See City of Lincoln, Oregon v. Portland Area Director*, 33 IBIA 102 (1999). To do so would require amending existing regulations in 25 CFR Part 151. The Department is not currently in the process of amending these regulations. In addition, the Department has been reluctant in the past to take any action to eliminate the flexibility that Indian tribes enjoy to change the use of trust lands both because it is an aspect of tribal sovereignty and because it is a needed tool to adapt to changed economic conditions.

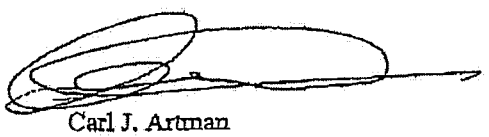
The Dehesa Community also questions whether the use of the 82.85-acre parcel for a parking lot is consistent with a provision of the Tribe's 1999 compact with the State of California which requires any portion of a gaming facility (including a parking lot) to be located on Indian lands on which gaming may lawfully be conducted under the Indian Gaming Regulatory Act (IGRA). Since the 82.85-acre parcel of land is contiguous to the Tribe's Indian Reservation as it existed on October 17, 1988, gaming on the parcel would be authorized under Section 20(a)(1) of IGRA, 25 U.S.C. 2719(a)(1).

The Dehesa Community would also like the Department to "pay attention" to the Tribe's potential future trust acquisition of a specific 1,600-acre parcel because that parcel is identified in the Tribe's 2007 class III gaming compact with the State of California. At this

time, the Department of the Interior has not received an application to take the 1600-acre parcel into trust for the Tribe. If and when that happens, the Department will be vigilant in reviewing the application, especially because the 2007 compact specifically lists that parcel as potentially eligible for gaming.

We hope this information is helpful. Thank you for your interest in this important matter.

Sincerely,



Carl J. Artman
Assistant Secretary – Indian Affairs

KENNETH R. WILLIAMS
ATTORNEY AT LAW
980 9th Street, 16th Floor
Sacramento, CA 95814
(916) 543-2918

April 29, 2013

Honorable Salud Carbajal, Chairman
Santa Barbara County Board of Supervisors
105 E. Anapamu Street
Santa Barbara, CA 93101

Re: Vincent Armenta's letter dated March 6. 2013

Dear Supervisor Carbajal,

I represent two prominent local citizens groups, Preservation of Los Olivos (POLO) and Preservation of Santa Ynez (POSY). Since 2002, POLO and POSY have been "dedicated to preserving the highest quality of life in our rural community." (www.polosy.org)

Thank you for distributing Mr. Armenta's March 6, 2013 letter and your April 18, 2013 response. POLO and POSY appreciate your careful approach. We also respectfully accept your and Supervisor Farr's informal invitations to comment on these issues. That is the purpose of this letter.

Mr. Armenta, ostensibly as Chairman of the Santa Ynez Band of Chumash Indians (SY Band), requested a "government-to-government dialogue" with the County regarding 1400 acres of land, known as Camp 4, which the SY Band acquired in 2011. The land is held in fee by the SY Band. It is not in trust for the SY Band. There is not even a fee-to-trust application pending.

POLO and POSY object to Mr. Armenta's "government-to-government dialogue" request because it relates to private property owned by the SY Band in fee. Fee ownership of land by a tribe does not convert that land to tribal government land worthy of special treatment or consideration or government-to-government negotiations. (*City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005).)

Furthermore, the Ninth Circuit Court of Appeal has held that the Chumash waived any aboriginal title claims that it may have had in California, when it failed to file a timely claim pursuant to the Land Claims Act of 1851. (*United States ex rel. Chunie v. Ringrose*, 788 F.2d 638 (1986) cert. denied 479 US 1009 (1986); see *Barker v. Harvey*, 181 U.S. 481.) Although this may seem harsh, it is important to add that, pursuant to a 1928 Act of Congress, California Indians, including the Chumash, were later compensated on an equitable and "moral" basis for any lost aboriginal title or treaty claims. (*Indians of California v. United States*, 98 Ct. Cl. 583 (1942).)

Thus, the 1400 acres should be treated like any other privately owned land. On the other hand, it cannot be denied that this particular parcel of land is a critical part of the Santa Ynez rural community and life style. It is currently zoned AG-II- 100 which means that it is agricultural land with a minimum parcel size of 100 acres. Also it is subject to multi-year Agricultural Preserve contracts which limit the use of the property to agricultural uses. The SY Band must comply with these land use rules. It would require a General Plan Amendment to allow a different use.

In summary, Mr. Armenta's and the SY Band's request for "government-to-government" preference and special treatment with respect to the future development of this privately owned land is inappropriate and should be rejected. To discriminate in favor of Mr. Armenta or the SY Band would violate the due process and equal protection constitutional rights of every other individual and property owner in the community. We urge the County not to go down that perilous path. (See 42 USC section 1983) The trend of recent Supreme Court case law is away from such unfair preferences and we expect it to continue to move in that direction.

Finally, several other incorrect statements in Mr. Armenta's letter should be addressed for the record, including:

1. Mr. Armenta claims that the County had a "defacto policy" of ignoring the SY Band's request to discuss the fee-to-trust process. But, as I am sure you know, this statement is wrong. Although POLO and POSY haven't always agreed with the County's dealings with the SY Band, it cannot be denied that the County consistently tried to work with, or appease, the SY Band – perhaps too much so from POLO and POSY's perspective.

2. Mr. Armenta describes the fee-to-trust process as a "federal annexation process." This is incorrect and creates confusion about the fee-to-trust procedures. The Federal government does not annex trust lands; nor could it annex property subject to State regulation. (*Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009).) Instead, after an application is filed by a tribe, and all the appropriate pre-conditions are met, the federal government may accept a transfer of land and hold in trust for a tribe. In this case, the SY Band has not applied to have the land taken into trust and has not transferred the land to the United States.

3. Mr. Armenta claims that the County has not commenced negotiations on the Cooperative Agreement (CA). This is true in a sense. The County takes the position that it will not initiate discussions with the SY Band about the proposed CA unless and until the SY Band submits a fee-to-trust application with the BIA. (Chandra L. Waller, Santa Barbara County Executive Officer, written testimony submitted for the August 2, 2012 Oversight Hearing on Indian Lands by the US House of Representatives, Subcommittee of Indian and Alaskan Native Affairs.) Furthermore, the County has informed the SY Band that it would have to comply with CEQA at least with respect to off-site impacts of the proposed CA. (Id.) The SY Band has not applied to the BIA and apparently they do not want to comply with CEQA or other applicable State and local laws with respect to

the CA. So there have been no discussions. And, according to the County, negotiations will not begin unless it is in the context of the fee-to-trust BIA processes. Although POLO and POSY oppose the CA, they appreciate the County's willingness to be steadfast and forthright on the CEQA compliance, and no-negotiation-without-an-application, issues. That is the right approach.

4. Finally, it is important to note that the fact that the SY Band is trying to secure a CA before it submits a fee-to-trust application to the BIA is not an accident. Instead, and despite SY Band's comments to the contrary, it is a clear indicator that they intend to use this property for a gaming casino in the future. Although not precluded, local agreements are not usually required in fee to trust transfers for non-gaming purposes. (See 25 CFR sections 151.10 and 151.11) But, when the fee-to-trust acquisition is for gaming purposes, the Office of Indian Gaming requires the tribe to provide an agreement between the tribe and local officials resolving any and all jurisdictional issues. (See Office of Indian Gaming Checklist for Gaming Acquisitions and Gaming Related [Fee to Trust] Acquisitions (2007).) Thus, if it wants to use the property for gaming, and apparently it does, the SY Band must first negotiate and complete the CA with the County. POLO and POSY oppose the finalization of the CA for this reason and because it probably will not be honored or enforceable – especially if it is not approved by the Department of Interior. (See 25 USC section 81.)

Thank you for considering these comments. Please let me know if you have any questions.

Sincerely,

KENNETH R. WILLIAMS
Attorney at Law

Cc: POLO and POSY
Supervisor Doreen Farr
Supervisor Janet Wolf
Supervisor Peter Adam
Supervisor Steve Lavagnino
SBCEO Chandra L. Wallar
Congresswoman Lois Capps

P.O. Box 722 • Los Olivos, CA 93441

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FOR IMMEDIATE RELEASE

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Citizens Groups Opposing Tribal Land Annexations in the Santa Ynez Valley Retain Former U.S. Solicitor General Theodore B. Olson to Pursue a Federal Court Action

Santa Ynez, Calif (February 17) - Citizens groups Preservation of Los Olivos (POLO) and Preservation of Santa Ynez (POSY) announced today that they have retained former U.S. Solicitor General Theodore B. Olson, a partner in the international law firm of Gibson, Dunn & Crutcher LLP, to represent them in a federal court action challenging a proposed land annexation by the Santa Ynez Band of Chumash Mission Indians.

POLO and POSY were formed in 2001 by a group of citizens concerned about preserving the rural quality of California's Santa Ynez Valley, an agricultural region in northern Santa Barbara County that also happens to be home to the Chumash Tribe's 139-acre rancheria. The Tribe's 157 members already operate a casino on that property, and they are currently asking the federal government to permit the addition of another 13 acres of land adjacent to their existing land area. Because land that the federal government holds in trust for Indian tribes is exempt from all state and local regulations—including zoning control—POLO and POSY are deeply concerned that the Chumash Tribe's efforts to extend its landholdings will result in further unregulated commercial development—including a possible casino expansion—that could severely compromise the natural beauty, orderly development, and tranquility of the Santa Ynez Valley.

POLO and POSY have been actively opposing the Chumash Tribe's trust application through all available legal and political channels. Dr. Doug Herthel, President of POLO, explained that his organization opposes the proposed tribal land expansion because Santa Ynez Valley residents have "witnessed firsthand the detrimental impact that the Chumash Tribe's casino has had on the Santa Ynez Valley. The once peaceful area is now plagued by crime, traffic, and congestion. Further tribal land acquisitions would open the door to expansion of the casino, and would further compromise the quality of life for *all* residents of the Santa Ynez Valley."

POLO and POSY also oppose the County of Santa Barbara's efforts to negotiate an intergovernmental agreement with the Chumash Tribe because such an agreement would permit the Tribe to acquire additional trust land without providing any assurance that the property would not be used for casino expansion or other purposes incompatible with the Valley's rural character.

POLO and POSY pursued their cause all the way to Washington, D.C., where they argued to the Department of the Interior—the federal department that oversees Indian lands—that under applicable federal law the Chumash Tribe's trust application must be denied because the annexation would adversely impact neighboring residential and business areas. Although the Department of the Interior denied this appeal by declining to address the merits of POLO and POSY's positions, POLO and POSY have a right to judicial review of that decision by a federal court. The citizens groups have hired Theodore B. Olson to pursue that claim.

Theodore Olson was the 42nd Solicitor General of the United States and has argued 42 cases before the Supreme Court of the United States, including cases concerning due process, equal protection, property rights, the environment, criminal law, separation of powers, and the First Amendment. *New York Times* columnist William Safire described Mr. Olson as this generation's "most persuasive advocate" before the Supreme Court and "the most effective Solicitor General" in decades. Mr. Olson also served as private counsel to both Presidents George W. Bush and Ronald Reagan, and held the position of Assistant Attorney General for the Office of Legal Counsel during the Reagan Administration, in which capacity he was the Executive Branch's principal legal adviser.

Discussing his representation of POLO and POSY, Mr. Olson stated that he is "deeply honored to have the opportunity to represent the citizens of the Santa Ynez Valley in this extremely important matter. The suit that POLO and POSY will file in federal court is necessary to protect the rights of the Santa Ynez Valley's residents and to preserve the pristine character of that rural community. POLO and POSY deserve their day in court, and I will do my very best to ensure that the court fully considers their position on the tribal annexation issue."

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Attorneys for Plaintiffs,
PRESERVATION OF LOS OLIVOS and
PRESERVATION OF SANTA YNEZ

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

CV06-1502 AHM (CTx)

PRESERVATION OF LOS OLIVOS and PRESERVATION OF SANTA YNEZ,

Plaintiffs,

v.

THE UNITED STATES DEPARTMENT OF THE INTERIOR, 1849 C Street, N.W., Washington, D.C. 20240; SECRETARY GALE A. NORTON, in her official capacity, 1849 C Street, N.W., Washington, D.C. 20240; BUREAU OF INDIAN AFFAIRS, by and through Pacific Regional Director, CLAY GREGORY, in his official capacity, 2800 Cottage Way, Sacramento, CA 95825; and the INTERIOR BOARD OF INDIAN APPEALS, 801 N. Quincy Street, Suite 300, Arlington, VA 22203,

Defendants.

CASE NO.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

[28 U.S.C. §1331; 5 U.S.C. § 500 *et seq.*, 28 U.S.C. § 2201 *et seq.*]

I.

SUMMARY OF COMPLAINT

1. Plaintiffs Preservation of Los Olivos and Preservation of Santa Ynez (collectively, "Plaintiffs") bring this action seeking judicial review of a final administrative decision issued by the Interior Board of Indian Appeals (hereinafter, "IBIA") of the United States Department of the Interior on February 3, 2006. *See* Order Dismissing Appeal, February 3, 2006, Docket No. IBIA 05-50-A, attached hereto as Exhibit A (hereinafter, "IBIA Order"). That administrative decision denied Plaintiffs standing to appeal the January 14, 2005 decision of the Pacific Regional Director of the Bureau of Indian Affairs (hereinafter, "BIA") approving the acceptance by the United States of a 6.9-acre parcel of land in Santa Barbara County, California, (hereinafter, the "Property") in trust for the Santa Ynez Band of Chumash Mission Indians of the Santa Ynez Reservation, California (hereinafter, "Tribe"). *See* Notice of Decision, January 14, 2005, attached hereto as Exhibit B (describing the real property to be taken into trust) (hereinafter, "BIA Decision"). The Property is adjacent to the Tribe's land, where the Tribe has developed a 190,000 square foot Class III casino, which opened in August 2003, and a hotel and spa, which opened in July 2004. The BIA publicly announced on February 17, 2006 that it has made a final agency determination to take the Property into trust. *See* Public Notice, attached hereto as Exhibit C.

2. Although Plaintiffs alleged significant environmental, aesthetic, and economic harms in their administrative appeal of the BIA Decision taking the Property into trust, the IBIA wrongly deprived the Plaintiffs of their right to be heard on the merits by dismissing their appeal for lack of standing. The IBIA acted arbitrarily and capriciously in violation of the Administrative Procedure Act ("APA") because Plaintiffs possess standing under both the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370f, and 25 U.S.C. § 465 and its implementing regulations. In dismissing Plaintiffs' appeal, the IBIA disregarded legal precedent and

clear evidence of the Plaintiffs' standing. For example, the IBIA ignored Plaintiffs' allegations of standing based on a recent report finding that the methyl tertiary-butyl ether (hereinafter, "MTBE") contamination has spread from an adjacent gasoline station to the Property to be taken into trust, thereby threatening the community's groundwater. Furthermore, the BIA is required to consider the surrounding community's interests before taking land into trust. Here, the IBIA not only ignored those interests but also found that they were not protected under the law despite clear legal precedent to the contrary.

3. Through this Complaint, Plaintiffs seek an opportunity to be heard on the merits of their administrative appeal. Plaintiffs specifically request that the Court (1) reverse the IBIA Order holding that Plaintiffs do not have standing to appeal the BIA Decision taking the Property into trust; and (2) preliminarily and permanently enjoin the enforcement of the BIA Decision pending consideration of the merits of Plaintiffs' administrative appeal.

II.

THE PARTIES

4. Plaintiff Preservation of Los Olivos is a non-profit 501(c)(4) corporation formed to protect the rural character, natural resources, and water and air quality of the Santa Ynez Valley. Preservation of Los Olivos was founded on the fundamental principle that the citizenry of the Santa Ynez Valley is best able to protect the Valley's interests. Preservation of Los Olivos participates in all local governance issues of the Santa Ynez Valley.

5. Preservation of Santa Ynez is a non-profit 501(c)(4) corporation formed to protect the rural character, water quality, and air quality of the Santa Ynez Valley.

6. Plaintiffs' combined membership consists of 150 people who reside, own property, recreate, and work within 6 miles of the Tribe's casino and the Property.

7. The Defendants are the United States Department of the Interior, Secretary of the Interior Gale A. Norton, the IBIA, and the BIA, through its Pacific

Regional Director, Clay Gregory. The Department of the Interior and Secretary of the Interior Gale A. Norton are named as defendants in this action as a result of the actions and decisions of the Department of the Interior's subdivisions, the IBIA and the BIA, through its Pacific Regional Director, Clay Gregory.

8. Service of process will be effected on the Department of the Interior, the Secretary of the Interior Gale A. Norton, the BIA, and the IBIA by delivering through the means indicated a copy of the summons and complaint to each of the following: (1) the United States Attorney or the Assistant United States Attorney for the Central District of California by personal delivery; (2) the United States Attorney General Alberto Gonzalez in Washington, D.C. by certified mail: (3) the Pacific Regional Director of the BIA, Clay Gregory, by personal delivery; (4) Gale A. Norton, Secretary of the Interior, by personal delivery; (5) the United States Department of the Interior by personal delivery; and (6) the IBIA by personal delivery.

9. Defendants, and their successors in office, are the parties responsible for both the creation and enforcement of the IBIA Order at issue in this lawsuit.

III.

JURISDICTION AND VENUE

10. This Court has jurisdiction under 28 U.S.C. § 1331 (federal question), 5 U.S.C. § 500 *et seq.* (the APA), and 28 U.S.C. § 2201 *et seq.* (the Declaratory Judgment Act). The IBIA Order constitutes final agency action. *See* 43 C.F.R. § 4.315(c). No further agency appeal is available, and final agency action amenable to judicial review occurred when the IBIA Order was entered against Plaintiffs and the BIA Decision was published in the newspaper the *Santa Barbara News-Press* on Friday, February 17, 2006. *See* Exhibit C. The United States has waived its sovereign immunity from suit under 5 U.S.C. § 702 and 28 U.S.C. § 2209(a).

11. Venue is properly placed under 28 U.S.C. § 1391(e) in that a substantial part of the events or omissions giving rise to the claim occurred in the Central District of California and the property that is the subject of the action is situated there.

IV.

PROCEDURAL BACKGROUND

12. The Tribe filed an application with the BIA on November 8, 2000 and a revised application on May 6, 2002 to have the Property placed into trust for a commercial retail facility, parking lot, museum and cultural center, and community/commemorative park. This Property is just one component of the Tribe's ongoing plans to expand commercial development and casino gaming in the Santa Ynez Valley. The Tribe already has a Class III casino, hotel and spa, and parking lots located on its land.

13. On January 14, 2005, the BIA issued the BIA Decision, which granted the Tribe's application to place the Property into trust pursuant to 25 U.S.C. § 465 and 25 C.F.R. §§ 151.3, 151.10. *See* Exhibit B (Notice of Decision).

14. On February 22, 2005, Plaintiffs filed a timely appeal of the BIA Decision with the IBIA pursuant to 43 C.F.R. §§ 4.310-4.340. *See* Notice of Appeal, February 22, 2005, attached hereto as Exhibit D. The appeal requested that the IBIA vacate the BIA Decision to take the Property into trust and remand the matter to the Pacific Regional Director for consideration of additional information and a reasonable determination based on the record. The grounds for appeal were: (1) the BIA Decision failed to comply with NEPA; (2) the BIA failed to consider all facts under 25 C.F.R. § 151.10; (3) the BIA failed to address potential gaming uses of the land; and (4) the BIA Decision was arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law, because the BIA did not act in accordance with 25 C.F.R. § 151.10 and did not have a rational basis for acquiring the Property in trust.

15. Plaintiffs alleged in their Notice of Appeal that the BIA based its decision to acquire the Property into trust on an inadequate Environmental Assessment ("EA") under NEPA. The EA was prepared by the Tribe and subsequently adopted by the BIA. Plaintiffs further alleged that the EA failed to consider the cumulative

environmental impact of this trust acquisition in combination with other commercial developments by the Tribe and others in the community, and also failed to assess the trust acquisition's impact on the Valley's water supply. In so doing, the BIA was able to avoid a finding that a more detailed and comprehensive Environmental Impact Statement ("EIS") was required.

16. On May 5, 2005, the Regional Director of the BIA filed a motion to dismiss Plaintiffs' appeal with the IBIA on the ground that Plaintiffs lacked standing to appeal the BIA Decision.

17. On August 11, 2005, Plaintiffs filed a response to the Regional Director's Motion to Dismiss. In their response, Plaintiffs asserted, *inter alia*, that (1) they satisfied the standing requirements set forth in 25 C.F.R. § 2.3; (2) Plaintiffs have standing under *Lujan v. Defenders of Wildlife*, 504 U.S. 555; 119 L. Ed. 2d 351; 112 S. Ct. 2130 (1992); (3) Plaintiffs are within the zone of interests of 28 U.S.C. § 465; (4) Plaintiffs have standing to raise issues regarding violations of NEPA and other environmental statutes and regulations referenced in the BIA Decision; and (5) Plaintiffs also have standing to raise these issues under Section 465 and 25 C.F.R. § 151.10, which require the BIA to take into account these issues when evaluating a fee-to-trust application.

18. On February 3, 2006, the IBIA dismissed Plaintiffs' appeal on the ground that Plaintiffs lacked standing. The IBIA held that only two declarants[1] had satisfied the requirements of Article III constitutional standing because they were able to show direct injury to their personal economic interests caused by the Tribe's proposed development of the Property. The IBIA concluded, however, that neither of these

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[1] The IBIA found that Jon Bowen, a member of Preservation of Los Olivos and President of Preservation of Santa Ynez, had established Article III standing. The IBIA also found that Michele Hinnrichs had established Article III standing, but she is a member of an organization called Santa Ynez Valley Concerned Citizens, not Preservation of Los Olivos or Preservation of Santa Ynez.

individuals had prudential standing because their private economic interests were unrelated to and inconsistent with 25 C.F.R. § 151.10, and thus were not within the zone of interests protected by the regulations. Plaintiffs now appeal this decision. *See* Exhibit A.

V.

STATUTORY AND REGULATORY FRAMEWORK

19. The APA authorizes this Court to review final agency action and mandates that the Court hold unlawful and set aside such action, findings, and conclusions when they are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with the law; contrary to constitutional right, power, privilege, or immunity; in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; without observance of procedure required by law; or unsupported by substantial evidence. 5 U.S.C. § 706(2)(A)-(E)

20. Federal law permits land to be taken into trust for the benefit of Native Americans in certain circumstances. Pursuant to 25 U.S.C. § 465, "[t]he Secretary of the Interior is . . . authorized, in [her] discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allotee be living or deceased, for the purpose of providing land for Indians." The regulations interpreting Section 465 state in relevant part:

> The Secretary will consider the following criteria in evaluating requests for the acquisition of land in trust status when the land is located within or contiguous to an Indian reservation, and the acquisition is not mandated: . . . (b) The need of the individual Indian or the tribe for additional land; (c) The purposes for which the land will be used; . . . (e) If the land to be acquired is in unrestricted fee status, the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls; (f) Jurisdictional problems and potential conflicts of land use which may arise; and (g) If the land to be acquired is in fee status, whether the Bureau of Indian Affairs is equipped

> to discharge the additional responsibilities resulting from the acquisition of the land in trust status.

25 C.F.R. § 151.10. The regulations further require consideration of "[t]he extent to which the applicant has provided information that allows the Secretary to comply with 516 DM 6, appendix 4, National Environmental Policy Act Revised Implementing Procedures, and 602 DM 2, Land Acquisitions: Hazardous Substances Determinations." 25 C.F.R. § 151.10(h); *see also* Department of the Interior, Departmental Manual, 516 DM 6, attached hereto as Exhibit E; Department of the Interior, Departmental Manual, 602 DM 2, attached hereto as Exhibit F.

21. NEPA requires that "all agencies of the Federal Government shall . . . include in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official." 42 U.S.C. § 4332(2)(C). When enacting NEPA, Congress

> recogniz[ed] the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recogniz[ed] further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, [and] declare[d] that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

42 U.S.C. § 4331(a).

22. Plaintiffs' interests in the environmental and economic well-being of the Santa Ynez Valley are among the interests to be considered under 25 C.F.R. § 151.10(f), 151.10(h) before land is placed into trust. *See, e.g.*, *TOMAC v. Norton*, 193 F. Supp. 2d 182 (D.D.C. 2002), *aff'd*, 433 F.3d 852 (D.C. Cir. 2006) (holding that

a community group had standing to challenge the BIA's decision to take land into trust for the construction of a casino under the Indian Gaming Regulatory Act and 25 C.F.R. § 151.10(f), (h)); *see also Citizens Exposing Truth About Casinos v. Norton*, 2004 U.S. Dist. LEXIS 27498, at *6 & n.3 (D.D.C. Apr. 23, 2004) (holding that a citizen's group had standing under the Indian Reorganization Act, found at 25 U.S.C. §§ 461-475, to challenge a trust acquisition because the Act's implementing regulations provide for consideration of land use conflicts and NEPA requirements). *Cf. City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197; 125 S. Ct. 1478, 1493; 161 L. Ed. 2d 386 (2005) ("If [the Tribe] may unilaterally reassert sovereign control and remove these parcels from the local tax rolls, little would prevent the Tribe from initiating a new generation of litigation to free the parcels from local zoning or other regulatory controls that protect all landowners in the area. Recognizing these practical concerns, Congress has provided a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well being.").

VI.

PLAINTIFFS HAVE STANDING TO APPEAL THE BIA DECISION

23. For Article III standing, Plaintiffs must demonstrate that (1) they suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) the injury will be redressed by a favorable decision. *See City of Sausalito v. O'Neil*, 386 F.3d 1186, 1196-97 (9th Cir. 2005). For prudential standing, the Plaintiffs "must establish that the injury [they] complain[] of . . . falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883; 111 L. Ed. 2d 695; 110 S. Ct. 3177 (1990).

24. An organization has standing to sue on behalf of its members if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it

seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343; 53 L. Ed. 2d 383; 97 S. Ct. 2434 (1977).

A. Plaintiffs Have Established That They Have Suffered An Injury In Fact.

25. In support of their response to the Regional Director's Motion to Dismiss, Plaintiffs submitted several declarations from their members in which each member alleged how he or she was personally injured by the taking of the Property into trust. All of the declarants live within 6 miles of the Property. The following statements were made in these declarations:

a. Doug Herthel stated in his declaration that a recent report found that MTBE contamination from a neighboring gasoline station has spread to the Property to be taken into trust and thus is threatening the quality of the Santa Ynez Valley's groundwater

b. Kathryn Cleary, Zoie Carter, Michael Byrne, Michele Griffoul, Keith Saarloos, and Chris Reinscheild stated in their declarations that MTBE contamination from a neighboring gasoline station may have spread to the Property to be taken into trust and thus is threatening the quality of the Santa Ynez Valley's groundwater;

c. Doug Herthel and Kathryn Cleary stated in their declarations that the Tribe has a history of disregarding environmental issues by, for example, using the creek that runs through the Tribe's land for dumping cars and trash;

d. Kathryn Cleary, Zoie Carter, Michael Byrne, Michele Griffoul, Keith Saarloos, Chris Reinscheild, Jon Bowen, and Ed Hammer stated in their declarations that the trust acquisition will create more traffic, air

pollution, and crime – all of which have already increased significantly as a result of the opening of the Tribe's casino;

e. Jon Bowen stated in his declaration that the proposed development by the Tribe does not comply with the community's architectural standards;

f. Doug Herthel, Kathryn Cleary, Zoie Carter, Michael Byrne, Michele Griffoul, Keith Saarloos, Chris Reinscheild, Jon Bowen, and Ed Hammer stated in their declarations that the taking of this Property into trust further increases their tax burdens because the Tribe's development will place additional demands on the community's public services without generating tax revenue to cover the increased costs; and

g. Jon Bowen and Ed Hammer stated in their declarations that the ability of the tribe to operate its commercial establishments free of sales and property taxes creates an unfair competitive advantage against local business owners, like themselves, who must pay such taxes.

26. These declarations allege facts sufficient to establish standing under NEPA and Section 465 and its implementing regulations by demonstrating that Plaintiffs have suffered environmental, aesthetic, and economic injuries, as well as an injury to their safety caused by the taking of the Property into trust.

27. The IBIA acted arbitrarily and capriciously under the APA when it found that Plaintiffs' members did not offer evidence that MTBE contamination had spread to tribal land. *See* IBIA Order, 42 IBIA 195. In fact, Doug Herthel alleged that a recent report disclosed that "a massive underground plume of gasoline containing MTBE is spreading deep under the properties the tribe seeks to acquire into trust." Several other declarants alleged that the contamination may have spread to the Property to be taken into trust. Such contamination, if not remediated, constitutes injury in fact because the contamination threatens the Valley's (and thus Plaintiffs') groundwater supply. NEPA and 25 C.F.R. § 151.10(h) require the Secretary of the Interior to consider whether the land is contaminated before taking it into trust.

Contaminated land should not be taken into trust until remediation efforts have been undertaken. *See* Exhibit F. Defendants, however, have ignored the evidence submitted by Plaintiffs that the contamination has spread to the Property to be taken into trust.

28. Plaintiffs alleged in their response that the BIA should have conducted an EIS to analyze the effect that taking the Property into trust would have on the Valley's water supply. In light of the MTBE contamination from the gasoline station, the BIA should have required groundwater sampling or the testing of wells on the Property. This EIS should also have analyzed the cumulative impact of the proposed commercial development of this Property together with other commercial developments in the surrounding area. Under NEPA, "a cognizable procedural injury exists when a plaintiff alleges that a proper EIS has not been prepared under the National Environmental Policy Act when the plaintiff also alleges a 'concrete' interest – such as an aesthetic or recreational interest – that is threatened by the proposed action." *City of Sausalito*, 386 F.3d at 1197. Thus, Plaintiffs' allegation that the BIA did not prepare an EIS as required by NEPA establishes an injury in fact.

29. In addition, the IBIA acted arbitrarily and capriciously under the APA when it found that Plaintiffs' members did not have standing under NEPA. *See* IBIA Order, 42 IBIA 194. The increased traffic, pollution, and crime that Plaintiffs' members have suffered and will suffer from the proposed development establish the element of injury in fact under NEPA. These injuries also provide a basis for standing under Section 465 and 25 C.F.R. § 151.10, which require the BIA to consider the community interests' before taking land into trust. Likewise, the economic injuries of Plaintiffs' members resulting from their increased tax burdens and the unfair competitive advantaged posed by the Tribe's businesses sets forth an independent basis for injury in fact under Section 465 and 25 C.F.R. § 151.10.

B. Plaintiffs Have Satisfied The Elements Of Causation And Redressability.

30. The BIA Decision ordering the taking of the Property into trust will cause injury to Plaintiffs' members. Once the Property goes into trust, the Tribe will not have to comply with any of the state and local laws and regulations addressing environmental, aesthetic, zoning, and traffic concerns, and will not have to contribute to the taxes required to fund the additional public services necessitated by the Tribe's development. If the Property is not taken into trust, the Tribe will have to comply with these state and local laws and regulations, and will be responsible for paying state and local taxes.

31. The relief sought by Plaintiffs will prevent the Property from being taken into trust, and thus being removed from the jurisdiction of state and local government. This remedy will redress the injury inflicted on Plaintiffs' members because – if the Property is not taken into trust – the Tribe will have to comply with the state and local environmental, zoning, and tax requirements that protect the interests of Plaintiffs' members.

C. Plaintiffs Have Prudential Standing.

32. The IBIA acted arbitrarily and capriciously when it found Plaintiffs' members did not have prudential standing. *See* IBIA Order, 42 IBIA 205. Plaintiffs' members fall within the zone of interests of 25 C.F.R. § 151.10(f) (land use conflicts) and 25 C.F.R. § 151.10(h) (NEPA requirements), which require the BIA to consider the community's interests when deciding whether to take a property into trust. In addition, Plaintiffs' members fall within the zone of interests of NEPA because their interests in protecting the environmental quality of the Santa Ynez Valley are consistent with NEPA's purposes. *See Douglas County v. Babbitt*, 48 F.3d 1495, 1499 (9th Cir. 1995).

33. Plaintiffs have standing under the APA because (1) the IBIA Order denying Plaintiffs standing constitutes final agency action adversely affecting

Plaintiffs; and (2) as a result of the IBIA Order, Plaintiffs suffered a legal wrong and their injury falls within the zone of interests of NEPA as well as Section 465 and its implementing regulations. *See Ocean Advocates v. United States Army Corps of Eng'rs*, 402 F.3d 846, 861-62 (9th Cir. 2005)

D. Plaintiffs Have Associational Standing.

34. Plaintiffs have standing to bring this Complaint on behalf of their members because (1) Plaintiffs' members have standing; (2) Plaintiffs' mission of protecting the rural character, water quality, and air quality of the Santa Ynez Valley is germane to their members' interests; and (3) there is no reason for the members to be individually joined to this litigation.

VII.

FIRST CAUSE OF ACTION:

VIOLATION OF THE APA WITH RESPECT TO THE IBIA'S FINDING THAT PLAINTIFFS LACK STANDING

35. Plaintiffs reallege and incorporate herein by reference all foregoing paragraphs.

36. Title 5 U.S.C. § 702 provides that each authority of the government of the United States is subject to judicial review. Section 706 provides that, in all cases, agency action must be set aside if the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; "contrary to constitutional right, power, privilege, or immunity"; "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right"; "without observance of procedure required by law"; or "unsupported by substantial evidence." Agencies must maintain a record in support of their action, and there must be evidence in that record to support the agency action.

37. The IBIA's decision that Plaintiffs lacked standing was arbitrary and capricious and an abuse of discretion and also failed to meet statutory, procedural, or constitutional requirements because the IBIA improperly decided that Plaintiffs failed

to allege Article III and prudential standing under the National Environment Policy Act and/or 25 U.S.C. § 465 and its implementing regulations found at 25 C.F.R. § 151.10.

38. As a result of the IBIA's arbitrary and capricious decision, Plaintiffs have suffered damages that will be permanent and continuous if the BIA is allowed to place the Property into trust without affording Plaintiffs the opportunity to have their appeal heard on the merits.

VIII.

SECOND CAUSE OF ACTION:

DECLARATORY AND INJUNCTIVE RELIEF,

28 U.S.C. §§ 2201 - 2202

39. Plaintiffs reallege and incorporate herein by reference all foregoing paragraphs.

40. An actual controversy has arisen and now exists between Plaintiffs and Defendants regarding their respective rights, duties, and obligations because Plaintiffs contend that Defendants have violated the APA and that this unlawful agency action has injured Plaintiffs by depriving them of their right to pursue an appeal before the IBIA.

41. Plaintiffs desire a judicial determination that Plaintiffs have standing to pursue their appeal of the BIA Decision on the merits before the IBIA.

42. Such a declaration is necessary and appropriate at this time so that the parties may ascertain their rights and duties with respect to each other.

43. Plaintiffs have been greatly and irreparably harmed by Defendants' violations of the APA, alleged herein, and unless Defendants are enjoined by this Court from taking the Property into trust pending consideration of Plaintiffs' appeal of the BIA Decision on the merits, Defendants will continue to violate Plaintiffs' rights and will cause Plaintiffs further irreparable harm.

44. As a result of the wrongful conduct of Defendants alleged herein, Plaintiffs are entitled to a preliminary and permanent injunction to prevent great and irreparable injury resulting from the violation of their rights, from the likelihood that Defendants will be unable to respond in damages, and from the difficulty or impossibility of ascertaining the exact amount of injury and property damage Plaintiffs have, and will in the future, sustain. These ongoing and continuing injuries sustained by Plaintiffs cannot be fully compensated in damages, and Plaintiffs are without an adequate remedy at law. Imposition of the requested equitable injunctive relief is therefore warranted.

PRAYER FOR RELIEF

THEREFORE, Plaintiffs pray for judgment against the Defendants as follows:

1. That this Court determine and adjudicate the rights and liabilities of the parties and declare that the IBIA Order, finding that Plaintiffs do not have standing to appeal the BIA Decision, should be reversed because it is:
   A. arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
   B. contrary to constitutional right, power, privilege, or immunity;
   C. in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
   D. without observance of procedure required by law; and
   E. unsupported by substantial evidence on the record;
2. That this Court preliminarily and permanently enjoin the Defendants and their successors in office from enforcing the January 14, 2005 decision of the Pacific Regional Director, Bureau of Indian Affairs, thus not allowing the Property to be taken into trust, pending consideration of the merits of Plaintiffs' appeal of the BIA Decision;

3. That Plaintiffs be awarded their costs and attorneys' fees incurred in connection with the institution and prosecution of this action as this Court may deem just and proper; and

4. That Plaintiffs be awarded such other relief as this Court may deem just and proper.

DATED: March 10, 2006

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August 19, 2010

VIA OVERNIGHT MAIL

Dale Risling
Acting Regional Director
Bureau of Indian Affairs
Pacific Regional Office
2800 Cottage Way
Sacramento, California 95825

Re: *Preservation of Los Olivos, et al., v. Pacific Regional Director, Bureau of Indian Affairs*, Docket No. IBIA 05-050-1

Dear Acting Regional Director:

We submit this letter brief on behalf of the Preservation of Los Olivos and Preservation of Santa Ynez (collectively "POLO") in response to the July 23, 2010 letter from the Pacific Regional Office of the Bureau of Indian Affairs ("Regional Director" or "BIA") inviting submission of documentation, information and briefs regarding the issues on remand in the above-entitled case. Enclosed herewith please also find an Appendix of documents to which POLO refers in this letter and which it respectfully requests the Regional Director to include in the administrative record.

I. INTRODUCTION

In February 2009 the United States Supreme Court decided the landmark case of *Carcieri v. Salazar*, (2009) 129 S.Ct. 1058, which, in terms as clear and unambiguous as the underlying statute itself, holds that the BIA may take land into trust under the Indian Reorganization Act ("IRA") *only* for Indian Tribes that were recognized by the federal government and under federal jurisdiction in June 1934, the effective date of the IRA. *Carcieri* reversed decades of erroneous administrative practice in which the BIA had taken untold acreage into trust and placed it beyond state and local jurisdiction on behalf of groups of Indians that were neither federally recognized nor under federal jurisdiction at the time the IRA was enacted in 1934.

When *Carcieri* came down, the Regional Director's ruling in this case (which recommended that 6.9 acres of land in Santa Ynez, California be placed into trust for the Santa Ynez Band of Mission Indians ("Santa Ynez Band")) was on appeal. Now, the case is again before the Regional Director to consider and apply the principles of *Carcieri*. As demonstrated below and by the historical records contained in the

Appendix, the Santa Ynez Band does not remotely qualify as a Tribe that was federally recognized and under federal jurisdiction as required by the Supreme Court. At best, the Band constituted a small collection of individuals of mixed heritage who occupied their land as citizens of the State of California. In 1934 the Band was not an independent political unit. It had no government. Indeed, the Band did not organize into such a political entity until thirty years later, in 1964. Nor was the Band federally recognized as an Indian Tribe in June 1934 and the unambiguous historical record clearly demonstrates that for decades before and after the enactment of IRA, the Indians which now constitute the Santa Ynez Band were governed by state law, like all other private citizens. Accordingly, under the dispositive authority of *Carcieri* the Regional Director's ruling must be vacated and the Santa Ynez Band's application to place the subject 6.9 acres into federal trust denied.

2009 brought a second United States Supreme Court decision that weighs heavily against the fee-to-trust application in this case. *Hawaii v. Office of Hawaiian Affairs*, (2009) 129 S.Ct. 1436. In *Office of Hawaiian Affairs*, the Court reversed a decision of the Hawaii Supreme Court that had placed a cloud on title to land that had been ceded to the State of Hawaii by the federal government upon statehood. The cloud was predicated on the interpretation of a post-statehood Congressional resolution which purportedly granted Native Hawaiians claims to their aboriginal land. The U.S. Supreme Court first disposed of the arguments on behalf of the Native Hawaiians' claims on the basis of conventional principles of statutory construction.

The Supreme Court then took the extraordinary additional step to state that even if Congress had intended the resolution to impair the state's title by granting to Native Hawaiians additional claimed rights in land; such grant would raise serious constitutional concerns arising from altering the State of Hawaii's sovereign rights granted by Congress on the Hawaiian's admission into statehood. Thus, *Office of Hawaiian Affairs* forecasts the Court's concern that the BIA's fee-to-trust practices pose a serious threat to the structural form of dual government guaranteed by the United States Constitution. In short, the Constitution neither authorizes nor permits the BIA to place land beyond state and local regulation by taking it into federal trust.

II. ARGUMENT

A. The BIA's Assertion That the Federal Government Recognized the Band Since 1891 Is Legally and Factually Flawed.

In a letter dated March 28, 2007, Carl Artman, the Assistant Secretary of the Department of Interior, Indian Affairs stated the BIA's official position as to when and how the federal government recognized the Santa Ynez Band:

> The Santa Ynez Band of Chumash Indians was included on the first list of Indian Tribal Entities published in the Federal Register. See 44 Fed. Reg. 7,235-7,236 (February

> 6, 1979). The reservation for the Santa Ynez Band of Chumash Indians was established December 27, 1901 pursuant to the Act of 1891 (26 Stat. 71-714, c.65) and the Band has had a bilateral political relationship with the federal government since at least the Act of 1891. (Appendix ("App.") Tab 1.)

Assistant Secretary Artman is correct that the Santa Ynez Band was included in the first list of Indian Tribes published in the Federal Register but that occurred in 1979 and has no relevance to whether the Band was a federally recognized Indian Tribe or was under federal jurisdiction in June 1934 when the IRA was enacted. However, Mr. Artman is wrong when he states that a *federal* Indian reservation was established for the Band in 1901 or that the Band has had a *bilateral political relationship* with the federal government since at least the Act of 1891 (the Mission Indian Relief Act.)

Indeed, the federal commission charged with investigating and reporting pursuant to the Act specifically recommended that the land occupied by the few families in Santa Ynez *not* be established as a federal reservation. Furthermore, the official position of both the BIA and the Santa Ynez Band itself is that the federal Santa Ynez reservation was established no earlier than 1941, seven years after the IRA was enacted. Nor is there any evidence whatsoever that the Santa Ynez Band was a political body capable of engaging in a bilateral political relationship with the federal government until 1964 when the BIA accepted the Band's initial Articles of Organization.[1]

1. The Santa Ynez Reservation Was Not Established As A Federal Reservation Until At Least 1941—Not 1901.

Contrary to the Mr. Artman's letter, the Santa Ynez reservation was not established as a federal reservation in 1901 pursuant to the Mission Indian Relief Act of 1891. That event—the establishment of a federal Santa Ynez reservation—did not occur until seventy three years after the foregoing Act and thirty years after the operative Indian Reorganization Act of 1934.

The stated purpose of the Mission Indian Relief Act was to establish *temporary* reservations for certain Indians residing in California. 26 Stat. 71-714, c.65. (App. Tab 3.) The Act was never intended to establish permanent federal reservations for any Indian group or tribe. Indeed, the Mission Indian Relief Act was not a tribal building

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[1] Assistant Secretary Artman's characterization of the Band as the Santa Ynez Band of *Chumash* Indians is also suspect. As late as 1933, the Superintendent of the Mission Indian Agency, John Dady, characterized the few scattered residents of the Santa Ynez area as "all of Shosonean origin with an admixture of Spanish." (App. Tab 18.) Even the Band's own initial Articles of Organization refers to itself as the Santa Ynez Band of *Mission* Indians. (App., Tab. 6.) The Band did not change its name to *Chumash* until subsequent amendments of its Articles, all in an apparent attempt to draw its origins to the historical aboriginal Chumash linguistic group that inhabited the Santa Ynez Valley prior to first contact.

statute at all. Nor was the Act a statute intended to establish new federally recognized tribes.[2] Rather, the Mission Indian Relief Act was a statute designed to allot land to Indians as individual private citizens. Moreover, the legislative history of the Act enumerates the specific California Mission Indian reservations and villages that the Act was intended to benefit *and Santa Ynez Village is not listed. See*, Congressional Record, Proceedings and Debates, Fifty-first Congress, Second Session, at 306-307 (App. Tab 4.)

The Mission Indian Relief Act authorized the formation of a commission to investigate conditions of the Mission Indians and issue a report recommending the feasibility for establishing temporary federal reservations which eventually would be broken up and allotted to the individual Indian occupants. The Mission Indian, or Smiley, Commission was expeditiously formed and undertook its chartered tasks.

On December 29, 1891 the Commission issued its Smiley Commission Report and Executive Order. (App. Tab 5.) Notwithstanding that the Santa Ynez Village had not been one of the reservations or villages enumerated in the Senate Debate of the Act, the Commission nonetheless investigated and reported on the Santa Ynez Village. (*Id.* at pg. 26.) The Report, which, as required, was approved and adopted by the Interior Secretary and President, is telling with respect to Santa Ynez. The area, characterized as an Indian village, was composed of about fifteen families. The families lived on land that was owned by the Catholic Church and as demonstrated by other land records, the Santa Ynez Land and Improvement Company ("Santa Ynez Land"). The Report further states that any claim to title by the fifteen or so foregoing families was questionable. Nonetheless, according to the Smiley Commission Report, the title holders had no intention to remove the families and, indeed, wished to provide for their continued occupancy, through a variety of alternative means including transferring title to the federal government. In conclusion, the report states that the Commission *does not have power* to set aside any lands for these families but does suggest that the special attorney for the Mission Indians take steps to receive the land that the title holders offered. Significantly, the Smiley Commission did not recommend that any land be taken into a federal reservation for the Santa Ynez families. This is in stark comparison to several other Indian settlements in which the Smiley Commission Report firmly recommends that a federal reservation be set aside.

Thereafter, the Catholic Church commenced litigation in the Santa Barbara Superior Court and obtained a judgment to settle its title. (App. Tabs 10, 11 & 12.) Later, the Church and Santa Ynez Land, respectively, entered into agreements to transfer title to the United States for the benefit of the Santa Ynez Band. (App. Tabs 13

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[2] The Mission Indian Act was passed by Congress during the era of Indian allotments and assimilation. *See*, Dawes Act of 1887, 24 Stat. 388. c 119. The purpose of the Dawes Act, and other Acts passed during this era such as the Mission Indian Relief Act, was to dissolve Indian tribes while granting allotments of land to individual Indians and assimilating the Indians into mainstream America. Assistant Secretary Artman's reliance on the Mission Indian Relief Act as the basis for establishing a permanent federal reservation for, or a bilateral political relationship with, the Santa Ynez Band stands the Act on its head.

& 14.) The judgment and the indentures executed pursuant to the foregoing agreements reserved certain water and other rights in the grantors and provided that the land shall revert to the grantors once all the descendents of the Band died (Catholic Church Agreement) or the original five Santa Ynez families ceased occupying the premises (Santa Ynez Land Agreement). (App. Tabs 13, 14 & 15.) All of the above is clearly spelled out in a Solicitor's Opinion dated October 14, 1940. (App. Tab 9.)

The fact that the judgment, agreements and indentures contained restrictions (including reversionary interests in the Church and Santa Ynez Land) prevented the United States from accepting title to the land. *See*, Solicitor's Opinion. (App. Tab 9.) Furthermore, such restrictions were not eliminated until at least 1938 following the recordation of a final set of quitclaim deeds by the Church and successors of Santa Ynez Land. (App. Tabs 16 & 17.) All of this means that *the federal government did not own the land* and could not possibly have established a federal reservation for the Santa Ynez Band until title was cleared and the conveyances accepted by the federal government. Those events did not occur until sometime after 1940.

Among the parties in interest in this appeal, the foregoing summary of events is not particularly controversial. For example:

- The face page of the aforementioned Solicitor's Opinion states that the opinion relates to the "*proposed* Santa Ynez Indian Reservation." Of course, the Deputy Solicitor would not refer to a federal reservation as "proposed" if it already existed. The Solicitor's Opinion also undercuts Assistant Secretary Artman's representation as to the authority for creating the reservation. At page 1, the Opinion states that the land is being taken for the (proposed) establishment of a federal reservation under the Act of February 14, 1931, not the Mission Indian Relief Act of 1891, as Mr. Artman's 2007 letter states. *Cf.* App., Tab 9 at pg. 1 with Tab 1 at pg. 1.

- In a November 7, 1941 letter to the Commissioner of Indian Affairs in Washington D.C., Mission Indian Agency Superintendent John Dady urges the Commissioner to "expedite as rapidly as possible" approval of these conveyancing papers in order to establish the reservation. (App. Tab 21.)

- In a document entitled "Title Statement," the BIA states that the Santa Ynez reservation was established on December 18, 1941. (App. Tab 22, final page.)

- Similarly, in another 5.8 acre fee to trust application, the Santa Ynez Band itself freely acknowledges that its reservation was not established until late 1941:

> It was not until December 18, 1941 that the area, approximately 100 acres of land; was officially acquired by

> the U.S. Government to be held in trust for use as the Santa Ynez Reservation."[3] (App. Tab 8 at 7 of 19.)

Therefore, the current contention of the Department of Interior and specifically the BIA that a federal Indian reservation was established for the Santa Ynez Band in 1901 pursuant to the Mission Indian Relief Act is simply wrong. Even if the Act were intended as a statutory means to recognize new Indian tribes (which it was not) and even if the Act specifically covered the Santa Ynez Band (which is questionable in light of the legislative history that omits Santa Ynez as one of the targeted reservations or villages) the historical evidence is overwhelming that a federal reservation was not created for the Santa Ynez Band until at least December 1941, well after the June 1934 enactment of the Indian Reorganization Act.

The delayed creation of the federal reservation is important for several reasons including, without limitation, that the Band continued to occupy land owned by the Catholic Church and successions of Santa Ynez Land and remained under the jurisdiction of the State of California as California citizens until late 1941.

2. In 1934 the Santa Ynez Band Was Not a Federally Recognized Tribe And Did Not Become One Until Thirty Years Later.

Federal recognition of an Indian tribe is a formal act that requires the group seeking such recognition to be a distinct political entity and upon such recognition a government-to-government relationship between the United States of America and the tribe is created.

> Federal acknowledgment or recognition of an Indian group's legal status as a tribe is a formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government. State authority over recognized tribes is concomitantly limited. Cohen's *Handbook of Federal Indian Law* (2005 Edition) § 3.02[3].

Therefore, at least three elements must be present in order for a group to become a federally recognized Indian Tribe. First, the group seeking such recognition must constitute a *distinct political society*. Second, the federal government must take such legal and political steps necessary to establish a *government-to-government*

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[3] The Santa Ynez Band withdrew its 5.8 acre application, but such withdrawal does not diminish the Band's admission that its federal reservation was not formed until late 1941 several years after the IRA had been enacted.

relationship with the group.[4] Third, upon such recognition federal jurisdiction primarily applies to the Tribe while state jurisdiction is accordingly limited. The overwhelming historical evidence in this case demonstrates that the Santa Ynez Band was not a federally recognized Indian Tribe until at least February 1964 when the Secretary of the Interior accepted the Santa Ynez Band of Mission Indians' initial Articles of Organization.

As early as December 1891, the Smiley Commission described the Santa Ynez Indians in the following terms:

> Within the limits of the College Grant, in Santa Barbara County, in the Canada de la Cota, is an Indian village composed of the some fifteen families. These date their possession of the lands they occupy from about 1935, they removed to this place immediately after the Secularization Act, which emancipated them from the control of the Padres. (App. Tab 5 at pg. 26.)

There is no discussion or reference in the Smiley Commission Report that the families occupying the Canada de Cota had developed any sense of a distinct political society. There was no discussion or reference to civic leadership or any sense of governance at all. The report simply describes the inhabitants as some fifteen families. Moreover, the Commission Report notes that the families were not even indigenous to the area, having "removed to this place" following the Secularization Act, which was legislation that liberated Indians from the Catholic Church during Mexican rule over California. Indeed, this report does not even mention that these families, which we know from the report came from somewhere else, had any common ancestry, custom, governance—any of the indicia of a distinct political society. They were, as the report notes, simply "some fifteen families."

The foregoing observations of the Smiley Commission Report are confirmed generally by experts from the California Governor's Office who acknowledge that to the extent there ever were distinct politically independent villages in the Santa Ynez Valley, they were wholly "subsumed within the Spanish political system" by the Missions. (App. Tab 23, at pg. 5.)

The next significant piece of historical evidence on the subject is the November 27, 1933 letter from Mission Indian Agency Superintendent John W. Dady to the Honorable Henry E. Stubbs, United States Congressman for California's 10th

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[4] Carl Artman's March 28, 2007 letter to Jim Marino implicitly acknowledges that in order to establish a federally recognized Indian tribe, the group seeking such recognition must be a distinct political society with which the United States creates a government-to-government relationship: "the Band has had a *bilateral political relationship with the federal government* since at least the Act of 1891." Mr. Artman was correct in stating two of the three the necessary criteria for federal recognition of a tribe; he was wrong, however, in stating that the Santa Ynez Band met those criteria in 1891.

Congressional District. (App. Tab 19.) Superintendent Dady's characterization of the Indian inhabitants of Santa Ynez, coming as it does less than six months before the enactment of the IRA, is particularly informative:

> These Indians (of Santa Ynez) are all of Shoshonean origin, with an admixture of Spanish. The truth of the matter is, they resent being classed as Indians. A former parish priest stated that there were but few of this tribe he called genuine Indians, the others being mixed bloods who do not call themselves Indians, nor do they desire to be so called. Many of them live away from the reservation, and in fact have lost their identity as Indians. Children of these Indians are entered in schools as "Spanish." (App. Tab 19.)

Suffice it to say that what Superintendent Dady describes above is not a distinct society of any nature, let alone such a distinct political entity as to which the United States of America would, or even in major part has lost its identity and could, create a government-to-government relationship. Dady describes a group that resists being classified as a distinct Indian society, let alone one that is politically organized and active.

The Santa Ynez Band itself does not even adopt Assistant Secretary Artman's assertion that the Band was a federally recognized Indian Tribe as early as 1891. In fact, the Santa Ynez Band readily concedes that it did not even begin to establish political identity until many years after (and as a result of) the IRA. Specifically, in its fee-to-trust application in the present case, the Band states as follows:

> The Santa Ynez Band of Mission Indians is recognized as an American Indian Tribe by the Secretary of the Interior. *The Tribe in (sic) organized under the Articles of Organization which were adopted by the membership on November 17, 1963. The Articles of Organization were approved by the Secretary of the Interior on August 23, 1963.*[5] (App. Tab 7, at pg 3, emphasis added.)

Further, the Band's 5.8 acre fee to trust application correctly pinpoints exactly when the band became a distinct political entity—which was *after* enactment of IRA in 1934:

> The Santa Ynez Band reorganized their government under the IRA and *began both developing its governmental*

[5] The date of federal approval of the Articles of Organization that POLO obtained by an FOIA request is February 7, 1964. (App. Tab 6.) The discrepancy between the date cited by the Santa Ynez Band and the date on the copy produced pursuant to the FOIA request is immaterial.

> *functions and structures* . . ." (App. Tab 8, at pg. 8 of 19, emphasis added.)

How could the Band have enjoyed a "bilateral political relationship with the federal government since at least the Act of 1891" when by the Band's own admission it did not organize its government or *begin* to develop its governmental functions or structures until after IRA had been enacted in 1934? The answer is self-evident: the Band correctly describes the Interior Secretary's approval of the Band's Articles of Organization as the seminal event before which the Band had not yet established a distinct political society and, thus, could not have not achieved federal recognition. Assertions to the contrary by Mr. Artman; that federal recognition dates back to 1891, are simply mistaken.

3. The Inhabitants of the Canada de Cota Were Under State—Not Federal—Jurisdiction at The Time The IRA Was Enacted.

The third and final element under *Carcieri* to establish the right ot place land in federal trust is that a federally recognized tribe must be "under federal jurisdiction" at the time IRA was enacted in June 1934. This element is consistent with Cohen's *Handbook of Indian Law* definition, *supra*, that upon federal recognition, the federal government assumes jurisdiction over the tribe on a government-to-government basis and "state authority over the tribe is concomitantly limited."

In the present case, the evidence is overwhelming that at the time the IRA was enacted, the Santa Ynez Indians were under state and local jurisdiction and not federal jurisdiction. As we have already seen, at all relevant times up to December 1941 the lands on which the Indians of the Santa Ynez Band resided were owned by the Catholic Church or successions of Santa Ynez land and subject to state and local jurisdiction. Superintendent Dady correctly observed in November 1933 that while the Santa Ynez Reservation is a reservation, "the land is not in the United States." Moreover, "[a]ll the (Santa Ynez) Indians are citizens of the United States, and the same laws govern them as any other citizen." (App. Tab 19.) Dady did not distinguish when he said "all laws;" he meant all *state, local* and federal laws that govern all other citizens. Of course, such an observation is wholly consistent with the fact that there is not a scintilla of evidence that the Indians who comprised the Santa Ynez Band fell outside the jurisdictions of the State of California or the County of Santa Barbara in June 1934.

Such status is also consistent with the Catholic Church suing to quiet title in the Santa Barbara Superior Court—not the federal district court. In short, not until 1964 did the Santa Ynez Band or the land it occupies fall under federal jurisdiction pursuant to federal tribal recognition.

4. Other Evidence That Undercuts the Santa Ynez Band of Mission Indian's Claim It Is A Federally Recognized Tribe of Chumash Indians

We wish to raise the following additional evidence with respect to the status and federal recognition of the Santa Ynez Band of Mission Indians as Chumash. As we noted earlier, Superintendent Dady's letter to Congressman Stubbs dispels any notion that the Indian occupants of Canada de Cota in 1934 were descendent of the original Chumash residents of the Santa Ynez Valley, a moniker that the Band adopted only recently by amending its Articles of Organization.[6] Dady refers to the inhabitants of Canada de Cota in 1933 as "Shosonean with an admixture of Spanish." Further, Dady's letter is consistent with the earlier Smiley Commission report which observes that the fifteen or so families that resided at Canada de Cota "removed to that area (from somewhere else) at the time of Secularization Act passed by the Mexican government in the mid-19th Century. (App. Tab 5.) While it is difficult and confusing to track descendancy disposition of the families that inhabited the area in the late 19th Century, Brenda Tomares, the Santa Ynez Band's lawyer speaking for the Band and the BIA, stated in a May 2002 letter to the federal Bureau of Land Management that there no longer existed any lineal descendents of the original five families of the land deeded by Santa Ynez Land to the federal government. (App. Tab 18, at pg 2.)

So, what we know for sure is that the administrative record in this case contains no evidence that the current occupants of the Santa Ynez reservation are direct descendents of the Chumash linguistic group that inhabited the Santa Ynez Valley before first contact. Indeed, since Assistant Secretary Artman asserts federal recognition as a result of the Mission Indian Relief Act and since the Smiley Commission, reporting pursuant to that Act, states that the residents of the Santa Ynez Village "removed" to the Canada de Cota from somewhere else, we may presume that they were immigrants from another region. Nor, according to Tomares, are the current inhabitants descendent of the original five families for whom Santa Ynez Land executed its deed of conveyance.

Furthermore, the records that we do have indicate that at the time the IRA was enacted in 1934 the Indian Census Rolls for Santa Ynez were manipulated in order to make it appear that the occupants of the land were "more Indian" than they had previously represented. Tabs 24 through 27 of the Appendix contain the Annual Indian Census Rolls for Santa Ynez from 1932 through 1934 and 1940. The 1932 Census Roll shows, for example Florencia Armenta as ¼ degree Indian blood. (App. Tab 24.) On the 1933 Roll, the same Florencia Armenta is listed as ½ degree Indian blood. (App. Tab 25.) By the 1934 Roll, someone has crossed out ½ for Florencia and insert a handwritten

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[6] This revisionist characterization of the Band as "Chumash" is important because one of the applicant's stated needs for fee-to-trust status is to preserve the ancient Chumash human remains and artifacts discovered on the 6.9 acre site. If the Santa Ynez Band are not descendent of the ancient Chumash, then they have to special interest or status as safe keepers of these antiquities beyond that held by other non-Chumash residents of the Santa Ynez Valley who are proud of the Valley's rich history.

"F" indicating full Indian. (App. Tab 26.) And, the full Indian designation continues for Florencia on each succeeding annual census roll thereafter. (e.g. App. Tab. 27.) The foregoing mysterious discrepancies appear during the same time-frame for several of the other individuals on the Santa Ynez census rolls.

B. Taking The Band's Land Into Federal Trust And Placing It Beyond State And Local Regulation Raises Serious Constitutional Concerns.

1. Constitutional Concerns in General.

Land taken into trust according to current regulation and case law becomes "Indian country" which is not subject to state and local taxation. Nevertheless, the local government is still required to provide services to the trust land as a result of activity on that land and as it affects the surrounding community. Additionally, federal regulations also attempt to exempt trust land from state and local land use regulation.[7] In addition to lost revenue and diminished control over land use, the state's civil and criminal jurisdiction may be significantly compromised where tribal land or members are involved.[8] Finally, the Santa Ynez Band and many other tribes conduct gaming on trust land under IGRA, an activity that creates several other significant local impacts.[9]

There are over 562 federally-recognized Indian tribes.[10] Several tribal acknowledgment petitions are pending at the BIA.[11] The number of tribes seeking to secure trust land, as here, for whatever purpose makes the issue of creating new Indian reservations and adding trust lands to existing reservations a growing and highly-controversial issue. In fact, as recently as March, 2009, the United States Supreme Court weighed in on this issue. In *Hawaii v. Office of Hawaiian Affairs*, 129 S.Ct. 1436 (2009), the Supreme Court reviewed a Congressional Act which purported to strip the State of Hawaii of its authority to alienate its sovereign territory by passing a joint resolution to apologize for the role the United States played in overthrowing the Hawaiian Monarchy in the late nineteenth century. Relying on the Congress' joint resolution, the Supreme Court of Hawaii permanently enjoined the State from alienating certain lands pending resolution of native Hawaiian land claims that the Hawaii court described as not relinquished. *Id.* The United States Supreme Court in reversing the State Supreme Court indicated this resolution would raise grave constitutional concerns if it purported to cloud Hawaii's title to its sovereign lands more than three decades after the State's admission to

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7 25 C.F.R. § 1.4 (2003).

8 *Compare U.S. v. Stands*, 105 F.3d. 1565 (8th Cir. 1997) *with U.S. v. Roberts*, 185 F.3d 1125, 1131-32 (10th Cir. 1999)

9 25 C.F.R. § 2703(4).

10 Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs; Notice, 73 F.R. 18,553 (2008).

11 Department of Interior, Bureau of Indian Affairs Report, *Status Summary of Acknowledgement Cases* (September 22, 2008), <www.doi.gov/bia/docs/ofa/admin_docs/Status_Summary_092208.pdf>.

the union. The Court went onto state that "we have emphasized that Congress cannot, after statehood, receive or convey submerged lands that have already been bestowed upon a state." *Id* The fact the Court invoked this fundamental interpretation of the structure of the Constitution indicates the seriousness of the constitutional question presented by the federal government asserting that land can be withdrawn from state jurisdiction and somehow converted back later into federal territorial land subject to the Property Clause, Art. IV, Sec. 3, Cl. 2. As the Supreme Court unanimously concluded in *office of Hawaii affairs*, once Congress has disposed of territorial land and created the new state, its exclusive power over that land ceases. To conclude otherwise would allow the Congress to potentially remove any land from state jurisdiction, effectively cancelling the creation of the state. This, of course, poses a direct threat to our federal form of government guaranteed under the United States Constitution.

It should also be noted that the title to the land currently occupied by the Santa Ynez Band was conveyed by patent of the United States government to the Catholic Church to be used as a religious seminary in 1861 and thereafter, in 1880 Congress passed an Act authorizing the Church to sell the land without regard to the religious purpose set forth in the initial patent. (App. Tab 2.) The land, thus, fell within the exclusive jurisdiction of the State of California and County of Santa Barbara, until the transfer of title by the Catholic Church and successors of Santa Ynez Land was eventually accepted by the federal government in or after 1941. The imminent loss of the State's and County's jurisdiction over the parcels which are the subject matter of the Band's fee-to-trust application raises grave constitutional concerns.

2. The 10th Amendment to the United States Constitution Prohibits the Placement of Land Into Trust at the Expense of State Jurisdiction.

The Constitution created a federal government with only specifically enumerated powers.[12] This constitutional structure was then further limited by the adoption of the Bill of Rights which includes the Tenth Amendment. Under the Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.[13]

The powers delegated to the federal government and those reserved to the states are mutually exclusive.[14] Therefore, all federal statutes must be grounded upon a

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12 U.S. Const., art. I, § 8.

13 U.S. Cons., amend. X.

14 *See New York v. U.S.*, 505 U.S. 144 (1992)("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States....")

power enumerated in Article I of the Constitution.[15] If the Congressional act lacks Article I authority, then the federal government has invaded the province of the states' reserved powers.[16]

James Madison wrote during the process by which the various states ratified the Constitution, that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite."[17] The United States Supreme Court has also stated:

> Just as the separation and independence of the coordinate branches of the federal Government serves to prevent the accumulation of excessive power in any one branch, *a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.*[18]

It is axiomatic that Congress cannot unilaterally expand its authority, or the authority of any other branch of the federal government, with respect to the states. As the Supreme Court noted, "[s]tates are not mere political subdivisions of the United States....The Constitution instead leaves to the several States a residuary and inviolable sovereignty, reserved explicitly to the States by the Tenth Amendment."[19] Congress cannot infringe upon the rights retained by the states under the Tenth Amendment.

With the exception of the Enclave Clause discussed below, the federal government lacks any Constitutional authority to impinge upon state sovereignty by removing land from a state's jurisdiction. The removal of state jurisdiction which would result from placement of these parcels into trust would therefore be a violation of the Tenth Amendment, which limits the powers of the federal government to those specifically enumerated in the Constitution. Consequently, 25 U.S.C. § 465, to the extent

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15 *Id.* at 155.

16 *Id.*

17 THE FEDERALIST NO. 45, pp. 292 - 293 (J. Madison)(C. Rossiter, ed. 1961).

18 *U.S. v. Lopez*, 514 U.S. 549, 552 (1995), *quoting Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991)[emphasis added].

19 *New York*, 505 U.S. at 156-57 ("The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power. The benefits of this federal structure have been extensively cataloged elsewhere, but they need not concern us here. Our task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution. "The question is not what power the Federal Government ought to have but what powers in fact have been given by the people." [citations omitted.])

it results in a loss of state jurisdiction to tax and further results in a total loss of land use jurisdiction under 25 C.F.R. § 1.4, is unconstitutional.

3. Congressional Authority to Create a Federal Enclave is Limited and Does Not Allow for the Placement of Land Into Trust for the Benefit of a Tribe Under § 465 of the IRA.

The Constitution provides the federal government only limited ability to reduce the land under control of the states. Under the Enclave Clause[20], congressional power is limited to establishing a federal "enclave," land over which the federal government exercises "exclusive jurisdiction," to that needed for "the erection of forts, magazines, arsenals, dock-yards, and other needful buildings...."[21] Even then, the land cannot be taken into federal jurisdiction without first obtaining the affected State's consent.[22] No other provision of the Constitution provides the federal government the authority to take land from state jurisdiction.[23]

Various courts, including the Supreme Court, have described "Indian country" and Indian reservations as federal enclaves.[24] The creation of these enclaves requires the consent of the affected state. Our federal system was created upon the

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20 U.S. Const. art. I, § 8 ("To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings....)

21 *Id.*

22 *Id.*

23 *See also* U.S. Const. art. IV, § 3 (expressly prohibiting the "involuntary reduction" of the State's sovereign territory in the creation of the new state.)

24 *See U.S. v. Antelope*, 430 U.S. 641, 648 n.9 (1977); *U.S. v. Goodface*, 835 F.2d 1233, 1237, n. 5 (8th Cir. 1987)(stating that the phrase "'within the exclusive jurisdiction of the United States' in 18 U.S.C. 1153 refers to the law in force in federal enclaves, including Indian country."); *U.S. v. Marcyes*, 557 F.2d 1361, 1364 (9th Cir. 1997); *U.S. v. Sloan*, 939 F.2d 499, 501(7th Cir. 1991), *cert denied*, 502 U.S. 1060 (1992)(tax code imposes taxes upon U.S. citizens through the nation not just in federal enclaves "such as ... Indian reservations"). Notwithstanding this fact, the First Circuit rejected an argument that taking trust lands for Indian tribes violates the Enclave Clause. *Carcieri v. Kempthorne*, 497 F.3d 15, 40 (1st Cir. 2007), *rev. on other grounds*, *Carcieri v. Salazar*, 129 S.Ct. 1058 (2009). That Court found that the Enclave Clause is inapplicable because the taking of land into trust by the federal government for the benefit of an Indian tribe is not one of the Clauses's enumerated permissible actions. The court also dismissed the assertion that taking land into trust by the federal government is an Enclave Clause violation because there is some sharing of jurisdictional authority between state and federal governments. *Id.* citing *Surplus Trading Co. v. Cook*, 281 U.S. 647, 651 (1930)("[Th]e Supreme Court offered an Indian reservation as a "typical illustration" of federally owned land that is not a federal enclave because state civil and criminal laws may still have partial application thereon."). The First Circuit reliance on *Surplus Trading* is a gross error. That case was decided well before the Indian Reorganization Act of 1934, which created the notion of Indian trust lands, and presented other facts rendering the court's premises unsupportable. And, the fact that States retain some jurisdiction over some matters in "Indian country" does eliminate the protection that the Enclave Clause provides to the territorial integrity of the states.

premise of the dual state and federal sovereignty. The lack of Constitutional authority to reduce state jurisdiction reflects the founders' respect for the territorial jurisdiction and integrity of the states as a fundamental aspect of their sovereignty. As the annals of the Constitutional convention reflect, delegates proposed and eventually adopted the Enclave Clause in the interest of safeguarding our nation's then-unique system of federalism.[25] To this end, the Enclave Clause grants Congress the right of exclusive legislative power over federal enclaves as prophylactic against undue state interference with the affairs of the federal government.[26] Yet, ever sensitive to the risk of granting the federal government unchecked power, the founders limited and balanced this grant of power by requiring state consent to the federal acquisition of land for an enclave.[27] Yet, neither the IRA nor the BIA fee to trust regulations requires consent of the affected states as a condition of taking land into federal trust.

The federal government simply lacks Constitutional authority to take land from the states without the state's consent. Nor may the BIA use the Enclave Clause for a purpose beyond those purposes enumerated in the Clause itself where the land in question is placed beyond state and local jurisdiction.

4. The Indian Commerce Clause Does Not Allow for the Placement of this Land into Trust.

The Indian Commerce Clause[28] is often cited as the authority for Congressional actions with respect to Indian tribes.[29] Federal courts deciding Tenth Amendment challenges have often based their opinions on the false assumption that Article I provides Congress with plenary authority over all matters involving Indians, no matter how remote, indirect, or tenuous the facts of the case may be related to the notion of "commerce," which is the only Constitutional authority actually granted the federal government.[30] Although lower courts have interpreted the Indian Commerce Clause to

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25 *Commonwealth of Va. v. Reno*, 955 F.Supp. 571, 577 (E.D. Va. 1997) *vacated on other grounds*, *Commonwealth of Va. v. Reno*, 122 F.3d 1060 (4th Cir. 1997).

26 *Id.*

27 As James Madison noted, many delegates expressed concern that Congress' exclusive legislation over federal enclaves would provide it with the means to "enslave any particular state by buying up its territory, and that the strongholds proposed would be a means of awing the State into an undue obedience to the [national] government." James Madison, 2 Debates in the Federal Convention, 513 (quoting Elbridge Gerry of Massachusetts). Ultimately, the delegates' apprehension about excessive federal power was allayed by requiring the national government to obtain the states' express consent to acquire and employ state property for federal purposes. *Id.*

28 U.S. Const. art I, § 8, cl. 3. "The Congress shall have the power...to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

29 *See e.g. Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191-92 (1989); *Morton v. Mancari*, 417 U.S. 535, 551-552 (1974).

30 *See e.g.*, Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENVER UNI. L. REV. 201, 217 (2007)("Natelson")("When eighteen-century English speakers wished to describe interaction with the Indians of all kinds, they referred not to Indian commerce but to Indian 'affairs.'").

give Congress "plenary power...to deal with the special problems of Indians," the Supreme Court has limited this assertion of plenary power.[31]

That limitation is appropriate. The language of the Constitution does not support the assertion of plenary authority under the Indian Commerce Clause. That clause grants the federal government authority "to regulate commerce with...the Indian tribes."[32] In the legal and constitutional context, however, "commerce" means only mercantile trade.[33] The phrase "to regulate commerce" has long meant to administer the *lex mercatoria* (law merchant) governing purchase and sale of goods, navigation, marine insurance, commercial paper, money, and banking.[34] The common use of the phrase "to regulate commerce," and similar phrases, at the time of the Constitutional Convention "almost invariably meant 'trade with the Indians' and nothing more....It was generally understood that such phrases referred to legal structures by which lawmakers governed the conduct of the merchants engaged in the Indian trade, the nature of the goods they sold, the prices charged, and similar matters."[35]

The ability to distinguish a reference to "commercial activities" and references to all other activities was common in the vernacular of the time.

> "When eighteenth-century English speakers wished to describe interaction with the Indians of all kinds, they referred not to Indian commerce but to Indian 'affairs.'"[36]

Federal documents treated "affairs" as a much broader term than "trade" or "commerce."[37] An academic article studying of the Indian Commerce Clause states:

> A 1786 congressional committee report proposed reorganization of the Department of Indian Affairs....Their report showed the department's responsibilities as including military measures,

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31 *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 45 (1996).

32 U.S. Const. art I, § 8, cl. 3.

33 Natelson, *supra* n. 189, at 214.

34 *Id.* ("Thus, 'commerce' did not include manufacturing, agriculture, hunting, fishing, other land use, property ownership, religion, education, or domestic family life. This conclusion can be a surprise to no one who has read the representations of the Constitution's advocates during the ratification debates. They explicitly maintained that all of the latter activities would be outside the sphere of federal control.")

35 *Id.* At 215-16.

36 *Id.* at 216-17 ("Contemporaneous dictionaries show how different were the meanings of 'commerce' and 'affairs.' The first definition of 'commerce' in Francis Allen's 1765 dictionary was 'the exchange of commodities.' The first definition of "affair" was "[s]omething done or to be done." Samuel Johnson's dictionary defined "commerce" merely as "[e]xchange of one thing for another; trade; traffick.' It described 'affair' as '[b]usiness; something to be managed or transacted." The 1783 edition of Nathan Bailey's dictionary defined "commerce" as "trade or traffic; also converse, correspondence, but it defined 'affair' as 'business, concern, matter, thing.'")[citations omitted.]

37 *Id.*

> diplomacy, and other aspects of foreign relations, as well as trade. The congressional instructions to Superintendents of Indian Affairs...clearly distinguished 'commerce with the Indians' from other, sometimes overlapping, responsibilities. Another 1787 congressional committee report listed within the category of Indian affairs: 'making war and peace, purchasing certain tracts of their lands, fixing the boundaries between them and our people, and preventing the latter settling on lands left in possession of the former.'[38]

There is, therefore, no basis to argue that the language of the Constitution grants plenary authority over any matter that concerns Indian affairs. The text of that Constitutional provision provides only authority over Indian commerce.

The fact Congress' lack of authority over any Indian matters beyond those related to commerce, coupled with the lack of any authority to remove land from a state without the consent of the state, leads to the conclusion that § 465 of the IRA, especially combined with 25 C.F.R. § 1.4, is unconstitutional.

5. The Regional Director's Attempt to Place the Land at Issue into Trust is Unconstitutional in that it Violates Article IV, Section 3 of the United States Constitution by depriving the State and its Subdivisions of a Republican form of Government.

The Congress does have authority under the Property Clause over lands ceded by treaty or through war to the United States. This power has been interpreted as remaining in Congress until the lands are disposed of and placed under the jurisdiction of a state.[39] This authority to reserve federal public lands from application of state law at statehood has been consistently upheld. Indeed, *Office of Hawaiian Affairs*, *supra*, implicitly recognizes this authority for all lands not ceded to state jurisdiction following statehood. The lands of College de los Pinos[40] were not reserved once Congress transferred them to the Catholic Church and subsequently removed all restrictions on alienation.[41] This leads to the conclusion that Sec. 465 of the IRA, when combined with 25 C.F.R. Sec. 1.4, is unconstitutional. Because the Regional Director's decision rests solely on the Regional Director's exercise of unconstitutional authority, the Secretary cannot take the land into trust as requested by the tribe.

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38 *Id.* at 217-18.

39 *Winters v. U.S.*, 207 U.S. 564 (1908)

40 For the purposes of this presentation, College de los Pinos and Canada de Cota may me used interchangeably.

41 Appendix, Tab. 2.

6. The Acceptance of these Parcels into Trust Violates the Fourteenth Amendment of the United States Constitution.

Section 1 of the Fourteenth Amendment reads as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction of the equal protection of the laws.[42]

In analyzing the Fourteenth Amendment, the United States Supreme Court discussed the issue of a Republican form of government.

> The equality of the rights of citizens is a principle of Republicanism. Every Republican government is in duty bound to protect all of its citizens in the enjoyment of this principle, if within its powers. That duty was originally assumed by the states; and it still remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guarantees, but no more. The power of the National Government is limited to the enforcement of this guarantee.[43]

By taking these parcels into trust under 25 U.S.C. § 465 and removing all state and local jurisdiction via 25 C.F.R. 1.4, the United States is abridging the privileges and immunities of the citizens of the State of California and County of Santa Barbara. The citizens of the surrounding Santa Ynez and County of Santa Barbara have no ability to participate in governments over the trust parcels and may be subject to tribal jurisdiction for activities occurring on these parcels. The Fourteenth Amendment does not allow for such a result. Consequently, 25 U.S.C. § 465, to the extent it results in trust parcels being removed from all state and local jurisdiction, pursuant to 25 C.F.R. § 1.4, is unconstitutional because it results in the state and local governments being forced into violating the Fourteenth Amendment.

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42 Fourteenth Amendment of the United States Constitution

43 *U.S. v. Cruikshank*, 92 U.S. 542, 555 (1875).

III. CONCLUSION

For the reasons set forth above, the Regional Director should deny the pending fee to trust application of the Santa Ynez Band of Mission Indians.

Very truly yours,

John M. Rochefort
Partner

JMR:jmr
Enclosure

LEGAL02/32118974v1

CERTIFICATE OF MAILING

I Cynthia Ambriz certify and declare that I am over the age of 18 years, employed in the County of Los Angeles, State of California, and not a party to the IBIA Appeal, Preservation of Los Olivos, *et al.* v. Pacific Regional Director, Bureau of Indian Affairs, Docket No. IBIA 05-050-1.

On August 19, 2010 I served a copy of the attached letter brief from John M. Rochefort to Acting Regional Director Dale Risling and the Appendix to said letter by depositing them in the United States Mail, in a sealed envelope with postage thereon fully prepaid to the persons and at the addresses on the attached list.

Place of Mailing: 333 S. Hope Street, 16th Floor, Los Angeles, CA 90071.

Executed on August 19, 2010 at Los Angeles California.

I hereby certify that I am employed in the office of a member of the Bar of California and the Bar of the United States District Court for the Central District of California.

Cynthia Ambriz

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United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

TAKE PRIDE IN AMERICA

Memorandum

To: Regional Directors, Bureau of Indian Affairs
George Skibine, Office of Indian Gaming

From: Assistant Secretary Carl Artman

Date: January 3, 2008

Subject: Guidance on taking off-reservation land into trust for gaming purposes

The Department currently has pending 30 applications from Indian tribes to take off-reservation land into trust for gaming purposes as part of the 25 U.S.C. § 2719(b)(1)(A) two-part determination. Many of the applications involve land that is a considerable distance from the reservation of the applicant tribe; for example, one involves land that is 1400 miles from the tribe's reservation. Processing these applications is time-consuming and resource-intensive in an area that is constrained by a large backlog and limited human resources.

The decision whether to take land into trust, either on-reservation or off-reservation, is discretionary with the Secretary. Section 151.11 of 25 C.F.R. Part 151 sets forth the factors the Department will consider when exercising this discretionary authority with respect to "tribal requests for the acquisition of lands in trust status, when the land is located outside of and noncontiguous to the tribe's reservation." Section 151.11(b) contains two provisions of particular relevance to applications that involve land that is a considerable distance from the reservation. It states that, as the distance between the tribe's reservation and the land to be acquired increases, the Secretary shall give:

1) greater scrutiny to the tribe's justification of anticipated benefits from the acquisition; and

2) greater weight to concerns raised by state and local governments as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments.

Part 151, however, does not further elaborate on how or why the Department is to give "greater scrutiny" and "greater weight" to these factors as the distance increases. The purpose of this guidance is to clarify how those terms are to be interpreted and applied,

particularly when considering the taking of off-reservation land into trust status for gaming purposes.

Core Principles

As background to the specific guidance that follows, it is important to restate the core principles that underlie the Part 151 regulations and that should inform the Department's interpretation of, and decisions under, those regulations. The Part 151 regulations implement the trust land acquisition authority given to the Secretary by the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. § 465. The IRA was primarily intended to redress the effects of the discredited policy of allotment, which had sought to divide up the tribal land base among individual Indians and non-Indians, and to destroy tribal governments and tribal identity. To assist in restoring the tribal land base, the IRA gives the Secretary the authority to: 1) return "to tribal ownership the remaining surplus lands of any Indian reservation" that had been opened to sale or disposal under the public land laws; 2) consolidate Indian ownership of land holdings within reservations by acquiring and exchanging interests of both Indians and non-Indians; and 3) acquire, in his discretion, interests in lands "within or without existing reservations". The IRA contains also provisions strengthening tribal governments and facilitating their operation. The policy of the IRA, which was just the opposite of allotment, is to provide a tribal land base on which tribal communities, governed by tribal governments, could exist and flourish. Consistent with the policy, the Secretary has typically exercised discretion regarding trust land acquisition authority to take lands into trust that are within, or in close proximity to, existing reservations.

The IRA has nothing directly to do with Indian gaming. The Indian Gaming Regulatory Act of 1988 (IGRA), 25 U.S.C. § 2701 et seq., adopted more than 50 years after the IRA, sets the parameters of Indian gaming. One requirement is that if gaming is to occur on off-reservation lands those lands must be trust lands "over which an Indian tribe exercises governmental power." The authority to acquire trust lands, however, is derived from the IRA; no trust land acquisition authority is granted to the Secretary by IGRA. The Department has taken the position that although IGRA was intended to promote the economic development of tribes by facilitating Indian gaming operations, it was not intended to encourage the establishment of Indian gaming facilities far from existing reservations. Whether land should be taken into trust far from existing reservations for gaming purposes is a decision that must be made pursuant to the Secretary's IRA authority.

Implementation of Guidance

This guidance should be implemented as follows:

1. All pending applications or those received in the future should be initially reviewed in accordance with this guidance. The initial review should precede any effort (if it is not already underway) to comply with the NEPA requirements of section 151.10(h).

2. If the initial review reveals that the application fails to address, or does not adequately address, the issues identified in this guidance, the application should be denied and the tribe promptly informed. This denial does not preclude the tribe from applying for future off-reservation acquisitions for gaming or other purposes. However, those future applications will be subject to these same guidelines.

3. A greater scrutiny of the justification of the anticipated benefits and the giving greater weight to the local concerns must still be given to all off-reservation land into trust applications, as required in 25 C.F.R. § 151.11(b). This memorandum does not diminish that responsibility, but only provides guidance for those applications that exceed a daily commutable distance from the reservation.

Greater Scrutiny of Anticipated Benefits

The guidance in this section applies to all applications, pending or yet to be received, that involve requests to take land into trust that is off-reservation. Reviewers must, in accordance with the regulations at 25 C.F.R. 151.11(b), "give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition" as the distance between the acquisition and the tribe's reservation increases. The reviewer should apply this greater scrutiny as long as the requested acquisition is off-reservation regardless of the mileage between the tribe's reservation and proposed acquisition. If the proposed acquisition exceeds a commutable distance from the reservation the reviewer, at a minimum, should answer the questions listed below to help determine the benefits to the tribe. A commutable distance is considered to be the distance a reservation resident could reasonably commute on a regular basis to work at a tribal gaming facility located off-reservation.

As noted above, section 151.11(b) requires the Secretary to "give greater scrutiny to the tribe's justification of anticipated benefits from the acquisition" of trust land "as the distance between the tribe's reservation and the land to be acquired increases." The reason for this requirement is that, as a general principle, the farther the economic enterprise - in this case, a gaming facility - is from the reservation, the greater the potential for significant negative consequences on reservation life.

Tribes typically view off-reservation gaming facilities as providing two economic benefits to the tribe. The first is the income stream from the gaming facility, which can be used to fund tribal services, develop tribal infrastructure, and provide per capita payments to tribal members, and thus can have a positive effect on reservation life. Obviously, the income stream from a gaming facility is not likely to decrease as the distance from the reservation increases. In fact, off-reservation sites are often selected for gaming facilities because they provide better markets for gaming and potentially greater income streams than sites on or close to the reservation.

The second benefit of off-reservation gaming facilities is the opportunity for job training and employment of tribal members. With respect to this benefit, the location of the

gaming facility can have significant negative effects on reservation life that potentially worsen as the distance increases. If the gaming facility is not within a commutable distance of the reservation, tribal members who are residents of the reservation will either: a) not be able to take advantage of the job opportunities if they desire to remain on the reservation; or b) be forced to move away from the reservation to take advantage of the job opportunity.

In either case, the negative impacts on reservation life could be considerable. In the first case, the operation of the gaming facility would not directly improve the employment rate of tribal members living on the reservation. High on-reservation unemployment rates, with their attendant social ills, are already a serious problem on many reservations. A gaming operation on or close to the reservation allows the tribe to alleviate this situation by using their gaming facility as a conduit for job training and employment programs for tribal members. Provision of employment opportunities to reservation residents promotes a strong tribal government and tribal community. Employment of tribal members is an important benefit of tribal economic enterprises.

In the second case, the existence of the off-reservation facility would require or encourage reservation residents to leave the reservation for an extended period to take advantage of the job opportunities created by the tribal gaming facility. The departure of a significant number of reservation residents and their families could have serious and far-reaching implications for the remaining tribal community and its continuity as a community. While the financial benefits of the proposed gaming facility might create revenues for the applicant tribe and may mitigate some potential negative impacts, no application to take land into trust beyond a commutable distance from the reservation should be granted unless it carefully and comprehensively analyzes the potential negative impacts on reservation life and clearly demonstrates why these are outweighed by the financial benefits of tribal ownership in a distant gaming facility.

As stated above, some of the issues that need to be addressed in the application if the land is to be taken into trust is off-reservation and for economic development are:

What is the unemployment rate on the reservation? How will it be affected by the operation of the gaming facility?

How many tribal members (with their dependents) are likely to leave the reservation to seek employment at the gaming facility? How will their departure

As long as it remains the policy of the Federal government to support and encourage growth of reservations governed by tribal governments, these are important questions that must be addressed before decisions about off-reservation trust land acquisitions are made. The Department should not use its IRA authority to acquire land in trust in such a way as to defeat or hinder the purpose of the IRA. It should be noted that tribes are free to pursue a wide variety of off-reservation business enterprises and initiatives without the approval or supervision of the Department. It is only when the enterprises involve the taking of land into trust, as is required for off-reservation Indian gaming facilities, that the Department must exercise its IRA authority.

NOTE FEE TO TRUST IS NOT NEEDED IF GAMING IS NOT INTENT

Greater Weight

Section 151.11(b) also requires the Secretary to give "greater weight" than he might otherwise to the concerns of state and local governments. Under the regulations, state and local governments are to be immediately notified of a tribe's application to take land into trust, and are to file their comments in writing no later than 30 days after receiving notice. The reviewer must give a greater weight to the concerns of the state and local governments no matter what the distance is between the tribe's reservation and the proposed off-reservation acquisition. This is the second part of the two part review required by section 151.11(b).

NOTE

The regulations identify two sets of state and local concerns that need to be given "greater weight:" 1) jurisdictional problems and potential conflicts of land use; and 2) the removal of the land from the tax rolls. The reason for this requirement of giving "greater weight" is two-fold. First, the farther from the reservation the proposed trust acquisition is, the more the transfer of Indian jurisdiction to that parcel of land is likely to disrupt established governmental patterns. The Department has considerable experience with the problems posed by checkerboard patterns of jurisdiction. Distant local governments are less likely to have experience dealing with and accommodating tribal governments with their unique governmental and regulatory authorities. Second, the farther from the reservation the land acquisition is, the more difficult it will be for the tribal government to efficiently project and exercise its governmental and regulatory powers.

NOTE

With respect to jurisdictional issues, the application should include copies of any intergovernmental agreements negotiated between the tribe and the state and local governments, or an explanation as to why no such agreements exist. Failure to achieve such agreements should weigh heavily against the approval of the application.

With respect to land use issues, the application should include a comprehensive analysis as to whether the proposed gaming facility is compatible with the current zoning and land use requirements of the state and local governments, and with the uses being made of adjacent or contiguous land, and whether such uses would be negatively impacted by the traffic, noise, and development associated with or generated by the proposed gaming facility. Incompatible uses might consist of adjacent or contiguous land zoned or used for: National Parks, National Monuments, Federally designated conservation areas,

National Fish and Wildlife Refuges, day care centers, schools, churches, or residential developments. If the application does not contain such an analysis, it should be denied.

Conclusion

The Office of Indian Gaming will review the current applications. If an application is denied subsequent to this review, the applicant tribe will be notified immediately. Tribes receiving a denial subsequent to this review may resubmit the application with information that will satisfy the regulations. Regional directors shall use this clarification to guide their recommendations or determinations on future applications to take off-reservation land into trust.

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ARTICLE: Reservation and Quantification of Indian Groundwater Rights in California

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LEXISNEXIS SUMMARY:
... Because groundwater is hydraulically connected to surface water in the Upland Basin, it should not matter if the Tribe withdraws their legal water appropriation from the groundwater or from the Creek. ... Therefore, California courts should have no trouble extending Winters rights to groundwater in a situation such as that faced by the Chumash on the Santa Ynez Reservation. ... The Homeland Theory When the Ninth Circuit applied New Mexico to Indian reservations in Adaiar, it found that the two primary reasons to reserve water to tribes were "to provide a homeland for the Indians to maintain their agrarian society," and to preserve the "tribes' access to fishing grounds." ... Montana allows for water for secondary purposes to be factored into the quantification of water rights because "Indian reserved rights ... include water for future needs and changes in use."

HIGHLIGHT: Abstract

The legalization of tribal gaming has transformed reservations throughout the state of California and the nation. Gaming has meant not only more revenue for tribes, but also increased visitors and residents on tribal land. An inevitable result of this, especially in Southern California, is an increased demand for water at the same time that the water supply is stressed and depleted. This note will lay out arguments the Santa Ynez Chumash Band of Indians could use to secure a right to groundwater on their reservation in Santa Barbara County as their successful casino brings in more and more visitors at the same time that groundwater beneath their reservation is depleted by non-Indian users.

Indian water rights have been adjudicated in other western states, and the law around both groundwater and surface water rights is, if not established, at least existing. In contrast, Indian water rights have not had a major role in California to date. This note lays out the established federal reserved water rights doctrine as applied in other state courts and argues that tribal water rights should apply to both ground and surface water. The Santa Ynez Chumash are

used as a case study to demonstrate how this could be done in California in a way that both promotes tribal sovereignty, and brings California water law in touch with the hydraulic reality that ground and surface water should be considered a common, interconnected source of water. Should the Santa Ynez take on this battle, the result would become important precedent for other Californian tribes.

TEXT:
[*278]

I. Tribal History

Native Americans in California, like those in all of the United States, have had long and tortured battles over property rights. The property right to water is no exception. As of January 2013, there were 114 federally recognized tribes in California with control over approximately 990,000 acres of trust land. n1 Although much of this land is located in Northern California where there is an ample supply of water, tribes with reservations in Southern California will likely face legal battles as water supply becomes more limited and water quality is threatened. One of these tribes is the Santa Ynez Band of Chumash Indians, who occupy a small reservation in Santa Barbara County. n2 The Santa Ynez Reservation has about 140 acres of land and the 100 developable acres contain "residential housing, the tribal center, a health center, and a casino." n3

The Santa Ynez Band is the only federally recognized tribe of Chumash Indians, although "at one time, [their] territory encompassed 7,000 square miles that spanned from the beaches of Malibu to Paso Robles." n4 The current tribal Chairman notes that "the Chumash numbered over 25,000 [*279] people on the eve of the first Spanish land expedition in 1769" that resulted in the founding of the Catholic Mission Santa Ines in 1772. n5 After the missions were secularized in 1833, "the Chumash population in the Santa Ynez River area alone" had decreased from 1200 "to only 455 Indians." n6 The current tribal Chairman is a descendant of The Chumash of the Village of Kalawashaq, "who found refuge in the Zanja de Cota riverbed" after secularization "mostly because no one else wanted to live in that flood plain." n7 The recent discovery of a Chumash burial site and intact Chumash village on land directly adjacent to the current reservation supports the Chairman's testimony. n8 Although it is not clear if the Chumash lived at the precise site of their current reservation prior to secularization in 1833, current tribal members are descendants of those who lived in the Santa Ynez River area since time immemorial.

Both the Tribe's website and the Department of Commerce's 1974 publication of "Federal and State Indian Reservations" state that the Santa Ynez "Reservation was established on December 27, 1901, under authority of the act of 1891." n9 The act referred to was passed by Congress on January 12, 1891, and is "an act for the relief of the Mission Indians in the State of California." n10 This act established the Mission Indian Commission (known as the Smiley Commission) and gave the Commission the authority to select reservations for the Mission Indians in California. n11 Pursuant to this act, the [*280] Smiley Commission went to California to "make themselves as familiar with condition of the Indians and their reservations as possible." n12

The Smiley Commission visited the Santa Ynez Indians, and in their December 1891 report, described them as an "Indian village composed of some fifteen families." n13 The report notes that although the Santa Ynez Indians had occupied the land since about 1835, they did not hold legal title to the land. n14 However, the private land grant holders told the Commission that "these Indians shall never be disturbed in their occupancy and use of the lands on which they now live." n15 It further stated that the preference would be to "deed to the Secretary of the Interior, in trust for them, five acres of good land, to each family; pipe to it a sufficiency of water for agricultural and domestic purposes, and build for each family a comfortable two-room frame house." n16 The Smiley Commission itself did not have the authority to take the land in trust, but recommended that the federal government take the appropriate steps to do so as soon as possible. n17

What happened with the Santa Ynez land after 1891 is complicated and is currently in dispute. n18 In 1903, a

private land company deeded land to the Secretary of the Interior for the benefit of five Chumash families. n19 In 1906, a second federal report was issued on the conditions of the California [*281] Indians. n20 This report noted that although there was Congressional intent to set apart for Indians all lands occupied by them, the Santa Ynez was one of only two out of several hundred cases where this was done. n21 The remainder of land that is now a part of the Santa Ynez Reservation was likely granted to the federal government to hold in trust for the Tribe in 1937 by successors to the same private entity that deeded the original twenty-five acres in 1903. n22 Based on the documents reviewed in researching this Note, it is not clear when all the paperwork formally transferring title to the United States to hold in trust for the Santa Ynez was completed. n23 However, it is apparent throughout both the Smiley Commission and Kelsey reports that the federal government intended to reserve water rights for the Tribe when it acquired land for them in trust from private grantors. As will be described in the following section, reserving land without water in Southern California would be akin to signing a death warrant for the Tribe.

II. Importance of Water to Tribes in Southern California

Without water, a reservation of land in much of Southern California is worth very little, as "the Indian could do nothing but watch his trees die and his garden dry up, and be forced to abandon his holding." n24 As early as 1891, the federal government recognized that "in Southern California, water supply is an important matter." n25 In 1906, Special Agent Kelsey recognized the imperative nature of securing water rights for Indian tribes in Southern California. He noted that "land without water is worth very little" and recommended that in desert areas, the government buy enough lands with [*282] adequate water supply to give each family "five acres of good land with water." n26 In securing these property rights, Kelsey hoped to reduce the incidence of cases "where white men have deliberately diverted a stream of water from the Indian with full knowledge of the Indian's priority of right, but secure in the knowledge that the Indian was helpless, and that the offence could be committed with impunity." n27 The land that is now part of the Santa Ynez Reservation is riparian to the Zanja de Cota Creek, and overlays the Santa Ynez Upland Groundwater Basin. n28

When the Chumash first moved to the Zanja de Cota flood plain, they had essentially unlimited access to water flowing in the creek that meanders its way through the Reservation. Today, the Tribe relies primarily on water purchased from a local water agency. Unknown to the members of the Tribe at the time they established their village on the banks of the Zanja de Cota Creek, the water they relied on was derived from a shallow aquifer that underlies the Reservation. In an attempt to better understand the water resources present on their reservation, the Tribe hired a consultant to quantify the historic and current availability of ground and surface water. The following information comes primarily from the consultant's 2010 report to the Tribe and has not been independently verified.

A. Surface Water

The Zanja de Cota Creek ("Creek") flows through the Reservation and was the Tribe's original source of water. When the Reservation was first established, base flow in the Creek was likely about 1,000 acre-feet per year (ac-ft/yr). n29 Subsequently, the flows have fluctuated dramatically. The Creek was periodically dry every year for more than twenty years between 1968 and 1992, n30 and in 1969, the Tribe ceased using its water both because fecal coliform contamination was discovered, and because the volume of water [*283] available was so low. n31 Although flows in the Creek have increased since then (base flows in 2008 were about 537 ac-ft/yr), n32 the Creek remains an unreliable source of water because of continued threats to both its quality and quantity. Increased urbanization in the surrounding valley and climate change are future threats that have led the Tribe to consider another on-reservation source of water - that which is found underground.

B. Groundwater

The Santa Ynez Upland Groundwater Basin (Upland Basin) underlies the Santa Ynez Reservation. This shallow aquifer extends well beyond the boundaries of the Reservation and is several hundred feet thick. n33 Water is found in the interstitial pore space between sands and gravels that were deposited by ancient river systems. The plane beneath which all pore spaces are filled with water rather than air is called the groundwater table; and below the groundwater

table, water can be accessed through vertical wells that are drilled into the aquifer. These wells can be used to monitor how fast the groundwater moves, the quality and quantity of the water available, and also to pump the water out for use above ground. Groundwater in shallow aquifers is most often replenished or recharged by water on the surface of the Earth, either from rain, snow melt, rivers, or sometimes artificially by injecting water underground through the same type of vertical well as described above. In addition, groundwater can come to the surface naturally through springs if the groundwater table intersects the surface of the Earth. This occurs on the Santa Ynez Reservation.

The Upland Basin thins out as it nears the Reservation and discharges groundwater into the Creek. The Creek's base flow is in fact "sustained by discharge of groundwater" n34 and in the early 1900s "groundwater seepage created perennial base flow in the streams." n35 This situation is described as a "hydraulic connection' between the ground and surface water and means that changes to one source of water will affect the other. It also means that the water the Tribe used from the Creek from at least 1835 until 1969 originated from below ground and was, in fact, groundwater from the Upland Basin.

Increased groundwater withdrawals from the Upland Basin have resulted in less discharge to the Creek and subsequently less water flow. Although not described as such in the consultant's report, the local water agency that also withdraws water from the aquifer described the Upland [*284] Basin as overdrafted in a 2011 document. n36 This means that more groundwater is removed from the aquifer than is added through recharge. The Tribe maintains that "finding ways to treat and use the groundwater beneath the Reservation may become more important to the Tribe in the future" because of climate change and associated uncertainties in water supply. n37 Whatever the reason, the Tribe will be more autonomous if it can secure a recognized right to withdraw groundwater from beneath their reservation.

III. Users of Water on and under the Santa Ynez Reservation

When the Smiley Commission first visited the Chumash in California, there were fifteen families living on the Santa Ynez Reservation and it found that "for many years, few tribal members lived on the Reservation" because "it was difficult to live a modern existence on the Reservation without running water or electricity." n38 Up until 1969, "the tribe met all of its water needs for domestic and irrigation purposes by diversions from Zanja de Cota Creek," n39 after which the Tribe became a customer of a local water agency called Santa Ynez River Water Conservation District, Improvement District No. 1 (hereinafter referred to as "ID-1"). n40

Although the Tribe has had gaming operations on the Reservation since 1983, the Chumash Casino Resort opened in 2003 with "2,000 slot machines, a 106-room luxury hotel and an auditorium where Jay Leno, Fleetwood Mac and Whoopi Goldberg have performed." n41 Today there are 249 residents on the Reservation, "thanks to the revenue generated from the Tribe's Chumash Casino Resort." n42 Importantly, the Casino brings about 6,000 additional visitors to the Reservation per day. n43 To mitigate the increased water demand from visitor facilities, the Tribe constructed a [*285] wastewater treatment plant in conjunction with its new Casino Resort "that supplies recycled water for irrigation and toilet flushing." n44 However, even with these conservation methods, it is not surprising that "water use on the Reservation has increased dramatically in the past 10-20 years." n45

California groundwater law allows an overlying landowner to withdraw groundwater without obtaining a permit. n46 If the Tribe was the sole user of groundwater from the Upland Basin, it could start pumping water tomorrow with very little legal risk. However, as will be discussed in the following section, many other users have been pumping water from the aquifer for years. If the Tribe were to start withdrawing significant quantities of groundwater, other users would be impacted through a lowering of the groundwater table. The impacts may be noticed when nearby wells cease to produce water, or the production of water slows. As a result, it is likely that the Tribe would face a legal challenge from a number of parties should they decide to use groundwater to supply potable water needs on the Reservation from an already overdrafted aquifer.

A. Current Groundwater Use by the Santa Ynez Chumash

There are currently five groundwater wells on the Reservation, four of which are test wells (rather than production wells). n47 There is one production well located at the wastewater treatment plant from which the Tribe has recently pumped 12.6 ac-ft/yr. n48 Less than 1 ac-ft/yr is occasionally pumped from one of the test wells and together "these extractions amount to 0.1 percent of basin-wide groundwater use." n49 However, the Tribe's consultant found that "the combined production capacity of the four test wells on the Reservation could easily supply the 96 ac-ft/yr of water presently used on the Reservation for potable purposes." n50 Moreover, the consultants concluded that even if the wells operated only "50 percent of the time at their expected capacities, they could produce a total of 302 ac-ft/yr." n51 As the Casino Resort attracts more visitors and casino revenues attract more tribal members to the Reservation, water demand will continue to increase and it is likely that the Tribe will tap into this resource. Based on current [*286] extraction from the aquifer, 302 ac-ft/yr is 2.3 percent of basin-wide groundwater use. In a basin that is already stressed, other users such as ID-1 will be sure to notice this volume of extraction.

B. Water District

ID-1 was formed in 1959 and currently supplies water to 2,553 municipal and industrial customers, and to approximately 118 agricultural customers. n52 ID-1 gets 27 percent of its water from the Upland Basin, and states that the basin "has been in a known overdraft condition since 1968." n53 "In the meantime, the District mitigates the impact of that pumping by importing significant amounts of water into the basin, which results in reducing pumping both by the District and by overlying owners who are customers of the District and by increasing non-native return flows into the basin." n54

C. Private Landowners and City of Solvang

ID-1 and the Tribe are not the only users of groundwater from the Upland Basin. Overlaying the aquifer are numerous ranches, vineyards, and other agricultural users who have historically derived their water supply from groundwater. n55 Currently, about two-thirds of all withdrawals from the Upland Basin are from private agricultural and nonagricultural wells, in addition to wells used by the City of Solvang. n56 These users are ranchers and private landowners, many of whom are members of the community group Preservation of Los Olivos (P.O.L.O.). This citizen group has a stated mission to preserve the "highest quality of life in [their] rural community" n57 and has the Santa Ynez Band of Chumash Indians in its crosshairs.

P.O.L.O. believes that "one of the biggest challenges [they] face today to the quality of life [they] all enjoy in the Santa Ynez Valley" is the Tribe's application to have an additional 6.9 acres of land taken into trust as part of [*287] the Reservation. n58 Central to this concern is the presence of the Chumash Casino Resort and the alleged increase in crime that is associated with its presence in the Santa Ynez Valley. n59 Because of the existing tension between the Tribe and its neighbors, any attempt to withdraw groundwater from the same aquifer that they rely on will be opposed vigorously.

In fact, local water users fought a recent legislative attempt by ID-1 to redefine its structure because it allowed the district to "contract with any public agency or tribal government for a water supply." n60 While many cited concerns over accountability, n61 an underlying worry was that "bill could give water rights to the band." n62 Although Governor Schwarzenegger vetoed the legislation after it passed both the Assembly and Senate in 2008, n63 efforts to defeat the legislation were misguided. The Tribe already has a federal reserved right to water and State legislation would have merely recognized this right.

IV. Tribal Water Rights

It is well established that "when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation." n64 Termed the "Winters doctrine," this idea was first recognized in an Indian Law case in 1908 that established that tribal rights to water are held from at least the initial date of federal

reservation. n65

In Winters v. United States, Indians of the Fort Belknap Indian Reservation in Montana sought to enjoin the Matheson Ditch Company and Cook's [*288] Irrigation Company from interfering with the Tribe's use of water from the Milk River. n66 The Reservation was established in May 1888 as a "permanent home and abiding place," and at that time the land was used for grazing and farming. n67 The Indians relied on water from the Milk River for both irrigation and domestic purposes because "portions [of the Reservation] are of dry and arid character, and, in order to make them productive, require large quantities of water." n68 After the Reservation was established, the Matheson Ditch Company and Cook's Irrigation Company started diverting from the Milk River, which interfered with the Indians' use of water. n69 In resolving the dispute, the U.S. Supreme Court found that the case "turns on the agreement of May, 1888, resulting in the creation of Fort Belknap Reservation." n70 Although there was no express reservation of water rights made at the time the Reservation was established, the Court interpreted the silence in favor of the Indians and held that the federal government reserved the waters on the date the Reservation was created. n71 The Court further held that water was reserved "for a use which would be necessarily continued through years." n72

The Santa Ynez Reservation is similar to that at Fort Belknap in that areas of the Reservation are dry and arid. n73 In fact, when flows in the Creek cease periodically, as they did between 1968 and 1992, the entire Reservation is a desert. It is clear from historical documents that the federal government intended to grant the Indians at Santa Ynez "good land with water." n74 It therefore follows that the Santa Ynez have at least an implied, perhaps explicit, federal right to water.

A. Priority Date of Reserved Water Right

The date the water right was created can become important in over-subscribed surface and groundwater systems. The Court in Winters held that the water was reserved for the Tribe no later than the date the Reservation was created. n75 The date the land was reserved is typically equated with the priority date of the water right that is used when determining relative rights [*289] to water in a stream system or groundwater basin. This reserved right is separate from state-law riparian or appropriative rights and it adds an additional layer of complexity to disputes over hydraulically connected water systems such as that in the Santa Ynez Valley. n76 It is not clear if a priority based analysis would be used in such a complex groundwater dispute, or whether the "first in time, first in right' rule would work at all. n77

California's state surface water law relies on both "first in time, first in right' (prior appropriation) and riparian systems, with riparian landowners holding the superior water right. n78 Groundwater rights are similar, with overlying landowners having superior rights over appropriators (entities that use water off the land on which it is pumped) of water. n79 The federal reserved water right typically only preempts water rights that were created after the reservation of the land and associated water right. n80 As such, other users of water in the Santa Ynez area could have their water rights preempted by the Tribe, depending on when they started using water. It is therefore important to determine when the Tribe's federal reserved right was created.

Most courts follow Winters and hold that water rights are reserved on the date the land was taken into trust by the federal government for the benefit of the tribe. The Winters Court, however, used standard methods of treaty interpretation and recognized that the federal government had taken from the Indians the "means of continuing their old habits," and through the reserved water right left "them the power to change to new ones." n81 Citing United States v. Winans, a foundational Indian law case, the Ninth Circuit explained in United States v. Adair that a "treaty is not a grant of rights to the Indians, but a grant of rights from them - a reservation of those not [*290] granted." n82 An Indian reservation is very different from a reservation of other federal land. As the owner of public land, the federal government can set aside some of that land for public purposes, reserving it from future private development. In comparison, Indian tribes, who controlled vast swaths of land, agreed by treaty or executive order to give up most of that land in exchange for sovereign control of a small piece of land we call a reservation. Because of this, the right to water and other natural resources should remain with the tribe, unless explicitly ceded by treaty (or executive order).

Tribal water rights should then be thought of as preserved, rather than reserved, rights. Unfortunately for the Santa Ynez Chumash, courts have recognized preserved water rights in only limited situations.

The Klamath Indians secured a water right with a priority date of "time immemorial" based on a 1983 decision by the Ninth Circuit in United States v. Adair. n83 In Adair, the court noted that the

Klamath Indians had lived in Central Oregon and Northern California for more than a thousand years. This ancestral homeland encompassed some 12 million acres. Within its domain, the Tribe used the waters that flowed over its land for domestic purposes and to support its hunting, fishing, and gathering lifestyle. This uninterrupted use and occupation of land and water created in the Tribe aboriginal or "Indian title" to all of its vast holdings. n84

The Klamath entered a treaty in 1864 and, consistent with the fundamentals of Indian Law, the Ninth Circuit held that their "1864 Treaty is a recognition of the Tribe's aboriginal water rights and a confirmation to the Tribe of a continued water right to support its hunting and fishing lifestyle on the Klamath Reservation." n85

Similarly, the Chumash have lived in Southern California for more than a thousand years. Their ancestral homeland encompassed almost 4.5 million acres and included the waters of the Zanja de Cota Creek. The only federal reserved land and water rights that they now hold is the 139 acres near Santa Ynez. However, it is not clear that the Chumash actually lived next to the Creek until 1835, and there is no evidence that they relied on the Creek for fishing or other food supply. In addition, the federal government's [*291] interaction with Indians in Southern California was much different from that in Oregon. The Chumash did not sign a treaty that retained their inherent rights, but rather accepted a deed of occupancy that was granted to them through the federal government. The language referred to in the 1891 Smiley Commission report does not help, as it shows an intent to deed "a sufficiency of water for agricultural and domestic purposes." n86 This language is problematic for a "time immemorial' right to water.

The Ninth Circuit's holding for a priority date of "first or immemorial use" was limited to "aboriginal use of water to support a hunting and fishing lifestyle." n87 Relying on Winters, the court held that "the priority date of Indian rights to water for irrigation and domestic purposes" was the date the treaty was signed, in that case, 1864. n88 Based on current law, this could be problematic should the Santa Ynez Cumash wish to secure a time immemorial water right. The Tribe did not sign a treaty and the water granted to it by the deed was specifically for domestic and irrigation purposes. n89 The Klamath's right to water for hunting and fishing with a priority date of time immemorial is for instream use and not consumptive use. Specifically, the court held that "the holder of such a right is not entitled to withdraw water from the stream for agricultural, industrial, or other consumptive uses (absent independent consumptive rights)." n90 Because the Santa Ynez Indians wish to withdraw water for consumptive use, the time immemorial priority date as articulated by the Ninth Circuit will not apply and the priority date for this water right is the date the land taken in trust for the Tribe by the United States.

Either a federal or California state court could extend the time immemorial concept to all uses of water by a tribe by relying on Winans and fundamentals of treaty interpretation alone. However, it would be difficult for a California court to extend the time immemorial priority date to all uses of water in the case of a tribe without a treaty. Because few tribes in California have ratified treaties with the federal government, n91 it is unlikely that either a federal or California state court will recognize a preserved right to water for tribes.

[*292]

B. Application of Winters Rights to Groundwater

It is important to note that both Winters and subsequent U.S. Supreme Court cases involving tribal claims dealt only with surface water rights. Based on this precedent, it appears clear that the Santa Ynez have a federally reserved right to

surface water. But, by the 1960s the Tribe's surface water source (the Creek) was essentially unusable, and it is unlikely that the Tribe could have withdrawn any water from it. Because that surface water supply is fed by groundwater and is no longer reliable, it would be logical to transfer the surface water right to the groundwater.

Yet, the U.S. Supreme Court has never explicitly extended Winters rights to groundwater, and not all states recognize the hydrologic reality that groundwater is connected to surface water. n92 In the case most often used to link Winters rights to groundwater, the Court found in Cappaert that the government had intended to reserve enough water so as to preserve a pool of underground water that supported endangered fish in Devil's Hole. n93 The Cappaerts were neighboring landowners who were pumping groundwater that was hydraulically connected to the pool of water. n94 Their withdrawal of groundwater caused the water level in Devil's Hole to lower, impacting the endangered fish. n95 The Court noted that "no cases of this Court have applied the doctrine of implied reservation of water rights to groundwater," but then characterized the "the water in the pool [as] surface water." n96 The Court enjoined the Cappaerts from pumping the connected groundwater and held "that the United States can protect its water from subsequent diversions, whether the diversion is of surface or groundwater." n97

The Cappeart reasoning was later applied to an Indian law case in a dispute involving the Pyramid Lake Tribe. In United States v. Orr Water Ditch Co. the Ninth Circuit held "that the Orr Ditch Decree forbids groundwater allocations that adversely affect the Tribe's decreed rights to water flows in the river." n98 The Santa Ynez can likewise apply Cappaert to enjoin users of hydraulically connected groundwater from pumping water because it causes lowering of the surface water in the Creek. By doing so, they could ensure a minimum flow of water in the Creek that could be withdrawn for consumptive purposes. Because groundwater is hydraulically connected to [*293] surface water in the Upland Basin, it should not matter if the Tribe withdraws their legal water appropriation from the groundwater or from the Creek. However, based on Cappeart, it is not clear if the Tribe can only enjoin other users of groundwater from affecting the flows in the Creek, or if the Tribe can instead claim a right to withdraw water from the ground for consumptive purposes.

The first western state to address this issue was Wyoming in a dispute over water in the Big Horn River. The Big Horn case involved the Shoshone Indians and their Wind River Indian Reservation that was established by treaty on July 3, 1868. n99 Consistent with Winters, the court in Big Horn found that there was a reserved water right for the Wind River Indian Reservation. n100 Although the court acknowledged that "the logic which supports a reservation of surface water to fulfill the purpose of the reservation also supports reservation of groundwater," it stressed "that, nonetheless, not a single case applying the reserved water doctrine to groundwater is cited to us." n101 Relying on Cappeart and the fact that the U.S. Supreme Court characterized the water in the Devil's Hole as surface water, the court held "that the reserved water doctrine does not extend to groundwater." n102 Wyoming therefore interpreted Cappeart narrowly, even though it agreed with the logic of extending the reserved water doctrine to groundwater.

While the Arizona Supreme Court "appreciated the hesitation of the Big Horn court to break new ground," it did not "find its reasoning persuasive." n103 Specifically, it emphasized the fact "that no previous court has come to grips with an issue does not relieve a present court, fairly confronted with the issue, of the obligation to do so." n104 In a battle over water rights in the Gila River system, Arizona became the first western state to recognize a federal reserved right to groundwater.

[*294] Arizona's water law "is administered based on a bifurcated system where surface water is regulated separately from ground water." n105 Relying on a 1988 law review article, the Arizona Supreme Court noted in Gila River III that "the hydrological connection of groundwater and surface water is sometimes such that groundwater pumped more distantly within an aquifer may" significantly diminish surface flow. n106 The court acknowledged that in "conforming their law to hydrological reality, most prior appropriation jurisdictions by now have abandoned the bifurcated treatment of ground and surface waters and undertaken unitary management of water supplies." n107 However, because in Gila River II it had refused recognize this "hydraulic reality," n108 the court instead interpreted the foundational U.S. Supreme Court cases as guideposts that justified the inclusion of groundwater in the reserved water doctrine.

The court found "one guidepost in Winters, where the Court stressed that the arid lands of the Fort Belknap Reservation could not be made "inhabitable and capable of growing crops' without an implicit reservation of Milk River waters." n109 Another was found in Arizona I, "where the Court declared it "impossible to believe' that those who created the Colorado River Indian Reservation "were unaware that most of the lands were of the desert kind?hot, scorching sands?and that water from the [Colorado River and its tributaries] would be essential to the life of the Indian people and to the animals they hunted and the crops they raised.'" n110 Contrary to the court in Wyoming, the Arizona Supreme Court interpreted Cappeart as standing for the proposition:

That federal reserved rights law declines to differentiate surface and groundwater?that it recognizes them as integral parts of a hydrologic cycle?when addressing the diversion of protected waters suggests that federal reserved rights law would similarly decline to differentiate surface and groundwater when identifying [*295] the water to be protected." n111 The court noted that "the significant question for the purpose of the reserved rights doctrine is not whether the water runs above or below the ground, but whether it is necessary to accomplish the purpose of the reservation." n112

In this favorable holding to the Tribe, the court concluded that because Arizona law allows "all landholders to pump as much groundwater as they can reasonably use," the state law does not "adequately serve to protect federal rights." n113 Therefore, it held that "the federal reserved water rights doctrine applies not only to surface water but to groundwater" as well. n114 This strong holding was limited somewhat, in that it applies only "where other waters are inadequate to accomplish the purpose of a reservation." n115

Because the Arizona decision was based primarily on federal law and not Arizona state law, this holding may be very persuasive to a California state court. Land in Southern California, like land in much of Arizona, is arid and worth little without adequate water. Like the Gila River, the Zanja De Cota Creek does not provide enough water to accomplish the purpose of the Santa Ynez Reservation, namely making the Reservation livable for the Chumash people. And finally, similar to Arizona water law, California's water law allows all landowners to pump as much water as they reasonably need. n116 Therefore, California courts should have no trouble extending Winters rights to groundwater in a situation such as that faced by the Chumash on the Santa Ynez Reservation.

Following the Arizona decision, both Montana and Washington followed suit. The Montana Supreme Court held in 2002 that that there was "no reason to limit the scope of our prior holdings by excluding groundwater from the Tribes' federally reserved water rights." n117 It also recognized the appropriate role of the state in "quantifying and negotiating Indian reserved water rights," noting that "quantifying the amount of groundwater available to the Tribes is simply another component of that inquiry." n118 In 2005, a federal district court in Washington State affirmed an earlier decision that "held that reserved Winters rights on the Lummi Reservation extend to [*296] groundwater, and that the Lummi hold rights to the groundwater under the Lummi Peninsula." n119 This trend comports with the scientific reality that when groundwater is hydrologically connected to surface water, it is only logical to treat them as one and the same. This is especially true if a surface water source has been depleted due to excessive groundwater withdrawals and has, as a result, diminished a tribe's federally reserved water rights.

Although Nevada has not yet explicitly extended Winters rights to groundwater, it has not precluded the possibility. In the latest installment of a decades old battle over water in Pyramid Lake, the Nevada Supreme Court held that the Paiute Tribe could not assert an implied right to groundwater based on Winters. n120 However, the rationale for this decision was that the Tribe had no right to pump groundwater after its water rights had been previously adjudicated. n121 Unlike California, Nevada requires a permit to withdraw groundwater, and the court reasoned that "because the Tribe lacks a permit for the water, it also does not have an express right to the water." n122 California water law is different than Nevada's in that the State does not have legislative authority to permit groundwater withdrawals. In addition, the Chumash have never had any of their water rights adjudicated and would therefore not be precluded from having groundwater considered at the same time as surface water.

The clear trend in western states is to extend Winters rights to groundwater. This makes sense not only legally as analyzed by the Arizona Supreme Court in the Gila case, but also scientifically. When a tribe is given the right to divert water for the purpose of making their reserved land livable, it should not matter that it comes from a horizontal ditch or a vertical well. This is especially true when the water source is in fact the same, as is the case on the Santa Ynez Reservation where groundwater actually feeds the Creek. When it comes time for California to decide this question, it will not have to break new ground to recognize the "hydrologic reality" and extend Winters rights to groundwater.

Similar to other western states, the California Supreme Court is receptive to the scientific reality of the hydraulic connection between groundwater and surface water. As early as 1903, the California Supreme Court recognized potential problems associated with the "exhaustion of the underground sources from which the surface streams and other supplies [*297] previously used have been fed and supported." n123 In 1975, the court found that the City of Los Angeles had water rights to all groundwater that was hydraulically connected to the Los Angeles River based on the doctrine of Pueblo rights. n124 And in a more recent case, the court found that "the ground and surface water within the entire Mojave River Basin constitute a single interrelated source." n125 The court also noted that the water table had been lowered due to increased extractions of groundwater, and as a result less surface water reached the downstream parts of the Mojave River. n126

If the California Supreme Court were to find that the ground and surface water of the Upland Basin was a "single interrelated source," it follows that the Tribe should have a right the volume of groundwater underlying the Reservation that is equal to the reserved federal right to water in Creek. If the water on the Reservation is actually coming from the same source, it should not matter how the Tribe withdraws it, be it through a ditch or a groundwater well. Federal and state law both support a recognition of the hydrologic connection between ground and surface water and extending Winters rights to groundwater. California should therefore follow Arizona's lead and recognize both as well. However, mere recognition of a right to groundwater is not the end of the analysis. An important final step is to determine how much water the Tribe is entitled to withdraw from the Upland Basin.

V. Quantification of Reserved Water Right

As part of its water supply analysis, the Tribe's consultant estimated base flows in the creek in the 1900s based on predevelopment conditions, but emphasized that "the Reservation's water rights to flow in Zanja de Cota Creek are not clear." n127 However, and with no discussion of how these rights were determined, the report concluded that the Tribe has a right to a flow of 450 to 1,810 ac-ft/yr. n128 Although the Creek may have this level of flow at some point, it is greater than both the simulated amount of baseflow under [*298] existing conditions and the amount of baseflow expected in all years under 2040 conditions. n129 Unfortunately for the Tribe, a determination of rights to water is not as simple as estimating the amount of water flowing in an available surface water source at the time the Reservation was established.

The current status of quantification of tribal water rights is based on an antiquated test that looks to the purposes of federal reservation of land. The primary purpose of a reservation of tribal land can almost always be interpreted as agricultural, even though many reservations are located in arid areas with marginal land. This has lead to a disconnect between the amount of water reserved for a tribe and how much water is actually used by the tribe on its reservation.

The origins of quantification based on agriculture started in 1963 when the U.S. Supreme Court developed two important doctrines. The first was that a federally reserved water right is "intended to satisfy the future as well as the present needs of the Indian Reservation[];" and the second is that "enough water was reserved to irrigate all the practicably irrigable acreage on the reservations." n130 Although Practicably Irrigable Acreage (PIA) has been used since in quantifying federally reserved water rights on Indian reservations, the methods used to calculate it are not straightforward. n131 In addition, some state courts that have the authority under the McCarran Amendment to adjudicate tribal water claims, have moved away from the PIA as a method of quantification. As argued below, a more modern approach to quantification of tribal rights should be applied today.

A. Where we are today: Practicably Irrigable Acreage

The basic controversy addressed by the U.S. Supreme Court in Arizona v. California (Arizona I) was "how much water each State has a legal right to use out of the waters of the Colorado River ... ." n132 Five Indian tribes, represented by the federal government, asserted rights to water, and the Court agreed with a Special Master's determination that "the only feasible and fair way by which reserved water for the reservations can be measured is irrigable acreage." n133 The analysis of the Indian claims, and the PIA in particular, was cursory. Using PIA as a means to quantify tribal rights in this case was presented by the Court with no accompanying analysis or justification. However, this now-standard method of quantification of tribal water rights has been much analyzed since.

[*299] There are many benefits to the PIA. For one, it is a relatively straightforward way to quantify a water right. It does not depend on complicated variables such the tribe's (often) undocumented history, the number of current or past tribal members, or a prediction of future population or economic growth. Rather, it is based on agricultural science that, while perhaps not precise, is much easier to put numbers to. The PIA then provides a fixed quantity of water that can be used by the tribe, and more importantly, not used by others in the system. This provides a level a certainty that is important in adjudication of water disputes. In general, tribes are in favor of using PIA to calculate their water rights because it typically grants more water than the tribe could ever use. For example, based on the PIA, the Navajo could have the right to more water from the Colorado River than Las Vegas. n134

The fact that the PIA calculation means tribes can get enormous volumes of water is one of many disadvantages of using the PIA. However, a more fundamental problem is that the PIA has created a presumption that agricultural use is the only way tribes can get a reserved water right. What this means is that tribes with marginal land (mountainous and not practical for agriculture) will get much less water than tribes with reservations in flat alluvial plains. As will be discussed in detail later, the Arizona Supreme Court noted that this inequality was one of reasons it declined to use PIA in adjudication of the Gila River cases. n135 Although many treaties that created reservations mention agriculture, and the general consensus of Congress at the time was to turn Indians into farmers, the reality is that few Indians can sustain themselves on farming now.

Quantification of water rights today should not hinge on the use of water for agrarian purposes and the PIA of a reservation. Instead, it is better to encourage water use for other more lucrative and sustainable forms of economy. Gaming, high tech, and other industries are all much less water intensive and will allow the tribes to make more money. Many tribes, such as the Santa Ynez Band of Chumash Indians, no longer rely on agriculture to sustain themselves, and quantification of current water needs based upon an antiquated calculation is not reasonable. A new method of [*300] quantification of tribal water rights is needed to comport with the social, economic and hydrologic realities of the present day.

B. Specific Purposes Test

Fifteen years after the PIA was endorsed by the U.S. Supreme Court as a method to quantify tribal water rights, the Court developed in United States v. New Mexico what is referred to as the specific purpose test: n136

Each time this Court has applied the "implied-reservation-of-water doctrine," it has carefully examined both the asserted water right and the specific purposes for which the land was reserved, and concluded that without the water the purposes of the reservation would be entirely defeated. n137

In Adair, the Ninth Circuit applied the New Mexico test to an Indian law case and noted that "water rights may be implied only "where water is necessary to fulfill the very purposes for which a federal reservation was created,' and not where it is merely "valuable for a secondary use of the reservation.'" n138 New Mexico dealt with a reservation of land from the public domain with the purpose of creating a National Forest. n139 As explained above, federal reservation of

land from the public domain is quite different from the creation of a reservation through executive order or treaty that is not a "grant of rights to the Indians, but a grant of rights from them?a reservation of those not granted an Indian reservation through a treaty." n140 Looking at the "specific purposes for which the land was reserved" may make sense in the context of a National Forest or National Park with a Congressional Act that declares its purpose. However, "the specific purposes of an Indian reservation [] were often unarticulated." n141 Although it is not logical to look back through a muddy history to determine the purpose of an Indian reservation, most state courts now use New Mexico's primary purpose test to find that agriculture was the primary purpose of an Indian reservation, and then use the PIA to quantify amount of water the tribe has a right to use. A fundamental problem with this approach is that courts are looking only at Congress' intent and are not considering present and future needs of the [*301] tribe. Arizona is a welcome exception to this trend and sets an example that California should follow.

C. The Homeland Theory

When the Ninth Circuit applied New Mexico to Indian reservations in Adaiar, it found that the two primary reasons to reserve water to tribes were "to provide a homeland for the Indians to maintain their agrarian society," and to preserve the "tribes' access to fishing grounds." n142 The Arizona Supreme Court extended this "provide a homeland' concept to quantification of water rights in 2001. Under the Arizona "homeland theory,' maintaining a homeland is a primary purpose of the reservation, and as such, tribes are entitled to the amount of water necessary to achieve this purpose. n143 The court explained that although

the Winters doctrine retains the concept of "minimal need' by reserving "only that amount of water necessary to fulfill the purpose of the reservation, no more," ... the method utilized in arriving at such an amount ... must satisfy both present and future needs of the reservation as a livable homeland ... . n144 Tribes would be entitled to the full measure of their reserved rights because water use necessary to the establishment of a permanent homeland is a primary, not secondary, purpose. n145

This is a very broad interpretation of the primary purpose of the reservation and may allow tribes to claim a reserved water right for unlimited purposes.

In order to secure a right to the maximum amount of water possible, the Santa Ynez Chumash would be wise to follow the lead of tribes in Arizona and other states who have used the homeland theory. The Santa Ynez Reservation is the only federally reserved land for all the Chumash in Southern California. They have not only maintained a homeland, but have created a vibrant and economically stable community for their tribe. There are now almost twenty times more people living on the Reservation than when the Reservation was created. At a minimum, they deserve a federal right to water that allows for those people to live on the Reservation at the same standard that other non-Indians in the community live. Furthermore, the homeland argument should extend in this instance beyond mere residential use and account for commercial uses as well, including gaming.

[*302] Based on the 1987 U.S. Supreme Court decision in California v. Cabazon, and the subsequent Congressional act to regulate Indian gaming, gambling is legal on tribal land. n146 Accordingly, the Santa Ynez Chumash entered a compact with the state of California in 1999 that allowed them to operate 2000 slot machines and other Class III gaming activities. n147 There does not appear to be any case law related to quantification of water rights based on gaming uses, in any jurisdiction. As a legal commercial enterprise that generates both revenue and pride for the Tribe, gaming operations create a viable homeland for the Chumash. The water demand to achieve this primary purpose should therefore be included in the quantification of federally reserved water rights. However, P.O.L.O. and other water users who will be adversely affected by the Tribe's withdrawal of water will argue that a casino is merely a "secondary use of the reservation" and that the Tribe must "acquire water in the same manner as any other public or private appropriator." n148

It is important to note that the expansive homeland theory has not been followed by any courts outside Arizona and has not been considered by any federal court. In quantifying the rights to waters of the Big Horn River, the Wyoming Supreme Court rejected a "homeland' argument?"the district court correctly found that the reference in Article 4 to "permanent homeland' does nothing more than permanently set aside lands for the Indians; it does not define the purpose of the reservation." n149 The court there instead relied on the New Mexico specific purposes test, and found that the although the primary purpose of the reservation was agricultural, the Tribe also had "a reserved water right for municipal, domestic, and commercial use." n150 Although the Wyoming analysis would limit the Santa Ynez to water that was needed only for municipal, domestic, and commercial purposes, this does not foreclose the right to use it for gaming. Gaming is clearly a commercial use that has revitalized the Tribe and has made the Reservation livable.

Although Montana has not explicitly rejected the homeland theory, it has not adopted it either. Its supreme court distinguished how the specific purpose test was applied to the reserved water rights in the New Mexico case (land reserved for a National Forest) from how it should be applied to [*303] federal Indian reservations. The court noted that "the purposes of Indian reserved rights, on the other hand, are given broader interpretation in order to further the federal goal of Indian self-sufficiency." n151 Montana allows for water for secondary purposes to be factored into the quantification of water rights because "Indian reserved rights ... include water for future needs and changes in use." n152

The Chumash in Santa Ynez no longer farm on their desert tract of land and have instead changed their land use to account for the current needs of their people. That those current uses involve gaming should be of no consequence to the calculus of reserved rights. It is unlikely that vineyards, swimming pools and golf courses existed when the neighboring landowners starting withdrawing groundwater from the Upland Basin. Needs in the surrounding area have changed over the years and as such, the purpose of water withdrawals have also changed. The same is true for the Chumash. Neither their water right, nor that of the neighboring landowners, should be quantified based on an antiquated use of the land. Instead, as held by the Montana Supreme Court, the Chumash's water right should include water for future needs and uses.

A federal district court in Washington State rejected the homeland argument more explicitly in a dispute over groundwater in the Lummi Peninsula, holding that "Plaintiffs' "homeland' theory of reserved water rights must fail as a matter of law." n153 Notably, it did not agree that "water was reserved for a myriad of "homeland" purposes at the time the Reservation was created," in part because "the effect of Plaintiffs' position would be the quantification of a water right for a broad and almost unlimited range of activities." n154 Emphasizing the limited nature of Winters rights, the court held that "[t[he appropriate inquiry under federal law requires a primary purpose determination based on the intent of the federal government at the time the reservation was established." n155 The Ninth Circuit affirmed the 2007 settlement agreement of this case but did not comment on the homeland theory. n156

Based on other states' interpretation of quantification of federal water rights, the Santa Ynez can try to include water needs for gaming using the homeland theory. At a minimum, quantification of rights should include that which is needed for domestic and agricultural uses. However, they may [*304] need more water in the future and should therefore argue for water use necessary to support a homeland for their tribe that accounts for future needs uses, whatever those uses may be.

VI. Conclusion

The Santa Ynez Band of Chumash Indians is a federally recognized tribe, living on land that was reserved for its members by the federal government. It therefore has a federal reserved right to water with a priority date that coincides with when the land was reserved. The surface water that was present at the time the land was reserved for the Tribe is no longer available and was in fact derived from groundwater that lies beneath the Reservation. The Tribe could withdraw this groundwater to meet its current needs. If it does, other groundwater users in the area will likely challenge the withdrawal in court. Because California has not explicitly addressed this question, the Chumash can look to cases from other states that interpreted the same federal law that applies in all states.

The Santa Ynez's argument in a groundwater adjudication should follow the logic employed by the Arizona Supreme Court. Because the surface water that was reserved for the Santa Ynez is no longer available, groundwater is "necessary to accomplish the purpose of the reservation." Although details on the establishment of the Reservation are murky, the fact that the Santa Ynez Indians needed water on that land has been crystal clear since at least 1891. The hydrologic reality, especially on the Santa Ynez Reservation, is that water in the Creek and in the Upland Basin is one and the same. Therefore, the Tribe should have the right to withdraw as much groundwater as is necessary for the Reservation and its people to survive and prosper.

Resolution of the Santa Ynez Chumash's water rights will likely come from either a federal or California state court. Should this occur, it has the potential not only to explicitly extend the federal reserved water right to groundwater, but it could also firmly establish that hydrologically connected ground and water should be adjudicated jointly. Either result would become important and necessary precedent in California water and Indian law.

Legal Topics:

For related research and practice materials, see the following legal topics:
GovernmentsNative AmericansGeneral OverviewGovernmentsState & Territorial GovernmentsGaming & LotteriesReal Property LawWater RightsGroundwater

FOOTNOTES:

n1. List of Federal Recognized Tribes, National Conference of State Legislatures, available at http://www.ncsl.org/issues-research/tribal/list-of-federal-and-state-recognized- tribes.aspx#ca; CSAC Fact Sheet on Indian Gaming in California (as of 11/5/2003), California State Association of Counties, available at http://www.csac. counties.org/sites/main/files/file-attachments/fact_sheet2.pdf.

n2. Pres. of Los Olivos v. U.S. Dept. of Interior, 635 F. Supp. 2d 1076, 1080 (C.D. Cal. 2008).

n3. Id.

n4. Pres. of Los Olivos, 635 F. Supp. 2d at 1080 (noting: "The Tribe is the only federally recognized Chumash Tribe in the United States. Today, it occupies the Santa Ynez Indian Reservation, located in Santa Barbara County."). See also Chumash History, available at http://www.santaynezchumash.org/history.html.

n5. Testimony of Tribal Chairman Vincent Armenta before the House Committee on Natural Resources, Feb. 27, 2008 (citing John R. Johnson, Chumash Social Organization: An Ethnohistoric Perspective. Ph.D. dissertation, University of California, Santa Barbara (1988); John R. Johnson, The Chumash after Secularization (1995), California Mission Studies Association; John R. Johnson, personal communication with Kathleen Conti (Feb. 8, 2008)), available at http://www. polosyv.org/images2/pages/index/armenta_testimony.pdf [hereinafter

Armenta Testimony].

n6. Id.

n7. Id.

n8. Pres. of Los Olivos, 635 F. Supp. 2d at 1080 (Prior to finding these historic resources, the Tribe had submitted an application to the BIA asking it to take the land into trust).

n9. Santa Ynez Reservation, http://www.santaynezchumash.org/reservation. html; U.S. Department of Commerce, Federal and State Indian Reservations and Indian Trust Areas (1974), available at http://www.gpo.gov/fdsys/pkg/CZIC-e93-u6553-1974/html/CZIC-e93-u6553-1974.htm.

n10. An Act For the relief of the Mission Indians in the State of California, 26 Stat. 712 (January 12, 1891).

n11. Mesa Grande Band of Mission Indians v. Salazar, 657 F. Supp. 2d 1169, 1171 (S.D. Cal. 2009).

n12. Smiley Commission Report and Executive Order of December 29, 1891, page 1, available at http://www.standupca.org/gaming-law/unique-federal-indian-law-california-specific/Smiley%20Commission%20Report.pdf [hereinafter Smiley Report).

n13. Id. at 26.

n14. Id. at 27.

n15. Id.

n16. Id.

n17. Id. at 27-28.

n18. For example, one source maintains that the current Reservation was initially a satellite mission of the Catholic Church called Santa Ines. William Wood, The Trajectory of Indian Country in California: Rancheras, Villages, Pueblos, Missions, Ranchos, Reservations, Colonies, and Rancherias, 44 Tulsa L. Rev. 317, 355-56 (2008) ("The Catholic Church had been issued a patent for the lands, and after the Church transferred the land to the United States government at the request of the Chumash at Santa Ynez, the lands became a trust patented reservation under the Southern California Mission Indian Agency.") However, a local community group that claimed that the Tribe was not placed on a list of federally recognized tribes until 1972. See Preservation of Los Olivos and Preservation of Santa Ynez v. Pacific Regional Director, Bureau of Indian Affairs, Docket No IBIA 05-050-1, Appellant's Opening Brief 13 (February 8, 2010), available at http://www.polosyv.org/images2/pages/index/Appellants_ Opening_Brief.pdf.

n19. Letter on behalf of the Tribe from California Indian Legal Services to BLM regarding two disputed parcels that the Tribe wants to be taken into trust (May 29, 2002), available at http://www.polosyv.org/images2/pages/index/2002_letter.pdf.

n20. C.E. Kelsey Report, 1906, available at http://www.standupca.org/gaming-law/unique-federal-indianlawcaliforniaspecific/C.%20E.%20Kelsey%20Report%2C%2 1906.pdf [hereinafter Kelsey Report].

n21. Id. at 5. The report also noted that the terms of the settlement for the Santa Ynez were so uncertain that an action was pending in state court to resolve it.

n22. California Indian Legal Services May 2002 letter; Solicitor of the Interior Opinion M. 29739, Sufficiency of deeds and acceptability of title to certain land and certain water rights within the proposed Santa Ynez Indian Reservation in Santa Barbara County, California, being donated to the United States in trust for the Santa Ynez Band of Mission Indians by the Petroleum Securities Company, the Roman Catholic Bishop of Los Angeles and San Diego Harold J. Buell, and Archie M. Hunt, Exhibit 4, p.5 to P.O.L.O brief (October 14, 1940), available at http://www.polosyv. org/images2/pages/index/Appellants_Opening_Brief. pdf. [hereinafter Solicitor of the Interior Opinion].

n23. Id.

n24. Kelsey Report, supra note 20, at 13.

n25. Smiley Report, supra note 12, at 4.

n26. Kelsey Report, supra note 20, at 12.

n27. Id. at 13.

n28. G. Yates, Assessment of Groundwater Availability on the Santa Ynez Chumash Reservation. Prepared for the Santa Ynez Band of Chumash Indians, Tetra Tech, (March 2010), available at http://syceo.org/wp-content/uploads/2010/10/Final-Ground-Water-Assess ment-Report- Mar2010.pdf.

n29. Id. at 12, 15 ("None of the creeks were gauged during 1900-1906. Instead, baseflow was estimated as the residual in the water budget, assuming that inflows and outflows were balanced and basin storage remained more or less constant. The resulting estimate of creek baseflow volume (2,006 ac-ft/yr) corresponds to a sustained flow of 2.8 cfs, approximately half of which would have been in Zanja de Cota Creek.").

n30. Id. at 12.

n31. Id. at 4.

n32. Id. at 12.

n33. Id. at 1.

n34. Id.

n35. Id. at 6, 28.

n36. Exhibit to February 2011 Santa Barbara County LAFCO meeting 6, available at http://www.sblafco.org/docs/2011/02/Item10_Exhibit-B.pdf.

n37. Water Resources, Santa Ynez Chumash Environmental Office, http://syceo.org/programs/water-resources/ (last visited Mar. 27, 2013).

n38. Santa Ynez Reservation, supra note 9.

n39. Yates, supra note 28, at 4 (citing Greggs, 1969).

n40. Id. at 1.

n41. Glenn F. Bunting, The Chumash Sudden Wealth: A Life of Payouts, Not Handouts, LA Times (December 3, 2004) available at https://eee.uci.edu/clients/ tcthorne/chumashconflict2004.htm (Casino riches recast the Chumash landscape. Tribal members, with spending power like never before, confront new challenges.).

n42. Santa Ynez Reservation, supra note 9.

n43. Id.

n44. Yates, supra note 28, at 1.

n45. Id. at 4.

n46. A. Littleworth & E. Garner, California Water II, 74 (2d ed. 2007).

n47. Yates, supra note 28, at 6.

n48. Id. at 14.

n49. Id.

n50. Id. at 30; In addition, it is notable that the use of recycled water in the Casino "decreases the demand on ID-1 by 46 ac-ft/yr." Id. at 7.

n51. Id. at 25.

n52. Santa Ynez River Water Conservation District Improvement District 1, Water Facts and Figures, available at http://www.syrwd.org/view/39 [Hereinafter Santa Ynez ID-1].

n53. Id.; Exhibit to February 2011 Santa Barbara County LAFCO meeting 6, available at http://www.sblafco.org/docs/2011/02/Item10_Exhibit-B.pdf.

n54. Id.

n55. Id. at 101. Prior to the formation of ID-1, the entire municipal supply for the Los Olivos area was assumed to derive from wells in the Upland Basin.

n56. Id. at 14.

n57. Preserve Our Los Olivos, http://www.polosyv.org (last visited Mar. 27, 2013).

n58. Preserve Our Los Olivos, Website Hot Topics, http://www.polosyv. org/hotTopics/acquisition.htm and http://www.polosyv.org/hotTopics/ourStory/property AndCrime.pdf (last visited Mar. 27, 2013).

n59. Id.

n60. AB-2686 line 170, Santa Ynez Valley Water District (2008) available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bil l_id=200720080AB2686.See Today's bill as amended, art. 2, line 170.

n61. Open letter to Gov. from Mike Hadley, President Meadowlark Ranches Mutual Water Co. Santa Ynez, The Santa Ynez Valley Journal, Sept. 25, 2008, available at http://www.syvjournal.com/archive/6/39/2906.

n62. P.O.L.O. president Doug Herthel, quoted, The Santa Ynez Valley Journal, Oct. 2, 2008, available at http://www.syvjournal.com/archive/6/40/2934.

n63. AB-2686 Santa Ynez Valley Water District (2008), available at http://leginfo.legislature.ca.gov/.

n64. Cappaert v. U. S., 426 U.S. 128, 138 (1976).

n65. Winters v. U.S., 207 U.S. 564 (1908); See also F.Cohen, Handbook of Federal Indian Law § 19.03 [2][a] at 1176 (2005).

n66. Winters, 207 U.S. at 565.

n67. Id. at 565-66.

n68. Id. at 566.

n69. Id. at 568-570.

n70. Id. at 575.

n71. Id. at 577.

n72. Id.

n73. Winters, 207 U.S. at 566.

n74. Kelsey Report, supra note 20, at 12.

n75. Winters, 207 U.S. at 577.

n76. Cohen § 19.01, supra note 65, at 1171.

n77. Littleworth and Garner, supra note 46, at 76.

n78. Lux v. Haggin, 69 Cal. 255 (1886); Getches, D.H., Wilkinson, C.F., Williams, R.A., Fletcher, M.L., Cases and Materials on Federal Indian Law 766 (6th ed. 2011); State of Ariz. v. State of Cal., 373 U.S. 546, 555 (1963) [hereinafter "Arizona I"] (Under the law of prior appropriation that prevails in most Western states "the one who first appropriates water and puts it to beneficial use thereby acquires a vested right to continue to divert and use that quantity of water against all claimants junior to him in point of time. "First in time, first in right' is the short hand expression of this legal principle").

n79. City of Barstow v. Mojave Water Agency, 23 Cal. 4th 1224, 1240 (2000). Note that municipal users of groundwater are treated somewhat differently in California water law.

n80. Arizona v. California, 460 U.S. 605, 641 (1983) (herein after referred to as "Arizona II").

n81. Winters, 207 U.S at 577.

n82. United States v. Adair, 723 F.2d 1394, 1412-13 (9th Cir. 1983) [hereinafter "Adair"], citing United States v. Winans, 198 U.S. 371, 381 (1905).

n83. Adair, 723 F.2d at 1414.

n84. Id. at 1413.

n85. Id. at 1414; Winans, 198 U.S. 371 at 381 (Establishing the reservation of rights doctrine in holding "the treaty was not a grant of rights to the Indians, but a grant of right from them,-a reservation of those not granted").

n86. Smiley Report, supra note 12, at 27.

n87. Adair, 723 F.2d at 1414.

n88. Id. at 1415.

n89. See generally Smiley Report, supra note 12, and Kelsey Report, supra note 20.

n90. Adair, 723 F.2d at 1411.

n91. See e.g. The Bureau of Indian Affairs' Pacific Regional Office, http://www.bia.gov/WhoWeAre/RegionalOffices/Pacific/WeAre/index .htm (last visited Mar. 27, 2013).

n92. John D. Leshy, Interstate Groundwater Resources: The Federal Role, 14 Hastings W.-N.W. J. Envtl. L. & Pol'y 1475, 1480 (2008).

n93. Cappaert, 426 U.S. at 139.

n94. Id. at 136.

n95. Id.

n96. Id. at 142.

n97. Id. at 143.

n98. United States v. Orr Water Ditch Co., 600 F.3d 1152, 1154 (9th Cir. 2010).

n99. In re Gen. Adjudication of All Rights to Use Water in the Big Horn River Sys., 753 P.2d 76, 83 (Wyo. 1988) [hereinafter "Big Horn"].

n100. Id. at 94

n101. Id. at 99.

n102. Id. at 100.

n103. In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source, 195 Ariz. 411, 417 (1999) [hereinafter "Gila River III"]. Note that this case is the third in a series of many cases: In the Matter of the Rights to the Use of the Gila River ("Gila River I"), 171 Ariz. 230 (1992); In re the General Adjudication of All Rights to Use Water in the Gila River Sys. ("Gila River II"), 175 Ariz. 382 (1993).

n104. Gila River III at 417.

n105. Western States Water Law - Arizona, Bureau of Land Management, http://www.blm.gov/nstc/WaterLaws/arizona.html (last visited Mar. 27, 2013).

n106. Gila River III at 415 (citing John D. Leshy & James Belanger, Arizona Law Where Ground And Surface Water Meet, 20 Ariz. St. L.J. 657 (1988)).

n107. Gila River III at 416.

n108. Id. at 414. In Gila River II, the court "affirmed the conclusion that water constituting "subflow' is the only underground water subject to appropriation under Arizona law, but disapproved the standard that the trial court adopted to distinguish subflow from non-appropriable "percolating groundwater,' remanding the standard to be reshaped after further hearings."

n109. Id. at 418.

n110. Id. (citing Arizona I at 599).

n111. Id. at 419.

n112. Id.

n113. Id. at 420.

n114. Id.

n115. Id.

n116. Littleworth and Garner, supra note 46, at 73-75.

n117. The Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Stults, 312 Mont. 420, 430 (2002).

n118. Id. at 430.

n119. United States v. Washington, 375 F. Supp. 2d 1050, 1058 (W.D. Wash. 2005).

n120. Pyramid Lake Paiute Tribe of Indians v. Ricci, 245 P.3d 1145, 1147 (Nev. 2010), reh'g denied (Apr. 19, 2011).

n121. Id. at 1147.

n122. Id. at 1149.

n123. Katz v. Walkinshaw, 141 Cal. 116, 126 (1903).

n124. City of Los Angeles v. City of San Fernando, 14 Cal. 3d 199 (1975) (disapproved of on other ground by City of Barstow v. Mojave Water Agency, 23 Cal. 4th 1224 (2000)).

n125. City of Barstow, 23 Cal. 4th at 1224.

n126. Id.

n127. Yates, supra note 28, at 17, 29. ("As a point of reference for interpreting future water budget scenarios, a simulation was completed that assumed a reversion to land use patterns and population that existed in 1900. This represents the state of the basin at the time the Reservation was founded and is close to a natural, undeveloped condition.")

n128. Id. at 29.

n129. Id. at 29-30.

n130. Arizona I at 600.

n131. Getches et al, supra note 78, at 810-814.

n132. Arizona I at 551.

n133. Id. at 601.

n134. Matt Jenkins, Seeking the Water Jackpot, High Country News (March 17, 2008), available at http://www.hcn.org/issues/366/17573.

n135. In re Gen. Adjudication of All Rights to Use Water in Gila River Sys. & Source, 201 Ariz. 307, 317 (2001) [hereinafter "Gila River V"] ("The first objection to an across-the-board application of PIA lies in its potential for inequitable treatment of tribes based solely on geographical location. Arizona's topography is such that some tribes inhabit flat alluvial plains while others dwell in steep, mountainous areas. This diversity creates a dilemma that PIA cannot solve"). Note that In re the General Adjudication of all Rights to Use Water in the Gila River System and Source, 198 Ariz. 330 (2000) is referred to as Gila River IV.

n136. United States v. New Mexico, 438 U.S. 696, 698 (1978) (hereinafter referred to as "New Mexico").

n137. New Mexico at 700.

n138. Adair at 1408-09 (citing New Mexico at 702).

n139. New Mexico, at 705.

n140. Winans, 198 U.S. at 381.

n141. Colville Confederated Tribes v. Walton, 647 F.2d 42, 47 (9th Cir. 1981).

n142. Id. at 47-48.

n143. Gila River V at 316.

n144. Gila River V at 316 (citing Cappaert, 426 U.S. at 141).

n145. Id. at 316.

n146. California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987); 25 U.S.C. § 2701.

n147. C. Simmons, Gambling in the Golden State,1998 Forward 63 (May 2006), available at http://www.ag.ca.gov/gambling/pdfs/GS98.pdf (Prepared for Attorney General Bill Lockyer).

n148. New Mexico at 702.

n149. Big Horn at 97-98.

n150. Big Horn at 99.

n151. State ex rel. Greely v. Confederated Salish & Kootenai Tribes of Flathead Reservation, 219 Mont. 76, 98 (1985).

n152. Id. at 97.

n153. Washington, 375 F. Supp. 2d at 1065.

n154. Id. at 1062.

n155. Id. at 1065.

n156. U.S. ex rel. Lummi Nation v. Dawson, 328 F. App'x 462, 463 (9th Cir. 2009).

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UNITED STATES DEPARTMENT OF INTERIOR

INTERIOR BOARD OF INDIAN APPEALS

PRESERVATION OF LOS OLIVOS and PRESERVATION OF SANTA YNEZ, Appellants, **v.** PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	Case No. IBIA 05-050-A **APPELLANTS' REPLY BRIEF**

INTRODUCTION

This appeal was filed by the Appellants, Preservation of Los Olivos and Preservation of Santa Ynez (collectively POLO) in 2005. The Interior Board of Indian Appeals (IBIA) dismissed POLO's appeal in 2006 and again in 2007. The IBIA held that POLO lacked standing to challenge the decision of the Bureau of Indian Affairs (BIA) to approve the application of the Santa Ynez Band of Mission Indians (SYBand) to have 6.9 acres of land taken into federal trust.

POLO immediately challenged the IBIA orders of dismissal in the United States District Court for the Central District of California. And in 2008, in a 30 page detailed decision, Judge

Matz of that Court vacated the two IBIA orders of dismissal and remanded the case to the IBIA for consideration of the standing issue consistent with the Court's ruling and instructions.

On February 8, 2010, POLO filed an Opening Brief pursuant to the IBIA's 2009 Order setting forth the remand procedures for this appeal. POLO's Opening Brief consolidated and summarized its arguments, which had been presented in earlier pleadings, on the standing issue and on the underlying merits of this appeal. POLO also brought two important Supreme Court decisions (*Carcieri* and *Hawaii)* issued in 2009 to the IBIA's attention. Those two decisions undermined the BIA's 2005 decision and preclude the transfer of the subject property into trust as a matter of law. And, consequently, POLO asked the IBIA to vacate the BIA's 2005 decision.

The SYBand, as a real party in interest, filed its Answer Brief on March 22, 2010. But the BIA did not file an answer to POLO's Opening Brief in 2010. Instead, at the direction of the Assistant Secretary for Indian Affairs (AS-IA), the BIA asked the IBIA to remand the matter so the BIA could consider the impact of the two Supreme Court cases and the arguments presented in POLO's Opening Brief. On May 17, 2010, the IBIA: (1) granted POLO's request to vacate the BIA's 2005 decision "In Part", (2) granted the AS-IA's request to remand this matter to the BIA "In Part", and (3) and stayed this entire appeal while the matter was on remand with the BIA.

This appeal was on remand with the BIA, and stayed by the IBIA, for almost three years. On April 3, 2013, the IBIA lifted the stay and scheduled the completion of the briefing that was initiated in 2010. POLO was not given an opportunity to supplement its 2010 Opening Brief; nor was the SYBand given an opportunity to supplement its 2010 Answer Brief. The Answer Brief of the BIA was filed on May 31, 2013 – over three years after it was initially due. Despite requesting the remand, which caused a three year delay in this process, the BIA did not discuss the *Carcieri* and *Hawaii* cases in its Answer Brief. This Reply Brief is submitted in response to both the SYBand's 2010 Answer Brief and the BIA's 2013 Answer Brief.

SUBJECT PROPERTY

On November 8, 2000, the SYBand applied to the BIA requesting that seven parcels of land, which it owns in fee, located in the City of Santa Ynez, be transferred to the United States to be held in trust for the benefit of the SYBand. The seven parcels consist of approximately 6.9 acres and include Santa Barbara County Assessor Parcel Numbers 143-241-02, 143-241-03, 143-251-01, 143-251-05, 143-251-06, 143-251-08, and 143-251-09.

The parcels are near the Chumash Casino property which the SYBand claims is a "reservation."[1] But none of the parcels share a "common boundary with", or "touch", the SYBand's casino/reservation. See 25 CFR § 292.2. Therefore, as is discussed in more detail below, these parcels are not "contiguous" to the reservation as that term is used to define "on-reservation" acquisitions in 25 CFR § 151.10.[2] Consequently the SYBand's application is for an "off-reservation" acquisition and is governed by 25 CFR § 151.11

From August 2001 through October of 2004, the SYBand purchased 13 additional parcels, consisting of 5.68 acres, in Santa Ynez all of which are near or adjacent to the seven parcels listed above. On April 25, 2005, the SYBand applied to have these 13 parcels transferred to the United States to be held in trust for the SYBand.[3] POLO, POSY, the Governor of the State of California, the County of Santa Barbara, several individual members and other parties, submitted

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[1] There is disagreement about whether this property is a "reservation" as that term is used in federal law. By using the term "reservation" in this brief, or other documents filed in this appeal, the Appellants are not conceding that this parcel is, in fact, a legal "reservation."

[2] A small segment of the boundary of one parcel (APN 143-241-02) borders State Highway 246. And fee title to the land under Highway 246 is "vested in the name of the People of the State of California." Cal. Sts. & Hwys. Code §§ 233 & 546. Furthermore, on the other side of Highway 246 is an 11 acre parcel (APN 143-450-006) which, according to the Santa Barbara Assessor's records is currently owned by the County or a private party. Thus there are at least two parcels between the reservation and the 6.9 acres. They are not contiguous.

[3] Pertinent portions of the SYBand's 2005 application to have the 5.68 acres taken into trust are attached to this brief as Exhibit A.

comments.[4] Among other things, POLO insisted that the BIA, in an EIS, "must address the cumulative impacts" of both the 6.9 acre and the 5.68 fee to trust applications.[5] The Appellants also joined the comments of the California Governor's Office which rejected the SYBand's aboriginal title[6] claims and the piecemeal nature of the environmental review. The SYBand's application to have the 5.68 acres transferred to the United States in trust is still pending and is contingent on the successful acquisition of the 6.9 acres.[7]

In addition, in 2010, SYBand acquired 1400 acres in the Santa Ynez Valley, known as Camp 4, and announced, almost immediately, its intention to request that this land, like the 6.9 acres and the 5.68 acres, be taken into trust. The SYBand claims that once all of these lands are held in trust they will be exempt from State and local laws – including State and local health and safety laws, the Santa Ynez Community Plan and the California Environmental Quality Act. In fact, as is summarized below, the SYBand's primary reason and stated "need" for having these lands taken into trust is to remove them from State and local. Also, in the most recent edition of the Chumash! magazine (Summer 2013), the Chairman of the SYBand and his Legal Advisor admit that they intend to use the fee-to-trust procedures to take all these parcels and additional parcels into trust to recapture all of their ancestral lands and insure that they exempt State and local laws. The BIA is facilitating the SYBand's step by step effort toward this goal.

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[4] POLO's comments on the proposed acquisition of the 5.68 acre parcel in trust are attached hereto as Exhibit B. The Governor's comments are attached as Exhibit C.

[5] Since 2005 the SYBand has acquired several other parcels which it also intends to have taken into trust. The cumulative impacts of all of these reasonably foreseeable fee-to-trust acquisitions should have been considered by the BIA.

[6] Also it is important to note that – in addition to the comments made by the Governor - the SYBand's aboriginal title claim on behalf of the Chumash has been specifically rejected by the Courts. *See United States ex rel. Chunie v. Ringrose* 788 F.2d 638 (1986).

[7] All of the documents related to the SYBand's application to put the 5.68 acre parcel in trust – including Exhibits A, B, and C - are directly relevant to the 6.9 acre application and are a part of the record in this case.

In contrast, POLO along with other groups and residents of the Santa Ynez Valley, have worked diligently for decades to protect their communities from unregulated development in violation of State and local laws including, and especially, the Santa Ynez Community Plan. This appeal is about whether POLO, as an interested party directly and adversely affected by the proposed actions of the SYBand and the BIA, will have a meaningful opportunity in this forum to challenge BIA's decision to the application of the SYBand's request to take these lands into trust. For the last eight years, as is outlined in more detail below, procedural obstacles have been placed in POLO's way in an attempt to preclude them from having any meaningful input in the IBIA.

PROCEDURAL BACKGROUND

On January 14, 2005, the BIA issued its initial Notice of Decision of their intent to accept the 6.9 acres into trust for the SYBand pursuant to the Indian Reorganization Act of 1934 (IRA). 25 U.S.C. 465 et.seq. The BIA's Decision was timely appealed by POLO on February 22, 2005.

In 2006, and again in 2007, the IBIA dismissed POLO's appeal. The IBIA held that POLO lack of standing to pursue this appeal before the IBIA. *See* 42 IBIA 189 (2006), *aff'd* 45 IBIA 98 (2007). On August 6, 2007, POLO filed an amended complaint in its pending lawsuit challenging the IBIA's dismissals of for lack of standing. *Preservation of Los Olivos v. United States Department of Interior* USDC CD Cal. No. CV 06-1502 AHM.[8] On July 9, 2008, the Central District Court granted POLO's Motion for Summary Judgment in part, vacated the IBIA order dismissing that administrative appeal and remanded the case back to the IBIA for further consideration of the standing issue consistent with its ruling. *Preservation of Los Olivos v. United States Department of Interior,* 635 F. Supp. 2d 1976 (CD Cal. 2008). The Court's directive to the IBIA was not ambiguous:

[8] While this matter was before the District Court, POLO filed several briefs on the standing and related issues. This matter was remanded to the IBIA by the District Court. POLO's briefs are a part of the record in this matter and are incorporated herein by reference.

"Specifically, the IBIA must articulate its reasons (functional, statutory, or otherwise) for its determination of standing, taking into account the distinction between administrative and judicial standing and the regulations governing administrative appeals." *Id.*

On September 5, 2008, the United States Department of Interior and SYBand appealed the District Court's decision. *Preservation of Los Olivos v. United States Department of Interior* 9th Cir. CA. No. 08-56469. On January 8, 2009, the Ninth Circuit dismissed the appeal and the matter was returned to the District Court and then remanded to the IBIA.

On May 27, 2009, the BIA filed a motion to reopen the IBIA proceedings pursuant to the District Court's remand. On September 17, 2009, the BIA filed the administrative record with the IBIA. On November 13, 2009, the IBIA issued and order establishing a briefing schedule to address the issues on remand as directed by Judge Matz of the District Court.

On February 8, 2010, Appellants filed their Opening Brief with the IBIA which, among other things, included arguments based on two recent Supreme Court cases. First, based on the Supreme Court decision in *Carcieri v. Salazar* 129 S.Ct. 1058 (2009), Appellants argued that the SYBand is not eligible for a fee-to-trust transfer pursuant to the IRA because it was not a federally "recognized tribe" in 1934 when the IRA was enacted. And, second, based on the Supreme Court decision in *Hawaii v. Office of Hawaiian Affairs* 129 S.Ct. 1436 (2009), the Appellants argued that the Secretary of Interior is precluded from taking non-public domain land into trust free of State and local regulation after those lands, and regulatory jurisdiction over those lands within the State, were transferred and ceded to the State upon statehood.

On February 24, 2010, apparently after reading Appellants' Opening Brief, the AS-IA directed the BIA to ask the IBIA to remand this appeal for reconsideration in light of the *Carcieri* and *Hawaii* decisions. On March 19, 2010, the BIA filed a motion requesting that the matter be remanded to the BIA to consider the impact of these two decisions. The SYBand filed its Answer Brief on March 22, 2010. The BIA did not file an answering brief in 2010.

On May 17, 2010, the IBIA issued an Order Vacating Decision in Part and Remanding in Part to the BIA to determine the legal impact of the *Carcieri* and *Hawaii* decisions on the fee-to-trust transfer. Specifically, the IBIA vacated "the portion of the January 14, 2005, [BIA] decision finding that 25 C.F.R. § 151.10(a) is satisfied in the present case." The 25 C.F.R. § 151.10 findings, vacated by the IBIA, are found on pages 6 through 10 of the BIA 2005 decision.

The IBIA declined to set a timetable for the BIA to issue its decision on remand. But, with the permission of the BIA, both POLO and the SYBand were allowed to brief these issues in 2010 while the matter was on remand.[9] It was not until June 13, 2012, over two years after the matter was remanded, that the BIA finally issued its partial decision on remand. But the 2012 BIA decision was not immediately sent to the IBIA. Instead it was sent in the form of a cover letter to SYBand Chairperson, Vincent Armenta. In its cover letter, the BIA revealed for the first time that this matter had been delegated by the BIA to an Associate Solicitor, Division of Indian Affairs for a legal opinion regarding the impact of the *Carcieri* and *Hawaii* decisions.

Although the BIA cover letter to Chairperson Armenta enclosed a legal opinion from the Associate Solicitor dated May 23, 2012, it did not enclose the 28 exhibits that were supposedly attached to that opinion. In fact, it is not certain whether the BIA received or reviewed these exhibits before issuing its 2012 decision 20 days later. In any event, based entirely on the May 23, 2012 Associate Solicitor's legal opinion, the BIA affirmed its partially vacated 2005 decision without modification or updating. But, the BIA ignored the 2005 requests made by POLO and the Governor and did not update environmental documents to consider the cumulative impacts of the 5.68 acre fee-to-trust application with the impacts of 6.9 acre application. The BIA served POLO with a copy of its 2012 partial decision on remand.

[9] All the briefs, documents and evidence submitted by POLO to the BIA, while this matter was on remand to the BIA, are incorporated herein by reference. They are part of the record and should have been transferred with the files when the BIA finally returned jurisdiction to the IBIA.

On July 12, 2012, POLO filed and served a supplemental notice of appeal with respect to the 2012 BIA partial decision on remand. The BIA subsequently returned the remand and transferred jurisdiction over this appeal backs to the IBIA. The date that jurisdiction was returned by the BIA to the IBIA is not certain. But, it is certain that on April 3, 2013 the IBIA reasserted jurisdiction over this appeal and directed the parties to complete the briefing on remand from the District Court that was initiated in 2010. Per the joint request of POLO and the BIA, and over the opposition of the SYBand,[10] the IBIA extended the briefing dates making the BIA's Answer Brief due May 31, 2013 and POLO's Reply Brief due July 1, 2013.

HISTORICAL BACKGROUND

The short narrative of the history of the Chumash Indians in the 2005 BIA decision is incomplete and incorrect. (NOD pp 7-8). Without referencing any authority to support its conclusions, the BIA claims that Chumash "tribal leaders" and "several heads of families" received land grants from the "the Mexican Governors of California" which were not honored by the United States Government after taking over California. As a result, according to the BIA, the predecessors of the SYBand were forced to live on mostly unusable land owned by the Catholic Church. According to the BIA this land, located "southwest of Highway 246", was acquired by United States from the Catholic Church in 1941 "for use as the Santa Ynez Reservation."

This short summary has little or no basis in historical reality.[11] It is intended to give the impression that the SYBand was in existence as a tribe in 1934 entitled to the land transfer benefits of the Indian Reorganization Act (IRA) and that it currently needs additional trust land. As summarized below, neither contention is correct. A brief overview of the history of the

[10] The SYBand complained about the three year delay while this matter was on remand, and to expedite the process, agreed to waive its objections based on standing.

[11] A more detailed, but still incorrect, summary of the history of the Chumash Indians is found in the Fee-to-Trust application of the SYBand dated April 25, 2005. (Exh. A)

California Indians will put the SYBand's applications and the BIA's decision in context and will confirm that the SYBand was not a federally recognized tribe in 1934 entitled to transfer or receive lands in trust under the IRA.

A. Prior to Spanish Contact – Pre-1769.

Although there are different estimates, it is generally accepted that the Chumash lived in what is now called California three to five thousand years before it was "discovered" or "conquered" by the Spanish. The Chumash were considered by the Spanish to be superior to other California Indians "due to their well-developed towns, extensive trade routes and high quality of goods." (Exh. A, p. 7.) The Chumash organized themselves in small communities or villages of a few or many families. Although they seem to have segregated themselves into linguistic or ethnic groups, there is no evidence that they were ever a formally organized as a tribe prior to Spanish contact.

B. The Spanish Empire – 1769 to 1823.

As is well known, after the Spanish occupation of California, the Spanish Franciscans established the Mission system along the coast of California. The Santa Ynez Mission was built in 1809. In the initial phase of their interaction, the Chumash and Spanish were very cooperative and helpful to each other. "Once the Mission Period began, the Chumash contributed both skilled craftsman and religious leaders to the benefit of the Santa Ines Mission." (Exh. A, p. 7.) In exchange the Spanish and Franciscans managed the property around the Missions for the benefit of the Indians - "not as owners, but as tutors for their primitive charges."[12] In many ways, the tutelage arrangement resembled a benevolent autocracy. However, as time passed, the relationship began to resemble a master-slave, abusive relationship to the point that many Indians,

[12] See Chauncy Shafter Goodrich, The Legal Status of the California Indian 14 Cal. Law Rev. 157 (1926).

including some of the Chumash at the SantaYnez Mission, joined the Mexican revolution and helped the fight for independence.

C. The Mexican Republic – 1823 to 1846.

Although the revolution of Mexico against Spain began in 1810, independence was not completely achieved until 1823. One of the charter documents of the Mexican Republic was the Plan of Iguala enacted February 4, 1821. This remarkable document included the following emancipation proclamation:

> "All the inhabitants of New Spain, without distinction, whether Europeans, Africans or Indians, are citizens of the monarchy, with the right to be employed in any post, according to their merits and virtues." (Emphasis added.)

Thus all California Indians under the jurisdiction of Mexico, including the Chumash, became full citizens of the Republic of Mexico in 1821. In addition, in 1833 the Spanish Missions were secularized by the Mexican Republic and the lands surrounding the Missions were conveyed to the resident Indians. Some of the Indians at Santa Ynez were granted lands as a result of this secularization process. In summary, in the Mexican Republic, Indians were emancipated from the paternalistic yoke of the Spanish Empire and became citizens of Mexico (not a separate tribe) who had the right to own land and, subject to a property qualification, had the right to vote.

D. United States Occupation and Military Rule – 1846 to 1850.

In 1846, the United States Military occupied portions of the Mexican Republic, including the land that was to become the State of California. The United States ignored the Plan of Iguala, and tried to establish a paternalistic – ward/guardian – relationship with the Indians. This paternalistic approach was consistent with the way most Indians and tribes were treated in the rest of the United States. But it was drastically different from the more respectful and equal way that the Mexican Republic treated Indians.

The first military Governor of California was Brigadier-General S.W. Kearny. Kearny appointed John Sutter and Don Vallejo, two individuals known to be trusted by the Indians of California, as United States Sub-Agents for Indian Affairs. And, in his instructions to these two new Sub-Agents, Kearny stated:

> "I wish you to explain to the Indians the changes in the administration of public affairs in this territory; that they must now look to the President of the United States as their great father; [and] that he takes care of his children."
>
> Letter from Kearny, Monterey to Sutter, New Helvetia, April 7, 1847.

Kearny also told his agents to offer presents the new Indian "children" of the United States to gain their cooperation. Specifically, in another letter to his Indian agents, Kearny said:

> "I will endeavor to obtain and furnish you with a quantity of Indian goods, to be given as presents to such chiefs and bands as may conduct themselves peaceably and honestly. You can tell the Indians this."
>
> Letter from Kearny, Monterey to Richardson, Monterey, April 21, 1847.

The Mexican-American War ended in 1848 with the signing of the Treaty of Guadalupe Hildago. Pursuant to that treaty, the United States vowed to recognize and protect the rights of all former Mexican citizens which, as summarized above, since 1821, included all of the Indians. (9 Stat. 922 (1848).) The United States Military Occupation of the territory of California continued until 1850 when California became a State.

E. California Statehood – 1850 to the Present.

California became a State on September 9, 1850 on an equal footing with all previously admitted States. And, at that point all jurisdiction, authority and regulatory control over the lands and citizens of the State of California were immediately transferred from the United States to California. At the time of Statehood, the Chumash Indians in the Santa Ynez Valley were former citizens of the Republic of Mexico whose property and citizenship rights were guaranteed under the Treaty of Guadalupe Hildago. The obligation to protect this guarantee transferred to the State.

Shortly after California became a State, Congress passed the Land Claims Act of 1851 (9 Stat. 631 (1851).) Every person claiming lands in California by virtue of any right derived from the Spanish or Mexican government was required to present his or her claim to the board within two years. Any land not claimed within two years, and any land for which the land claim was rejected, was deemed to be part of the public domain of the United States available for sale. Although some of the Indians living near the Santa Ynez Mission had received deeds from Mexico as a result of the 1833 Mission Secularization Act, apparently none filed a claim for their deeded land within the time limits allowed by the 1851 Act. Nor did any representative of the Chumash file a claim for aboriginal title. In contrast, the Catholic Church filed timely claims for all the California Mission properties – including the Mission at Santa Ynez. *United States ex rel. Chunie* 788 F.2d 638 (1986).

In 1853, consistent with its paternalistic approach, the United States entered into 18 treaties with some California Indians and tried to move many of them onto reservations. Although many of the Indians may have moved to the supposed reservations, the treaties were never ratified. California officials, some of whom were previously officials in the Mexican Republic, objected to the removal and relocation of California Indian citizens to remote locations. In any event, the Santa Ynez Indians were not removed to a reservation. Instead, with the permission of the Catholic Church, they continued to occupy the lands near the Mission.

CALIFORNIA INDIANS

In summary, at the time California became a State in 1850, Indians in California were subject to the laws and policies of two governments with two entirely different views and approaches to governing Indians. The United States had a paternalistic guardian-ward protective view of Indians and tribes that continues to this day. The United States' paternalistic approach is akin to the Spanish benevolent autocracy approach implemented by the Franciscan Mission

system. In contrast, the State of California's view, inherited from the approach of the Mexican Republic, was and continues to be is that Indians are citizens with the same rights and obligations of all California citizens. For the last 163 years much of California Indian law has been developed as a direct result of the tension between these two widely different approaches.

A good example of this tension is found in a case that quickly made its way to the United States Supreme Court four years after California became a State. *United States v. Ritchie* 58 U.S, 525 (1854). That case involved a dispute based on a deed from Governor of Mexico to Francisco Solano in 1842. Mr. Francisco was an Indian and a Mexican citizen. He is described in the deeds as the "principal chief of the unconverted Indians" and as a "free man, owning a sufficient number of cattle and horses to establish a rancho." *Id.* In 1842 Mr. Francisco sold the land to Mr. Vallejo who in turn sold it in 1850 to Mr. Ritchie a resident and citizen of the State of California. Mr. Ritchie's title was challenged by the United States which wanted the land to be treated as public domain land available for sale. Consistent with its paternalistic attitude toward Indians, the United States argued that the initial deed was void because Mr. Solano was an Indian and, therefore, was not competent to own or sell real property. The Supreme Court reviewed the laws of Mexico and found just the opposite to be true:

> "Our conclusion is, (sic) that he [Mr. Solano] was one of the citizens of the Mexican government at the time of the grant to him, and that, as such, he was competent to take, hold and convey, real property, the same as any other citizen of the republic."
>
> *United States v. Ritchie,* 58 U.S. at 540.

Thus at the time California became a State, all Indians were individual citizens with the same rights "as any other citizen" of California and former citizens of the Mexican Republic.

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A legacy of the Plan of Iguala, and full Indian emancipation and citizenship in the Republic of Mexico is that, at the time of Statehood, there were very few tribes in California.[13] Instead there was a 30 year heritage of individual rights (including land ownership) and citizenship (including voting rights) that were previously conferred upon the California Indians by the Republic of Mexico in 1821. Although there were virtually no tribes in California in a governmental sense, there were some historic Indian neighborhoods where individual Indians continued to live. This included the Indians who continued to live around the Santa Ynez Mission. In 1891, instead of being described as a tribe, the Indians living near the Santa Ynez Mission were described as an: "Indian village composed of some fifteen families." (Smiley Commission Report and Executive Order of December 29, 1891.)

Although most of the California Indians remained wards of the United States, the State of California did its best to protect its citizens from the over paternalistic governance of the United States. California granted citizenship – including the right to vote and to be on a jury – to California Indians in 1871, over fifty years before they were given United States citizenship in 1924. Although the United States had extinguished all Indian aboriginal land title claims in California when it enacted and implemented the Act of 1851, California successfully sued the United States and obtained equitable relief and compensation for the "Indians of California." Similarly, although the United States failed to ratify 18 treaties with California Indians, California successfully prosecuted a lawsuit against the United States for equitable relief and compensation on behalf of the "Indians of California." California Indians, despite the ward-guardian relationship that they continue to have with the United States, have all the rights, privileges and duties of every other resident of California. See *Acosta v. San Diego* 126 Cal.App. 2d 455 (1954).

[13] The tribes that did exist were in the far north and far east areas of the State which were beyond the purview of the Mexican Republic.

As a result of this unique history, the Santa Ynez Indians, like most California Indians were not members of an organized tribe, much less a federally recognized tribe, in 1934 when the IRA was enacted.[14] They were individual citizens; tribes in the governmental sense were virtually non-existent. As was succinctly stated by Professor A.L. Kroeber in his 1925 book, "The California Indians" on page 27:

> "Tribes did not exist in California in the sense in which that word is properly applicable to the greater part of the North American continent. When the term is used [in relation to California Indians] it must therefore be understood as synonymous with 'ethnic group' rather than denoting a political entity." (Quoted in *Acosta* 126 Cal.App.2d at 465 (1954).)

Thus, instead of being a tribe or political entity, the Santa Ynez Indians may have been part of part of the Chumash ethnic group, or individuals from different ethnic groups, when California became a State and in 1934 when the IRA was enacted.[15]

This distinction between historic tribes and Indian communities, vis-à-vis the IRA, was outlined in a January 14, 1994 letter from Wyman D. Babby, Assistant Secretary of the Interior for Indian Affairs to Congressman George Miller, Chairman of the committee on Natural Resources. (A copy of that letter is attached as Exhibit E.) Assistant Secretary Babby states that:

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[14] In 1932 the Carnegie Institution of Washington published Charles O. Paulin's *Atlas of the Historical Geography of the United States* (Publication No. 401). Plates 35 and 36 depicting the Indian Reservations from 1840 through 1930 are attached as Exhibit D. In 1840, California was still part of the Mexican Republic and, as a consequence, there were no reservations in California. The Plates depict only four Reservations in California between 1875 and 1930. This is consistent with the fact that in 1864 Congress passed the Four Reservations Act which specifically stated that no more than four Indian reservations could be created in California. (13 Stat. 39.) The four reservations were Round Valley, Hoopa Valley, Tule River, and "Mission." *Matz v. Arnett* (1973) 412 U.S. 481, 489-491.) According to the Plates the reservation for the Mission Indians was created in 1875 in the San Diego area. There is no reservation in the Santa Ynez area. And the SYBand's claim that a "reservation" was created by the U.S. for their benefit in 1941 is not only incorrect; it would have been precluded by the Four Reservations Act.

[15] The Indians and others who lived near the Santa Ynez Mission over the years were not limited to those with Chumash ancestry. Nor was there a requirement that they any or all of the Indians at Santa Ynez be Chumash. According to Article III, Section 1, of the SYBand's 1964 Articles of Organization, membership individuals "whose names appear on the January 1, 1940 Census Roll of the Santa Ynez Band of Mission Indians" and their descendants who "have one fourth (1/4) or more degree of Indian blood of the Band."

> "Since the passage of the IRA the Department of the Interior (Department) has distinguished between the powers possessed by an historic tribe and those possessed by a community of adult Indians residing on a reservation, i.e. a non-historic tribe."

Assistant Secretary Babby also described a third category of landless Indians who, although living in a community, were not living on a reservation and were not an organized as tribe. "Once the land was acquired for these [landless] Indians, they then were entitled to organize under the provisions of Section 16 of the IRA and adopt a constitution and bylaws" and, thereafter, submit these documents and Articles of Organization to the Secretary of Interior for approval. This is the approach followed by the SYBand.

In 1934, although there were still a few Indians living near the Santa Ynez Mission, they did not own the land and were technically landless. Twenty of the 48 adult Indians living near the Santa Ynez Mission voted to accept the IRA in 1934. In 1941, the United States acquired land from the Catholic Church for the benefit of these landless Indians. And, thereafter the Santa Ynez Indians adopted a constitution, bylaws and article of organization which were approved by the Department of Interior in 1964. In the PREAMBLE and ARTICLE I - Name of their ARTICLES OF Incorporation the Santa Ynez Indians make it clear that they are creating a new tribe not confirming an historic tribe:

> "We, the members of the Santa Ynez Band of Mission Indians, in order to establish a formal organization and to promote our common welfare do hereby adopt the following Articles of Organization. . . . The name of this organiztion (sic) shall be the Santa Ynez Band of Mission Indian, hereinafter referred to as the Band."

At least as of 1964, the Santa Ynez Band did not claim to be Chumash or part of any historical group. And, although they claim to be a band of Mission Indians, they do not claim any interest in the Mission Reservation in San Diego. Thus, as summarized by Assistant Babby, the SYBand was as a group of landless Indians who, after receiving land from the United States, organized themselves into a new tribe in 1964. They were not a federally recognized tribe in 1934.

STANDARD AND SCOPE OF REVIEW

The IBIA's jurisdiction to review of BIA decisions is narrow and very limited. These limitations and the reasons behind them are outlined in detail at the Department of Interior website for the IBIA. (www.oha.doi.gov/IBIA). As is clarified there, the IBIA is part of the Executive Branch of Government and it has only that authority that has been delegated to it by the Secretary of Interior. The IBIA is not a court or part of the Judicial Branch of Government. And it lacks the authority to decide or adjudicate constitutional legal issues. The IBIA gives deference to tribal sovereignty and lacks the authority to grant equitable relief against a tribe. But, the IBIA does not have the authority to give racial preferences, or discriminate in favor of, individual Indians. (*See Adoptive Couple v. Baby Girl* U.S. (No. 12-399; decided June 25, 2013.) In addition to these general rules, there are some specific rules that pertain to this appeal which should be mentioned:

First the BIA's decision to take land into trust is a discretionary decision and the IBIA lacks the authority to reverse, or substitute its judgment for the BIA's judgment in such discretionary decisions. *Arizona State Land Department v. Western Regional Director,* 43 IBIA 158 (2006). Although the IBIA cannot reverse BIA's discretionary decisions, the IBIA must confirm and insure that the BIA's decision is supported by substantial evidence in the record. *Id.*

Second, the IBIA review of a discretionary decision is limited to determining whether BIA gave proper consideration to all legal prerequisites to the exercise of its discretionary authority, including any limit on the BIA's discretion established in the regulations. *Cass County v. Midwest Regional Director,* 42 IBIA 243, 246 (2006). The proof that the BIA considered all the factors set forth in the regulations must appear in the record, but there is no requirement that the BIA reach a particular conclusion with respect to each factor. *Eades v. Muskogee Area Director*, 17 IBIA 198, 202 (1989).

Third, although the IBIA has the authority to review some legal issues raised in a trust acquisition case, it lacks the authority to adjudicate legal challenges to the constitutionality of laws and regulations. *Arizona State Land Department,* 43 IBIA at 160. Furthermore, its legal conclusions regarding non-constitutional issues are not binding on the Courts.

Finally, although an appeal to the IBIA is a procedural prerequisite to initiating litigation with respect the BIA's decision to take land into trust, there is no requirement that the IBIA decide the merits of an appeal for it to be a final agency action. 43 CFR §4.314. This is because the IBIA is not able to reverse a BIA discretionary decision or grant the complete relief requested by the appellant. Consequently exhaustion of administrative remedies on the merits before the IBIA is not possible or necessary. If the IBIA declines to accept jurisdiction of the merits or dismisses the appeal for procedural reasons, then BIA decision on the merits becomes the final agency action for litigation purposes. *See Pine Bar Ranch v. IBIA*, 9th Cir. No. 11-35564 (2012).

ARGUMENT

A. POLO has Standing to Pursue this Appeal Before the IBIA.

As directed by Judge Matz of the United States District Court for the Central District of California in his 2008 remand order, the first order of business in this appeal is for the IBIA to reconsider its 2006 and 2007 Orders dismissing this appeal on the basis of standing. *Preservation of Los Olivos v. United States Department of Interior,* 635 F.Supp.2d 1076 (2008). Instead of following the "interested party" standing rules in its own regulations, the IBIA dismissed POLO's appeal by using the restrictive judicial standing principles. The IBIA intentionally used these rules "as a matter of prudence in the interest of administrative economy" to restrict appellate access. The Court held that IBIA's reliance on restrictive judicial standing principles was inappropriate and inconsistent with the broad standing principles outlined in the regulations. In fact the Court noted that the IBIA did not even cite, much less discuss, the regulations which

allow any "interested party" to appeal. 25 CFR §2.2 and 43 CFR §4.331. The Court provided guidance to the IBIA as it revaluates this issue and specifically directed the IBIA to conduct a functional analysis of administrative standing as detailed 35 years ago by Judge Bazelon in *Koniag, Inc. Village of Uyak v. Andrus*, 580 F.2d 601, 614-15 (D.C.Cir. 1978.) And although he gave the IBIA some latitude in this regard, Judge Matz cautioned that the regulations governing standing are not ambiguous and, therefore, the IBIA's interpretation of them is not entitled to deference. The Court's instructions to the IBIA were clear and direct:

> "Specifically, the IBIA must articulate its reasons (functional, statutory, or otherwise) for its determination of standing, taking into account the distinction between administrative and judicial standing and the regulations governing administrative appeals."
>
> *Preservation of Los Olivos,* 635 F.Supp.2d at 1080.

The functional analysis test for administrative standing directed and urged by Judge Matz is clearly the appropriate test. In its Appellants' Opening Brief (AOB), POLO applied the five factors of the functional analysis to the facts of this case. (AOB pp. 1-8) Based on that test POLO is an interested party which clearly has standing to pursue the appeal.

The SYBand in its Answer Brief argues that the IBIA, despite Judge Matz' Order and the broad regulatory standing standard, is free to adopt a stricter standard and can continue to use the restrictive concepts of judicial standing. These are basically the same arguments that were made by the SYBand and rejected by the District Court. They should be rejected here for the same reasons. The SYBand also claims that the IBIA was not required to apply the functional analysis of standing. But it is not possible to read Judge Matz directive – "the IBIA must articulate its reasons (functional, statutory or otherwise)" – as anything other than a mandate.

The SYBand also claimed that regardless of the test that was used, POLO failed to demonstrate sufficient "interest" to appeal the BIA's decision to take the 6.9 acres into trust under the IRA. The SYBand relied on the District of Columbia District Court case of *Patchak v.*

Salazar, 646 F.Supp. 2d 72 (2009). Mr. Patchak in that case, like POLO in this case, challenged a decision by the BIA to take land into trust for a tribe that was federally recognized in 1934 as required by *Carcieri.* Relying on the following quote from that case, SYBand claims POLO lacked standing because they are not Indians:

> "Plaintiff's alleged injuries could not be further divorced from these objectives [of the IRA]. Plaintiff is not an Indian, nor does he purport to seek to protect the interests of any Indians or Indian tribes."
>
> *Patchak*, 646 F.Supp. 2d at 77.

Fortunately, this race-based test for standing to challenge fee-to-trust transfers under the IRA, was ultimately rejected by the United States Supreme Court. (*Patchak v. Salazar,* 132 S.Ct. 2199 (2012); s*ee also Adoptive Couple v. Baby Girl supra.*) The Supreme Court in *Patchak* applied judicial standing principles and found that Mr. Patchak, a non-Indian, had standing to challenge the fee-to-trust transfer under the IRA. He met the Article III standing requirements and the interests he is asserting – economic, environmental and aesthetic - were "arguably within the zone of interests to be protected or regulated" by the IRA. Thus, even if the IBIA continues to apply the judicial standing requirement, the Supreme Court decision in *Patchak* confirms that POLO has standing under judicial standing principles, as well as regulatory standing.

The BIA, in its Answering Brief, also argues that it is permissible for the IBIA to use the judicial standing principles instead of the broader standing rules allowed by the regulations. The BIA claims that the stricter standing standard is appropriate because the regulations contemplate public participation during the BIA decision making stage and "very limited agency review" of BIA decisions by the IBIA. The BIA contends that the IBIA has no authority review the merits of the BIA decision and it is limited to insuring that the BIA complied with the procedural regulations. According to the BIA, the IBIA's limited scope of review of the merits of the BIA decision should mean that fewer interested parties should be allowed to appeal to the IBIA.

Although creative, this argument defies common sense.[16]

The IBIA has a different and broader role in the review process and its forum should be available to all interested parties. The IBIA has been delegated the responsibility by the Secretary of Interior to supervise the BIA and audit its actions to insure that the law and regulations were followed in the decision making process. This is especially important given the BIA's decision making is not an impartial process. The BIA's obligation and mission is to promote tribal interests. Thus it is usually an advocate for the SYBand's fee-to-trust request.[17]

POLO agrees that the IBIA's jurisdiction to conduct a *de novo* review of the merits of BIA's fee-to-trust decisions is limited . But the IBIA has broad authority to review the BIA's decision to insure that it complies with the law and all the applicable procedural rules and regulations. This is an extremely important appellate function. By insuring that the BIA fully complies with the procedures, the IBIA protects the due process rights of the public and the community. The IBIA is also required to insure that the decision is supported by sufficient evidence in the record. If the IBIA requires full procedural compliance with the regulations, then many of the concerns about BIA decision may be resolved without the need for litigation. All interested parties should be allowed to appeal to the IBIA and request a procedural review of the BIA's decision.[18]

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[16] It is also inconsistent with argument made by the BIA later in its answer that, although the IBIA's decision that POLO lacks standing was correct, the IBIA should still decide the merits.

[17] A primary purpose of the 1934 IRA was to restructure and recreate the BIA as a tribal controlled agency where the interests of the tribe is given the highest priority over all other factors when a fee to trust application is being considered. *See Morton v. Mancari* 417 U.S. 536 (1974). In the BIA Pacific Regional Office the bias is blatant. Specifically, The BIA has given a consortium of California tribes control over the fee-to-trust decision making process pursuant to an agreement known as the: MEMORANDUM OF UNDERSTANDING Between CALIFORNIA FEE TO TRUST CONSORTIUM TRIBES And BUREAU OF INDIAN AFFAIRS PACIFIC REGIONAL OFFICE. As a result of this built-in bias, the Pacific Region BIA approves 100% of the fee-to-trust applications. See Kelsey J. Waples, Extreme Rubber Stamping: the Fee-to-Trust Process of the Indian Reorganization Act of 1934 40 Pepperdine Law Review 251 (2013),

[18] This is not to say that the IBIA's procedural review of the BIA's decision is an impartial

(Continued...)

As suggested by Judge Matz, and outlined in POLO's Opening Brief, the administrative standing test *Koniag* it the appropriate test to determine if an interested party has standing before the IBIA. The BIA, unlike the SYBand, acknowledges the IBIA is required by the remand order to "articulate" standing using the functional analysis in *Koniag.* But the BIA contends that the IBIA is not required to utilize the functional test. The BIA's attempt to parse to the obligation of the IBIA to comply with the Court's 2008 remand order, and resurrect the judicial standing standard, ignores the directive in the last sentence of that order which was made after a detailed discussion regarding the importance and applicability of the *Konaig* case:

> "For the forgoing reasons, the Court VACATES the IBIA Order [dismissing POLO's appeal based on judicial standing principles] and REMANDS the case to the IBIA for further consideration consistent with this ruling."
>
> *Preservation of Los Olivos,* 635 F.Supp.2d at 1096 (emphasis added).

Furthermore, the BIA also ignores the remand order in its discussion of the applicability of the judicial principles of standing. The BIA is trying to litigate issues that have already been conceded or decide against them. As stated by the Court in its decision:

> "Federal Defendants do not dispute that aesthetic, recreational and other quality of life values affected by the physical environment are cognizable injuries-in-fact under Article III or that the declarants who asserted such injuries have the required geographic nexus."
>
> *Preservation of Los Olivos,* 635 F.Supp.2d at 1086 (emphasis added).

Furthermore, the BIA's analysis and attempt to limit the prudential standing aspect of the judicial standing test is contrary the Supreme Court's discussion of this issue in *Patchak.* As stated and

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(...continued)
review. It is not. As summarized on its own website, the IBIA and the BIA are a part of the Department of the Executive Branch. And like the BIA, it is required to give deference to tribal interests and to uphold BIA decisions to take land into trust. As a result, the IBIA usually uses its procedural review to advance tribal interests and protect the BIA's decision from challenge. This history of the IBIA's review of this case over the last eight years is clear example of the IBIA's use of the procedural tools available to it to protect the merits of the BIA's 2005 decision from being challenged and reviewed in an impartial forum.

confirmed by the Supreme Court, the "prudential standing test . . . is not meant to be especially demanding." *Patchak* 132 S.Ct. at 2210. The BIA's attempt to limit the prudential standing test to economic interests, to the exclusion of aesthetic and environmental interests, should be rejected. As should the BIA's attempt to limit the application of the *Patchak* case to concerns over use of the land for gaming.[19] It is impossible to reconcile the BIA's proposed narrow reading of the prudential standing with the Supreme Court's decision in *Patchak.*[20] It should be rejected. It is clear that POLO has standing as an interested party to appeal the BIA decision to take the 6.9 acres into trust to the IBIA – whether under the *Konaig* functional analysis test or the *Patchak* prudential standard test.

B. The BIA Failed to Comply With the Applicable Regulations.

1. The BIA Failed to Comply with Section 151.11 of the Fee to Trust Regulations.

Both the BIA and the SYBand claim that the Regional Director's use of Section 151.10 to evaluate the fee to trust application was appropriate because the 6.9 acres is contiguous to the SYBand's reservation/casino property. Neither the BIA, nor the SYBand, presented evidence in the record to support their claim that the properties are contiguous.[21] In fact, as is outlined below,

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[19] Even if the *Patchak* prudential standing test was limited to trust acquisitions for gaming (and it is not) it would apply here. The SYBand's initial application explicitly stated that this trust acquisition is being pursued as a gaming application. And the current version is being pursued as an acquisition of a parcel that is contiguous to a parcel for gaming and therefore useable for casino and gaming or as potential first stepping stone to a contiguous, larger parcel that can be used for a new expanded casino.

[20] It is also inconsistent with recent changes to the fee-to-trust procedures and regulations proposed by Assistant Secretary of the Interior for Indian Affairs, Kevin K. Washburn, in response to the *Patchak* case. The proposed regulations, through several proactive notice provisions, are designed to increase the number of "interested parties" entitled to appeal to the IBIA. The proposed broadening of the regulations, nick-named the "Patchak Patch", is inconsistent with BIA's suggestion that the number of interested parties with IBIA standing should be reduced.

[21] The BIA also claims that this issue was already decided by the IBIA in its 2006 order dismissing POLO's appeal. But, even if that contention were true (and it is not), the 2006 IBIA Order predate the new regulations that specifically define "contiguous". 25 CFR § 292.2.

the evidence in the record reveals that the two parcels are not contiguous and therefore Section 151.11 should have been followed. Both the BIA and SYBand acknowledge that Section 151.11 applies to non-contiguous trust acquisitions and they admit that the Regional Director did not follow Section 151.11.

Instead the Regional Director followed Section 151.10 of the fee-to-trust regulations when it evaluated and decided the SYBand's application to take the 6.9 acre parcels into trust. That section pertains to "on-reservation" acquisitions and includes the acquisition of "land that is located within or contiguous to a reservation." (25 CFR §151.10.) The BIA and SYBand claim that the 6.9 acre parcel is contiguous to their "reservation" where their gaming casino is located.

"Off-reservation acquisitions" are governed by Section 151.11 which includes most of the requirements of Section 151.10 and adds several additional requirements to the fee-to-trust application. Such acquisitions include the acquisition of lands that are outside of and non-contiguous to the tribe's reservation." (25 CFR§ 151.11.)

Thus, the distinction between on-reservation and off-reservation acquisitions turns on the definition of the word "contiguous." "*Contiguous* means two parcels of land having a common boundary notwithstanding the existence of . . . a public road or right-of –way and includes parcels that touch at a point." (25 CFR §292.2.) [22]

A review of the assessor's parcel maps included in the record confirms that no part of the 6.9 acres is contiguous to the casino/reservation property. One small segment of one parcel in the 6.9 acres borders on State Highway 246 which is owned in fee by the public. (Calif. Sts. & Hwys Code §§ 233 and 546.) And, according to the assessor's parcel maps and their online

[22] POLO acknowledged and cited this rule in its Opening Brief. The SYBand in its Answering Brief, implies that this reference was an admission by POLO that the properties were contiguous. This is not correct. POLO did not admit that the properties were contiguous when it acknowledged the existence of this regulation.

information, on the other side of Highway 246 is a narrow 11 acre parcel apparently owned by the County of Santa Barbara for sewer lines and other right of ways. Consequently there are at least two parcels that separate the 6.9 acres and the casino/reservation property. They do not share a common boundary, they don't touch at any point and, therefore, they are not contiguous parcels. The BIA should have complied with Section 151.11 when evaluating this fee-to-trust application to acquire off-reservation property.

Furthermore, neither the BIA nor the SYBand offer or reference any contrary evidence in the record that demonstrates that the parcels are "contiguous" or that they "share a common boundary" or "touch at a point" as required by Section 292.2. Instead, there is evidence in the record that, in 2009, the BIA asked the Solicitor for an opinion as to whether the parcels were "contiguous." But, if there was a response from the Solicitor it is not in the record. And the 2012 Associate Solicitor's opinion offered by the BIA as part of its 2012 Notice of Decision did not address this issue. The record does not support the unsubstantiated statements by the BIA and the SYBand in their Answer Briefs that the 6.9 acres is contiguous to the casino/reservation property.

2. **The Regional Director's decision to take the 6.9 acres into trust is not supported by evidence in the record.**

POLO, in its 2010 Opening Brief, brought the *Carcieri* and *Hawaii* Supreme Court decisions to the IBIA's attention and, given the implications of these decisions, asked that the BIA 2005 decision be vacated. The BIA in response POLO's Opening Brief, and at the directive of the AS-IA, asked the IBIA to remand the matter to the BIA to be evaluated in light of these decisions. The IBIA granted POLO's request to vacate the 2005 decision and the BIA's request to remand. Thus, at this point, the 2005 BIA decision remains partially vacated.

This matter was on remand with the BIA for three years. The BIA finally filed an Answer Brief on May 31, 2013. But, contrary to the IBIA Order, the BIA did not discuss the *Carcieri* and

Hawaii cases. Nor did the BIA oppose POLO's contentions with respect to those cases. Nor did the BIA ask the IBIA to reverse or reconsider its decision to vacate part of the BIA's 2005 decision. Instead, the Regional Director of the BIA sent a letter to Vincent Armenta, Chairperson of the SYBand, reissuing and reaffirming the 2005 decision that was vacated by the IBIA in 2010. Although the top of the letter was labeled a "Notice of Decision," it was not published in the federal register and therefore was not a public notice to all interested parties. The Regional Director also informed Chairperson Armenta that the matter, including "supplemental evidence, briefs,[23] and other documentation," was referred to an Associate Solicitor for a legal opinion. The BIA attached a copy of this legal opinion without the supporting exhibits. It was in the form of an informal memorandum to the BIA Regional Director from an Associate Solicitor.

The Regional Director's 2012 "Notice of Decision" is defective and should be vacated for several reasons. First, although copies were sent to some interested parties, it was in the form of a letter to the SYBand Chairperson and not a public notice to all interested parties published in the federal register. Second it merely reasserted its 2005 decision (which was partially vacated by the IBIA in 2010) without modification or correction.

Third, although the Regional Director attached the legal memorandum from the Associate Solicitor, she did not attach the documents that she gave to the Associate Solicitor. Nor did she attach the 28 exhibits referenced by the Associate Solicitor. Thus there is no evidence in the record to support the unsubstantiated conclusions included in his memorandum to the Regional Director. And, consequently, there is no evidence in the administrative record to support Regional Director's 2012 decision. It should be vacated.

[23] POLO submitted several letter briefs to the BIA while this matter was on remand. Those letters are referenced in the BIA's Answer Brief and are incorporated into this reply brief by this reference.

3. The BIA Failed to Consider Potential Gaming Uses for the Property or to Comply with the Regulations Governing Gaming Related Trust Acquisitions.

Both the BIA and SYBand argue that POLO's contention that the SYBand proposed trust acquisition is for gaming related purposes is mere speculation. But just the opposite is true. The parties need not speculate about the SYBand's intent to use the property for gaming related purposes. The SYBand, in its initial application, candidly concedes that it was requesting a gaming related acquisitions pursuant to 25 USC §2719. That section governs gaming on lands acquired after October 17, 1988. Although the SYBand amended its application to remove any reference to gaming or Section 2719, it could not erase the statements and admissions it made in its initial application. They remain in, and an important part of, the record.

Nor does the SYBand try to hide their intention to use the 6.9 acres for gaming related purposes in their amended application. In fact, as summarized above, the SYBand now claims that the 6.9 acres is "contiguous" to the casino and, even though it was acquired after 1988, it can be used for gaming related purposes pursuant to Section 2719.[24] Furthermore, the SYBand's 2005 application to have the 5.68 acres taken into trust expressly states that it is being made pursuant to Section 2719 and submits a map in support of its application that depicts both the 6.9 acres and the 5.68 acres. (Exhibit A.)

In summary, when considering the SYBand's application, the BIA was required to consider the impacts of the potential gaming related uses of the 6.9 acres and the 5.68 acres in connection with the existing casino. The BIA was also required to consider the applicability and

[24] The SYBand in footnote 124 of its Answer Brief states that POLO's argument that the SYBand intends to use the 6.9 acres for gaming related purposes is inconsistent with POLO's contention that the two parcels are not contiguous. This argument does not make sense; POLO's arguments regarding the properties and the SYBand's intended use of the properties are not inconsistent. But this comment does reveal that the SYBand understands the direct connection and importance of finding that the properties are contiguous if it is to be used for gaming or gaming related purposes.

SYBand's compliance with Section 2719. Furthermore, in addition to the fee-to trust regulations outlined in 25 CFR §§ 151.10 and 151.11, an applicant for a gaming or a gaming related acquisition must comply with additional guidelines, checklists, and guidance memoranda issued by the Assistant Secretary for Indian Affairs or the Office of Indian Gaming, Department of Interior, with respect to the proposed acquisition of trust land for gaming or gaming related uses. The BIA failed to mention the OIG regulations or to consider any of these factors in either its 2005 decision or its 2012 decision.

4. The Regional Director abused her discretion by concluding that the SYBand had a need for additional land.

As outlined in POLO's opening brief, there is no evidence that there is a need for the land to be taken into trust. The SYBand currently owns the land in fee and, assuming it complies with State and local law, it has not been precluded from developing the property as a museum and related facilities as planned. Both the BIA and SYBand acknowledge that land is not needed for the SYBand's governmental or sovereign functions.

The BIA and SYBand claims that the Regional Director need not consider a tribes need for additional *trust* lands, only whether it needs additional lands. That may be true, but it is not the issue here. The SYBand already owns the land in fee and the issue is not whether it needs additional lands. Instead, the issue is whether lands already owned by the SYBand need to be put in trust. For the reasons outlined in POLO's Opening Brief, the land that the SYBand already owns does not need to be in trust. The SYBand's contention in this regard is undermined by the fact that it owns several properties in fee in the area that are not, and apparently do not "need" to be, in trust.

The BIA and SYBand also agree with the Regional Director's claim that, regardless of its intended use, there is a need to put this land in trust to insure that the SYBand is able to exercise its own land use control and regulations over the property. As claimed by the Regional Director:

> "If the land were to remain in fee status, tribal decisions concerning the use of the land would be subject to the overriding authority of the State of California and the County of Santa Barbara, thus impairing the Tribe's ability to adopt and execute its own land use decision and development goals."

The Regional Director's assertion that the property will be exempt from State and local regulation is incorrect. The Regional Director cites no authority for the claim that lands taken into trust are exempt for state and local regulations. The IRA does not provide support for this claim. Although the IRA exempts trust land from state and local taxation, trust land was not exempted from State and local regulation.

POLO is aware that the Secretary of Interior claims that it has the authority to exempt Indian trust lands from State and local regulation pursuant to 25 CFR § 1.4. But there is no statutory authority for Section 1.4 and its constitutionality is suspect. Furthermore, even if Section 1.4 were constitutional, in 1965 the Secretary of Interior pursuant to his claimed authority under Section 1.4, adopted and made applicable to all trust lands in California:

> "all of the laws, ordinances, codes, resolutions, rules or other regulations of the State of California, now enacted or as they may be amended or enacted in the future, limiting zoning, or otherwise governing, regulating or controlling the use or development of any real or personal property, including water rights , , ,"
>
> 30 Fed. Reg. 8722 (1965).

Thus, regardless of whether the land is owned in fee by the SYBand, or owned by the United States in trust for the SYBand, it is subject to State laws and regulations. And, consequently, the Regional Director's claim that the SYBand needs to have the property placed in trust to escape State and local land use regulations is without merit. Instead, as required by the 1965 Secretarial Order, the SYBand should be required to demonstrate that it has complied with, and will continue to comply with, all State and local laws before this land is taken into trust – including the Santa Ynez Community Plan and the California Environment Quality Act and all other applicable California land use, water use, environmental and planning laws.

5. **The Regional Director abused her discretion by failing to consider Significant Jurisdictional Problems and Conflicts of Land Use.**

The Regional Director admits that the SYBand will attempt to assert its own civil regulatory jurisdiction over the 6.9 acres if the land is taken into trust. In fact, Regional Director claims that the primary reason or need to take the land into trust is to remove it from State and local control and regulation. This could cause major jurisdictional and land use conflicts.

But the Regional Director did not discuss the applicable State and local laws or the impact of removing their requirements and protections. Nor did the Regional Director compare the State and local laws to the proposed or applicable tribal laws to insure that the environment and public remain protected. Nor does the Regional Director discuss the 1965 order of the Secretary of Interior declaring that State laws and regulations, not tribal laws and regulations, apply to trust lands in California.

Furthermore the Regional Director implies that the SYBand will have exclusive, governmental control and authority over the land if it is taken into trust. This is simply not correct. The SYBand is not an independent government. It is, at most, a "dependent domestic sovereign" government subject to the guardianship and supervision of the United States. If the land conveyed into trust, it will be owned by the United States and held and managed by the United States for the benefit of the SYBand subject to federal land use and environmental laws. The potential application of these federal laws was not discussed by the BIA.

One extremely important federal land use law, which was not discussed by the Regional Director, is the potential impact of applying the federal reserved water rights doctrine to land acquired in trust and whether that doctrine should apply to Indian water claims to both ground water and surface water. Although the BIA and Regional Director ignored this issue in their 2005 and 2012 decisions, it has not been ignored SYBand. In a very recent law review article, which appears to been written on behalf or at the behest of the SYBand, a legal argument is made for the

notion that the SYBand has a reserved water right to the ground water and that it is entitled to take as much ground water that is needed for the casino and before the ground water "is depleted by non-Indian users." (Reservation and Quantification of Indian Groundwater Rights in California" Joanna (Joey) Meldrum, 19 Hastings West-Northwest Journal of Environmental Law & Policy 277 (Summer 2013).) The implication of SYBand's claim to federal priority reserved water rights, including ground and surface water to support their casino and other trust properties, should have been considered by the BIA before deciding whether to take these lands into trust.

C. The BIA failed to comply with NEPA.

The National Environmental Policy Act (NEPA) requires and Environmental Impact Statement (EIS) be prepared for all "major Federal actions significantly affecting the quality of the human environment." (42 U.S.C. § 4332(2)(c).) An agency may first prepare an Environmental Assessment (EA) to determine if a proposed federal action may have an environmental effect. (*National Parks & Conservation Assn. v. Babbit* (9th Cir. 2001) 241 F.#d 722,730. NEPA requires the agency to take "hard look" at the environmental consequences of its actions and provide a "convincing statement of reasons to explain why a project's impacts are insignificant." *(Id.)* In this context, NEPA requires the agency to take cumulative impacts and the interests of the community into account. (*Blue Mountain Biodiversity Project v. Blackwood as Supervisor, Umatilla National Forest* 161 F.3d 1208 (1998).) If there is a potential significant environmental effect, the agency must prepare an EIS (*Native Ecosystems Council v. U.S. Forest Services* (9th Cir. 2005) 428 F.3d 1233, 1239.)

In this case, as summarized in POLO's Opening Brief, it was arbitrary and capricious for the BIA in 2005 to prepare a Finding Of No Significant Impact (FONSI) instead of an EIS with respect to the trust acquisition and development of the 6.9 acres and reasonably foreseeable related projects. It was even more arbitrary and capricious for the BIA to rely on that same

FONSI and not update its environmental review and prepare and circulate an EIS before it approved the same project in 2012.

In its Opening Brief, POLO listed several serious impacts – including traffic, air quality and noise impacts - that warranted the preparation of an EIS. Those potential impacts are still there but were not even mentioned, much less addressed by the BIA in 2012. An EIS is still necessary to study these initially identified impacts.

Furthermore, the BIA should have also studied, at least in a new EA, the cumulative impacts of putting the 6.9 acres,5.68 acres and 1400 acres in trust. An agency is required to study the cumulative impacts of "past, present and reasonably foreseeable future actions." 40 CFR § 1508.7. Cumulative impacts may result from "individually minor but collectively significant actions taking place over time." *Id.* If several actions have a cumulative environmental effect, "this consequence must be considered in an EIS." *City of Tenakee Spring v. Clough,* 915 F.2d 1308, 1312 (9th Cir. 1990).) The 5.68 acre fee-to-trust application is still pending and the 1400 acre fee-to-trust application, according to the SYBand, is anticipated in the near future. The cumulative impacts of all three applications, and any other reasonably foreseeable trust applications, should be studied in an EIS now.

Despite the urging of POLO and others, and contrary to the mandates of NEPA outlined above, the BIA failed to study the cumulative impact of all three of these applications in either an EA or EIS. The BIA's decision to ignore NEPA or study these environmental issues prior to issuing its 2012 decision was arbitrary and capricious.

Any other federal agency taking a "hard look" at these potential impacts would mandate the preparation of an EIS. In this case the BIA completely ignored these impacts despite the fact that they were brought to their attention. The BIA does not even mention these impacts, much less supply a "convincing statement of reasons" to explain why, in their view, these impacts are

insignificant. *Save the Yaak Committee v. Block* 840 F.2d 714, 717 (9th Cir. 1997).

Furthermore, the problem here is potentially more serious than the fact that the BIA failed to take a "hard look" at the potential impacts or that the BIA failed to provide "convincing statement of reasons" why they think the impacts are insignificant. The problem is that it appears that the BIA is unwilling or unable to require full compliance with NEPA because to do so would be incompatible with its mission to protect and fully support tribal economic development. (See Footnote 17 above.) Obviously the BIA will not fully comply with NEPA and prepare an EIS, unless directed to do so by this Board or the Court.

D. **The *Carcieri* Supreme Court Decision.**

According to the application of the SY Band, its tribal charter was approved by, the Secretary of Interior in 1964. (See also Exh. A.)Thus, the SYBand was first recognized by the federal government in 1964 at the earliest. Before 1964, the SYBand did not exist as a tribal government. And it was not a federally recognized tribe in 1934 when the IRA was enacted and, per the Supreme Court's decision in *Carcieri*, it is not entitled to the benefits of a fee-to-trust transfer. The SYBand's application should be denied for this reason alone.

The *Carcieri* decision is not complicated. In *Carcieri v. Salazar* (2009) 555 U.S. 379, the Supreme Court held that the Supreme Court held that the Secretary of Interior's authority under the IRA to take lands into trust is limited to "recognized . . . under federal jurisdiction" in 1934. The Supreme Court also held that this statutory rule is clear and is not ambiguous and, therefore, the Secretary's and DOI's interpretation of this rule is not necessary or entitled to deference.[25]

A review of the facts of the *Carcieri* helps put the Supreme Court's decision in context – especially when comparing the tribal interests in that case with those of California Indians in

[25] The interpretation of the requirements of the IRA by the Supreme Court in *Carcieri,* is identical to the Assistant Secretary Babby's interpretation made 15 years earlier in his comprehensive letter to Congressman Miller. (Exh. E.)

general and the SYBand in particular. The tribe in *Carcieri* was the Nargansett tribe which is a State recognized tribe that had a long 200 year history of dealings with the Federal government. The Supreme Court held that although the Nargansett tribe was a federal recognized tribe with a 200 plus year relationship and interaction with the federal government, it was not a "federally recognized tribe" in 1934 when the IRA was enacted and therefore was not to the benefit of a fee to trust transfer.

In contrast the SYBand is not a State recognized tribe and had no government to government dealings with the federal government as a tribe (as opposed to individual Indians) in 1934. The SYBand did not even submit its tribal charter to the DOI for approval, or exist as a federally recognized tribal entity, until 1964. As stated in POLO's Opening Brief : "the evidence is overwhelming that the Santa Ynez Band lacked federal recognition at that critical date [1934]."

The SYBand and the BIA/Associate Solicitor ignored the clear legal test stated in majority opinion adopted, without qualification, by five Justices. In *Carcieri* the Supreme Court clearly stated that to benefit from the fee-to-trust provisions of the IRA, a tribe must have been a "recognized tribe now under federal jurisdiction" in 1934. The Supreme Court also said that this clear test did not require deference to the agency's interpretation. Either the tribe was a federally recognized tribe in 1934 or it was not. The SYBand was not.

Instead of acknowledging that the SYBand does not qualify under the *Carcieri* test, the BIA/Associate Solicitor and SYBand try to create a new test more to their liking. Specifically they cut the clear *Carcieri* test in half and then focus only on the "under federal jurisdiction" half of the test. And after severing it from the "recognized tribe" half of the test, they then claim that the phrase "under federal jurisdiction" is ambiguous and subject to interpretation by the federal entities – which they then claim should be entitled deference . This attempt to escape the clear legal test stated by Supreme Court should be rejected. It should also be considered as an

admission that SYBand could not meet the full *Carcieri* test because it was not a federally recognized tribe in 1934.

Furthermore, the facts that they offer do not support the claim that the SYBand was a tribal government under federal jurisdiction in 1934. The BIA/Associate Solicitor discuss a series of pre-1934 facts and events that they claim demonstrate that the SYBand was under federal jurisdiction in 1934. But these proposed facts do not support the claim that the SYBand was a tribal government in 1934 for several reasons.

First the BIA/Associate Solicitor failed to attach or provide copies of the exhibits which they contend support the Associate Solicitor's analysis. The Associate Solicitor's memorandum is unsubstantiated and should be stricken from the record to the extent it purports to provide factual support for his legal contentions. Second, none of the facts and correspondence involves evidence that the United States dealt with the SYBand as a governmental entity in 1934. Instead, all of the facts offered involve individual Santa Ynez Indians or the Catholic Church and not the SYBand as a tribe. Indeed, the SYBand did not even adopt its "new tribal name" until 1964. And, third, some of the so called supporting evidence was mischaracterized by the Associate Solicitor as involving tribal members and tribal lands and actions by the United States, when, in fact, the proffered evidence involved individual non-tribal citizens dealing with lands owned by the Catholic Church.[26]

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[26] In essence, BIA is trying to rewrite history to create, after the fact, a fictional Santa Ynez tribe in 1934. The purpose of this fictional tribe is to give the current SYBand preferences and entitlements under the IRA that, under *Carcieri* it is not entitled to have. The Associate Solicitor seems to claim that the United States has the "plenary authority" to create this fictional tribe and use it to take land into trust exempt from State and local regulation and with priority water rights to the detriment of other residents in the Santa Ynez Valley. But the United States' so called plenary power over Indians has constitutional limits and certainly does not include creating a tribe 80 years after the fact just to benefit the current Indians of the SYBand. To give IRA preferences to Indians who were not a recognized tribe in 1934 would violate the equal protection rights of other residents in Santa Barbara. (See *Adoptive Couple v. Baby Girl supra.*)

Both the SYBand and the Associate Solicitor claim that the 1947 Haas report, Ten Years of Tribal Government Under the I.R.A. supports the contention that the SYBand was a federally recognized tribe in 1934, because it lists 20 Santa Ynez Indians as voting to accept the IRA. However, as is outlined in POLO's opening brief, just the opposite is true. First Table A attached to the Haas Report is not just a list of tribes; it is a list "Indian Tribes, Bands and Communities." As outlined above the Santa Ynez Indians were, at most, an Indian community, not a tribe, in 1934. Second, a majority of the Santa Ynez Indians did not vote to accept the IRA. Instead, of the 48 eligible voters, only 20 Santa Ynez Indians voted to accept the IRA. Furthermore the list incorrectly indicates that there was a Santa Ynez reservation in 1934. Even the SYBand acknowledges that the land that they call their reservation was not acquired until 1941. (Exh. A.)

Finally the Haas Report confirms that voting to accept the IRA did not immediately make the Indian community a tribe. Instead, before they can emerge as a acknowledged as a newly organized tribe under the IRA, according to Haas, the Indian group needs to adopt by-laws and a constitution and complete several pre-requisites before submitting a tribal charter to the Secretary of Interior for approval. This is consistent with the description of the situation included in the 1994 letter by Assistant Secretary Babby. (Exh. E.) And even the SYBand concedes that its tribal charter was not approved until 1964 – 30 years after IRA was enacted.

It is true that 20 of the 48 Indians living at the Santa Ynez Mission in 1934 voted to accept and try organize themselves pursuant to the terms of under the IRA. But that is not evidence that they existed as a tribe before 1934. It is merely evidence that some (not the majority) of the Indians living near the Santa Ynez Mission would, in the future, try to organize themselves in accordance with the IRA. And, in fact, after the enactment of the IRA, at the urging of the federal government some of the Indians at the Santa Ynez Mission began to try to organize themselves in accordance with the IRA. But it would be 30 years before they were prepared to submit a tribal

charter to the Department of Interior for approval under the IRA in 1964. Regardless of these post 1934 activities, the SYBand clearly was not a "recognized tribe now under federal jurisdiction" in 1934 and is not entitled to benefit from the fee-to-trust transfer provisions of the IRA as defined by the Supreme Court in *Carcieri.*

This unique non-tribal status of the California Indians in 1934 when the IRA was enacted was discussed in 2009 by the Supreme Court when it heard *Carcieri.* It was noted by the Court that, during a 1934 hearing before the IRA was enacted, Senator Wheeler and Mr. Collier, Indian Commissioner and author of the IRA, had a discussion regarding its potential applicability to the California Indians. Apparently Senator Wheeler expressed concern that California Indians, who were not federally recognized or organized as tribes, would receive the fee-to-trust benefits of the IRA. Commissioner Collier's solution was to add the phrase "recognized tribe now under federal jurisdiction" and that would be sufficient to exclude most California Indians and other Indians who were not federally recognized as tribes before 1934. See *Carcieri* transcript at pp. 14-16 and 25-28. Thus, that same language inserted by Collier in the IRA, was intended to, and should, preclude the BIA and AS-IA from taking into trust for the benefit of the SYBand.

E. The *Hawaii* Supreme Court Decision

It is undisputed that the 6.9 acres is currently owned by the SYBand in fee. And it is equally beyond dispute that, prior the SYBand's acquisition of this property, it was privately held and not part of the public domain of the United States. Under these circumstances, under the principles of federalism and State sovereignty outlined by the Supreme Court in *Hawaii v. Office of Hawaiian Affairs* 129 S. Ct. 1436 (2009), the Secretary of Interior lacks the authority to remove the land from State and local regulation for the exclusive benefit of the SYBand.

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Both the SYBand and the BIA/Associate Solicitor address the *Hawaii* in terse fashion. They basically argue that it is irrelevant or not applicable to this appeal. The BIA and SYBand misunderstand the *Hawaii* decision and ignore its importance to this appeal.

The issue in *Hawaii* was whether the United States, after granting all public domain land to the State of Hawaii upon its admission in 1959, could strip Hawaii of its ownership and sovereignty over such land and return it to the Native Hawaiians. The lower court had held that the Native Hawaiians retained "unrelinquished claims" over the public domain lands previously transferred to the State. The Supreme Court disagreed and reversed that decision for several reasons. Most important for our purposes is the Court's conclusion that Congress cannot, after Statehood, retrieve public domain land or sovereign regulatory jurisdiction that has been previously transferred to the State. See also *Idaho v. United States,* 121 S. Ct. 2135 (2001). The Court concluded, based on the principles summarized in the *Idaho* case that "the consequences of admission are instantaneous, and it ignores the uniquely sovereign character of that event ... to suggest that subsequent events somehow diminish what has already been bestowed." Acts of Congress should not be read to create a "retroactive cloud" on the State's title or sovereignty. *Id.* The same principles of federalism apply to California lands and regulatory jurisdiction.

California received sovereign regulatory jurisdiction over all public and private lands and over all of it citizens "instantly" upon admission to the Union in 1850. (See also *Tarrant Regional Water District v. Herrmann* S.Ct. (No. 11-889; June 13, 2013.) Even public domain lands owned by the United States at the time of California's statehood are subject to State regulatory jurisdiction. The United States attempt to reassert exclusive regulatory jurisdiction over privately held lands to the benefit of SYBand – and to the exclusion of State and local laws and regulations - violates the principles of federalism and is precluded by the *Hawaii* case. And to the extent it gives rights and preference to Indians that are not enjoyed by the other citizens of California it

violates the Equal Protection clause of the constitution. Furthermore, any attempt by the Secretary of Interior, to exempt trust lands from State and local regulation, including 25 CFR Section 1.4, is unconstitutional and precluded for the same reasons. (See *Adoptive Couple v. Baby Girl supra.*)

CONCLUSION

For the forgoing reasons, POLO respectfully requests that the IBIA:

1. Find that POLO has standing to pursue this appeal;
2. Submit a response to the District Court as required by the 2008 remand order;
3. Find that the BIA failed to comply with the applicable regulations;
4. Find that the BIA failed to comply with NEPA;
5. Find that the SYBand was not a federally recognized tribe in 1934;
6. Find that the land is subject to State and local laws whether held in fee or in trust;
7. Find that the BIA's efforts to create preferences for Indians violates equal protection; and
8. For all the forgoing reasons, vacate the BIA's 2005 and 2012 Decisions.

Date: July 1, 2013

Respectfully submitted,

/s/
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Preservation of Los Olivos and
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UNITED STATES DEPARTMENT OF INTERIOR

INTERIOR BOARD OF INDIAN APPEALS

PRESERVATION OF LOS OLIVOS and PRESERVATION OF SANTA YNEZ, Appellants, **v.** PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	Case No. IBIA 05-050-A **APPELLANTS' REPLY BRIEF** **EXHIBITS A - E**

EXHIBIT A

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Laura Y. Miranda

April 25, 2005

James Fletcher, Superintendent
Bureau of Indian Affairs, Southern California Agency
1451 Research Park Drive
Riverside, CA 92507-2471

Re: Fee-to-Trust Application for the Santa Ynez Band of Chumash Mission Indians

Dear Mr. Fletcher:

This letter and the following attachments constitute the application of the Santa Ynez Band of Chumash Mission Indians ("Tribe"), a federally recognized tribe, for acceptance into trust of a parcel of land located within Santa Barbara County. Miranda, Tomaras & Ogas, LLP represents the Tribe in this matter.

Pursuant to 25 USC § 465, 25 USC § 2719, and 25 CFR Part 151, the Santa Ynez Band of Chumash Mission Indians hereby applies to the United States Department of Interior for approval of its request to take the following described parcels of land, located in Santa Barbara, California, into trust for the use and benefit of the Tribe. The land is described as: Santa Barbara County Assessor's Parcel Nos. 143-253-02,143-253-07,143-253-08,143-254-01,143-254-03,143-253-04,143-253-05,143-253-06, 143-252-01,143-252-02,143-242-01 143-242-02, and 143-253-03, consisting of approximately five and six eighths acres (5.68) total.

This application is structured according to the latest guidelines set by the Area Office, entitled "Sacramento Area - Bureau of Indian Affairs, Land Acquisition Applications (Tribal Requests)". The Tribe requests that you inform it of any additional materials the BIA may need to process its request. We further request that you process this application as soon as possible as the documents which are now current will not be so if this process is unnecessarily delayed and since the Tribe is currently incurring property taxes in connection with this land.

Should you have any questions, please do not hesitate to contact me at (858) 554-0550.

Very truly yours,

MIRANDA, TOMARAS & OGAS, LLP

Brenda L. Tomaras

Brenda L. Tomaras
Attorneys for the Santa Ynez Band of Chumash Mission Indians.

Enclosure
cc w/ enclosure:
Santa Ynez Band of Chumash Indians
P.O. Box 517
100 Via Juana Lane
Santa Ynez, CA 93460

INTRODUCTION

Purpose

The purpose of this document is to provide a formal request to the Pacific Regional Office, through the Southern California Agency, from the Santa Ynez Band of Mission Indians (Santa Ynez Band) to process the transfer of title from fee land owned by the Santa Ynez Band of Mission Indians, to land owned by the United States of America held in trust for the benefit of the Santa Ynez Band of Mission Indians. This application has been prepared under the guidelines of 25 CFR 151, Land Acquisitions, and the Fee to Trust Land Acquisitions Application Requirements Checklist for Tribal Land Transfers. All of the accompanying support materials are included herein. A combined application for the Condit and Daniels properties was previously submitted in January of 2002. That application was withdrawn by the Santa Ynez Band earlier this year. This application incorporates those parcels.

The property is located within the City of Santa Ynez. There is no issue regarding contradictory jurisdictions as the property is approximately 634 miles from the Oregon border, approximately 401 miles from the Nevada border, approximately 397 miles from the Arizona border and approximately 18 miles from the Pacific Ocean. Further, the property lies within the County of Santa Barbara, and lies approximately 30 miles from the City of Santa Barbara. Finally, the property is adjacent to Highway 246 which runs along the Santa Ynez Reservation and is contiguous to the Reservation. (**See Exhibit A**).

From August 2001 through October of 2004, the Santa Ynez Band purchased the various parcels as follows:

Common Property Name	APNs	Closing Date	Acreage
Condit	143-253-02 143-253-07 143-253-08	August 3, 2001	0.7
Daniels	143-254-01 143-254-03	August 13, 2001	1.1
Cogburn	143-253-04 143-253-05 143-253-06	March 28, 2002	1.24
Escobar	143-252-01 143-252-02	May 13, 2002	.73
Mooney	143-242-01 143-242-02	April 29, 2003	1.38
Verizon	143-253-03	October 6, 2004	.53
		Total:	5.68

As outlined herein, these parcel are contiguous to each other and the Reservation. (**See Exhibit A.**) Therefore, the regulations for on-reservation acquisitions under 25 CFR 151 shall apply to this application.

Santa Ynez Historical Perspective

The members of the modern day Santa Ynez Band of Mission Indians are the direct descendants of the original Chumash peoples, whose numbers totaled 18,000-22,000 prior to the Spanish contact. Prior to the Mission Period, there were around 150 independent Chumash villages along the coast of California. Subsequent to Spanish contact, the Chumash population dwindled to a mere 2700 in 1831.

The Santa Ynez Band is a politically independent unit of the Chumash cultural group and is the only federally-recognized band of Chumash Indians. At the time of the missions, the Chumash were the most widespread tribe within California; their territory stretched from what is today Malibu to the South to modern day Paso Robles to the North. They occupied many of the Channel Islands to the West and extended as far East as a portion of what is now Kern County. In all, their lands comprised over seven thousand square miles.

The Spaniards considered the Chumash to be superior to other Indian tribes in California due to their well-developed towns, extensive trade routes and high quality of goods. The Spaniards encountered prosperous and sophisticated towns on their arrival on the coast. Once the Mission Period began, the Chumash contributed both skilled craftsmen and religious leaders to the benefit of the Santa Ines Mission.

Creation of the Santa Ynez Reservation

Subsequent to the Mission Period, the Mexican governors of California issued land grants to tribal leaders and several heads of families of the "Santa Inés Indians." These land grants were not honored by the United States Government after taking over California. The Santa Ynez Band was therefore forced from the lands near the Mission where they had lived throughout the Mexican occupation/rule of California.

The Band eventually resettled at Sanja de Cota creek area which was owned by the Catholic Church. Although it was documented that many of the tribal families resided on the land since about 1835, a formal lease of the land from the Catholic Church was not made until 1877. In 1898, the Catholic Church entered into an agreement with the United States to convey the property in trust for the tribe. In 1903, the Santa Ynez Land and Improvement Company also conveyed land to the United States to be held in trust for the tribe. In the early 1900s, a series of court cases ensued concerning the ownership and occupancy of the land.

It was not until December 18, 1941 that the area, approximately 100 acres of land; was officially acquired by the U.S. Government to be held in trust for use as the Santa Ynez Reservation. Much of that land was unusable creek bed and flood plain and continues to be so today.

The original hundred acres makes up the Southern portion of the reservation. In July of 1979, approximately 26.35 acres (the Northern portion) was added for tribal housing. In February of 2004, the Davidge/Walker property, an irregularly shaped 12.6 acre parcel of land which is primarily riparian in nature and separated the Northern and Southern portions of the reservation, was acquired in Trust for the Santa Ynez Band. The reservation now includes a total holding of

approximately 139 acres in Trust. However, even with uniting the reservation, the Tribe continues to have a very limited useable trust land base.

The current reservation of the Santa Ynez Band of Mission Indians is located in the community of Santa Ynez, southwest of Highway 246 in Santa Barbara County, California.

Santa Ynez Recent History

As difficult as conditions had been in the past for the Santa Ynez Band of Mission Indians, they became even more difficult in recent years. Despite the large population of Chumash Indians prior to contact, today the Santa Ynez Band of Mission Indians has a tribal enrollment of 157.

In the face of stark poverty on land with little serviceable area, the Santa Ynez Band continued with its strong drive for preservation of its lands and people. The Santa Ynez Band reorganized their government under the IRA and began both developing its governmental functions and structures, to assure such necessities as tribal housing, as well as economic development to assure continued survival of the Band and its members. The turbulent beginnings of the Indian casino in the 1980s ultimately provided a base upon which the Santa Ynez Band began to develop their governmental capabilities and entrepreneurial infrastructure.

Today, the Tribal government oversees a number of different programs: A full-time Environmental Department, Education Committee, Elders Council and Enrollment Committee. The Tribe maintains a Social Services/Community Outreach program through its Tribal Health Clinic. These programs and services help manage and ensure the well-planned growth of the Santa Ynez Tribal government.

The Band continues to identify goals and opportunities for the future benefit of the Tribe. They utilize the proceeds from economic development efforts to become more self-sufficient and expand the capabilities of the Tribal government, and increase the amount of usable land for tribal needs such as housing.

It is widely understood throughout Indian Country that a Tribal government's sovereignty is dependent on a land base to exercise its jurisdiction over. Thus, the preservation of the tribe's existing land base and the re-acquisition of its aboriginal lands have always been top philosophical priorities. Today, although land prices around the Reservation are not necessarily favorable, the Tribe is fortunate to have extra income to allocate for land acquisitions.

Summary

Historically the Chumash had an extensive territory ranging along the California Coast. In 1941, the Santa Ynez Reservation was formally established with 100 acres of land, largely unusable creek beds and flood plains. The Tribe has slowly but surely been able to increase this acreage and has purchased additional properties. These properties are to be transferred back to the reservation under the jurisdiction of the Tribal Government for use and development for future generations.

This application shall demonstrate that all provisions of 25 CFR 151, Land Acquisitions, have been met to establish the documents and conditions by which the Secretary, at her discretion (as authorized by US Code 25 Section 465), may transfer title of property from land held in fee by the

Santa Ynez Band of Mission Indians to land held in trust by the United States for benefit of the Santa Ynez Band of Mission Indians. It is pursuant to these federal laws that the Tribe hereby makes the request.

SECTION: 1
REQUEST FOR SECRETARIAL ACTION

All applications must be in writing and accompanied by a duly enacted Tribal Resolution which requests Secretarial action. (25 C.F.R. 151.9)

On August 17, 2004, the General Council of the Santa Ynez Band of Mission Indians duly adopted Resolution No. 871, authorizing the Tribal Chairperson and the Business Council to take the steps necessary to acquire and place into trust, certain lands contiguous to the existing reservation; requesting the Secretary to take the action of transferring title from fee land owned by the Santa Ynez Band of Mission Indians to land owned by the United States of America in trust for the benefit of the Santa Ynez Band of Mission Indians through submission of a Fee-to-Trust Application; and execution of a grant deed conveying the subject property to the United States of America to be held in trust for the Santa Ynez Band of Mission Indians on the Santa Ynez Indian Reservation. **(See Exhibit B)**.

In furtherance of the General Council's authorization, the Santa Ynez Band, through submission of this application, is requesting Secretarial action to transfer title of land from fee landed owned by the Santa Ynez Band to land owned by the United States of American in trust for the benefit of the Santa Ynez Band of Mission Indians.

SECTION: 2
STATUTORY AUTHORITY FOR THE ACQUISITION

All applications must cite the statutory authority for the land acquisition. (25 C.F.R. 151.10(a)).

Section 5 of the Indian Reorganization Act of 1934 (48 Stat. 984), as amended, provides the authority for this acquisition. The Secretary of the Interior is authorized to acquire and hold land in trust for the Tribe pursuant to Section 203 of the Indian Land Consolidation Act (25 U.S.C. 465) as amended. The process for securing this land acquisition is governed generally by 25 CFR Part 151.

The Santa Ynez Band of Mission Indians is recognized as an American Indian Tribe by the Secretary of the Interior. The Tribe in organized under the Articles of Organization which were adopted by the membership on November 17, 1963. The Articles of Organization were approved by the Secretary of the Interior on August 23, 1963 and later approved as a Constitution in 1964 and amended in 1980.

SECTION: 3
CONSISTENCY

Land acquisitions must be consistent with the policy set forth in 25 CFR 151.3. If application is not consistent with the policy, that application must state that a waiver of the regulations is being

requested, and a justification for approval of the waiver should be contained within the application and/or supporting documents. (25 C.F.R. 151.3)

The Santa Ynez Band of Mission Indians has ownership of fee simple title to the properties encompassed within this application. Pursuant to 25 CFR sections 151.3(a), 151.3(a)(1), (2) and (3), the Tribe does hereby submit the following information and documents contained within this Application in support of its request that the Secretary of the Interior accept into trust the subject lands, as described in the title reports (**Exhibits C - H**), which are contiguous with the boundaries of the Santa Ynez Band of Mission Indians' existing reservation for purposes of facilitating tribal self-determination.

SECTION: 4
JUSTIFICATION FOR ACQUISITION

The applicant must state the need for additional land (25 C.F.R. 151.10(b)).

The Santa Ynez Band of Mission Indians is a strong functioning Tribal Government with many capabilities and a growing economy. These are some of the tools necessary to sustain future generations, increase the Tribal enrollment, and build an ever-stronger functioning Tribe in the future. Another critical element is land as a basic resource. The Tribal government, and the life of its members rely on the highest and best use of its land resources to generate income and opportunities that contribute to Tribal self-sufficiency. While the Tribe has managed to move ahead on its existing land base, it recognizes the need to acquire more useable land for the reservation to either develop now, or land-bank and hold for development by future generations. The proposed action of transferring the land into trust for the benefit of the Tribe will meet the following needs:

1. Bring land within the jurisdictional control of the Tribe, meeting the need for consistent planning, regulatory, and development practices under the single jurisdiction of the Tribe.
2. Help meet the Tribal long range need to establish reservation land base to by increasing the reservation land base by 5.68 acres.
3. Help meet the need to preserve the Tribal land base.
4. Help meet the need for a land base for future generations, land-banking, etc.
5. Help to increase Tribe's ability to exercise self-determination, and to expand Tribal government.
6. Help meet the need to preserve cultural resources in the area by returning land to Tribal and DOI control in order to protect Tribal land from dumping, environmental hazard, unauthorized trespass, or jurisdictional conflict.

The current Reservation lands are highly constrained due to a variety of physical, social, and economic factors. A majority of the lands held in Trust for the Santa Ynez Band are located in a flood plain. This land is not suitable for much, if any, development because of flooding and drainage problems. The irregular topography and flood hazards are associated with the multiple creek corridors which run throughout the property resulting in severe limitations of efficient land utilization. The current reservation has a residential capability of approximately 26 acres or 18% and an economic development capability of approximately 16 acres or 11%. The remaining 99 acres or 71% of the reservation is creek corridor and sloped areas which are difficult to impossible

to develop. Therefore, the size of the usable portion of the Santa Ynez Reservation amounts to approximately 50 acres, much of which has already been developed.

Undeveloped property is at a minimum within the Santa Ynez Reservation. Lands that are undeveloped are of insufficient size for development. The northern portion of the reservation, has the Tribal Health Clinic and Tribal Government facilities, the remainder of the land utilization is specifically designed to provide residential opportunities for tribal members. Any further development in the area would be appropriate only for small scale residential enhancements.

The remaining acres held in Trust for the Santa Ynez Band constitutes the southern Reservation. This is a long narrow parcel of land which at times narrows to only a couple of hundred feet in width. Such narrowness imposes severe constraints on development of the property. Given the limited usable land the Tribe has to work with, it has established a plan for land consolidation of lands immediately adjacent to the Reservation. Such land consolidation allows the Tribe to consolidate its holdings for purposes of enhancing its self-determination, beautification of the Reservation and surrounding properties, and protection and preservation of invaluable cultural resources.

A significant archaeological/cultural resource was recently discovered on property adjacent to the Reservation. This resource is portions of an ancient village site which the Tribe is making every effort to preserve and protect. Nevertheless, the proximity of that property to the properties which are the subject of this application suggests the potential for such significant resources to be encountered as well. There should be no question that the Tribe maintains the primary interest in such resources and should therefore be the ultimate authority on proper treatment and disposition of such resources. Placing the property into trust thus ensures that the Tribe has jurisdiction over the property and will be able to dictate how best to preserve and protect such resources.

Further, placing the property into trust facilitates the Tribes' land consolidation plan by allowing the Tribe to exercise its self-determination and sovereignty over such property. Land is often considered to be the single most important economic resource of an Indian tribe. Once the lands are placed under the jurisdiction of the Federal and tribal governments, the tribal right to govern the lands becomes predominant. This is important, as the inherent right to govern its own lands is one of the most essential powers of any tribal government. As with any government, the Tribe must be able to determine its own course in addressing the needs of its government and its members. Trust status is crucial to this ability.

Specifically, the Tribe must be able to manage and develop its property pursuant its own interests and goals. If the land were to remain in fee status, tribal decisions concerning the use of the land would be subject to the authority of the State of California and the County of Santa Barbara, impairing the Tribe's ability to adopt and execute its own land use decisions and development goals. Thus, in order to ensure the effective exercise of tribal sovereignty and development prerogatives with respect to the land, trust status is essential.

In addition to allowing the Tribe to work within its own regulatory scheme, trust status provides protections for the lands that the Tribe would not otherwise be able to achieve. For example, once the land is in trust, parties other than the Federal government or the Tribe, whether they be governmental or private entities, have no power over the property. Thus, these parties would not

be able to obtain rights in the property through, for example, adverse possession or the power of eminent domain.

SECTION: 5
PURPOSE FOR ACQUISITION

Applicant must state the purpose(s) for which the land will be used. (25 CF.R. 151.0(c)).

The Tribe has no current planned uses for the property. The purpose of the acquisition and transfer from fee to trust status will be for future long range planning and land banking. The property will serve to enhance the Tribe's land base as is contemplated by its land consolidation plan which supports tribal self-determination. Placing the land into trust will allow the Tribe jurisdiction over such things as the overt appearances of the property, as well as any cultural resources contained within the property. Tribal lands also comprise the heart of the non-economic resources of a tribe by serving cultural, spiritual, or educational purposes, among others. This invaluable tribal resource is protected by placing newly acquired fee lands in trust with the United States Government. By placing the land in trust, the potential interference with those powers by State and local governments is reduced, and the jurisdiction of the Tribe thereby solidified and preserved.

SECTION: 6
IMPACTS ON THE STATE OF CALIFORNIA AND ITS POLITICAL SUBDIVISIONS

The application must state what impacts on the state and its political subdivisions will result from removal of property from the tax rolls. (25 C.F.R. 151.10(e)).

The Tribe has practiced sound environmental stewardship of their Tribal lands and will do so with this property; therefore, there will be a positive environmental and visual impact on the neighboring county and city areas as well as from Highway 246.

Santa Barbara County would experience a *de minimis* decrease in the amount of assessable taxes in the county by placing the property into trust and removing it from the county tax rolls. The County of Santa Barbara expected to generate $410 million for the fiscal year 2003-2004. The following is a table demonstrating the taxes collectable from the properties for 2001-2004 (**See Exhibit I**):

Common Property Name	APNs	Taxes 2001-2002	Taxes 2002-2003	Taxes 2003-2004
Condit	143-253-02	$185.33	$2000.00	$2040.00
	143-253-07	$185.33	$2000.00	$2040.00
	143-253-08	$224.42	$2250.00	$2294.99
Daniels	143-254-01	$839.76	$6500.00	$6629.99
	143-254-03	$11.51	$780.00	$285.60
Cogburn	143-253-04	$185.33	$1585.00	$2040.00
	143-253-05	$540.17	$4050.00	$5661.00
	143-253-06	$239.30	$1249.99	$1989.01
Escobar	143-252-01	$46.20	$47.13	$3621.00
	143-252-02	$30.63	$32.64	$1479.00

Mooney	143-242-01	$8.17	$8.32	$8.48
	143-242-02	$434.36	$444.32	$454.61
Verizon	143-253-03	0*	0	0

The total collectable taxes on the properties (prior to the ownership by the Tribe) was $2,930.51, this reflects less than 1% of the County's total 2001-2002 property tax revenues which were $356 million. Despite the fact that property taxes increased significantly (nearly tenfold) once the Tribe was the owner, the total collectable on the properties for 2003-2004 is $28,543.68 which still represents less than 1% of the total which the County expects to generate from property taxes. Therefore, the percentage of tax revenue that will be lost by transferring the land into trust would be insignificant in comparison to the total amount of revenue enjoyed by the County.

SECTION: 7
POTENTIAL JURISDICTIONAL PROBLEMS

The application must fully describe the jurisdictional problems or conflicts which may arise as a result of the intended land use, and the removal from state or local jurisdictions. (25 C.F.R. 151.10(f)).

Santa Barbara County has current jurisdiction over the land use on property encompassed by this application. The County's land use regulations are presently the applicable regulations when identifying potential future land use conflicts.

The Condit Properties are zoned C-2, General Commercial. Surrounding areas are also zoned either C-2, Retail Commercial or Commercial Highway. The Daniels Properties are zoned Commercial Highway. The Cogburn Properties are zoned C-2, General Commercial. The Escobar Properties are zoned Commercial Highway. The Mooney Properties are zoned Commercial Highway. The Verizon Property is zoned C-2, General Commercial. Surrounding areas are either also zoned Commercial Highway or C-2 Commercial Retail.

There is a great need for the land to be taken into trust so that the Tribe may consolidate its land base and solidify its jurisdiction over the property owned by it. There should be no adverse jurisdictional impacts to the County because the Tribe's intended purpose of land consolidation and land banking are not inconsistent with the surrounding uses. As such, the County will not have any additional impacts of trying to coordinate incompatible uses. Further, the County would not have the burden or responsibility of maintaining jurisdiction over the Tribal property. As such, the Tribe does not anticipate that there will be any adverse jurisdictional impacts by the land being taken into trust.

The land presently is subject to the full civil and criminal prohibitory jurisdiction of the State of California and Santa Barbara County. Once title to the land is accepted into trust and becomes part of the Santa Ynez Reservation and thus becomes Indian Country, the State of California will have the same territorial and adjudicatory jurisdiction over it and over individuals and transactions that occur on it as the State now has over similar individuals and transactions in other areas of Indian Country within the state. Under PL. 280 [18 U.S.C., Section 1162 (criminal) and 28 U.S.C.

* According to the County's site, no information can be found on this parcel.

Section 1360 (civil)], except as otherwise provided in PL. 280, the State of California would continue to exercise its jurisdiction to enforce its civil and criminal prohibitory laws against all individuals on the land, and to adjudicate in State courts civil causes of action arising in this Indian Country involving individual Indian defendants, but not the Tribe itself. PL. 280 itself does provide certain important exceptions to this civil jurisdiction, such as extending no civil jurisdiction to tax, and denying to State courts the right to determine ownership, possession, or any interest in such trust land. Thus, provision of police services would continue to be the responsibility of the Santa Barbara County Sheriff's Department, and criminal prosecutions of criminal offenses under state statutes committed by anyone within such Indian Country would continue to be brought in State courts. However, neither the State nor the County would have jurisdiction to enforce civil regulatory laws within that Indian Country against individual reservation Indians or the Tribe, such as building and zoning ordinances, rent control, etc. As such, there should be no adverse jurisdictional impacts created by placing the property into trust.

With respect to impacts to the State and County, the Tribe has consistently been cooperative with local government and service providers to assist in mitigating any adverse effects their activities may cause. For instance, the Tribe has an existing agreement with the California Highway Patrol to assist in monitoring traffic related to the Tribe's casino. This agreement is renewable and has been in place since the summer of 1995. The Tribe has also been able to make generous contributions to the surrounding communities. They have sponsored numerous organizations and events. These include youth programs, sports programs, and local emergency service providers such as the Sheriff's Department and Fire Department. Thus the Tribe has made every effort to help mitigate any impacts to County service organizations. The Tribe hopes to continue to support such community activities.

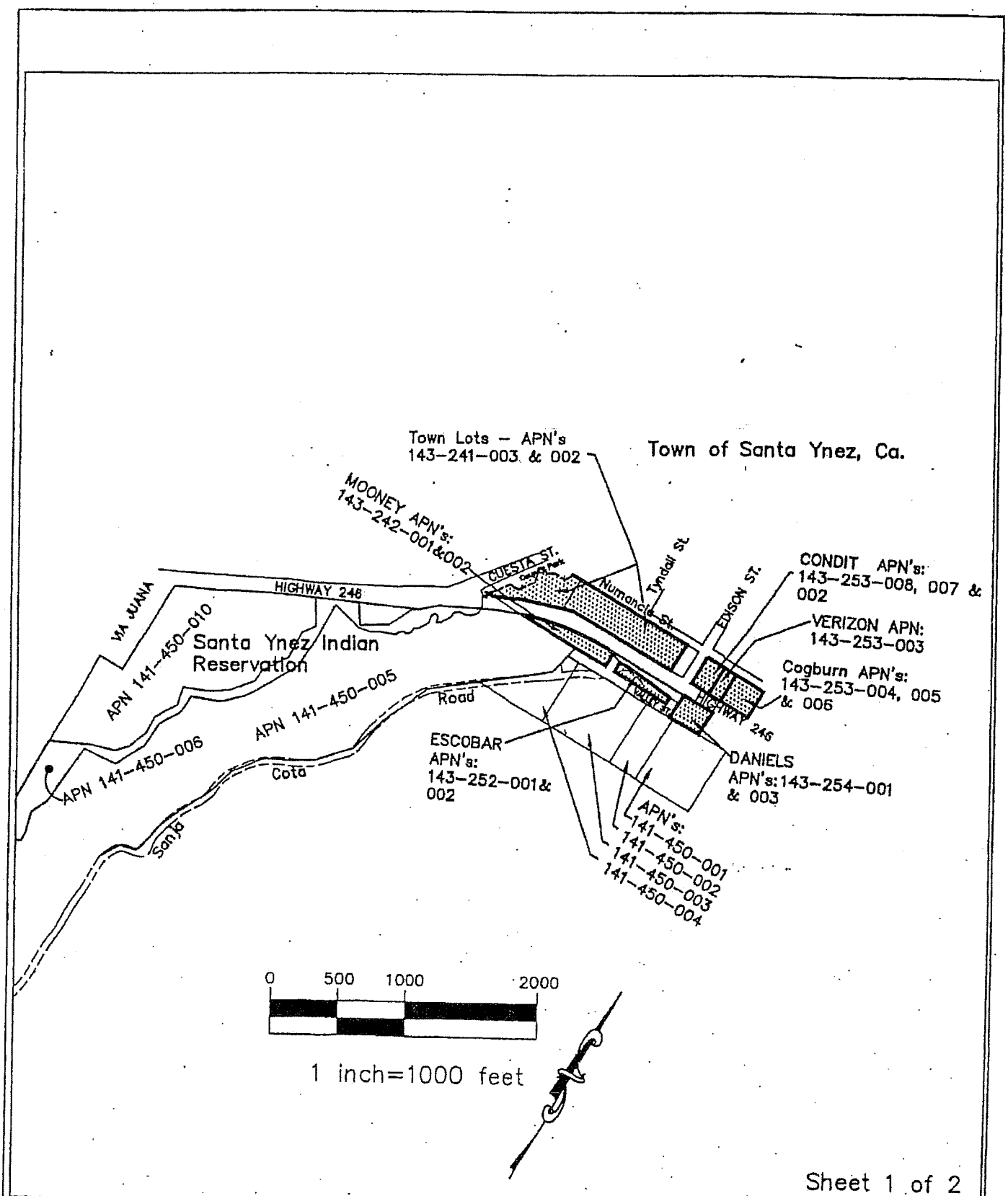
Finally, the Tribe, as part of its Highway 246 Mitigation Measures (unrelated to the instant application), has installed signalization of the Edison intersection which is an improvement the County itself has wanted for some time.

SECTION: 8
PROPOSED MITIGATION MEASURES

The application must state what mitigation actions are planned to reduce adverse impacts identified under Item Nos. 6 and 7 above.

The Tribe does not anticipate any adverse impacts with the use of land to be taken into Trust. The Tribe's intended purpose of land consolidation is consistent with the current surrounding zoning. Since there are no adverse impacts to taking this parcel into trust, there is no mitigation action necessary. Further, impacts on the local government tax schemes and services have been addressed. (See above in Section 7.)

At such time as the property is developed, the impacts will be reviewed and addressed in the environmental documents as required by the Tribal laws and ordinances, including all applicable federal and state requirements related to the impacts of particular uses.

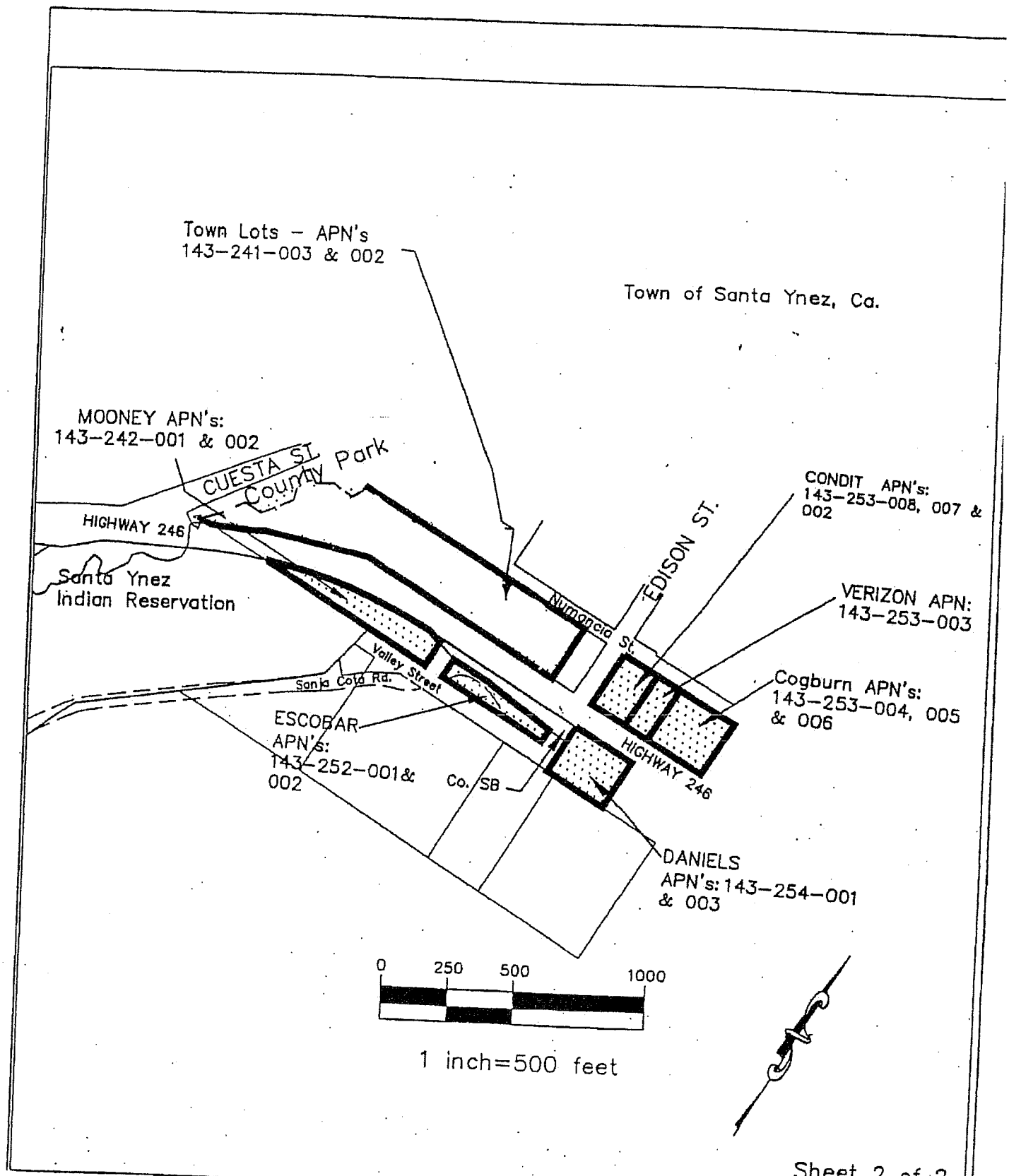


Sheet 1 of 2

WALLACE GROUP
4115 BROAD STREET, SUITE B-5
SAN LUIS OBISPO, CA 93401
T 805 544-4011
F 805 544-4294
www.wallacegroup.us

Santa Ynez Properties Exhibit
County of Santa Barbara,
State of California

JOB No. : 375.09
DRAWING : exh 01-31-05
DRAWN BY: GM
DATE : 01/31/05



Sheet 2 of 2

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Santa Ynez Properties Exhibit
County of Santa Barbara,
State of California

JOB No. :	375.09
DRAWING :	exh 01-31-05
DRAWN BY:	GM
DATE :	01/31/05

EXHIBIT B

COPY

Mr. James J. Fletcher, Superintendent
United States Department of the Interior
Bureau of Indian Affairs
Southern California Agency
1451 Research Park Dr., Suite 100
Riverside, CA 92507-2154

September 24, 2005

Re: Notice of Non-Gaming Land Acquisition of 5.68 acres for the Santa Ynez Band of Chumash Mission Indians

Dear Mr. Fletcher:

These comments are from Preservation of Los Olivos (POLO) and Preservation of Santa Ynez (POSY) in response to the Santa Ynez Band of Chumash Mission Indians fee to trust application for 5.68 acres of property located in the Town of Santa Ynez, Santa Barbara County. Counsel for POLO/POSY was informed that the comment period for this application was extended through September 25, 2005. POLO and POSY are citizen's groups formed to protect the character of the local area. POLO and POSY oppose the removal of these 13 parcels from state jurisdiction for the exclusive benefit of the Santa Ynez Band of Chumash Mission Indians. Please list POLO/POSY on your list of interested parties to this application using the address in the signature block.

POLO/POSY agree that all fee to trust applications are subject to the regulations promulgated as 25 CFR § 151.10. POLO/POSY point out that these regulations must include a balancing of the interests of all affected landowners and local citizens against the interests of the Chumash Band according to *City of Sherrill v. Oneida Indian Nation*, 125 S.Ct 1478 (March 29, 2005). This recent decision concerns the interests of local landowners to address additional Indian land claims in federal court. Appellants POLO/POSY specifically state that they have justifiable expectations in the continued use and quiet enjoyment of their property and for state jurisdiction to continue to apply on these parcels requested to be placed into trust status. *Sherrill* at 1490-1. The *Sherrill* decision recognizes that 25 U.S.C. § 465 is the method Congress has provided "for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well being." *Id.* at 1493. As made clear by the *Sherrill* Court, all requests for lands to be placed into trust are additional land claims of Indian tribes that must go through the 25 U.S.C. § 465 process. The reasoning of the majority in *Sherrill* applies directly to 25 C.F.R. § 151.10 (2004), requiring the Department of the Interior to now specifically take into account all of the factors protecting the justifiable expectations and rebalanced equities in favor of retaining state jurisdiction cited in *Sherrill* before taking lands into trust status for an Indian tribe. *Sherrill* at 1493-4. POLO/POSY attach a letter from Deputy Secretary James Cason regarding the *Sherrill* decision to the fee to trust applications in New York as Exhibit 1.

These local considerations are particularly important in light of the major gasoline spill at the Union 76 Station immediately across the street from these 13 parcels requested to be placed

into trust status. POLO/POSY attach the declaration of Kate Sulka summarizing the present action being taken by the Hazardous Materials Unit of the County of Santa Barbara Fire Department to address the gasoline contamination as Exhibit 2. Contaminated lands are not even eligible to be placed into trust status. The proximity to this serious gasoline spill makes this fee to trust application major federal action. A complete Environmental Impact Statement (EIS) must be prepared to show that these parcels have not been affected by this contamination under the National Environmental Policy Act (NEPA). As major federal action, this fee to trust application is not eligible for any categorical exclusion or finding of no significant impact (FONSI) to avoid the EIS requirements. Also, this EIS must address the cumulative impacts of these 13 parcels and the 2 parcels composing the 6.9 acre fee to trust application currently on appeal to the Interior Board of Indian Appeals.

POLO/POSY are including with these comments petitions signed by approximately 700 residents of the Santa Ynez Valley opposing this fee to trust application. Taking land out of state jurisdiction prejudices all of the local interests the people of the Santa Ynez Valley have strived to maintain. These include the Western theme of the Town of Santa Ynez that the Chumash Band would not be subject to if these lands are removed form the town's jurisdiction. The health and safety issues created by the traffic impacts also do not have to be considered or mitigated by the Chumash Band. The fire and police protection needs for tribal developments also are not the responsibility of the Chumash Band. All of these burdens fall on the remaining residents and business owners creating a potentially unsafe and unfair situation. These community impacts are exactly the types of impacts that must now be considered within the fee to trust process to protect the justifiable expectations of the community as a whole and to prevent rekindling long dead tribal sovereignty to the detriment of the majority of people affected.

POLO/POSY join with the Governor's office in questioning the basis of the land claim being made by the Santa Ynez Band of Chumash Mission Indians for this fee to trust application. Each one of these fee to trust applications is an additional land claim. To now establish Indian reservations where no reservations have ever existed raises serious constitutional questions very similar to those raised in the *Sherrill* case. It is not in the public interest to remove land from state jurisdiction or to place land under the sovereign jurisdiction of an Indian tribe that is not bound by either the state of federal constitutions. The Indian Reorganization Act requirements for tribal governance create nothing more than sham democracies with no enforceable rights or duties. Tribal governments are not accountable to anyone including tribal members. Congress does not possess the authority to rekindle long dead tribal sovereignty or to create a separate sovereign entity that was not recognized historically through 25 U.S.C. § 465.

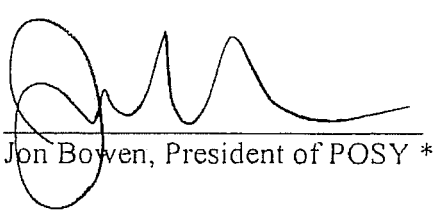
POLO/POSY also point out the inadequacy of the Notice of Non-Gaming Land Acquisition Application (Notice). The Notice does not specify any proposed or designated land use for these parcels. Therefore, it must be assumed that there is no economic benefit to the Chumash Band in acquiring these parcels. If there is no direct economic benefit then the lands cannot be placed into trust status pursuant to 25 CFR § 151.10. If the Tribe has development plans, they should have been stated in the application. The Notice also does not contain any explanation of how these parcels are deemed to be contiguous. In order to be contiguous, there

must be an existing reservation of land for the Chumash Tribe. The lands the Chumash Tribe occupies are private property of the Tribe and do not qualify as a "federal reservation." This is the same problem addressed in the *Sherrill* case concerning how the Oneida and United States kept unilaterally referring to the Oneida private property as a "reservation." The Supreme Court specifically held that the Oneida Tribe's private property was not a federal reservation or Indian land as a matter of federal law. The Notice is inadequate as a matter of law in not giving actual notice of the legal basis for claiming these lands are contiguous to a reservation of federal land or Indian land.

It is impossible for POLO/POSY to comment on the specific land status language contained in the Application for fee to trust because your Agency did not send our counsel a copy of the Application as requested. Counsel for POLO/POSY will not be able to see the actual Application until after these comments are submitted. For this reason, POLO/POSY assert the right to supplement these comments after September 26, 2005 to address the land status issue. POLO/POSY do appreciate the assistance of Mr. Jim Haynes in attempting to supply the actual Application in a timely manner and verify this extension of the comment deadline.

We again request that POLO/POSY be listed as an interested party on all mailing lists regarding the Santa Ynez Band of Chumash Mission Indians. We thank you for the consideration of our comments and the attached petititons.

Sincerely,



Jon Bowen, President of POSY *

*Please refer to and cross-reference the similar letter sent by POLO, dated September 23, 2005 containing the signature of Doug Herthel, President of POLO and all supporting documents.

EXHIBIT C

OFFICE OF THE GOVERNOR

August 26, 2005

Via Facsimile (951) 276-6641 & U.S. Mail

Mr. James J. Fletcher, Superintendent
United States Department of the Interior
Bureau of Indian Affairs
Southern California Agency
1451 Research Park Dr., Suite 100
Riverside, California 92507-2154

Re: Notice of Non-Gaming Land Acquisition (5.68 Acres) Santa Ynez Band of Mission Indians

Dear Mr. Fletcher:

This is in response to a notice received by the Governor's Office regarding the Santa Ynez Band of Mission Indian's ("Tribe") pending application to have the United States of America accept the conveyance of approximately 5.68 acres of property located in Santa Barbara County in trust for the Tribe ("Trust Acquisition"). Though the Governor's Office received this notice in late June, at our request, your office courteously extended the time for comment to August 26, 2005

From the materials submitted with the application, it is our understanding that the proposed Trust Acquisition consists of 13 parcels. All 13 parcels are contiguous to one another and two of the parcels appear to be contiguous to the Tribe's existing trust lands. From the notice of application it appears that ten of the parcels are vacant properties and that three of the parcels have vacant houses or buildings on them. The application asserts that while no immediate change of use is planned as a result of the proposed Trust Acquisition, there may be commercial or residential development on those parcels in the future. Seven of the parcels, Assessor's Nos. 143-253-002, 003, 004, 005, 006, 007 and 008 are currently zoned as commercial lots. The other six, Assessor's Nos. 143-254-001, 005, 143-252-001, 002, 143-242-001, and 002 are currently zoned as commercial highway.

In compliance with 25 C.F.R. section 151.10(b), the Tribe lists, in section 4 of its application, six Tribal needs this acquisition would purportedly fulfill. These are to help the Tribe: (1) meet its needs to have jurisdictional control over its land base; (2) meet its long-range needs to establish its reservation land base by increasing the land base; (3) meet the Tribe's need to preserve its land base; (4) meet its needs to "land-bank" property for future generations; (5) meet its needs to expand its Tribal government; and (6) meet its need to preserve cultural resources and protect the land from environmental damage, trespass or jurisdictional conflict.

In its essence, the Tribe's need for this acquisition amounts to a desire to fulfill what it concedes is a "top philosophical priority" – "the re-acquisition of its aboriginal lands." (Application ("App."), p. 8.) Secondarily, this acquisition appears to fulfill a Tribal goal to acquire more commercially viable land now so that it may be "land-banked" for future Tribal economic or residential development. (App., p. 10.) This is attractive to the Tribe because such land, if placed in trust, would allow the Tribe to argue that State and local land use regulation did not apply. Moreover, it would invest that land with the commercial advantage of being free of property tax, and potentially State income and State and local sales tax liability for certain types of economic activities. Additionally, the Tribe suggests that a trust acquisition at this time is necessary in order to protect Tribal cultural resources. (App., p. 11.)

In support of its claim that the Trust Acquisition would constitute re-acquisition of the Tribe's aboriginal lands, the Tribe appears to assert an entitlement to any lands that were part of the "Chumash cultural group's" territory prior to the first European contact. (App., p. 7.) Generally, this would encompass seven thousand square miles of land extending from Malibu in the South to Paso Robles in the North, to Kern County in the East and the Northern Channel Islands to the West. (*Id.*) More specifically, the Tribe seems to contend that the Trust Acquisition is part of lands that were purportedly granted by the Mexican Governor Micheltoreno to certain "tribal leaders" of the "Santa Ines Indians." (*Id.*)

Underpinning the assertion of its need for additional developable land is the Tribe's claim that only 50 of its existing 139 acres of trust land is developable and that "much" but not all of that land has already been developed. (App., pp. 10-11.)

The Tribe's asserted justification for acquisition as a means of preserving Tribal cultural resources is the suggestion that because cultural resources were discovered on another site nearby, there might be cultural resources on these lands and that this possibility justifies a trust acquisition at this time. This suggestion is, of course, speculative.

The Department of Interior policy for trust acquisitions provides that land may be taken in trust when the Secretary of the Interior determines that the "acquisition is necessary to facilitate tribal self-determination, economic development, or Indian housing." (25 C.F.R. §

151.3(a)(3).) In this case, there has been no showing that the United States' failure to accept the proposed Trust Acquisition will: (a) preclude the Tribe from developing any needed housing for its members; (b) prevent the Tribe from proceeding with an economic development; or (c) leave Tribal cultural resources at risk. Similarly, there has been no showing that this trust conveyance is essential to the Tribe's ability to exercise sovereign authority.

In contrast to the absence of any immediate impact to the Tribe of a denial of its instant trust application, this Trust Acquisition, if approved, would have a significant individual and cumulative adverse impact on the State and its political subdivisions within the meaning of 25 C.F.R. section 151.10, subdivisions (e) and (f) and should, therefore, be denied.

A. The Tribe Has Failed to Provide the Demonstration of Immediate Need or Necessity Required by 25 U.S.C. Section 465 and 25 C.F.R. Section 151.3(a)(3).

The Tribe notes in its application that it currently exercises sovereign control over 139 acres of land including 12.6 acres of recently acquired land that allowed the Tribe to consolidate the northern and southern portions of its territory into a single geographic unit. The Tribe also notes that its current membership is 157. Despite the fact that this equates to more than .885 acres of land for each man, woman and child, or approximately 3.5 acres for each family of 4, the Tribe asserts that it does not have enough land. Its principal contention is that only 50 acres of the 139 are developable and that "most" of those acres have been taken up by its recently expanded and highly successful casino and hotel commercial venture and existing residential development. Though it concedes that there is land that can be developed for "small scale residential enhancements" (App., p. 11), the Tribe suggests that it needs additional land for possible future residential use or possible future commercial activities.

A desire for additional land, however, does not render an acquisition of land "necessary" within the meaning of 25 C.F.R. section 151.3(a)(3). Nothing in the legislative history of 25 U.S.C. section 465 ("IRA" or "Section 465") suggests any Congressional intent for the Secretary of the Interior to take land into trust for a tribe in the absence of a demonstrable immediate need. To the contrary, that history establishes that Section 465 was enacted in response to the immediate need to provide land for homeless Indians for the purpose of creating subsistence homesteads, consolidating areas within a reservation, for grazing and other similar agricultural purposes. (See House Report No. 1804, 73rd Cong. 2d. sess. (May 28, 1934) at 6-7; 78 Cong. Rec. at 9,269, 11,123, 11,134, 11,726-30, 11,743.) Neither the term nor the concept of "land-banking" for future generations or future speculative needs appears anywhere in Section 465, the Department of Interior's regulations or the legislative history of either. (See, for example, 25 C.F.R. section 151.11(c) which requires the submission of a business plan detailing the economic benefit to a tribe of a proposed economic activity where, as here, some of the parcels at issue are not contiguous to the Tribe's existing "reservation" as that term is defined in those regulations.)

Similarly speculative is the Tribe's assertion that some of its cultural resources might be at risk if this Trust Acquisition were not approved. In this regard, the Tribe argues that "[a] significant archaeological/cultural resource was recently discovered on property adjacent" to the Tribe's trust lands and that because of the "proximity" of the Trust Acquisition to that discovery, there is a "potential" that such resources might exist on the Trust Acquisition as well. (App., p. 11.) The Tribe has had control of the Trust Acquisition for more than two years and the complete ability to conduct an archaeological survey. The fact that the Tribe has not uncovered any sites on the property in this period of time suggests strongly that no such sites exist. In any event, the mere possibility that such a site might exist is not a valid basis for a trust acquisition.

Further, while the Tribe seeks to justify the acquisition as a re-acquisition of the "Chumash cultural group's" aboriginal territory, it has not demonstrated either a political entitlement to that territory or, assuming such an entitlement were established, that an acquisition of this nature is essential either to its existence as a tribe or to its ability to function.

While there are numerous discrepancies on details, historical accounts of the Chumash[1] agree that prior to European contact the Chumash did not constitute a single political entity but rather were an amalgam of peoples speaking roughly six to eight different but related languages in contiguous linguistic territories. Within each linguistic territory there were villages typically of 15 to 50 dwellings that constituted separate and independent political entities each controlled by a chieftain (although some chieftain at various times may have controlled more than one village). Altogether it is estimated that there were about 150 such villages in all of these linguistic territories. The Tribe's trust lands are located in the territory of a single linguistic group that by some accounts could have contained up to 50 different politically independent villages. Thus, in the absence of a more detailed explanation from the Tribe, there does not appear to be any basis for a claim by the Tribe to all Chumash linguistic group aboriginal territory. Acceptance of such a claim by the United States could justify the acquisition in trust of seven thousand square miles of land now occupied by an overwhelmingly non-Native American population well beyond the needs of a 157 member tribe that already exercises sovereign authority over more land than it is currently utilizing.

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[1] See generally, California's Chumash Indians, Santa Barbara Museum of Natural History, EZ Nature Books 1996, Rev. Ed. 2002; The Chumash Indians After Secularization, Johnson, California Mission Studies Association, Nov. 1995; Anthropology and the Making of Chumash Tradition, Haley & Wilcoxon, Current Anthropology vol. 38, no. 5, Dec. 1997; Encyclopedia of North American Indians, Chumash, Houghton Mifflin.

The aboriginal political configuration of the Chumash linguistic territories, in which the Santa Ynez Valley was variously under the control of up to 50 independent tribal entities, was itself obliterated during the Mission era. Most sources appear to agree that very shortly after establishment of the Missions there were no politically independent villages in the Santa Ynez Valley, all Indians having been subsumed within the Spanish political system. Spain, the initial political successor to the aboriginal sovereigns after conquest, was succeeded in political authority by Mexico, neither of these sovereigns having recognized sovereignty in any aboriginal political entity. (See, Aboriginal Title: The Special Case of California, (1986) 17 Pac. Law Journal 391, 400.) Similarly, in the Treaty of Guadalupe Hidalgo, the United States recognized no sovereignty other than its own over the newly acquired land, and, upon admission of California into the Union, reserved no Indian lands from State jurisdiction as it had with other states. (See, California Admission Act of Sept. 9, 1850, 9 Stat. 452.)[2] Though the United States has subsequently compensated individual Indians for lost land in several acts (see, Aboriginal Title: The Special Case of California, supra, at pp. 400-415), the purpose of those enactments was not to recognize sovereign title by any government or title by any individual Indians. Instead, their purpose was to foreclose possible claims of aboriginal title altogether. (Id. at 419.) For the Secretary of the Interior to determine to add additional land to the Tribe's existing trust lands merely for the purpose of allowing the Tribe to re-acquire aboriginal lands would thus be contrary to established Congressional policy.

When the Tribe eventually received recognition from the United States, it was recognized as a new political entity comprised of the remnants of the many different independent villages–not as the continuation of any pre-existing political entity. Under the Mission Indians Relief Act of 1891, the Tribe was recognized and its reservation established in order to provide land for homeless Indians and a means by which those Indians could survive economically. When

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[2]Under the Land Claims Act of March 3, 1851, 9 Stat. 631, the United States determined, through a board of land commissioners, that the land in the Santa Ynez Valley had been granted to the Catholic Church and other private individuals. Additionally, in a report required by section 16 of the Land Claims Act, the board determined that Indians living in and around California Missions, though asserting grants to them by the Mexican Governor Micheltoreno, could not provide sufficient documentation supporting any such claims. A subsequent suit by the Catholic Church in 1853 likewise did not validate any Indian claims to lands around the missions. Thus, subsequent to California's admission to the Union, the United States not only did not reserve any lands otherwise ceded to State sovereignty for the sovereign use of any tribe of Indians, but it also did not recognize non-sovereign title to any such lands by individuals Indians or groups of Indians.

Section 465 was subsequently enacted in 1934, it had a nearly identical purpose. That purpose was not to re-establish the aboriginal territory of any pre-existing tribe. Rather, it was to provide a secure place for Indians to live and to become financially independent.

Simply put, in pre-contact times there was no Santa Ynez Band of Mission Indians or any single independent political entity constituting a collection of the many different villages in the Santa Ynez Valley. The Santa Ynez Band's territory is the territory assigned to it by the federal government because of United States' policy to provide land for homeless Indians whose survival depended upon the provision of such land.

In summary, the Tribe has not demonstrated an entitlement to seek sovereignty over the aboriginal lands of Chumash villages in linguistic territories outside of the Santa Ynez Valley and has not demonstrated that it is the successor in interest to any of the independent political villages of the pre-contact Santa Ynez Valley. In any event, the objective of re-acquisition of aboriginal lands is not a valid basis for approval of a trust acquisition under the IRA. Certainly nothing in the IRA suggests that the establishment of tribal political control over land overwhelmingly populated by non-Indians is a valid basis for a trust acquisition. The United States Supreme Court recognized in *City of Sherrill, New York v. Oneida Indian Nation of New York* (2005) 125 S.Ct. 2290, 161 L.Ed.2d 1103, that the long passage of time and the creation of vested non-Indian political and private interests on former Indian territory argue strongly against any *legal* right to that territory. The ability to bring such territory under the sovereign control of the Tribe through the trust acquisition process exists only in the IRA. Where, as here, the Tribe has made no showing of an immediately cognizable need for the acquisition and has failed to show that the acquisition of purported aboriginal territory would not create intense adverse inter-jurisdictional conflicts as required by the IRA, its application should be denied.[3]

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[3]As the Supreme Court noted:

> Recognizing these practical concerns, Congress has provided a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well being. Title 25 U.S.C. § 465 authorizes the Secretary of the Interior to acquire land in trust for Indians and provides that the land "shall be exempt from State and local taxation." *See Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114-115, 118 S.Ct. 1904, 141 L.Ed.2d 90 (1998). The regulations implementing § 465 are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory. Before approving an acquisition, the Secretary must consider, among other things, the tribe's need for additional land; "[t]he purposes for which the land will be used"; "the impact on the State and its political subdivisions resulting from the

B. Any Benefit to The Tribe From this Proposed Trust Acquisition is Far Outweighed by the Adverse Individual and Cumulative Adverse Effects Approval of this Trust Application Would Have on the State.

Approval of the Tribe's application absent a showing of immediate need or necessity could have potentially severe adverse cumulative impacts on California. There are 108 federally recognized tribes in the State. If this Tribe is permitted to acquire land in trust when it has no immediate need for that land, other tribes in the State may claim entitlement to the same treatment by the Department of the Interior pursuant to the provisions of 25 U.S.C section 476, subdivisions (f) and (g) which provide that no agency of the United States shall make a determination under the IRA that "classifies, enhances, or diminishes the privileges and immunities available to an Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes" and that any decision that does discriminate in that fashion "shall have no force or effect." Allowing up to 108 federally recognized tribes in California to place into trust land for which they have an aboriginal claim could involve more than 75 million acres—the amount of land many tribes in this State have claimed would have been theirs had the United States ratified 19th century treaties granting that acreage. Congress rejected those treaties because of the impact that granting tribes that amount of land would have had on California in the 1850s. Whatever impact those treaties might have had on California in the 19th Century pales in comparison to the impact of contemporary removal of a comparable amount of land from the State's authority over land use and taxation—both of which are fundamental attributes of its sovereignty. Such a result would constitute federal interference with the powers reserved to the State in a manner patently at odds with the intent of the Tenth Amendment.

Further, the Tribe's claim that there would be no jurisdictional conflicts if this land were taken into trust is belied by the County of Santa Barbara's present inability to complete an agreement with the Tribe over land use restrictions on its pending 6.9-acre trust acquisition and the appeal of the Bureau's decision to approve that application by adversely affected residents in the surrounding community. It is also belied by the County's request (in its August 10, 2005, comment letter on the Trust Acquisition) that the Bureau refrain from approving this application pending execution of an agreement between the County and the Tribe over land use and other matters affecting the Trust Acquisition.

Additionally, as the County's comment letter demonstrates, and contrary to the Tribe's assertions, there are tremendous tax implications for local government should this property be taken into trust. The property is commercially zoned for the most part. In its application, the

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removal of the land from the tax rolls"; and "[j]urisdictional problems and potential conflicts of land use which may arise." 25 CFR § 151.10 (2004).

(*City of Sherrill, New York v. Oneida Indian Nation of New York*, 161 L.Ed.2d at p. 1494.)

Tribe calculates only the current assessed value of the property in calculating the tax loss to the County. However, the County's comment demonstrates that if the property were commercially developed, the potential loss to the County would be over forty million dollars. (See, County comment attached hereto as Exhibit A.) The comment also demonstrates that even if the property were not developed, the loss to the County over the next 50 years for land that could be immune from taxation in perpetuity would be more than 2.3 million dollars.

Similarly, there are significant implications for non-Tribal businesses located in the adjacent business district. Freed from the requirement to pay State and local property, sales and income taxes, Tribal businesses could plainly undercut non-Tribal businesses to an unfair commercial advantage. That this concern is real is demonstrated by the newspaper article attached hereto as Exhibit B. Simply put, there is no basis in the IRA for continuing to grant the Tribe the political, regulatory and economic advantages of trust status when the Tribe's political and economic survival is no longer an issue. The Tribe does not claim that its casino and hotel business, which is exempt from State and local taxation, is insufficient to allow the Tribe to function as a tribal government or to provide for the economic well-being of its 157 members. Indeed, the Tribe's income from those two businesses alone by all accounts is able to provide income distributions to Tribal members that substantially exceed the average individual income in Santa Barbara County. The IRA combined with the Indian Gaming Regulatory Act has accomplished its purpose with respect to this Tribe.

C. NEPA Requires that the Bureau not Make a Decision on a Trust Application Until it has Examined All Reasonably Foreseeable Individual and Cumulative Adverse Impacts an Approval Might Have on the Environment.

The Tribe's application indicates that it has no plans to perform an analysis of the potential individual and cumulative adverse impacts this acquisition might have on the environment. Instead, the Tribe claims that this project is entitled to a categorical exclusion. A transfer of regulatory authority from the State to an Indian tribe that may have the consequence of eliminating regulatory preclusion of a development that is reasonably foreseeable compels the preparation of an environmental impact statement. (*Anacostia Watershed Soc. v. Babbitt* (D.D.C., 1994) 871 F. Supp. 475, 482-483; *Conner v. Burford* (9th Cir. 1988) 848 F.2d 1441, 1450-1451; *Sierra Club v. Peterson* (D.C.Cir. 1983) 717 F.2d 1409, 1412-1415.) In this case, while the Tribe has no apparent immediate plans to develop the Trust Acquisition, it has indicated that it may develop the property in the future for commercial or residential purposes. Thus, such development, without full federal or State regulatory control, is a reasonable foreseeable consequence of the approval of this Trust Acquisition and the potential individual and cumulative adverse impacts of such development must be analyzed in an environmental

impact statement. Further, as noted by the County in its comment letter, the Bureau has an obligation to consider the impact of the various trust acquisitions the Tribe has pursued and is pursuing on a collective rather than a piecemeal basis. The Bureau should not consider the Tribe's current application in isolation but rather in the context of its apparent intention to pursue further acquisitions for the sake of the "re-acquisition of its aboriginal lands."

CONCLUSION

For the foregoing reasons, the Governor's Office opposes the Trust Acquisition at this time and requests that the Bureau deny the Tribe's proposed Trust Acquisition. This acquisition does not seem justified under the requirements of, or in accord with the intent underlying, the IRA. Thank you for the opportunity to comment on this application.

Sincerely,

PETER SIGGINS
Legal Affairs Secretary

Attachments

EXHIBIT D

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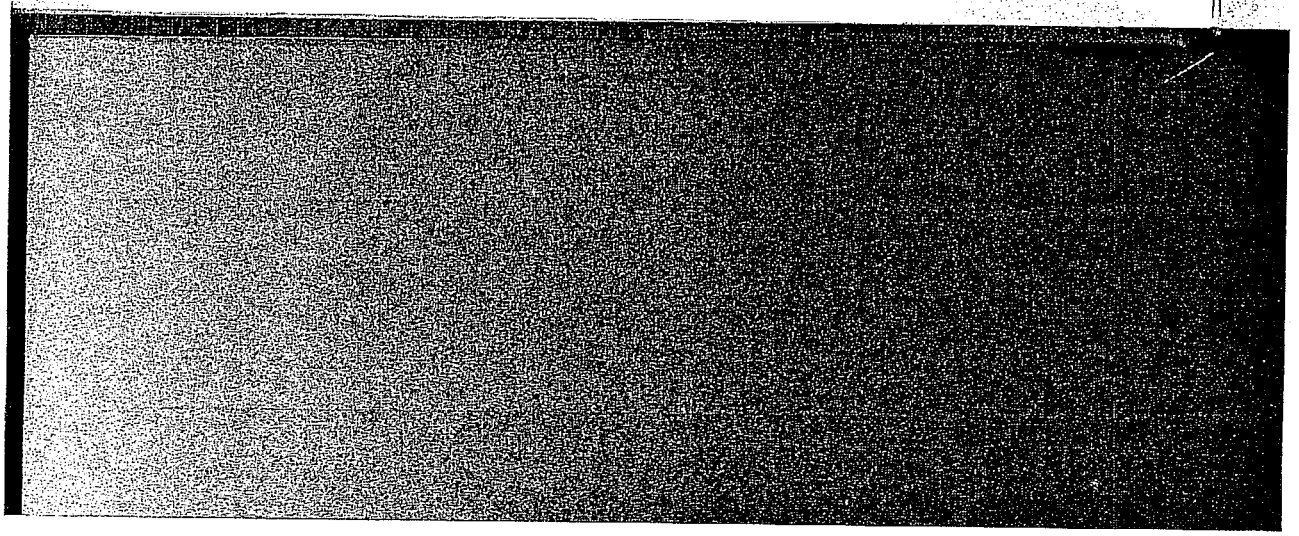


INDIANS, 1567-1930

[PLATES 33–37]

THE maps of this division of the *Atlas* and Plate 47A, "Indian Cessions, 1750–1890," of the division "Lands" illustrate the history of the Indians.

Indian Tribes and Linguistic Stocks, 1650

[PLATE 33]

The names and locations of tribes were derived in the first instance from a map in Clark Wissler, *The American Indian*, 2nd edit., New York, 1922, Fig. 81, and those of the linguistic stocks, with one exception, from a map entitled "Linguistic Families of American Indians North of Mexico, by J. W. Powell, revised by Members of the Staff of the Bureau of American Ethnology," published in 1915 by the U. S. Bureau of the Census in its volume entitled *Indian Population in the United States and Alaska, 1910*, Washington, 1915, facing p. 9. The exception is the several small linguistic groups of California and Oregon, which were united. The first draft of the map as thus compiled was thoroughly revised in 1930 and 1931 by Dr. John R. Swanton of the Bureau of American Ethnology, at whose suggestion many changes were made.

As it is not certain that the Ais, Tekesta, and Calusa tribes of southern Florida belonged to the Mushkogean stock the symbol for the latter is here shown in bands of color. In 1650 the Arawak had been swept off the Bahama Islands and had been destroyed in Cuba, with the exception of a small number living at the eastern end of the island. Hence their name and the number referring to them are shown in brackets. The Hurons had been destroyed and driven from their native region in 1648–1649 and the Tobacco Nation in December, 1649.

Indian Battles, 1521–1890

[PLATE 34]

These maps show the location of 198 Indian battles fought within the limits of the present continental United States between 1521 and 1890. The battles are shown on four maps covering successive periods (1521–1700, 1701–1800, 1801–1845, 1846–1890) in order to reveal the gradual westward movement of Indian warfare with the advance of the frontier. These battles include only those between Indians (aided or unaided by whites) fighting under Indian leadership on the one side, and whites (aided or unaided by Indians) fighting under white leadership on the other side. They have been chosen, out of a great number of actions, because of their relative magnitude and historical importance. A few battles were excluded for lack of definite information. As an Indian siege was usually of an informal character, sieges are included under the designation "battles." Before 1775 engagements were between the Indians and the English, French, or Spanish (chiefly in the Southwest), and after 1775 they were between the Indians and the Americans. Unnamed battles are designated by the names of the combatants.

The maps are based upon information derived from official reports, accounts of Indian wars, general and local histories, biographies and reminiscences of Indian fighters, maps, etc.

Indian Reservations, 1840, 1875, 1900, 1930

[PLATES 35–36]

These four maps illustrate the history of Indian reservations from the close of the Revolutionary War in 1783 until the present time (1930). Plate 35A shows the reservations in 1840 after the reservation policy of the federal government had been in operation for half a century and after the Indians to the eastward of the Mississippi River had been removed to their reserved lands, which lay chiefly to the westward of Arkansas, Missouri, and Iowa, and extended from the Red to the Little Nemaha River. In 1840 the area of the "Indian Territory" was at its maximum. Plate 35B shows the reservations in 1875 when their total area, 166,000,000 acres, was at a maximum. Plate 36A shows the reservations after a considerable reduction in area had been effected, notably by the application of the Dawes act of 1887, which provided for the allotment of the lands to the Indians in severalty. In 1900 the acreage of the reservations was 78,000,000 acres. Plate 36B shows the reservations in 1930, forty-three years after the passage of the Dawes act, when their area had been reduced to 39,000,000 acres.

The date accompanying each reservation is the date of its origin as given by the most trustworthy authority. It may be the date of a treaty, executive order, act of Congress, or other official action. Information respecting reservations is often conflicting. The chief sources that were used are as follows: Plate 35A and B, Charles C. Royce, *Indian Land Cessions in the United States* (Eighteenth Annual Report of the Bureau of American Ethnology, Washington, 1899), Part II, pp. 648–949, with accompanying maps; Plate 36A, Royce's *Indian Land Cessions*, "Schedule showing the Names of Indian Reservations," in *Annual Report of Department of Interior*, 1900, pp. 601–618, and Map showing Reservations, Washington, 1900; Plate 36B, *General Data Concerning Indian Reservations*, Washington, 1930, with manuscript additions made by the officials of the Office of Indian Affairs, and Map of the United States west of the Mississippi River showing Activities of Bureau of the Department of the Interior, Washington, 1929. The maps on Plate 36 do not always show small tracts reserved for agency, school, burial, or religious purposes, or other small areas difficult to depict. Small reservations whose boundaries cannot be accurately marked owing to the small scale of the maps are shown by means of rectangles approximately proportional to the areas. This is also true of the following somewhat larger reservations on the map for 1930: Washington: Yakima, Colville, Spokane; Oregon: Warm Springs, Klamath; Montana: Crow; South Dakota: Pine Ridge.

Indian Missions, 1567–1861

[PLATE 37]

This map illustrates the Indian missions established within the present continental United States between 1567, when the first permanent Florida mission was founded, and 1861, the year of the outbreak of the Civil War—a year which roughly marks the end of the period of pioneer Indian missions. The missions that are illustrated are religious missions, although many of them in addition to inculcating religion conducted secular schools and gave industrial training. The missions were variously named. Many of them bore names derived from religious history. Frequently they bore the name of the Indian tribe that they served or the name of the place in which they were located. Some of them bore several names. When a choice of name had to be made, the more inclusive name was often preferred; and of inclusive names, the one derived from the name of the tribe was usually chosen. When, however, a name otherwise derived had acquired much historical importance it was regarded as preferable. Missions that served more than one tribe are often designated by the name of the principal tribe.

The missions that are mapped are permanent missions; temporary or visiting missions are disregarded. The stationing of a missionary within a tribe for a considerable period was regarded as a test of permanency. This usually resulted in a mission station consisting of one or more buildings used for religious, educational, industrial, or residential purposes.

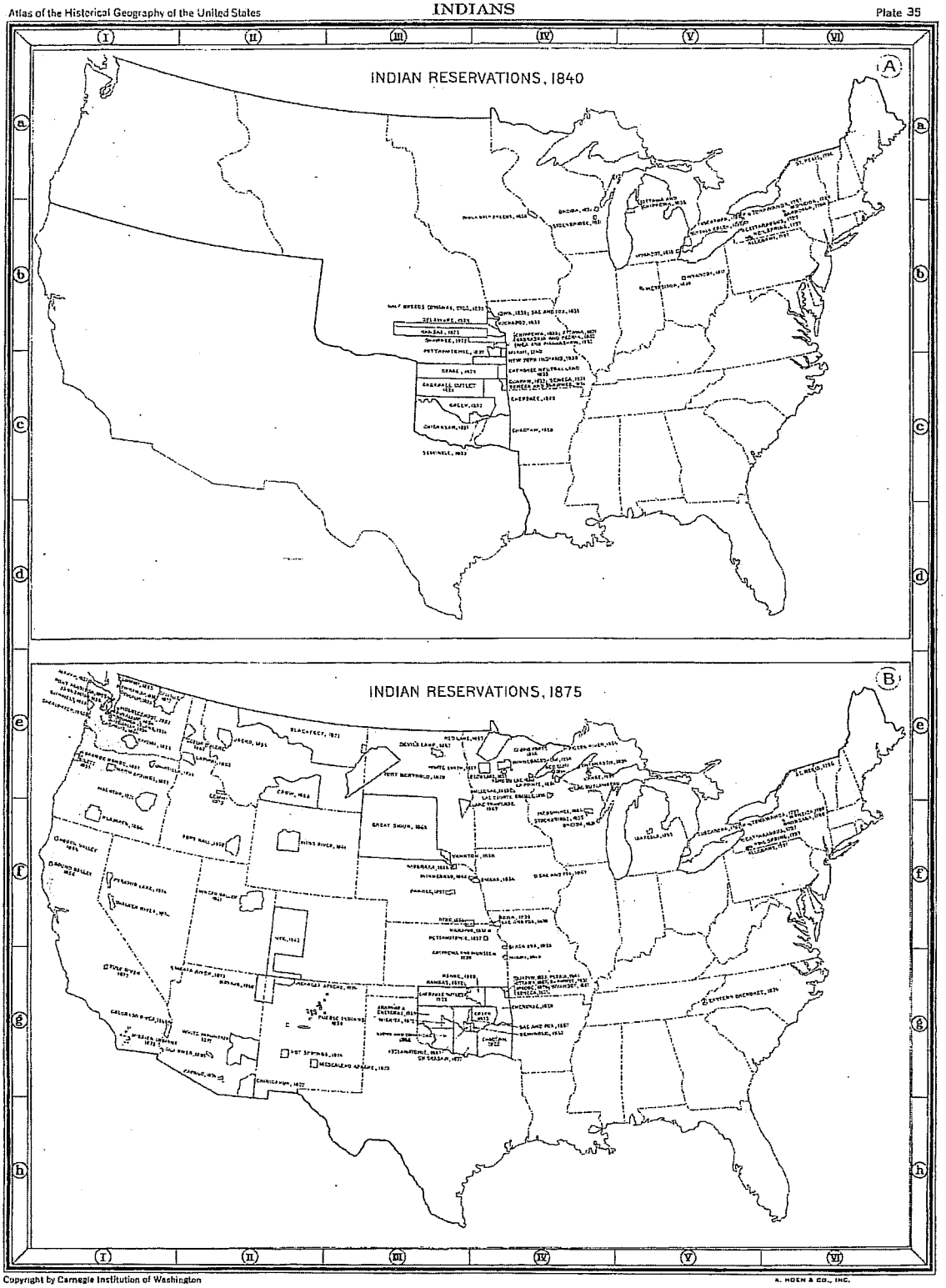
The date following the name is the date of the establishment of the mission. In a few cases, owing to the lack of precise information, this date is only approximate. The name of the denomination founding or supporting a mission is indicated by an appropriate abbreviation. Those missions marked "Pr." (Protestant) were founded by organizations representing several denominations, such as the American Board of Commissioners for Foreign Missions, or, in a few cases, by Protestant ministers independent of denominational aid. When several denominations have missions of the same name near one another the name of the mission is given but once.

Owing to limitations of space and of information the following rules of inclusion were adopted: In those cases in which a denomination had more than one mission to an Indian tribe in a given state, only the earliest one is as a rule mapped. The later ones, however, are mapped when they have considerable historical importance. It is for this reason that all of the Catholic and Moravian missions in several of the states are shown. On the other hand, following the general rule, only the

earliest Protestant missions in several of the Southern States to the Cherokees and other tribes are shown. When a mission moves from one location to another within a state only the first location is mapped. The case of the Kaskaskia mission in Illinois, however, is an exception to this rule. Each "X" marks the location of a missionary establishment. In the case, however, of the Guale, Timucua, Apalache, and Pueblo missions, owing to the absence of precise information respecting the first mission, the center of the mission field is marked; and in the case of some itinerant Methodist missions the chief preaching station is marked.

The sources of information for this map are diverse. Of the special histories of missions, the following were most serviceable:

J. G. Shea, *History of the Catholic Missions among the Indian Tribes of the United States, 1529–1854*, New York, 1855; A. C. Thompson, *Protestant Missions*, New York, 1894, pp. 59–147; William Gammell, *History of American Baptist Missions*, Boston, 1894, pp. 313–343; Isaac McCoy, *History of Baptist Indian Missions*, Washington and New York, 1840; Nathan Bangs, *An Authentic History of the Missions under the Care of the Missionary Society of the Methodist Episcopal Church*, New York, 1832; W. P. Strickland, *History of the Missions of the Methodist Episcopal Church*, Cincinnati, 1850, pp. 71–159; Ashbel Green, *Historical Sketch of Domestic and Foreign Missions in the Presbyterian Church*, Philadelphia, 1838; W. H. Hare, *Hand-Book of the [Episcopal] Church's Mission to the Indians*, Hartford, 1914; A. C. Thompson, *Moravian Missions*, New York, 1882, pp. 267–341; G. H. Loskiel, *History of the Mission of the United Brethren among the Indians in North America*, London, 1794; R. W. Kelsey, *Friends and the Indians, 1655–1917*, Philadelphia, 1917; Albert Keiser, *Lutheran Mission Work among the American Indians*, Minneapolis, 1922; Z. Engelhardt, *Missions and Missionaries of California*, San Francisco, 1908–1915; Joseph Tracy, *History of American Missions to the Heathen from their Commencement to the Present Time*, Worcester, 1840; *Annual Report of the American Board of Commissioners for Foreign Missions*, Boston, 1810–1861; *Baptist Missionary Magazine*, Boston, 1817–1861; *Foreign Missionary Chronicle*, Pittsburgh, 1833–1849; *Minutes of the General Assembly of the Presbyterian Church*, Philadelphia, 1802–1861; *Minutes of the Annual Conferences of the Methodist Episcopal Church*, New York, 1773–1861; *Report of Commissioner for Indian Affairs*, Washington, 1834–1861; *Catholic Almanac*, Baltimore, 1837–1861; H. E. Bolton, *Texas in the Middle Eighteenth Century*, Berkeley, 1915, and other books and articles by the same author treating of the Southwest; F. W. Hodge, *Handbook of American Indians*, Washington, 1912; R. G. Thwaites, *Jesuit Relations*, Cleveland, 1896–1901, and *Early Western Travels*, Cleveland, 1904–1907. Use was also made of state and county histories, church histories, Indian tribal histories, lives of missionaries, and the publications of state historical societies and of the Bureau of American Ethnology.



A. HOEN & CO., INC.

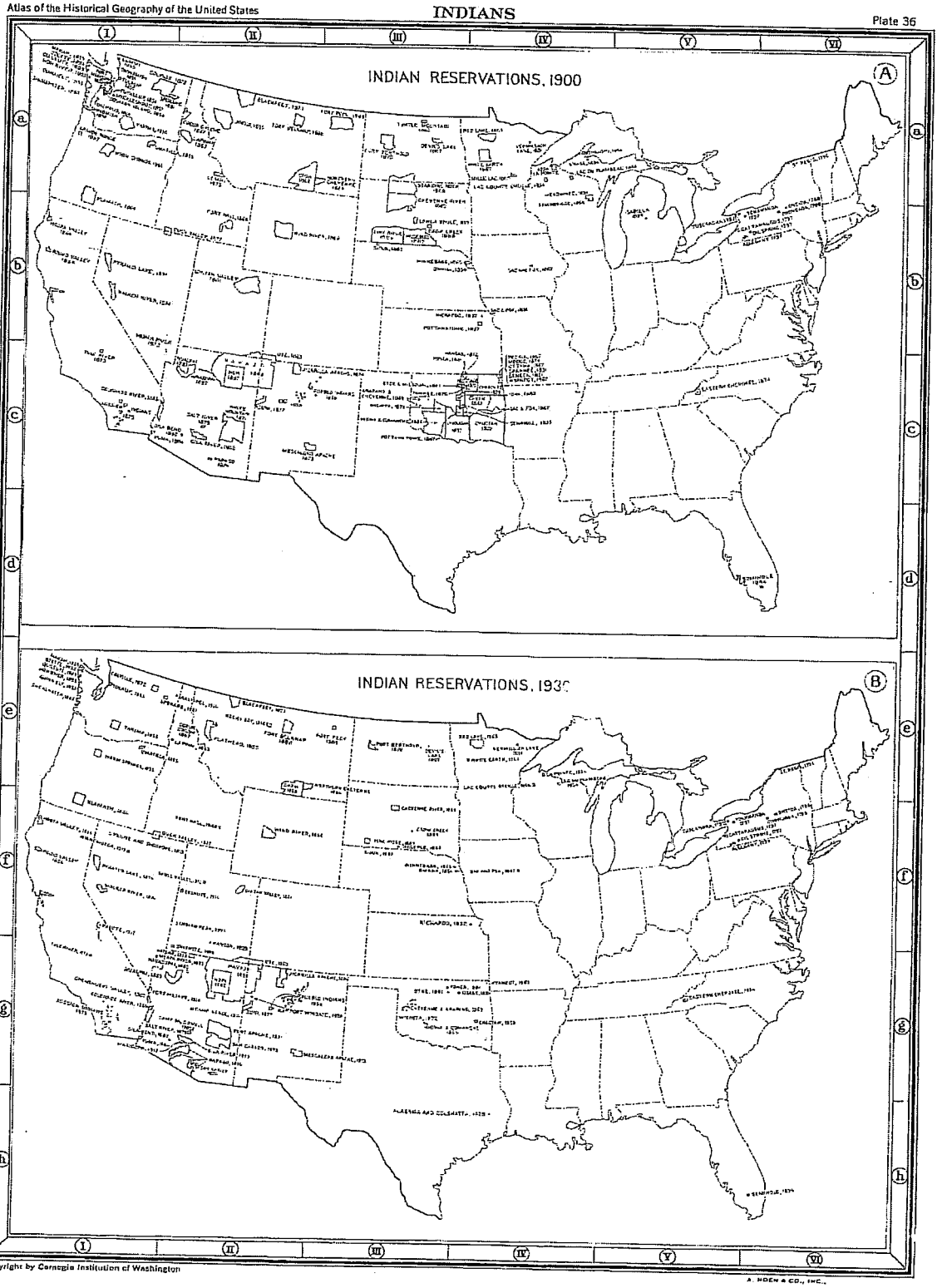


EXHIBIT E

United States Department of the Interior

OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20240

JAN 14 1994

Honorable George Miller
Chairman, Committee on Natural Resources
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

At the hearing before the Subcommittee on Native American Affairs on H.R. 734, to amend the Act entitled "An Act to provide for the extension of certain Federal benefits, services and assistance to the Pascua Yaqui Indians of Arizona, and for other purposes," we were asked by Mr. Richardson to provide a list of nonhistoric Indian tribes.

The Bureau of Indian Affairs (BIA) does not maintain a comprehensive list of non-historic tribes per se. The determination is usually made on a case by case basis and arises in the context of our review of proposed constitutions submitted pursuant to the Indian Reorganization Act (IRA) of June 18, 1934, (48 Stat. 984) to the Secretary of the Interior (Secretary) for his legal and technical review and approval of such documents. The 1988 amendments to the IRA require, among other things, the Secretary to advise the tribe in writing 30 days prior to calling the election of any provision which he found contrary to applicable Federal law. Since passage of the IRA the Department of the Interior (Department) has distinguished between the powers possessed by an historic tribe and those possessed by a community of adult Indians residing on a reservation, i.e. a non-historic tribe. The distinction affects the group's authority to define its membership and determines who is allowed to vote. Members of historic tribes are entitled to vote even if they permanently reside off the reservation. Members of adult Indian communities are entitled to vote only if they reside on the reservation or are temporarily absent. Because the distinction between historic and nonhistoric tribes affect the Secretary's view of their powers, it is key to advising the tribe what provisions of their proposed constitution or amendment may be contrary to applicable Federal law as required by the IRA.

Section 16 of the IRA as original enacted provided in part:

> Section 16. Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may 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 under such rules and regulations as he may prescribe. Such constitution and bylaws when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.

49 Stat. 978, 25 U.S.C. § 476 (1986).

In response to a request for an explanation of what were the powers vested in an Indian tribe by "existing law," the Solicitor issued a lengthy opinion discussing the inherent powers of Indian tribes. Solicitor's Opinion (Oct. 25, 1934), 55 I.D. 14 (1934), 1 Op. Sol. on Indian Affairs 445, 459 (U.S.D.I. 1979). Shortly, thereafter, on December 13, 1934, the Solicitor advised the Secretary that Section 16 contemplated two distinct and alternative types of organization. These were explained and defined by the Solicitor as follows:

> In the first place, it [the IRA] authorizes the members of a tribe (or of 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 the purposes of this act), under Section 16 to organize without regard to past tribal affiliation.

Solicitor's Opinion, M-27810 (December 13, 1934), 1 Op. Sol. on Indian Affairs 484, 487 (U.S.D.I. 1979).

The Solicitor further explained that when Indians organized under Section 16 as members of a tribe or tribes their constitution and bylaws must be ratified by a majority vote of the adult members, whether residents or nonresidents of the reservation. On the other hand, if the Indians were organized as residents of a single reservation, ratification of their constitution and bylaws could be accomplished only by a majority vote of the adult Indians residing on such reservation.

The Solicitor's views were embodied in Amended Rules and Regulations for the Holding of Elections under the IRA of June 18, 1934, promulgated by the Commissioner of Indian Affairs on October 18, 1935. 55 I.D. 355. The interpretation of Section 16 as providing or two types of tribal organization with different voting rights for nonresidents is retained in the current regulations on Secretarial elections. 25 C.F.R. Part 81.

In addition, the IRA authorized the Secretary to acquire land through purchase for Indians, landless or otherwise, and to proclaim new Indian reservations on lands acquired pursuant to any authority conferred by the IRA. (See Sections 5 and 7 of the IRA, 48 Stat. 984, 25 U.S.C. §§ 465, 467 and the legislative history of the IRA). Section 19 of the IRA defined "Indians" not only as "all persons of Indian descent who are members of any recognized [in 1934] tribe under Federal jurisdiction," and their descendants who then were residing on any Indian reservation, but also "all other persons of one-half or more Indian blood." The practical effect of these provisions was the creation of new "tribes" where none previously existed. Once the land was acquired for these Indians, they then were entitled to organize under the provisions of Section 16 of the IRA and adopt a constitution and bylaws.

The constitutions adopted pursuant to Section 16 of the IRA varied considerably with respect to the form of tribal government. The powers of self-government vested in the tribes organized under the IRA also varied according to the circumstances, experiences and resources of the tribes. See F. Cohen, Handbook of Federal Indian Law, p. 130.

In implementing the reorganization of tribes, the Department made the distinction between groups which were organized as historic tribes and groups which were organized as communities of Indians residing on one reservation. F. Cohen, Handbook of Federal Indian Law 130, n. 67 (1942). The distinction between the powers of the two types of organization was established in a Solicitor's Opinion. Solicitor's Opinion, April 9, 1936, 1 Op. Sol. on Indian Affairs 618 (U.S.D.I. 1979). The same opinion but with a different heading and bearing a date of April 15, 1938, appears at 1 Op. Sol. on Indian Affairs 813 (U.S.D.I. 1979).

The distinctions were based on the differing requirements of the IRA, i.e., the reorganization of existing tribes and the creation of "new" tribes, and the unique historical circumstances that existed in some parts of the country. For instance, self-governing tribes generally did not exist in California in the same sense as they did elsewhere. See The Legal Status of the California Indian, California Law Review, Vol. XIV, No. 2, January, 1926; See also A. L. Kroeber, Handbook of the Indians of California, and A. L. Kroeber, History of California. Most of the California rancherias have unique historical circumstances and were organized without regard to tribal affiliation or historical tribal status. Generally, these rancherias did not represent tribes but were collections or remnants of Indian groups for whom the United States bought homesites for homeless California Indians under various statutes. They were placed on trust land which was purchased for landless, homeless California Indians without regard to tribal status. Recognizing the unique historical circumstances of the Indians of California, the Congress recently enacted status clarification legislation to address the problems facing California Indians. See the Act of October 14, 1992, Public Law 102-416, 106 Stat. 2131.

In 1936, Congress amended the IRA to permit the reorganization of "tribes" in Alaska without first establishing a reservation as required in the contiguous 48 states. Moreover, the 1936 Alaska amendments permitted "groups of Indians in Alaska not recognized prior to May 1, 1936, as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community or rural district" to reorganize as "tribes." 49 Stat. 1250, 25 U.S.C. § 473a.

The BIA's view is that an historic tribe has existed since time immemorial. Its powers derive from its unextinguished, inherent sovereignty. Such a tribe has the full range of governmental powers except where it has been expressly limited by Congress or is inconsistent with the dependent status of tribes. See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978).

In contrast, a community of adult Indians is composed simply of Indian people who reside together on trust land. A community of adult Indians may have only those powers which are incidental to its ownership of property and to its carrying on of business and those which may be delegated to it by the Secretary. In addition, a community of adult Indians may have a certain status which entitles it to certain privileges and immunities (See United States v. John, 437 U.S. 634 (1978), in which the Court rejected the argument by the State of Mississippi that the lands of the Mississippi Choctaws could not be Indian country because the reorganized group of 1/2 blood Choctaw Indians did not constitute an historic tribe. cf. Native Village of Stevens v. Alaska Management & Planning, 757 P. 2d 32 (Alaska 1988), holding that reorganization under the IRA did not establish that the Native Village of Stevens was entitled to assert sovereign immunity.) However, those privileges and immunities are derived as necessary incidents of a comprehensive Federal statutory scheme to benefit Indians, not from some historical inherent sovereignty.

Those powers not within the powers of a community of Indians residing on the same reservation include the powers to condemn land of members of the community, the regulation of inheritance of property of community members, the levying of taxes upon community members or others, and the regulation of law and order. It is within the community's authority to levy assessments and fees upon its members for the use of community property and privileges as these assessments would be incidental to the ownership of the property. The community may also levy assessments on non-members coming or doing business on community lands. However, such assessments would be levied in its exercise of the community's powers as a land owner, not some historical, inherent power to tax.

As we indicated earlier, while the BIA has not developed a comprehensive list of nonhistoric tribes, we can provide a list of those for whom a determination has been made in the context of reviewing and approving their constitution. That list is as follows:

Mississippi Band of Choctaw Indians of Mississippi[11]
Pascua Yaqui Tribe of Arizona[12]
Port Gamble Indian Community of Washington[13]
Prairie Island Indian Community of Minnesota[14]
Quartz Valley Rancheria of California[15]
Redwood Valley Rancheria of California[16]
Reno-Sparks Indian Colony[17]
Sokaogon Chippewa Community of the Mole Lake Band, Wisconsin[18]
St. Croix Chippewa Indians of Wisconsin[19]
Yavapai Prescott Tribe of the Yavapai Prescott Reservation, Arizona[20]

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[11]See F. Cohen, Handbook of Federal Indian Law 273 (1941); See also Solicitor's Opinion, August 31, 1936, 1 Op. Sol. on Indian Affairs, 668 (U.S.D.I. 1979); and United States v. John, 437 U.S. 634 (1978), in which the Court rejected the argument by the State of Mississippi that the lands of the Mississippi Choctaws could not be Indian Country because the reorganized group of 1/2 blood Choctaw Indians did not constitute an historic tribe.

[12]See letter of January 27, 1983, from Deputy Assistant Secretary - Indian Affairs (Operations) to Superintendent, Salt River Agency; letter dated October 15, 1987, from Assistant Secretary - Indian Affairs to Superintendent, Salt River Agency; Letter dated November 3, 1991, from Director, Office of Tribal Services to Chairman, Pascua Yaqui Tribe.

[13]See T. Haas, Ten Years of Tribal Government Under I.R.A., Tribal Relations Pamphlet No. 1, United States Indian Service, 1947.

[14]See Solicitor's Opinion, April 15, 1936, 1 Op. Sol. on Indian Affairs, 618 (U.S.D.I. 1979).

[15]See T. Haas, Ten Years of Tribal Government Under I.R.A., Tribal Relations Pamphlet No. 1, United States Indian Service, 1947.

[16]See letters of October 6, 1986, and March 30, 1987, from the Assistant Secretary - Indian Affairs, to Superintendent, Central California Agency; letter of May 6, 1988, from Deputy Assistant Secretary - Indian Affairs (Tribal Services) to Superintendent, Central California Agency.

[17]See United States v. McGowan, 302 U.S. 535, 537 (1938).

[18]See T. Haas, Ten Years of Tribal Government Under I.R.A., Tribal Relations Pamphlet No. 1, United States Indian Service, 1947.

[19]See T. Haas, Ten Years of Tribal Government Under I.R.A., Tribal Relations Pamphlet No. 1, United States Indian Service, 1947.

[20]See letter of May 6, 1988, from Deputy Assistant Secretary - Indian Affairs (Tribal Services) to Superintendent, Truxton Canon Agency; letter of December 8, 1992, from Director, Office of Tribal Services to Chairman, Yavapai Prescott Tribe.

EXAMPLES OF NONHISTORIC INDIAN TRIBES

Burns Paiute Indian Tribe[1]
Blue Lake Rancheria of California[2]
Coast Indian Community of the Resighini Rancheria, California[3]
Cuyapaipe Indian Community of the Cuyapaipe Reservation, California[4]
Duckwater Shoshone Tribe of the Duckwater Reservation, Nevada[5]
Elk Valley Rancheria of California[6]
Ely Shoshone Indian Tribe[7]
Jamul Indian Village[8]
Lower Elwha Indian Community of the Lower Elwha Reservation, Washington[9]
Lower Sioux Indian Community of Minnesota[10]

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[1]See letters of March 12, 1987, and November 2, 1987, from the Deputy to the Assistant Secretary - Indian Affairs (Tribal Services) to Chairman, Burns Paiute Indian Colony.

[2]See letter of June 6, 1988, from the Deputy Assistant Secretary - Indian Affairs (Tribal Services) to the Superintendent, Northern California Agency.

[3]See Proclamation of Acting Secretary of the Interior dated October 21, 1939; letter of May 19, 1953 to the Commissioner of Indian Affairs from Sacramento Area Director; letter of November 8, 1956, to the Field Representative, Hoopa, from Sacramento Area Director; letter of June 8, 1989, to the President, Coast Indian Community from Deputy Assistant Secretary - Indian Affairs (Tribal Services); letter November 15, 1991 to President, Coast Indian Community from Director, Office of Tribal Services.

[4]See letter of March 17, 1982 to Superintendent, Southern California Agency from Deputy Assistant Secretary - Indian Affairs (Operations).

[5]See T. Haas, Ten Years of Tribal Government Under I.R.A., Tribal Relations Pamphlet No. 1, 1947.

[6]See letter of November 8, 1992, to Chairman, Elk Valley, from Director, Office of Tribal Services.

[7]See letter of September 28, 1988 from Deputy Assistant Secretary - Indian Affairs to Superintendent, Eastern Nevada Agency.

[8]See letter of November 16, 1980, from Commissioner of Indian Affairs to Superintendent, Southern California Agency.

[9]Land purchased in 1936 and 1937 under Section 5 of the Indian Reorganization Act.

[10]See Solicitor's Opinion, April 15, 1936, 1 Op. Sol. on Indian Affairs, 618 (U.S.D.C. 1979).

Yomba Shoshone Tribe of the Yomba Reservation, Nevada[21]

In addition to the foregoing list of examples of nonhistoric tribes, we believe that most if not all of the original California rancherias listed in the Act of August 18, 1958, (P. L. 85-671, 72 Stat. 619) as amended, and which have not already been so designated, would fall within the nonhistoric tribal designation. Recognizing that the tribal status of California rancherias was uncertain, the United States District Court in Tillie Hardwick v. United States, U.S. District Court, Northern District of California, No. C-79-1710-SW, relieved them of the application of the California Rancheria Act, which terminated them from Federal supervision, and restored these "Indian entities" to "the same status as they possessed prior to distribution of the assets of these Rancherias under the California Rancheria Act." Similar language is contained in other court decisions restoring individual rancherias to Federal status. Congress recognized the uncertain status of California Indians by the passage of the the Act of October 14, 1992, P.L. 102-416, 106 Stat. 2131) creating the Advisory Council on California Indian Policy (Advisory Council). One of the Advisory Council's principal functions is to conduct a comprehensive study of the social, economic and political status of California Indians and develop recommendations for specific actions that will help ensure that California Indians have life opportunities comparable to other American Indians.

We appreciate the opportunity to respond to your request for information. If we may be of further assistance, please let us know.

Sincerely,

Wyman D. Babby

Acting Assistant Secretary - Indian Affairs

cc: Assistant Solicitor, Tribal Government/Alaska

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[21]See T. Haas, Ten Years of Tribal Government Under I.R.A., Tribal Relations Pamphlet No. 1, United States Indian Service, 1947.

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Attorney for the Pacific
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UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS

PRESERVATION OF LOS OLIVOS and PRESERVATION OF SANTA YNEZ, Appellants, v. PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	Docket No. IBIA 05-050-1

JOINT MOTION TO STRIKE PORTIONS OF APPELLANTS' REPLY BRIEF

JOINT MOTION TO STRIKE PORTIONS OF APPELLANTS' REPLY BRIEF

Appellee, the Pacific Regional Director, Bureau of Indian Affairs, and the real party in interest, Appellee, Santa Ynez Band of Chumash Mission Indians, jointly move to strike several arguments in Appellants', Preservation of Los Olivos and Preservation of Santa Ynez ("POLO/POSY"), reply brief. POLO/POSY make several arguments that are not properly before the Board in this appeal, including a challenge to the Pacific Regional Director's July 13, 2012 *Carcieri* and *Hawaii* decision ("2012 Decision"). This argument is outside the scope of this appeal because this Board held that POLO/POSY failed to timely appeal that decision, a jurisdictional requirement of Board review. A significant portion of POLO/POSY's reply brief is dedicated to arguing that the Regional Director erred in the 2012 Decision, including its conclusion that the Tribe was a recognized Indian tribe under federal jurisdiction in 1934. But because POLO/POSY did not timely appeal the 2012 Decision, that argument must be stricken from their reply brief. POLO/POSY also seek to challenge the Board's ruling that POLO/POSY did not timely appeal the 2012 Decision, which is also plainly beyond the scope of this appeal, and should therefore also be stricken from POLO/POSY's reply brief.

Further, POLO/POSY raise for the first time in their reply brief arguments that the BIA should have considered the cumulative effects of the Tribe's recently filed fee-to-trust application for what is commonly referred to as the Camp 4 property, and that argument too should be stricken since it was newly raised in a reply brief. In addition, however, there is no requirement that the BIA look to or consider other fee-to-trust applications submitted by the applicant in making a single fee-to-trust decision, so this

argument should be stricken as it will have no possible bearing on the issues in this appeal.

POLO/POSY also seek to challenge the trust acquisition on equal protection grounds and challenge the constitutionality of 25 C.F.R. § 1.4, the agency's authority to exempt Indian trust lands from state and local regulation, both of which are issues POLO/POSY raised for the first time in their reply brief. These issues should therefore be stricken. In addition, this Board lacks jurisdiction to review constitutional challenges to a federal regulation. So these arguments can have no possible bearing on any issue in this appeal and should also be stricken.

Finally, POLO/POSY make a number of false contentions that are also highly inflammatory in their reply brief, including their incorrect contention that the Tribe intends to use the 6.9 acres for gaming and does not need this 6.9 acres taken into trust for any government or sovereign function. These false and inflammatory statements serve no relevant purpose in helping the Board resolve the issues properly before it and therefore they should all be stricken as impertinent, scandalous, and as having no bearing on the subject matter of this appeal.

Appellees therefore ask the Board to strike these portions from POLO/POSY's reply brief and order appellants to file a corrected brief deleting these sections:

- Arguments and documents pertaining to the Supreme Court's rulings in *Carcieri v. Salazar*[1] and *Hawaii v. Office of Hawaiian Affairs,*[2] which are

[1] 555 U.S. 379 (2009).
[2] 556 U.S. 163 (2009).

not properly before this Board in this appeal (pages 2, 6–16, 25–26, and 33–39 of POLO/POSY's reply brief, including footnotes and Exhibits D and E to the reply brief);

- Argument that the Board erred in ruling that POLO/POSY failed to comply with the Board's requirements for appealing the 2012 Decision (pages 7–8 and 25–26, including footnotes);
- Newly raised arguments that the Regional Director should have considered the cumulative impacts under NEPA of a fee-to-trust application for property the Tribe did not even own when it applied for trust status for the 6.9 acres, that the Regional Director was biased in her decision-making, that the trust acquisition violates equal protection and the assertion that 25 C.F.R. § 1.4 is unconstitutional, or that the Regional Director should have considered speculative water rights claims not made by the Tribe (pages 3–4, 21–22, 27, 29, 30–33, and 38–39, including footnotes);
- False and inflammatory arguments including POLO/POSY's inaccurate rendition of the Tribe's history meant to attack the legitimacy of this federally recognized Tribe, the argument that the Tribe sought to have the land taken into trust so that the property could be used for gaming and not uniquely sovereign purposes, and the argument that the property is not contiguous to the Tribe's Reservation (pages 3, 8–16, 23–25, and 27–28, including footnotes);

- All or portions of Exhibits A, B, and C filed by POLO/POSY in connection with is Reply Brief that address issues outside the scope of this appeal; and
- Submissions by POLO/POSY to the BIA following the issuance of the Board's May 17, 2010 remand order that POLO/POSY attempts to incorporate by reference in its reply brief but that are not part of the record for this appeal.

BACKGROUND

The fee-to-trust petition at issue in this case involves 6.9 acres of land containing an ancient Chumash village site, contiguous with the Tribe's reservation.[3] Almost 13 years ago, on November 8, 2000, the Tribe first submitted an application to the Bureau of Indian Affairs, and later revised the application on May 6, 2002.[4] The original application stated that the Tribe intended to move the Tribe's government and community center facilities to the parcel.[5] But once the Tribe discovered an ancient Chumash village site on the parcel their plans changed dramatically. The revised application stated that the Tribe intended to dedicate the site for creation of a memorial park, a Chumash cultural center, and a small commercial area.[6] The Tribe never intended—and does not intend—to use this 6.9-acre parcel for gaming. The BIA's Pacific Regional Director approved the revised application on January 14, 2005.[7]

On February 22, 2005, Appellants, POLO/POSY, along with Santa Ynez Valley

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[3] *Santa Ynez Valley Concerned Citizens v. Pac. Reg'l Dir.*, 42 IBIA 189, 190 (2006).
[4] *Id.*
[5] *See* Notice of Decision at 8 (Jan. 14, 2005).
[6] *Id.*
[7] *Id.* at 1.

Concerned Citizens (SYVCC), filed an administrative appeal of the BIA's decision, which culminated in a decision by this Board dismissing their appeal for lack of standing on February 3, 2006. POLO/POSY (but not SYVCC) challenged the Board's dismissal in the U.S. District Court for the Central District of California. Following a brief remand of the case back to this Board in light of newly discovered documents that the BIA had inadvertently omitted from the administrative record transmitted to the Board,[8] and additional briefing in light of the supplemental record, this Board again dismissed appellants' appeal for lack of standing on June 29, 2007.[9]

On August 6, 2007, POLO/POSY filed an amended complaint in federal district court again challenging the Board's dismissal for lack of standing. The district court vacated the Board's order, and remanded the case back to the Board for further consideration.[10]

While this case was pending before the Board on December 24, 2009, POLO/POSY filed a Motion for Leave to Amend Statement of Reasons for the appeal and a Request to Extend the Briefing Schedule. In their Motion for Leave to Amend, POLO/POSY raised an entirely new argument: POLO/POSY alleged that the Regional Director did not consider evidence of whether the Tribe was "a recognized tribe under

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[8] *See* Fed. Def.'s Notice and Mot. For Remand to Dept. of the Interior at 2, *Pres. of Los Olivos & Preservation of Santa Ynez v. Dep't of the Interior,* No. 2:06-cv-1502-AHM (C.D. Cal. Sept. 26, 2006).

[9] *Preservation of Los Olivos & Preservation of Santa Ynez v. Pac. Reg'l Dir.*, 45 IBIA 98, 116 (2007).

[10] *Pres. of Los Olivos & Preservation of Santa Ynez v. Dep't of the Interior,* No. 2:06-cv-1502-AHM, Order Vacating and Remanding (Doc. 84) at 30 (July 9, 2008).

federal jurisdiction at the time the Indian Reorganization Act was enacted in 1934,"[11] based on the Supreme Court's then newly issued rulings in *Carcieri v. Salazar*[12] and *Hawaii v. Office of Hawaiian Affairs*.[13] The Tribe opposed this effort to raise issues outside the original appeal, but the Department petitioned for and received a limited remand to consider this issue.

On May 17, 2010, the Board issued an Order vacating its earlier decision in part and remanding in part to the BIA.[14] That Order vacated that portion of the 2005 Decision that had determined that 25 C.F.R. § 151.10(a) was satisfied, and remanded the case to the Pacific Regional Director for further consideration in light of *Carcieri* and *Hawaii*. The primary focus of this remand was to determine whether either the *Carcieri* or *Hawaii* decisions limited the Secretary's authority under the Indian Reorganization Act to acquire land in trust for the Tribe.[15]

On July 13, 2012, the Regional Director issued the 2012 Decision reaffirming the BIA's 2005 Decision to take the 6.9-acre parcel into trust, stating that neither Supreme Court decision (*Carcieri* nor *Hawaii*) limited or affected the authority of the Secretary to acquire land in trust for the Santa Ynez Band of Chumash Indians.[16] In that decision, the Regional Director also stated her conclusion that the record confirmed that the Tribe was

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[11] App. Mot. to Amend Statement of Reasons and Req. to Extend Briefing Schedule, *Preservation of Los Olivos & Preservation of Santa Ynez v. Pac. Reg'l Dir.*, IBIA 05-050-1, at 2.
[12] 555 U.S. 379 (2009).
[13] 556 U.S. 163 (2009).
[14] Order Vacating Decision in Part and Remanding in Part, *Preservation of Los Olivos & Preservation of Santa Ynez v. Pac. Reg'l Dir.*, IBIA 05-050-1 (May 17, 2010).
[15] 25 U.S.C. § 465; *Carcieri*, 555 U.S. at 381–382.
[16] Notice of Decision (June 13, 2012).

a recognized Indian tribe under federal jurisdiction in 1934.[17]

A number of citizens groups unsuccessfully attempted to perfect an appeal of the Regional Director's 2012 Decision, including POLO/POSY.[18] But the Board held that none of the groups timely filed their notices with the Board as required by 43 C.F.R. § 4.332(a), which is a jurisdictional requirement.[19] Instead, POLO/POSY's notice of appeal was "filed with the BIA ('the office of the official whose decision is being appealed') . . . [and] [t]he NOA was also sent to the Assistant Secretary of the Interior."[20]

Because none of these notices of appeal reached the Board within the 30 days required under 43 C.F.R. § 4.332(a), on August 21, 2012, the Board issued an Order to Show Cause to POLO/POSY directing them to file a response stating why their appeal should not be dismissed for lack of jurisdiction. POLO/POSY conceded in their response that they had not timely filed with the Board.[21]

Accordingly, on March 18, 2013, the Board dismissed POLO/POSY's attempted appeal of the Regional Director's 2012 Decision that neither *Carcieri* nor *Hawaii* limited the Secretary's authority to acquire land in trust for the Tribe under the IRA.[22] Stating that "[t]he remand proceedings were concluded when the Board dismissed several appeals from the Regional Director's decision on remand," the Board expressly noted that "[t]he dismissal of POLO/POSY's appeal from the Decision does not affect

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[17] Notice of Decision at 28 (June 13, 2012).
[18] *See No More Slots, Santa Ynez Valley Concerned Citizens, Preservation of Los Olivos, & Preservation of Santa Ynez v. Pac. Regional Director*, 56 IBIA 233 (2013).
[19] *Id.* at 233.
[20] POLO/POSY Response to Show Cause Order at 7.
[21] *Id.* at 2.
[22] *No More Slots*, 56 IBIA at 233.

POLO/POSY's pending appeal from the portion of the 2005 decision that was not vacated and remanded."[23]

On April 3, 2013, the Board ordered that briefing on administrative standing and the remaining merits of Appellants' appeal be completed. The Regional Director's Answer Brief was filed on May 31, 2013, and Appellants filed their reply brief on July 1, 2013.

ARGUMENT

This Board has the authority to grant "[m]otions to strike . . . if 'it is clear that the matter to be stricken could have no possible bearing on the subject matter of the [appeal],'"[24] or if that matter is "redundant, immaterial, impertinent, or scandalous,"[25] or if the arguments made are untimely.[26] In *Crow Tribe v. BLM*,[27] the Board declined to consider arguments raised, like many of POLO/POSY's merits arguments, for the first time on appeal to the Board.[28] And in *Estate of Wellknown*,[29] the Board struck an entire memorandum that was not timely filed, like POLO/POSY's challenge to the 2012 Decision.[30] The Board has previously admonished POLO/POSY that it will not consider

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[23] *No More Slots*, 56 IBIA at 243 n.11.
[24] *Wilkerson v. Butler*, 229 F.R.D. 166, 170 (E.D. Cal. 2005) (citing *LeDuc v. Kentucky Central Life Ins. Co.*, 814 F. Supp. 820, 830 (N.D. Cal. 1992)).
[25] Fed. R. Civ. P. 12(f).
[26] *See, e.g.*, *Olson v. BIA*, 31 IBIA 44 (1997) (granting motion to strike two documents submitted in support of appellants' opening brief).
[27] *Crow Tribe v. BLM*, 31 IBIA 16 (1997).
[28] *Id.* at 28.
[29] *Estate of Wellknown*, 1 IBIA 84 (1971).
[30] *Estate of Wellknown*, 1 IBIA at 86.

arguments "raised for the first time on appeal or for the first time in a reply brief."[31]

Here, the Board should strike all those portions of POLO/POSY's reply brief that are outside the scope of this appeal and outside the Board's jurisdiction to review including POLO/POSY's arguments which are so inflammatory as to be scandalous, POLO/POSY's arguments that seek to improperly reinstate their failed appeal of the 2012 Decision, attacks on the Tribe's federal recognition status, and other newly raised arguments.

1. Issues outside the scope of this appeal and the scope of the Board's jurisdiction

Having failed to comply with the Board's rules for filing an appeal of the 2012 Decision that neither *Carcieri* nor *Hawaii* deprive the Secretary of the authority to accept the 6.9 acres into trust for the Tribe under 25 U.S.C. § 465, POLO/POSY devote almost 16 pages of their 39-page reply brief to what amounts to an appeal of that decision. POLO/POSY failed to timely appeal the 2012 Decision and the arguments against the 2012 Decision are therefore "impertinent."[32] An "'impertinent' matter consists of statements that do not pertain and are unnecessary to the issues in question."[33] The 2012 Decision regarding the effect of *Carcieri* and *Hawaii* is not before this Board. POLO/POSY's arguments challenging that decision in their reply brief should therefore be stricken.

The Board should also strike POLO/POSY's inaccurate and misleading rendition

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[31] *Preservation of Los Olivos and Preservation of Santa Ynez*, 45 IBIA at 108.
[32] *See* Fed. R. Civ. P. 12(f).
[33] *Wilkerson*, 229 F.R.D. at 170 (citing *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993)).

of the history of the Tribe, which challenges the accurate history contained in the Pacific Regional Director's 2012 Decision. Again, since POLO/POSY failed to comply with the Board's jurisdictional rules for filing an appeal of the 2012 Decision, this argument (which challenges the Regional Director's *Carcieri* determination that carefully reviewed the historical evidence to determine that the Tribe was a recognized Indian tribe under federal jurisdiction in 1934), raises issues well outside the scope of this appeal, and outside the Board's jurisdiction to entertain.

In its April 3, 2013 order, this Board made clear that proceedings on these issues—raised late in the day by POLO/POSY—are no longer before the Board:

> The remand proceedings were concluded when the Board dismissed several appeals from the Regional Director's decision on remand. *See NoMore Slots et al. P. Pacific Regional Director*, 56 IBIA 233 (2013).
>
> * * *
>
> Now that the remand proceedings on the vacated portion of the Decision have concluded . . . .[34]

Therefore, all of the many pages of POLO/POSY's reply brief (pages 2, 6–16, 25–26, and 33–39) that really constitute an appeal of the 2012 Decision should be stricken as "impertinent."[35]

Likewise, POLO/POSY's attempt to use their reply brief as a vehicle to challenge the Board's ruling that they failed to timely comply with the Board's jurisdictional filing requirements for appealing should be stricken. POLO/POSY offer a newly revised

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[34] Order Lifting Stay and Scheduling Completion of Briefing at 1, *Preservation of Los Olivos & Preservation of Santa Ynez v. Pac. Reg'l Dir.*, IBIA 05-050-1 (April 3, 2013).
[35] *See* Fed. R. Civ. P. 12(f).

version of the facts as justification for why the Board was wrong in holding that POLO/POSY had failed to timely file a notice of appeal.[36] But as this Board stated in its decision denying POLO/POSY's right to appeal, POLO/POSY indeed failed to file a timely appeal with the Board despite being given instructions on how to do so:

> The Decision advised potential appellants that any appeal from the Decision must be filed with the Board of Indian Appeals (Board) within 30 days of receipt, it provided the Board's address, and it cited the Board's appeal regulations, which include the requirements for filing an appeal with the Board. None of the Appellants filed an appeal with the Board within the 30-day deadline, which is jurisdictional . . . .[37]

POLO/POSY get no more bites at this apple. These arguments should be stricken as outside the scope of this appeal because the timely appeal question is now decided, and POLO/POSY's reprise of their previous arguments can have no possible bearing on the subject matter of this appeal.

2. Arguments that are false, inflammatory, and irrelevant to this appeal should also be stricken

POLO/POSY's long-winded attack and inaccurate rendition of the Tribe's history is at best a thinly veiled attack on the Chumash people and this Tribe. POLO/POSY's contention that this Tribe is not a legitimate Indian Tribe plainly and "improperly casts a derogatory light" on the Tribe.[38] Some commentators have suggested that attacking the Department of the Interior's decision to recognize a tribe as legitimate is one of the most inflammatory accusations one can make about a tribe since "[t]he term 'federally

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[36] Ex. A, Appellants' Reply Brief at 8.
[37] *No More Slots*, 56 IBIA at 233.
[38] *Wilkerson*, 229 F.R.D. at 170 (citing *Skadegaard v. Farrell*, 578 F. Supp. 1209, 1221 (D.N.J. 1984).

recognized tribe' has become synonymous with 'true' Indian heritage. As a result, a claim that a Tribe is a 'nonrecognized tribe' has become associated with the '[s]tigma of second class Indian.'"[39] In addition, this attack has no relevance to the matters under consideration—because POLO/POSY failed to timely file their appeal of the 2012 Decision, which concluded that the Tribe met the first definition of "Indian" in the IRA, namely, that the Tribe was a "recognized Indian tribe [] under federal jurisdiction" in 1934. POLO/POSY failed to timely challenge such 2012 Decision and thus the merits of the 2012 Decision are not at issue in this appeal. Therefore, since this attack on the Tribe's history and status will play no part in this Board's determination of the standing issue or the merits of the remaining issues on appeal, these allegations are gratuitously inflammatory and should be stricken from POLO/POSY's filing as scandalous.

This Board has struck similar portions of POLO/POSY's briefs from the record for similar reasons. In 2007, during the limited first remand to the Board, POLO/POSY's opening brief also challenged the legitimacy of the Tribe. The Regional Director and the Tribe jointly moved to strike those portions of the opening brief, which this Board granted "[b]ecause Appellants' claims regarding . . . the Tribe's status are clearly outside the scope of these proceedings and violate the Board's order establishing procedures on remand."[40]

POLO/POSY's argument that the Tribe sought to have the 6.9 acres taken into

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[39] Alva C. Mather, *Old Promises: The Judiciary and the Future of Native American Federal Acknowledgment Litigation*, 151 U. Pa. L. Rev. 1827, 1836 (2003)) (citing and quoting congressional testimony).

[40] *Preservation of Los Olivos & Preservation of Santa Ynez*, 45 IBIA at 106.

trust so that the property could be used for gaming is also false and not supported by the long record in this case. The Board has repeatedly held that speculation like POLO/POSY's that trust land may be used for gaming should play no role in the fee-to-trust decision, especially when a Tribe has repeatedly denied that the land would be used for gaming—just as the Tribe has done here.[41] In *Iowa v. Great Plains Regional Director*, the Board rejected the same kind of speculation offered by POLO/POSY in this appeal:

> [T]he property here was purchased by the Tribe and is currently used for health care facilities. The Tribe has continuously stated that it intends to use the property for health care facilities or for other Tribal governmental operations. There is nothing other than pure speculation to suggest that the Tribe intends to use this property for gaming purposes.
>
> The Board has previously held that mere speculation that a tribe might, at some future time, attempt to use trust land for gaming purposes does not require BIA to consider gaming as a use of the property in deciding whether to acquire the property in trust.[42]

The Tribe has consistently stated that these 6.9 acres will not be used for gaming. The January 14, 2005 decision of the BIA agreeing to take this land into trust, and which POLO/POSY originally challenged, states that the petition is part of the Tribe's efforts to preserve the ancient village site:

> The identified site has a portion of an ancient village site, which the Tribe is making every effort to preserve and protect. It is proper that the Tribe maintain primary interest in such resources, and therefore, be the ultimate

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[41] *See, e.g., Shawano Cnty. Wisc. v. Midwest reg'l Dir.*, 40 IBIA 241, 248–249 (2005); *Iowa v. Great Plains Reg'l Dir.*, 38 IBIA 42, 52–53 (2002); *Charleston, R.I. v. Eastern Area Dir.*, 35 IBIA 93, 103 (2000); *see also City of Lincoln City, Or. v. Portland Area Dir.*, 33 IBIA 102, 107 (1999) (rejecting the argument that "BIA is required to examine every possible use that could be made of the property.").

[42] *Iowa v. Great Plains Reg'l Dir.*, 38 IBIA at 52–53.

> authority on proper treatment and disposition of such resources. Placing the property into trust will ensure tribal jurisdiction over the property and preserve and protect such resources for generations to come.[43]

The decision also states that the Tribe had planned on using the land for a tribal administration and community center. Even then, the agency did not address in that decision POLO/POSY's contentions that the property would be used for gaming because it believed those contentions were "speculative in nature."[44]

Following the BIA's decision in 2005 to take the 6.9 acres into trust, the Tribe's Chairman, Vincent Armenta, sent a letter to the Chairperson of the Santa Ynez County Board of Supervisors proposing an agreement in which the County would agree not to appeal the decision, and the Tribe would commit to not using "the Property directly or indirectly [to] support gaming, including but not limited to use of the Property for Casino overflow parking or Casino employee parking."[45]

Even the Executive Director of one of the local citizen groups that was one of the original plaintiffs in the legal challenge to the fee-to-trust determination—the Santa Ynez Valley Concerned Citizens—testified to the County Board of Supervisors: "The Tribe's proposal for this land has always been something that we have supported, a museum

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[43] Notice of Decision at 8 (Jan. 14, 2005).
[44] *Id.* at 6; *see also Avoyelles Parish, La. v. Eastern Area Dir.*, 34 IBIA 149, 158 (1999) ("[T]he Board does not undertake to reanalyze or re-weigh [a trust] acquisition request under the criteria in section 151.10.").
[45] Letter from Vicent Armenta, Tribal Chairman, to the Honorable Susan Rose, Chairperson, Santa Barbara Cty. Bd. of Supervisors (Feb. 14, 2005) (attached as Exhibit B).

cultural center, some retail and adequate parking to support those."[46]

Therefore, these arguments are likewise irrelevant to this appeal, and again highly inflammatory. This argument should therefore be stricken from POLO/POSY's reply brief.

Similarly, POLO/POSY also argue—but cite to nothing in the record—that the Tribe has "acknowledged" that it does not need the 6.9 acres taken into trust for a tribal "governmental or sovereign function."[47] This is false. There is no question that preservation of the Tribe's culture and history is part of its sovereign governmental function.[48] So this argument is facially specious. In addition, there is no factual support for this false contention, for once again, the Tribe has repeatedly explained that this 6.9-acre parcel contains a historical ancient village site for the Chumash people. That the Tribe intends to preserve the site as a memorial area and commemorative park and a cultural center to the Chumash Mission Indians alone belies this contention. This property will be used for purposes that reside at the heart of the Tribe's sovereignty and self-governance.[49]

In the Tribe's Joinder in the Government's Motion to Dismiss, the Tribe explicitly

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[46] Testimony of Charles Jackson, Executive Director, Santa Ynez Valley Concerned Citizens, before the Santa Barbara Cty. Bd. of Supervisors (Feb. 15, 2005) (attached as Exhibit C).

[47] Appellants' Reply Br. at 28.

[48] *See Roberts Cnty., S.D. v. Acting Great Plans Reg'l Dir.*, 51 IBIA 35 (2009) (affirming decision to take land into trust where it would "help the Tribe preserve its native language and culture, and support tribal self-determination"); *Bunney v. Pac. Reg'l Dir.*, 49 IBIA 26, 28–29 (2009) (affirming decision to take land into trust "to protect important cultural, spiritual, and historic sites"); *Cohen's Handbook of Federal Indian Law* § 20.01 ("Cultural resources are of central importance to Indian nations.").

[49] *Id.*

states these facts, and there are no contrary statements in the record (as POLO/POSY inaccurately contend):

> In November of 2000, the Tribe submitted an initial application to the Bureau of Indian Affairs ("BIA") to take 6.9 acres of property into trust for the purpose of relocating its tribal government center and health clinic to land that would enable the Tribe to increase the size of the buildings in order to accommodate more departments and services.[50]

As the Tribe's Joinder further explains, after the discovery of the village, the Tribe's goal became one of ensuring the protection and preservation of a significant historical and cultural site:

> Once the village site was encountered, the Tribe revised its plans for the property to ensure the protection and preservation of the significant cultural site. The proposed tribal government and health care buildings were relocated to the northern Reservation and various proposals for preservation of the site and use of the property were considered. The Tribe determined that it would avoid and protect the village site by capping the site and constructing a community commemorative park over it to prevent any further disturbance. As a corollary to protection of the site, the Tribe decided to use the property to construct a Museum and Cultural Center with interactive exhibits through which it could share its knowledge and heritage with local residents and visiting tourists. In addition, the Tribe determined it would construct a commercial/retail facility which would contain space for retail shops and professional offices.[51]

So, the Board should strike all of POLO/POSY's false and inflammatory attacks on the Tribe's intended use of this property and disparagement of the Tribe's use of this property, which are demonstrably and incontestably for a sovereign purpose.

Finally, POLO/POSY falsely contend that the 6.9 acre parcel is not contiguous to

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[50] Joinder of Real Party in Interest Santa Ynez Band of Chumash Mission Indians in Support of the Bureau of Indian Affairs Motion to Dismiss for Lack og Standing at 4 (May 10, 2005).

[51] *Id.* at 4–5.

the Tribe's reservation. But that issue was resolved as part of the Solicitor's preliminary title opinion, which was prepared before any decision was made to accept the parcel into trust, or before the Notice of Decision in 2005.[52] Therefore there is no possibility that this inflammatory and false argument would have any relevance to the subject matter of this appeal. This argument therefore should also be stricken from the reply brief.

3. Newly raised issues

POLO/POSY raise for the first time issues in their reply brief, all of which have no place in a reply brief and should be stricken.[53] These arguments include whether the BIA should have analyzed the cumulative impacts under NEPA of a fee-to-trust application for the Camp 4 site, property the Tribe did not even own when it applied for fee-to-trust status of the 6.9 acres.[54] POLO/POSY did not raise this issue in their original appeal, did not discuss this issue in their opening brief, and so therefore this argument is wholly outside the scope of this briefing and should be stricken from POLO/POSY's reply brief.

In addition this issue could have no bearing on the subject matter of this appeal because the BIA has no obligation to look to or consider other fee-to-trust applications submitted by an applicant when considering a single fee-to-trust decision.[55] And even if it did, the BIA could not have considered the Camp 4 fee-to-trust petition since the Tribe did not even acquire the land until 5 years after the BIA decided to accept the 6.9 acres into trust.

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[52] Solicitor's Preliminary Opinion of Title (Jan. 29, 2003) (attached as Exhibit D).
[53] *Preservation of Los Olivos and Preservation of Santa Ynez*, 45 IBIA at 108.
[54] *See* Appellants' Reply Br. at 4, 32–33.
[55] *Thurston Cnty. Neb. v. Acting Great Plains Regional Dir.*, 56 IBIA 62, 74 (2012).

POLO/POSY's new allegation of bias, which it mentions in passing by including in a footnote to their reply brief, should also be stricken. Not only did POLO/POSY fail to raise this issue previously, it offers no evidence or support for the contention that the Regional Director was biased in her decision-making. Thus, this new and wholly unsupported argument should be stricken from POLO/POSY's reply brief.

Additional newly raised issues in this reply brief concern POLO/POSY's request that the Board conclude the trust acquisition violates equal protection principles and the novel contention that 25 C.F.R. §1.4 is unconstitutional. This provision exempts Indian trust land from state and local regulation:

> [N]one of the laws, ordinances, codes, resolutions, rules or other regulations of any State or political subdivision thereof limiting, zoning or otherwise governing, regulating, or controlling the use or development of any real or personal property, including water rights, shall be applicable to any such property leased from or held or used under agreement with and belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States.[56]

That POLO/POSY raise these arguments now, for the first time in their reply brief, is alone a sufficient basis for striking these arguments from their reply brief.

In addition, however, POLO/POSY cite no authority for the proposition that 25 C.F.R. § 1.4 is unconstitutional, nor could they, since courts have applied this provision and have upheld its validity.[57] And, since this Board lacks authority to review constitutional challenges to a federal statute or regulation, these constitutional challenges

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[56] 25 C.F.R. § 1.4(a).

[57] *See, e.g., Santa Rosa Band of Indians v. Kings County*, 532 F.2d 655 (9th Cir. 1975); *see also Cohen's Handbook of Federal Indian Law* §15.07[1][c] (discussing the failed constitutional challenges to the fee-to-trust process).

could have no possible bearing on the subject matter of this appeal.[58] POLO/POSY, in fact, admit this in their reply brief:

> [T]he IBIA is part of the Executive Branch of Government and it has only that authority that has been delegated to it by the Secretary of Interior. The IBIA is not a court or part of the Judicial Branch of Government. And it lacks the authority to decide or adjudicate constitutional legal issues. . . . [A]lthough the IBIA has the authority to review some legal issues raised in a trust acquisition case, it lacks the authority to adjudicate legal challenges to the constitutionality of laws and regulations.[59]

Finally, POLO/POSY raise for the first time a speculative argument that the BIA should have considered whether the federal doctrine of reserved water rights might apply to groundwater beneath the Tribe's Reservation, as suggested in a recent law journal article.[60] Because the Tribe has made no such claim, however—and it would likely not relate to this property if it did—this argument should be stricken from pages 30–31 of POLO/POSY's brief as having no bearing on the subject matter of this appeal.

The Board should strike POLO/POSY's newly raised arguments which can have no bearing on any issue before the Board in this appeal.

CONCLUSION

The Board should strike all those portions of POLO/POSY's reply brief that raise arguments POLO/POSY failed to timely raise in this appeal, which are outside the scope

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[58] *Estate of Joyce Mary James*, 4 IBIA 84, 82 (1975) ("This Board, like the Administrative Law Judge, is without authority to declare a statute unconstitutional as being in violation of the Constitution of the United States."); *Oklahoma Petroleum Marketers Association v. Muskogee Cnty.*, 35 IBIA 285, 287 (2000) ("The Board has no authority to declare an act of Congress unconstitutional.").

[59] Appellants' Reply Br. at 17–18.

[60] Appellants' Reply Br. at 30–31 (citing Joanna (Joey) Meldrum, *Reservation and Quantification of Indian Groundwater Rights in California*, 19 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 277 (Summer 2013)).

of this appeal, which are scandalous or inflammatory, or which raise issues that have no bearing on the subject matter of this appeal.

Respectfully submitted,

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UNITED STATES DEPARTMENT OF INTERIOR

INTERIOR BOARD OF INDIAN APPEALS

PRESERVATION OF LOS OLIVOS and PRESERVATION OF SANTA YNEZ, Appellants, **v.** PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	Case No. IBIA 05-050-A **APPELLANTS' RESPONSE TO JOINT MOTION TO STRIKE PORTIONS OF APPELLANTS' REPLY BRIEF**

INTRODUCTION

POLO filed its Opening Brief on February 8, 2010. POLO's Opening Brief included arguments on the standing issue and the merits of this appeal. POLO also brought two important Supreme Court decisions (*Carcieri* and *Hawaii)* to the IBIA's attention. Those two decisions undermined the BIA's 2005 decision and preclude the transfer of the subject property into trust as a matter of law. Consequently, POLO asked the IBIA to vacate the BIA's 2005 decision.

The SYBand filed its Answer Brief on March 22, 2010. The SYBand responded to all the arguments raised in POLO's Opening Brief including POLO's arguments regarding standing,

IGRA, NEPA and those based on the *Carcieri* and *Hawaii* decisions. On May 7, 2013, the SYBand reaffirmed its 2010 Answer Brief except that, to expedite the process, the SYBand agreed to "waive the standing issue." The SYBand did not mention the BIA 2012 decision or claim that it precluded POLO from replying to the SYBand's contentions regarding the *Carcieri* and *Hawaii* issues in either its Answer Brief or its May 7, 2013 filing affirming its Answer Brief.

The BIA did not file an Answer Brief to POLO's Opening Brief in 2010. Instead, at the direction of the Assistant Secretary - Indian Affairs (AS-IA), the Solicitor General for the Department of Interior asked the IBIA to remand the matter so the BIA could consider the impact of the two Supreme Court cases on its 2005 decision. *See* 25 C.F.R. § 2.20.

On May 17, 2010, the IBIA: (1) granted POLO's request to vacate the BIA's 2005 decision, (2) granted the AS-IA's request to remand this matter to the BIA, and (3) and stayed this entire appeal while jurisdiction over this matter was on remand with the BIA. The IBIA vacated "the portion of the January 14, 2005, [BIA] decision finding that 25 C.F.R. § 151.10(a) is satisfied in the present case" and remanded the issue to the BIA for further consideration in light of *Carcieri* and *Hawaii.* The IBIA also held that, although it will grant the AS-IA's request for remand, it "will not limit it solely to the *Carcieri* issue."

While the matter was on remand, POLO submitted briefs to the BIA on August 19, 2010, October 4, 2010 and October 5, 2010.[1] The BIA issued an interim decision in 2012 which consisted of its 2005 decision supported by a legal memorandum dated May 25, 2012, from an Associate Solicitor Michael J. Berrigan. In that memorandum, Mr. Berrigan outlined his legal opinion regarding the applicability of the *Carcieri* and *Hawaii* decisions to the 2005 BIA decision. But the exhibits referenced in Mr. Berrigan's memorandum were not attached.

[1] These briefs, and other comments submitted by POLO to the BIA while this matter was on remand to the BIA, are part of the record and incorporated herein by reference.

After receiving the BIA's 2012 decision, POLO filed a supplemental notice of appeal in this case with the BIA regarding that 2012 decision. Paragraph 1 of the supplemental notice of appeal clearly states that it "is a continuation and renewal of the initial appeal submitted by the Appellants [POLO and POSY] with respect to a January 14, 2005 decision by the BIA – which was affirmed by the June 13, 2012 decision of the BIA." POLO properly filed this supplemental notice with the BIA because it was the deciding agency (25 C.F.R. § 2.9(a).) and because BIA still had remand jurisdiction over this appeal.

POLO anticipated that the remand and jurisdiction would be immediately returned by the BIA to the IBIA. But that did not happen for another year. And this appeal was on remand with the BIA, and stayed by the IBIA, for almost three years - from May 2010 to April 2013. Finally on April 3, 2013, the IBIA took back jurisdiction from the BIA, lifted the stay and scheduled the completion of the briefing that was initiated in 2010. As summarized above, on May 7, 2013, the SYBand reaffirmed its 2010 Answer Brief. And the BIA filed its Answer Brief on May 31, 2013.

The BIA did not brief the *Carcieri* and *Hawaii* cases in its Answer Brief. Instead, the BIA relied on its 2012 interim decision which, as noted above, was its 2005 decision coupled with a 2012 legal memorandum from an Associate Solicitor regarding *Carcieri* and *Hawaii.* Specifically, the BIA offered its 2012 decision to support the 2005 BIA "determination, pursuant to 25 C.F.R. § 151.10(a), that statutory authority exists for the trust acquisition of the Property [the 6.9 acres]." Thus, in its Answer Brief, instead of briefing *Carcieri* and *Hawaii,* the BIA relied on its 2012 interim decision to support the 151.10(a) findings in its 2005 decision. And, although this matter was on remand for three years, the BIA reissued its 2005 decision without an updated environmental review or other modification to the 2005 findings.

On July 1, 2013, POLO filed its Reply Brief in response to both Answer Briefs. POLO's Reply Brief should have been the final brief filed in this case. 43 C.F.R. § 4.311.

Over three weeks later, on July 25, 2013, POLO received an unauthorized Joint Motion to Strike Portions of Appellants' Reply Brief submitted by the SYBand and BIA.[2] The next day, on July 26, 2013, POLO received the IBIA's Order Allowing Response to Joint Motion to Strike Portions of Appellants' Reply Brief. Although the IBIA Order confirmed that briefing on this matter "has been completed," it gave POLO an opportunity to respond to the joint motion on or before August 9, 2013. As is outlined below, the joint motion is not authorized and was filed without justification or permission. It lacks merit and should be denied and rejected.

ARGUMENT

A. The joint motion to strike or sur-reply brief was filed without the required "special permission" of the IBIA; it should be disregarded and not considered by the Board.

The regulations allow for only three types of briefs: an opening brief, an answer brief and a reply brief. 43 C.F.R. § 4.311. The regulations are very clear that: "Except by special permission of the Board **no other briefs** will be allowed on appeal." *Id; emphasis added.* Thus, regardless of whether it is called a joint motion or a sur-reply brief, supplemental briefing is not allowed without special permission from the IBIA. This prohibition applies to all "other briefs."

Neither the BIA, nor the SYBand, was given special permission from the IBIA to file another brief after POLO filed its Reply Brief. In fact, the BIA and SYBand were apparently so confident that they could ignore these rules with impunity that they do not even bother to explain why they did not ask for permission to file another brief. There is no justification or authority for another brief. The joint motion/sur-reply brief should be rejected and not considered by the IBIA.

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[2] This motion is actually a not very well disguised sur-reply brief. The SYBand and BIA filed it without permission from the IBIA. Furthermore, the "motion" is not signed by counsel of record for either the SYBand or the BIA. Instead, it is signed on their behalf by someone with the initials "IFG". There is no attorney with the initials "IFG" designated as an attorney of record in this appeal. In fact it is not certain if "IFG" is an attorney or if he/she is authorized to sign pleadings on behalf of the federal government. (*See* Fed.R.Civ.Proc. Rule 11; "every pleading, written motion and other paper must be signed by at least one attorney of record.")

B. There is no authority in the applicable Code of Federal Regulations or Federal Rules of Civil Procedure to strike legal arguments or portions of a legal memorandum.

The BIA and SYBand's joint motion to strike is directed at the legal arguments POLO raised in its Reply Brief.[3] This "motion" is frivolous and designed to harass the appellants and further delay these proceedings. It is a clear abuse of process and is so self-evidently ludicrous that it hardly warrants a response. There is no authority to strike valid legal arguments from your opponent's brief just because you disagree with those arguments.

The BIA and SYBand's reliance on Federal Rule of Civil Procedure, Rule 12(f) is misplaced. That section applies to motions to strike "pleadings" not to legal memoranda or legal arguments within legal memoranda. Pleadings, as defined in Federal Rule of Civil Procedure 7(a), include only complaints, answers, and third-party complaints. POLO's reply brief is obviously not a pleading under Rule 7(a) and, therefore, it is not subject to a motion to strike under Rule 12(f). This pleading limitation is exemplified by the *Wilkerson* case reference by the BIA and SYBand in their joint motion. *Wilkerson v. Butler,* 229 F.R.D. 166 (2005). In that case, it was held that a court may strike a prayer for relief where the damages sought were precluded as a matter of law. The motion to strike was directed at allegations in complaint not arguments in a brief. Simply put, there is no federal rule allowing for a motion to strike after the pleading stage.[4] There is clearly no authority to strike arguments within a legal memorandum filed after the pleading stage.

Furthermore, even if Rule 12(f) was applicable, motions to strike "are strongly disfavored." *U.S. v. Mass. HFA* 456 F.Supp.2d 46, 51 (D.D.C. 2006) *aff'd,*530 F.3d 980 (D.C. Cir. 2008). Motions to strike portions of pleadings are generally not granted unless it is clear that the matter

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[3] Attached as Exhibit A to the joint motion is a copy of POLO's Reply Brief with highlighted portions of the legal and factual arguments that the moving parties would like to have stricken including all the legal and factual arguments except those related to standing.

[4] One exception is Federal Rule of Civil Procedure 11 which mandates that unsigned or improperly signed documents (like the joint motion here) be stricken from the record.

to be stricken from the pleading could have no possible bearing on the subject matter of the litigation. *Colaprico v. Sun-Micro Systems, Inc,* 758 F.Supp 1335, 1339 (N.D. Cal. (1991).)

It cannot be said that the legal and factual arguments that POLO raised in its Reply brief, in direct response to the legal and factual arguments in the Answer Briefs, "could have no bearing on the subject matter of the litigation." Instead, POLO's reply to the arguments raised by the BIA and SYBand in their Answer briefs is the reason that the IBIA rescheduled the briefing schedule. The BIA and SYBand's claim that POLO is not entitled to respond to their arguments in its reply brief is clearly wrong. POLO's reply arguments are appropriate and are not subject to Rule 12(f).

Nor do the IBIA cases referenced by the BIA and SYBand support their motion to strike POLO's legal arguments. Although they all involved a motion to strike, none of the cases relied on by the BIA and SYBand discuss the authority to file a motion to strike in an IBIA matter. There is no regulation in the applicable Code of Federal Regulations that authorizes a motion to strike legal arguments in an opening, answer or reply brief before the IBIA. The *Estate of Wellknown* case, 1 IBIA 84, 86 (1971), involved a motion to strike an entire brief that was not timely filed. It is not applicable here; there is no contention that POLO's Reply Brief was not timely filed. The IBIA, over the SYBand's objection, granted the BIA's and POLO's joint request to extend the briefing schedule. POLO's Reply Brief was due on July 1, 2013 and was mailed and, consequently, filed on July 1, 2013. 43 C.F.R. § 4.310(a).

C. The Joint Motion to Strike, if granted, would violate the Administrative Procedures Act and Appellants' due process right to fully present their case in a fair forum.

The BIA and SYBand apparently want this appeal to be a one-sided affair where any arguments in opposition to their claims are stricken from the record and not even allowed to be presented. To be sure, the BIA and SYBand already have many procedural advantages in this forum. As noted in the Reply Brief, this is because the BIA, IBIA and AS-IA are all required to

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give deference to tribal interests. The BIA's or a tribe's lax compliance with the applicable procedural rules and deadlines is usually tolerated and/or excused.[5]

This institutionalized BIA and tribal procedural preference, although not excusable, is explainable given the history of the BIA since 1934. *See Morton v. Mancari*, 417 U.S. 535 (1974). But, regardless of its constitutional validity, this procedural deference or preference should not be extended to the point of violating the due process rights on non-tribal interested parties. POLO has the right to reply, as it deems appropriate, to the legal and factual arguments raised by the BIA and SYBand in their Answer Briefs. It would violate POLO's due process right to fully present its case in a fair forum if its Reply Brief is stricken. Indeed, it would be arbitrary and capricious and an abuse of discretion and contrary to the Administrative Procedures Act to strike the legal and factual arguments in POLO's Reply Brief just to give the BIA and SYBand the advantage of having a one-sided argument. 5 U.S.C. §§ 500 et seq. And, if the arguments are stricken, it would render this entire process as meaningless exercise in futility for POLO and other non-tribal interested parties.

In *Olson v. BIA*, 31 IBIA 44 (1997), a case referenced by the moving parties, the BIA moved to strike all the documents submitted with appellants' opening brief. The Board denied the BIA's motion and held that the documents could be added to the administrative record. The Board observed that its "normal practice is to allow the parties to supplement the record provide by the deciding official as long as opposing parties have the opportunity to respond to any documents submitted." In this case, the BIA and SYBand have had plenty of time to respond to POLO's

[5] The joint motion/sur-reply brief, filed after the briefing was completed, is the latest example of the contrast between tribal interests and non-tribal interests when it comes to procedural compliance. The BIA and SYBand were not required to respond to an order to show cause for filing a sur-reply brief in violation of 43 C.F.R. § 4.311. Nor were they required to seek permission, much less provide an explanation, for filing a sur-reply brief in violation of 43 C.F.R. § 4.311. They merely filed the joint motion/sur-reply and it was allowed in stride.

arguments. The legal and factual issues in this appeal have been briefed several times since 2005. And the *Carcieri* and *Hawaii* issues have been briefed several times by the parties since 2009 – including extensive briefing before the BIA while this matter is on remand. All of these briefs and documents are in the record and the SYBand and BIA have had ample time to respond to POLO's contentions over the last eight years. It is too late for the SYBand and BIA to ask that these arguments be deleted from the record. This Board should have the complete record, including all the documents provided by POLO, when it makes its decision.

In *Crow Tribe v. BLM* 31 IBIA 16 (1997) the Board also denied the Crow Tribe's motion to strike the BLM's opening brief in its entirety with language that could easily be applied here:

> "**With the unique procedural problems raised in this case and the general requirements of due process firmly in mind**, the Board concludes that, if err it must, it will err on the side of allowing consideration of materials that BLM filed . . . The Board therefore denies the Tribe's motion to strike the BLM's Opening Brief in its entirety."
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> *Id.* at 23; emphasis added.

The BIA and SYBand's motion is, in effect, to strike POLO's Reply Brief in entirety.[6] It would violate POLO's due process right to present all the legal and factual arguments, it deems appropriate, in response to the legal and factual arguments presented in the Answer Briefs. The fact that the BIA and SYBand disagree with the arguments in POLO's Reply Brief is not an appropriate or sufficient reason to strike them. If the IBIA is going to err, it is better for fairness and due process reasons for it to err on the side of including all of POLO's legal and factual arguments and resolving the issues on the merits

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[6] The only part of the brief that would likely remain, if the joint motion to strike is granted, is the section on the standing related arguments. And there may be no disagreement about the standing issues; the SYBand has already agreed to waive its objection to POLO's standing in this matter. It is uncertain whether the BIA will do likewise.

D. The arguments presented in the motion to strike, regardless of all the pejorative accusations and unprofessional language, are wrong.

On pages 3 and 4 of their joint motion/sur-reply brief the BIA and the SYBand list their contentions in bullet form. For convenience, POLO will address their claims in basically the same order, with some variation, that they are presented there. But POLO does not intend to restate the arguments in its Reply Brief – which is incorporated by reference here in its entirety.

1. The legal arguments and documents presented by POLO in its Reply Brief regarding the *Carcieri* and *Hawaii* decision are properly before this Board.

POLO, in its 2010 Opening Brief, brought the *Carcieri* and *Hawaii* Supreme Court decisions to the IBIA's attention and, given the implications of these decisions, asked that the BIA 2005 decision be vacated. This Board agreed with POLO and partially vacated the BIA's 2005 decision. Specifically the IBIA, based on the *Carcieri* and *Hawaii* decisions, vacated the 151.10(a) findings. And at this point, three years later, the 2005 BIA decision remains vacated. The primary purpose of the three year briefing schedule, that was finally completed when POLO's Reply Brief was filed on July 1, 2013, was for the parties to brief the impact of the *Carcieri* and *Hawaii* decision on the vacated 151.10(a) findings in the 2005 decision.

The SYBand filed its Answer Brief in March 2010 and fully briefed its contentions about the impact of the *Carcieri* and *Hawaii* decision on this case. The SYBand reaffirmed its March 2010 Answer Brief on May 7, 2013, with the exception that it waived its arguments about POLO's standing to pursue this appeal. The SYBand did not mention or rely on the 2012 BIA decision when it confirmed its Answer Brief in 2013. Obviously, it was appropriate for POLO to respond in its Reply Brief to the SYBand's contentions about *Carcieri* and *Hawaii* impact on the SYBand's fee-to-trust applications. It would violate POLO's due process rights to strike the *Carcieri* and *Hawaii* legal arguments that POLO submitted in response to the SYBand's contentions. These are legal issues and are not subject to a motion to strike.

This matter was on remand with the BIA and stayed by the IBIA for three years. The BIA finally filed an Answer Brief on May 31, 2013 and, for the first time, confirmed that it was going to rely on its 2012 decision. The BIA mentioned, but did not discuss, the *Carcieri* and *Hawaii* cases. Nor did the BIA oppose POLO's legal contentions outlined in its Opening Brief with respect to those cases. Nor did it modify or supplement its 2005 decision. Instead, the BIA relied on its 2012 decision, and an Associate Solicitor General legal memorandum to the BIA regarding *Carcieri* and *Hawaii* to support it 151.10(a) findings in its 2005 decision. POLO addressed these claims of the BIA in its Reply Brief. POLO's contentions and arguments regarding the BIA's reliance on the 2012 decision are appropriately included in its reply brief. It would violate POLO's due process rights to strike these arguments from the record.

2. POLO has not raised IBIA errors related to the IBIA assertion of jurisdiction and dismissal of IBIA Docket No. 12-148 in its reply brief in this appeal.

The BIA and SYBand also claim that POLO argued in its Reply Brief that the IBIA erred when it dismissed a separate appeal (Docket No. 12-148). But, contrary to these assertions, POLO did not raise these issues in its Reply Brief. The Reply Brief does not mention , much less discuss, Docket No, 12-148. Nor is that separate appeal relevant to this appeal. This appeal (Docket No. 05-050) was stayed from 2010 until April 2013, while that appeal (Docket No. 12-148) was generated and dismissed by the IBIA in 2012.[7] This appeal involves the 2005 BIA decision which was reaffirmed and supplemented by the BIA in 2012. To be sure, there are legal problems associated with Docket No. 12-148. But those issues are not part of this appeal.

[7] Although Docket No. 12-148 was generated by the IBIA from this appeal, it is a separate appeal. As summarized above, POLO had supplemented its 2005 notice of appeal in this matter (Docket No. 05-050) to include the 2012 decision to reaffirm the 2005 decision. POLO filed the supplemental notice with the BIA because it was the deciding agency and because it had jurisdiction while this matter was on remand. Despite these facts, the IBIA – on its own motion - assumed jurisdiction over POLO's supplemental notice, gave it a separate docket number (Docket No. 12-148) and then dismissed it because it was initially filed with the BIA instead of the IBIA. It is POLO's contention in that case that the IBIA did not have jurisdiction to assume control and dismiss the supplement appeal filed in this case. (See POLO's briefs filed in Docket No. 12-148.)

Furthermore, it would not have been appropriate or necessary for POLO to discuss these issues in the Reply Brief. Neither the BIA nor the SYBand had mentioned Docket No. 12-148 in their Answer Briefs. Neither argued that the dismissal of Docket No. 12-148 affects or precludes the continuation of this appeal. Although the SYBand's Answer Brief pre-dates Docket No. 12-148, the SYBand did not mention that appeal when it confirmed its Answer Brief and waived the standing issue on May 7, 2013. Although the BIA does not reference Docket No. 12-148 in its Answer Brief, it does mention the dismissal to support its contention that its 2012 decision is its final agency action on these issues in that appeal. The BIA did not claim that the dismissal of Docket No. 12-148 precluded the continuation of this appeal. It is too late for the SYBand or the BIA to make this preclusion argument now. Furthermore, this contention lacks merit. *Carcieri* and *Hawaii* involve legal issues that were appropriately addressed in the Reply Brief in this appeal regardless of Docket No. 12-148.

Unlike Docket No. 12-148, this appeal is not limited to the 2012 BIA decision. This appeal involves the 2005 decision of the BIA to take 6.9 acres into trust. POLO filed a timely Notice of Appeal of the 2005 decision. And, as summarized in POLO's Reply Brief, the 2005 BIA decision was vacated by the IBIA in 2010 based on the *Carcieri* and *Hawaii* decisions. This appeal was remanded to the BIA to evaluate the impact of those cases and stayed by the IBIA for three years. The IBIA did not have jurisdiction over this appeal during that three year period that the BIA did. Jurisdiction was finally returned from the BIA to the IBIA in April 2013. The IBIA, after regaining jurisdiction, lifted the stay and set a briefing schedule. In its 2013 Answer Brief, the BIA is relying on the interim decision it issued in 2012, to support its 151.10(a) findings that the IBIA vacated in its 2005 decision. Thus, regardless of whether the 2012 BIA Decision is a final agency action for purposes of Docket No. 12-148, it is an interim or interlocutory decision in this appeal. It is being offered by the BIA in response to the IBIA's

interlocutory 2010 Order vacating the 2005 BIA decision. It was put in issue by the BIA in its Answer Brief in 2013 and, consequently, is subject to POLO's reply.

In summary, the BIA put the 2012 BIA decision in issue in this case when it submitted that decision in support of it 25 C.F.R. §151.10(a) findings in the 2005 decision. Specifically, although the 2012 BIA decision does not contain 151.10(a) findings, the BIA argues that it supports the findings that were vacated by the IBIA in the 2005 decision. The 2012 BIA decision was issued after it was fully briefed by the parties and is supposedly supported by exhibits and other documents. The entire record regarding the 2012 BIA decision, including the briefs, documents and exhibits submitted by POLO, are now a part of the record in this appeal. The BIA is required to transmit the entire record to the IBIA. 43 C.F.R. § 4.335.[8]

3. The legal and factual arguments in POLO's reply are in direct response to the arguments raised by the SYBand and BIA in their Answer Briefs.

The SYBand and BIA list a series of arguments that they claim should be stricken from the Reply Brief. These contentions are incorrect. The arguments in the Reply Brief are in direct response to the arguments raised in the Answer Briefs. It would violate POLO's due process rights to strike its legal arguments and preclude an appropriate response to the Answer Briefs.

a. NEPA issues.

Contrary to the assertions of the BIA and SYBand, the NEPA related issues are not new. Since this appeal was first filed in 2005, POLO has consistently argued that the BIA should fully comply with NEPA, including the preparation of an EIS, before it approved the fee-to-trust. NEPA requires that an EIS be prepared for all "major Federal actions significantly affecting the

[8] The only way to avoid this necessary administrative record transmission process, is for the BIA to withdraw its reliance on the 2012 decision to support the vacated 151.10(a) findings in the 2005 decision – which is the subject of this appeal. POLO has no objection if the BIA wants to withdraw page 6 of its May 31, 2013 Answer Brief and its reliance on the 2012 decision to support its 2005 151.10(a) findings. But, in that event, the 2005 decision remains vacated and the record is obviously insufficient to support the fee-to-trust transfer of the 6.9 acres.

quality of the human environment." (42 U.S.C. § 4332(2) (c).) NEPA also requires the agency to take "hard look" at the environmental consequences of its actions and provide a "convincing statement of reasons to explain why a project's impacts are insignificant." *(Id.)* In this context, NEPA requires the agency to take cumulative impacts and the interests of the community into account. (*Blue Mountain Biodiversity Project v. Blackwood as Supervisor, Umatilla National Forest* 161 F.3d 1208 (1998).)

In this case, as summarized in POLO's Opening and Reply Briefs, it was arbitrary and capricious for the BIA in 2005 to prepare a Finding Of No Significant Impact (FONSI). Instead, the BIA should have prepared an EIS with respect to the trust acquisition and development of the 6.9 acres and reasonably foreseeable related projects. This matter was on remand and under the BIA's jurisdiction for over three years. The remand was not restricted to *Carcieri* issues; therefore the BIA should have updated its environmental documents. It was arbitrary and capricious for the BIA to rely on that same FONSI and not update its environmental review and circulate an EIS before it approved the same project in 2012.

Furthermore, the BIA should have studied the cumulative impacts of putting the 6.9 acres, 5.68 acres and 1400 acres in trust. An agency is required to study the cumulative impacts of "past, present and reasonably foreseeable future actions." 40 CFR § 1508.7. The BIA and SYBand, in their joint motion, confirmed that a fee-to-trust application has been submitted with respect to the 1400 acre parcel. Thus, in addition to the 6.9 acre parcel which is the focus of this appeal, the 5.68 acre fee-to-trust application and the 1400 acre fee-to-trust application are also pending. The cumulative impacts of all three pending fee-to-trust applications should be studied in an EIS now and before any of these applications are considered or approved.[9]

[9] Contrary to the assertion of the BIA and SYBand, the fact that the trust applications for the 5.68 acres and the 1400 acres were submitted after the 2005 BIA decision on the 6.9 acres did (Continued...)

In this case, the BIA completely ignored these impacts despite the fact that they were brought to their attention. The BIA does not even mention these impacts, much less supply a "convincing statement of reasons" to explain why, in their view, these impacts are insignificant. *Save the Yaak Committee v. Block* 840 F.2d 714, 717 (9th Cir. 1997). As outlined in POLO's reply brief, it appears that the BIA is unwilling or unable to require full compliance with NEPA because to do so would be incompatible with its mission to protect and fully support tribal economic development. (*See Morton v. Mancari, supra.*)

b. IGRA Issues.

The BIA and SYBand argue that POLO's contention that the SYBand proposed trust acquisition is for gaming related purposes is "false and inflammatory." But POLO's statements are true and based on undeniable facts in the record. It cannot be denied that the SYBand, in its initial application, applied for a gaming related trust acquisition pursuant to 25 USC §2719. Although the SYBand amended its application to remove any reference to gaming or Section 2719, the statements and admissions it made in its initial application remain in the record.

The BIA and SYBand attach a February 14, 2005 letter from the SYBand Chairman which outlined a proposed settlement to the County of Santa Barbara. The proposed settlement included a provision that, if the County made certain commitments, the 6.9 acres will not be used for gaming. POLO objects to this letter as being irrelevant and an inadmissible settlement proposal. Furthermore, there is no evidence that the settlement proposal was accepted by the County and, if so, there is no evidence that the agreement was approved by the Department of

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(...continued)
not preclude them from consideration by the BIA. *Olson v. BIA*, 31 IBIA 44 (1997). This is especially true here because this matter was on remand with the BIA for three years (2010-2013) and there was ample time for it to consider these issues and update its environmental documents.

Interior. 25 C.F.R. § 81.[10]

Furthermore, despite the assurances of the SYBand Chairman, two months after sending this settlement proposal to the County, the SYBand submitted another fee-to-trust gaming application. On April 25, 2005, the SYBand sent an application to the BIA to have the 5.68 acres taken into trust. The letter transmitting the application expressly states that it is being made pursuant to Section 2719 and submits a map in support of its gaming trust application that depicts both the 6.9 acres and the 5.68 acres. (Exhibit A to the Reply Brief.) POLO's arguments that the SYBand intends to use the 6.9 acres for gaming related purposes are supported by the record. It would violate POLO's due process rights to strike these arguments from the Reply Brief.

In summary, when considering the SYBand's application, the BIA was required to consider the impacts of the potential gaming related uses of the 6.9 acres and the 5.68 acres in connection with the existing casino. The BIA was also required to consider the applicability and SYBand's compliance with Section 2719. Furthermore, in addition to the fee-to trust regulations outlined in 25 CFR §§ 151.10 and 151.11, an applicant for a gaming or a gaming related acquisition must comply with additional guidelines issued by the Assistant Secretary for Indian Affairs or the Office of Indian Gaming, Department of Interior. The BIA failed to mention the OIG regulations or to consider any of these factors in either its 2005 decision or its 2012 decision.

c. Contiguous Parcel Issue.

The BIA and SYBand contend that POLO's argument that 6.9 acre parcel is not contiguous to the SYBand's reservation is also "false and inflammatory." But the merits of

[10] The BIA and SYBand also offer a supposed transcript of testimony in 2005 by Charles Jackson Executive Director of the Santa Ynez Valley Concerned Citizens (SYVCC) group. (Exh. C to the joint motion) POLO objects to this "transcript" because it was not authenticated or verified by Mr. Jackson or the transcriber. It is also irrelevant. Neither Mr. Jackson nor the SYVCC are parties to this appeal. The SYVCC has filed a separate appeal of the 2012 BIA decision. (Docket Nos. 12-140 & 12-141.) In its Notice of Appeal the SYVCC States that the application of the SYBand is "false and contradictory" in that it proposes "27,000 square feet of commercial and retail development" on the 6.9 acres instead of a museum and cultural center.

POLO's argument that the parcels are not contiguous are not "false" and are easily verified by looking at the parcel maps and applying the plain language of the regulations.

The regulation defining the word "contiguous" is clear: "*Contiguous* means two parcels of land having a common boundary notwithstanding the existence of . . . a public road or right-of –way and **includes parcels that touch at a point.**" (25 CFR §292.2; emphasis added.) A review of the assessor's parcel maps included in the administrative record confirms that no part of the 6.9 acres touches or is contiguous to the casino/reservation property. One small segment of one parcel in the 6.9 acres borders on State Highway 246 which is owned in fee by the public. (Calif. Sts. & Hwys Code §§ 233 and 546.) And, according to the assessor's parcel maps and their online information, on the other side of Highway 246 is a narrow 11 acre parcel apparently owned by the County of Santa Barbara for sewer lines and other right of ways. Consequently there are at least two parcels that separate one small corner of the 6.9 acres and the casino/reservation property. They do not share a common boundary, they don't touch at any point and, therefore, they are not contiguous parcels. The BIA should have complied with Section 151.11 when evaluating this fee-to-trust application to acquire this off-reservation property.

Furthermore, neither the BIA nor the SYBand refer to any contrary evidence in the record that demonstrates that the parcels are "contiguous" or that they "share a common boundary" or "touch at a point" as required by Section 292.2. Instead, there is evidence in the record that, in 2009, the BIA asked the Solicitor for an opinion as to whether the parcels were "contiguous." But, there is no response from the Solicitor in the record.

The BIA and SYBand, in their joint motion, now rely on a signature page of a letter from Regional Solicitor Shillito dated January 29, 2003 – two years before this appeal, five years before Section 292.2 defining "contiguous" was adopted and six years before the BIA asked the Solicitor for an opinion on the "contiguous" parcel issue. Apparently this unidentified letter,

based on the unidentified maps provided by that unidentified person, led Mr. Shillito to conclude an unidentified parcel is "contiguous" to the reservation. The BIA and SYBand did not provide copies of the maps reviewed by Mr. Shillito showing the parcels as being "contiguous" because they do not exist. The 6.9 acre parcel is not contiguous to the reservation parcel.

The record does not support the unsubstantiated statements by the BIA and the SYBand in their Answer Briefs that the 6.9 acres is contiguous to the casino/reservation property. It was appropriate for POLO to address this point in its Reply Brief and it would violate due process to strike these arguments and facts from the record. Because the parcels are not "contiguous," the BIA and SYBand are required to comply with 151.11, in addition to 151.10, before the 6.9 acres can be accepted into trust. Furthermore, because the 6.9 acres is not contiguous to the casino/reservation parcel, it cannot be used for gaming related activities now or in the future.

d. Historical Facts and Exhibits.

The BIA and SYBand claim that the summary of the SYBand's history was inaccurate but do not state what was inaccurate. Furthermore, contrary to the claim of the BIA and SYBand the historical summary was not "false and inflammatory." In fact, much of the history is based on the summary in the 2005 fee-to-trust application of the SYBand and the related comments for the 5.68 acres (Exhs. A, B, & C)) And some of the historical facts are found in related documents (such as the Smiley report) provided by the SYBand. The summary is a very respectful historical overview of the proud heritage of the Chumash Indians and other Indians in California.

The historical summary, contrary to the claims of the SYBand and BIA, does not challenge its legitimacy. Instead the summary demonstrates that, regardless of its status today, the SYBand was not a federally recognized tribe in 1934 and therefore the SYBand is not qualified for a fee-to-trust under the IRA as required by the Supreme Court in *Carcieri*. Exhibit D and E further demonstrate that the SYBand was not a federally recognized tribe in 1934.

The SYBand and BIA note that this Board in 2007 determined that the federal recognition of the SYBand was outside the scope of this appeal. (See Order Granting Request to Limit Disclosure of Historic Preservation Related Documents, February 27, 2007.) But, given subsequent events, this 2007 Order has been eclipsed. The federal recognition status of the Santa Ynez Band in 1934 is now a central issue in this case. The 2007 Order was issued two years before the Supreme Court decided *Carcieri* and *Hawaii.* It was also issued three years before the Board vacated the 151.10 findings in the 2005 decision and remanded the matter to the BIA to consider the impact of *Carcieri* and *Hawaii.* The key issue in *Carcieri* is whether or not the Santa Ynez Indians were a "recognized tribe now under federal jurisdiction" in 1934.

POLO in its Opening Brief outlined facts that established that the Santa Ynez Band was "not a federally recognized tribe in 1934." The SYBand and BIA also used historical documents and facts in their Answer Briefs to support their claim that the Santa Ynez Band "under federal jurisdiction in 1934." It was appropriate for POLO to respond to these arguments in its Reply Brief and challenge the SYBand's claim that it was a federally recognized tribe.

The factual summary included in POLO's Reply Brief is accurate and appropriate. It counters the incorrect and incomplete historical summaries in the Answer Briefs and the Record of Decision. It also counters their claim that the SYBand was a federally recognized tribe in 1934 and therefore entitled to an IRA fee-to-trust transfer under the *Carcieri* decision. It would violate POLO's due process to strike this information and argument from the reply brief.[11]

e. Need for trust property.

The BIA and SYBand in their Answer Briefs agreed with the Regional Director's claim that there is a need to put this land in trust to insure that the SYBand is able to exercise its own

[11] In further reply to the Answer Briefs, and in response to the joint motion to strike, POLO reasserts the briefs and documents it filed, including those submitted in 2007, regarding the federal recognition issue. Those briefs and documents are incorporated herein by reference.

land use control and regulations over the property. As outlined in POLO's reply brief, the BIA's assertion that the property will be exempt from State and local regulation is incorrect. The IRA does not provide support for this claim. Although the IRA exempts trust land from state and local taxation, trust land was not exempted from State and local regulation.

Although not referenced by the BIA Regional Director in either her 2005 or her 2012 decision, POLO noted in its Reply Brief that that the Secretary of Interior claims that he has the authority to exempt Indian trust lands from State and local regulation pursuant to 25 CFR § 1.4. But there is no statutory authority for Section 1.4 and its constitutionality is suspect. In any event, the issue is resolved as far as California tribes are concerned because, in 1965, the Secretary of Interior pursuant to his claimed authority under Section 1.4, held that all trust lands in California are subject to State law. 30 Fed. Reg. 8722 (1965).

Thus, regardless of whether the land is owned in fee by the SYBand, or owned by the United States in trust for the SYBand, it is subject to State laws and regulations. And, consequently, the BIA's claim that the SYBand needs to have the property placed in trust to escape State and local land use regulations is without merit.

POLO's discussion of Section 1.4 and the 1965 Secretary of Interior Order applying State law to all lands held in trust for Indians in California is an appropriate response to the BIA and SYBand's arguments in their Answer Briefs regarding the supposed need for trust land. The land will remain subject to State law even if it is taken into trust. It would violate POLO's due process rights to present its case and to respond to the contentions of the BIA and SYBand to strike POLO's factual and legal arguments from the record.

f. Equal Protection.

The BIA and SYBand also claim that POLO contention that the acquisition of trust lands for Indians who do not qualify under the IRA and *Carieri* violates equal protection is a "newly

raised in the reply brief." However, as both the BIA and SYBand should know, this statement is not true. POLO has raised equal protection concerns from the beginning of this appeal in 2005. In fact, the equal protection issue was briefed in detail in POLO's initial Opening Brief filed in this matter dated March 14, 2007. (POLO incorporates that brief herein by reference.)

The Supreme Court was very clear in *Carcieri* when it described what tribes were, and what tribes were not, entitled the to benefit by the fee-to-trust provisions of the IRA. Specifically to qualify a tribe had to be a federally recognized tribe in 1934. As outlined in POLO's Reply Brief, the SYBand does not qualify. In response, the BIA and AS-IA ignored the requirement that the SYBand be a federally recognized tribe in 1934 and claim that it is sufficient that the Santa Ynez Indians existed as a non-governmental community of individual Indians in 1934.[12]

The AS-IA lacks the authority to redefine the community of Santa Ynez Indians so they qualify, after the fact, as a "federally recognized tribe" in 1934 entitled to the fee-to-trust benefits of the IRA. As summarized in POLO's Reply Brief and its Opening Briefs, the BIA's effort to create 1934 tribal status for the SYBand just to give benefits and preferences based on race, and which are not enjoyed by other citizens in the Santa Ynez Valley, violates Equal Protection.

POLO's arguments in this regard are a proper response to the BIA's and SYBand's contentions regarding *Carcieri*. The BIA's claim that it can give IRA benefits to Indian communities without regard to whether they were a federally recognized tribe in 1934 violates

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[12] The is basically the same position that the AS-IA took in 1979 when he created a list of Indian communities, including the Santa Ynez Indians, and included that list in the Federal Register and treated these listed communities tribes for IRA purposes. But, after *Carcieri*, being on the 1979 list of tribes in the Federal Register was not adequate to qualify a tribe for the fee-to-trust benefits of the IRA. An Indian group needed to be a federally recognized tribe in 1934. Consequently the AS-IA is currently taking steps to expand the scope of the Part 83 (tribal recognition) regulations to include Indian communities in 1934 as federally recognized tribes. But the AS-IA lacks the authority to create tribes or give preference to Indian communities as after-the-fact tribes. To do so would give some Indians a benefit based on race and, consequently, would violate the Equal Protection Clause of the United States Constitution.

Equal Protection. This is especially true if the purpose is to give right and preferences to Indians that are not enjoyed by other citizens of California.

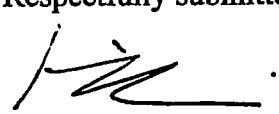
POLO has consistently raised the Equal Protection argument in this appeal over the last eight years. The Equal Protection argument is a valid response to the SYBand's and BIA's contention that they can redefine the SYBand (which did not exist as tribal entity or corporation until 1964) as federally recognized tribe in 1934 to obtain the benefits and preferences under the IRA and *Carcieri*. It would violate POLO's due process rights to strike these constitutional arguments from the Reply Brief.

CONCLUSION

For the forgoing reasons, POLO respectfully requests that the IBIA disregard and/or deny the BIA's and SYBand's joint motion to strike POLO's reply brief. It is an unauthorized motion or sur-reply brief that was submitted without permission and is without merit. It should be rejected and denied

Date: August 9, 2013

Respectfully submitted,



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CERTIFICATE OF FILING AND SERVICE

I certify that a true and correct copy of the APPELLANTS' RESPONSE TO JOINT MOTION TO STRIKE PORTIONS OF APPELLANTS' REPLY BRIEF was mailed to the addresses listed below, by first class mail, postage prepaid, on August 9, 2013:

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Exhibit A

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UNITED STATES DEPARTMENT OF INTERIOR

INTERIOR BOARD OF INDIAN APPEALS

PRESERVATION OF LOS OLIVOS and PRESERVATION OF SANTA YNEZ, Appellants, v. PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	Case No. IBIA 05-050-A **APPELLANTS' REPLY BRIEF**

INTRODUCTION

This appeal was filed by the Appellants, Preservation of Los Olivos and Preservation of Santa Ynez (collectively POLO) in 2005. The Interior Board of Indian Appeals (IBIA) dismissed POLO's appeal in 2006 and again in 2007. The IBIA held that POLO lacked standing to challenge the decision of the Bureau of Indian Affairs (BIA) to approve the application of the Santa Ynez Band of Mission Indians (SYBand) to have 6.9 acres of land taken into federal trust.

POLO immediately challenged the IBIA orders of dismissal in the United States District Court for the Central District of California. And in 2008, in a 30 page detailed decision, Judge

Matz of that Court vacated the two IBIA orders of dismissal and remanded the case to the IBIA for consideration of the standing issue consistent with the Court's ruling and instructions.

On February 8, 2010, POLO filed an Opening Brief pursuant to the IBIA's 2009 Order setting forth the remand procedures for this appeal. POLO's Opening Brief consolidated and summarized its arguments, which had been presented in earlier pleadings, on the standing issue and on the underlying merits of this appeal. POLO also brought two important Supreme Court decisions (*Carcieri* and *Hawaii)* issued in 2009 to the IBIA's attention. Those two decisions undermined the BIA's 2005 decision and preclude the transfer of the subject property into trust as a matter of law. And, consequently, POLO asked the IBIA to vacate the BIA's 2005 decision.

The SYBand, as a real party in interest, filed its Answer Brief on March 22, 2010. But the BIA did not file an answer to POLO's Opening Brief in 2010. Instead, at the direction of the Assistant Secretary for Indian Affairs (AS-IA), the BIA asked the IBIA to remand the matter so the BIA could consider the impact of the two Supreme Court cases and the arguments presented in POLO's Opening Brief. On May 17, 2010, the IBIA: (1) granted POLO's request to vacate the BIA's 2005 decision "In Part", (2) granted the AS-IA's request to remand this matter to the BIA "In Part", and (3) and stayed this entire appeal while the matter was on remand with the BIA.

This appeal was on remand with the BIA, and stayed by the IBIA, for almost three years. On April 3, 2013, the IBIA lifted the stay and scheduled the completion of the briefing that was initiated in 2010. POLO was not given an opportunity to supplement its 2010 Opening Brief; nor was the SYBand given an opportunity to supplement its 2010 Answer Brief. The Answer Brief of the BIA was filed on May 31, 2013 – over three years after it was initially due. Despite requesting the remand, which caused a three year delay in this process, the BIA did not discuss the *Carcieri* and *Hawaii* cases in its Answer Brief. This Reply Brief is submitted in response to both the SYBand's 2010 Answer Brief and the BIA's 2013 Answer Brief.

SUBJECT PROPERTY

On November 8, 2000, the SYBand applied to the BIA requesting that seven parcels of land, which it owns in fee, located in the City of Santa Ynez, be transferred to the United States to be held in trust for the benefit of the SYBand. The seven parcels consist of approximately 6.9 acres and include Santa Barbara County Assessor Parcel Numbers 143-241-02, 143-241-03, 143-251-01, 143-251-05, 143-251-06, 143-251-08, and 143-251-09.

The parcels are near the Chumash Casino property which the SYBand claims is a "reservation."[1] But none of the parcels share a "common boundary with", or "touch", the SYBand's casino/reservation. See 25 CFR § 292.2. Therefore, as is discussed in more detail below, these parcels are not "contiguous" to the reservation as that term is used to define "on-reservation" acquisitions in 25 CFR § 151.10.[2] Consequently the SYBand's application is for an "off-reservation" acquisition and is governed by 25 CFR § 151.11

From August 2001 through October of 2004, the SYBand purchased 13 additional parcels, consisting of 5.68 acres, in Santa Ynez all of which are near or adjacent to the seven parcels listed above. On April 25, 2005, the SYBand applied to have these 13 parcels transferred to the United States to be held in trust for the SYBand.[3] POLO, POSY, the Governor of the State of California, the County of Santa Barbara, several individual members and other parties, submitted

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[1] There is disagreement about whether this property is a "reservation" as that term is used in federal law. By using the term "reservation" in this brief, or other documents filed in this appeal, the Appellants are not conceding that this parcel is, in fact, a legal "reservation."

[2] A small segment of the boundary of one parcel (APN 143-241-02) borders State Highway 246. And fee title to the land under Highway 246 is "vested in the name of the People of the State of California." Cal. Sts. & Hwys. Code §§ 233 & 546. Furthermore, on the other side of Highway 246 is an 11 acre parcel (APN 143-450-006) which, according to the Santa Barbara Assessor's records is currently owned by the County or a private party. Thus there are at least two parcels between the reservation and the 6.9 acres. They are not contiguous.

[3] Pertinent portions of the SYBand's 2005 application to have the 5.68 acres taken into trust are attached to this brief as Exhibit A.

comments.[4] Among other things, POLO insisted that the BIA, in an EIS, "must address the cumulative impacts" of both the 6.9 acre and the 5.68 fee to trust applications.[5] The Appellants also joined the comments of the California Governor's Office which rejected the SYBand's aboriginal title[6] claims and the piecemeal nature of the environmental review. The SYBand's application to have the 5.68 acres transferred to the United States in trust is still pending and is contingent on the successful acquisition of the 6.9 acres.[7]

In addition, in 2010, SYBand acquired 1400 acres in the Santa Ynez Valley, known as Camp 4, and announced, almost immediately, its intention to request that this land, like the 6.9 acres and the 5.68 acres, be taken into trust. The SYBand claims that once all of these lands are held in trust they will be exempt from State and local laws – including State and local health and safety laws, the Santa Ynez Community Plan and the California Environmental Quality Act. In fact, as is summarized below, the SYBand's primary reason and stated "need" for having these lands taken into trust is to remove them from State and local. Also, in the most recent edition of the Chumash! magazine (Summer 2013), the Chairman of the SYBand and his Legal Advisor admit that they intend to use the fee-to-trust procedures to take all these parcels and additional parcels into trust to recapture all of their ancestral lands and insure that they exempt State and local laws. The BIA is facilitating the SYBand's step by step effort toward this goal.

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[4] POLO's comments on the proposed acquisition of the 5.68 acre parcel in trust are attached hereto as Exhibit B. The Governor's comments are attached as Exhibit C.

[5] Since 2005 the SYBand has acquired several other parcels which it also intends to have taken into trust. The cumulative impacts of all of these reasonably foreseeable fee-to-trust acquisitions should have been considered by the BIA.

[6] Also it is important to note that – in addition to the comments made by the Governor - the SYBand's aboriginal title claim on behalf of the Chumash has been specifically rejected by the Courts. *See United States ex rel. Chunie v. Ringrose* 788 F.2d 638 (1986).

[7] All of the documents related to the SYBand's application to put the 5.68 acre parcel in trust – including Exhibits A, B, and C - are directly relevant to the 6.9 acre application and are a part of the record in this case.

In contrast, POLO along with other groups and residents of the Santa Ynez Valley, have worked diligently for decades to protect their communities from unregulated development in violation of State and local laws including, and especially, the Santa Ynez Community Plan. This appeal is about whether POLO, as an interested party directly and adversely affected by the proposed actions of the SYBand and the BIA, will have a meaningful opportunity in this forum to challenge BIA's decision to the application of the SYBand's request to take these lands into trust. For the last eight years, as is outlined in more detail below, procedural obstacles have been placed in POLO's way in an attempt to preclude them from having any meaningful input in the IBIA.

PROCEDURAL BACKGROUND

On January 14, 2005, the BIA issued its initial Notice of Decision of their intent to accept the 6.9 acres into trust for the SYBand pursuant to the Indian Reorganization Act of 1934 (IRA). 25 U.S.C. 465 et.seq. The BIA's Decision was timely appealed by POLO on February 22, 2005.

In 2006, and again in 2007, the IBIA dismissed POLO's appeal. The IBIA held that POLO lack of standing to pursue this appeal before the IBIA. *See* 42 IBIA 189 (2006), *aff'd* 45 IBIA 98 (2007). On August 6, 2007, POLO filed an amended complaint in its pending lawsuit challenging the IBIA's dismissals of for lack of standing. *Preservation of Los Olivos v. United States Department of Interior* USDC CD Cal. No. CV 06-1502 AHM.[8] On July 9, 2008, the Central District Court granted POLO's Motion for Summary Judgment in part, vacated the IBIA order dismissing that administrative appeal and remanded the case back to the IBIA for further consideration of the standing issue consistent with its ruling. *Preservation of Los Olivos v. United States Department of Interior,* 635 F. Supp. 2d 1976 (CD Cal. 2008). The Court's directive to the IBIA was not ambiguous:

[8] While this matter was before the District Court, POLO filed several briefs on the standing and related issues. This matter was remanded to the IBIA by the District Court. POLO's briefs are a part of the record in this matter and are incorporated herein by reference.

"Specifically, the IBIA must articulate its reasons (functional, statutory, or otherwise) for its determination of standing, taking into account the distinction between administrative and judicial standing and the regulations governing administrative appeals." *Id.*

On September 5, 2008, the United States Department of Interior and SYBand appealed the District Court's decision. *Preservation of Los Olivos v. United States Department of Interior* 9th Cir. CA. No. 08-56469. On January 8, 2009, the Ninth Circuit dismissed the appeal and the matter was returned to the District Court and then remanded to the IBIA.

On May 27, 2009, the BIA filed a motion to reopen the IBIA proceedings pursuant to the District Court's remand. On September 17, 2009, the BIA filed the administrative record with the IBIA. On November 13, 2009, the IBIA issued and order establishing a briefing schedule to address the issues on remand as directed by Judge Matz of the District Court.

On February 8, 2010, Appellants filed their Opening Brief with the IBIA which, among other things, included arguments based on two recent Supreme Court cases. First, based on the Supreme Court decision in *Carcieri v. Salazar* 129 S.Ct. 1058 (2009), Appellants argued that the SYBand is not eligible for a fee-to-trust transfer pursuant to the IRA because it was not a federally "recognized tribe" in 1934 when the IRA was enacted. And, second, based on the Supreme Court decision in *Hawaii v. Office of Hawaiian Affairs* 129 S.Ct. 1436 (2009), the Appellants argued that the Secretary of Interior is precluded from taking non-public domain land into trust free of State and local regulation after those lands, and regulatory jurisdiction over those lands within the State, were transferred and ceded to the State upon statehood.

On February 24, 2010, apparently after reading Appellants' Opening Brief, the AS-IA directed the BIA to ask the IBIA to remand this appeal for reconsideration in light of the *Carcieri* and *Hawaii* decisions. On March 19, 2010, the BIA filed a motion requesting that the matter be remanded to the BIA to consider the impact of these two decisions. The SYBand filed its Answer Brief on March 22, 2010. The BIA did not file an answering brief in 2010.

On May 17, 2010, the IBIA issued an Order Vacating Decision in Part and Remanding in Part to the BIA to determine the legal impact of the *Carcieri* and *Hawaii* decisions on the fee-to-trust transfer. Specifically, the IBIA vacated "the portion of the January 14, 2005, [BIA] decision finding that 25 C.F.R. § 151.10(a) is satisfied in the present case." The 25 C.F.R. § 151.10 findings, vacated by the IBIA, are found on pages 6 through 10 of the BIA 2005 decision.

The IBIA declined to set a timetable for the BIA to issue its decision on remand. But, with the permission of the BIA, both POLO and the SYBand were allowed to brief these issues in 2010 while the matter was on remand.[9] It was not until June 13, 2012, over two years after the matter was remanded, that the BIA finally issued its partial decision on remand. But the 2012 BIA decision was not immediately sent to the IBIA. Instead it was sent in the form of a cover letter to SYBand Chairperson, Vincent Armenta. In its cover letter, the BIA revealed for the first time that this matter had been delegated by the BIA to an Associate Solicitor, Division of Indian Affairs for a legal opinion regarding the impact of the *Carcieri* and *Hawaii* decisions.

Although the BIA cover letter to Chairperson Armenta enclosed a legal opinion from the Associate Solicitor dated May 23, 2012, it did not enclose the 28 exhibits that were supposedly attached to that opinion. In fact, it is not certain whether the BIA received or reviewed these exhibits before issuing its 2012 decision 20 days later. In any event, based entirely on the May 23, 2012 Associate Solicitor's legal opinion, the BIA affirmed its partially vacated 2005 decision without modification or updating. But, the BIA ignored the 2005 requests made by POLO and the Governor and did not update environmental documents to consider the cumulative impacts of the 5.68 acre fee-to-trust application with the impacts of 6.9 acre application. The BIA served POLO with a copy of its 2012 partial decision on remand.

[9] All the briefs, documents and evidence submitted by POLO to the BIA, while this matter was on remand to the BIA, are incorporated herein by reference. They are part of the record and should have been transferred with the files when the BIA finally returned jurisdiction to the IBIA.

On July 12, 2012, POLO filed and served a supplemental notice of appeal with respect to the 2012 BIA partial decision on remand. The BIA subsequently returned the remand and transferred jurisdiction over this appeal backs to the IBIA. The date that jurisdiction was returned by the BIA to the IBIA is not certain. But, it is certain that on April 3, 2013 the IBIA reasserted jurisdiction over this appeal and directed the parties to complete the briefing on remand from the District Court that was initiated in 2010. Per the joint request of POLO and the BIA, and over the opposition of the SYBand,[10] the IBIA extended the briefing dates making the BIA's Answer Brief due May 31, 2013 and POLO's Reply Brief due July 1, 2013.

HISTORICAL BACKGROUND

The short narrative of the history of the Chumash Indians in the 2005 BIA decision is incomplete and incorrect. (NOD pp 7-8). Without referencing any authority to support its conclusions, the BIA claims that Chumash "tribal leaders" and "several heads of families" received land grants from the "the Mexican Governors of California" which were not honored by the United States Government after taking over California. As a result, according to the BIA, the predecessors of the SYBand were forced to live on mostly unusable land owned by the Catholic Church. According to the BIA this land, located "southwest of Highway 246", was acquired by United States from the Catholic Church in 1941 "for use as the Santa Ynez Reservation."

This short summary has little or no basis in historical reality.[11] It is intended to give the impression that the SYBand was in existence as a tribe in 1934 entitled to the land transfer benefits of the Indian Reorganization Act (IRA) and that it currently needs additional trust land. As summarized below, neither contention is correct. A brief overview of the history of the

[10] The SYBand complained about the three year delay while this matter was on remand, and to expedite the process, agreed to waive its objections based on standing.

[11] A more detailed, but still incorrect, summary of the history of the Chumash Indians is found in the Fee-to-Trust application of the SYBand dated April 25, 2005. (Exh. A)

California Indians will put the SYBand's applications and the BIA's decision in context and will confirm that the SYBand was not a federally recognized tribe in 1934 entitled to transfer or receive lands in trust under the IRA.

A. Prior to Spanish Contact – Pre-1769.

Although there are different estimates, it is generally accepted that the Chumash lived in what is now called California three to five thousand years before it was "discovered" or "conquered" by the Spanish. The Chumash were considered by the Spanish to be superior to other California Indians "due to their well-developed towns, extensive trade routes and high quality of goods." (Exh. A, p. 7.) The Chumash organized themselves in small communities or villages of a few or many families. Although they seem to have segregated themselves into linguistic or ethnic groups, there is no evidence that they were ever a formally organized as a tribe prior to Spanish contact.

B. The Spanish Empire – 1769 to 1823.

As is well known, after the Spanish occupation of California, the Spanish Franciscans established the Mission system along the coast of California. The Santa Ynez Mission was built in 1809. In the initial phase of their interaction, the Chumash and Spanish were very cooperative and helpful to each other. "Once the Mission Period began, the Chumash contributed both skilled craftsman and religious leaders to the benefit of the Santa Ines Mission." (Exh. A, p. 7.) In exchange the Spanish and Franciscans managed the property around the Missions for the benefit of the Indians - "not as owners, but as tutors for their primitive charges."[12] In many ways, the tutelage arrangement resembled a benevolent autocracy. However, as time passed, the relationship began to resemble a master-slave, abusive relationship to the point that many Indians,

[12] See Chauncy Shafter Goodrich, The Legal Status of the California Indian 14 Cal. Law Rev. 157 (1926).

including some of the Chumash at the SantaYnez Mission, joined the Mexican revolution and helped the fight for independence.

C. The Mexican Republic – 1823 to 1846.

Although the revolution of Mexico against Spain began in 1810, independence was not completely achieved until 1823. One of the charter documents of the Mexican Republic was the Plan of Iguala enacted February 4, 1821. This remarkable document included the following emancipation proclamation:

> "All the inhabitants of New Spain, without distinction, whether Europeans, Africans or Indians, are citizens of the monarchy, with the right to be employed in any post, according to their merits and virtues." (Emphasis added.)

Thus all California Indians under the jurisdiction of Mexico, including the Chumash, became full citizens of the Republic of Mexico in 1821. In addition, in 1833 the Spanish Missions were secularized by the Mexican Republic and the lands surrounding the Missions were conveyed to the resident Indians. Some of the Indians at Santa Ynez were granted lands as a result of this secularization process. In summary, in the Mexican Republic, Indians were emancipated from the paternalistic yoke of the Spanish Empire and became citizens of Mexico (not a separate tribe) who had the right to own land and, subject to a property qualification, had the right to vote.

D. United States Occupation and Military Rule – 1846 to 1850.

In 1846, the United States Military occupied portions of the Mexican Republic, including the land that was to become the State of California. The United States ignored the Plan of Iguala, and tried to establish a paternalistic – ward/guardian – relationship with the Indians. This paternalistic approach was consistent with the way most Indians and tribes were treated in the rest of the United States. But it was drastically different from the more respectful and equal way that the Mexican Republic treated Indians.

The first military Governor of California was Brigadier-General S.W. Kearny. Kearny appointed John Sutter and Don Vallejo, two individuals known to be trusted by the Indians of California, as United States Sub-Agents for Indian Affairs. And, in his instructions to these two new Sub-Agents, Kearny stated:

> "I wish you to explain to the Indians the changes in the administration of public affairs in this territory; that they must now look to the President of the United States as their great father; [and] that he takes care of his children."
>
> Letter from Kearny, Monterey to Sutter, New Helvetia, April 7, 1847.

Kearny also told his agents to offer presents the new Indian "children" of the United States to gain their cooperation. Specifically, in another letter to his Indian agents, Kearny said:

> "I will endeavor to obtain and furnish you with a quantity of Indian goods, to be given as presents to such chiefs and bands as may conduct themselves peaceably and honestly. You can tell the Indians this."
>
> Letter from Kearny, Monterey to Richardson, Monterey, April 21, 1847.

The Mexican-American War ended in 1848 with the signing of the Treaty of Guadalupe Hildago. Pursuant to that treaty, the United States vowed to recognize and protect the rights of all former Mexican citizens which, as summarized above, since 1821, included all of the Indians. (9 Stat. 922 (1848).) The United States Military Occupation of the territory of California continued until 1850 when California became a State.

E. California Statehood – 1850 to the Present.

California became a State on September 9, 1850 on an equal footing with all previously admitted States. And, at that point all jurisdiction, authority and regulatory control over the lands and citizens of the State of California were immediately transferred from the United States to California. At the time of Statehood, the Chumash Indians in the Santa Ynez Valley were former citizens of the Republic of Mexico whose property and citizenship rights were guaranteed under the Treaty of Guadalupe Hildago. The obligation to protect this guarantee transferred to the State.

Shortly after California became a State, Congress passed the Land Claims Act of 1851 (9 Stat. 631 (1851).) Every person claiming lands in California by virtue of any right derived from the Spanish or Mexican government was required to present his or her claim to the board within two years. Any land not claimed within two years, and any land for which the land claim was rejected, was deemed to be part of the public domain of the United States available for sale. Although some of the Indians living near the Santa Ynez Mission had received deeds from Mexico as a result of the 1833 Mission Secularization Act, apparently none filed a claim for their deeded land within the time limits allowed by the 1851 Act. Nor did any representative of the Chumash file a claim for aboriginal title. In contrast, the Catholic Church filed timely claims for all the California Mission properties – including the Mission at Santa Ynez. *United States ex rel. Chunie* 788 F.2d 638 (1986).

In 1853, consistent with its paternalistic approach, the United States entered into 18 treaties with some California Indians and tried to move many of them onto reservations. Although many of the Indians may have moved to the supposed reservations, the treaties were never ratified. California officials, some of whom were previously officials in the Mexican Republic, objected to the removal and relocation of California Indian citizens to remote locations. In any event, the Santa Ynez Indians were not removed to a reservation. Instead, with the permission of the Catholic Church, they continued to occupy the lands near the Mission.

CALIFORNIA INDIANS

In summary, at the time California became a State in 1850, Indians in California were subject to the laws and policies of two governments with two entirely different views and approaches to governing Indians. The United States had a paternalistic guardian-ward protective view of Indians and tribes that continues to this day. The United States' paternalistic approach is akin to the Spanish benevolent autocracy approach implemented by the Franciscan Mission

system. In contrast, the State of California's view, inherited from the approach of the Mexican Republic, was and continues to be is that Indians are citizens with the same rights and obligations of all California citizens. For the last 163 years much of California Indian law has been developed as a direct result of the tension between these two widely different approaches.

A good example of this tension is found in a case that quickly made its way to the United States Supreme Court four years after California became a State. *United States v. Ritchie* 58 U.S, 525 (1854). That case involved a dispute based on a deed from Governor of Mexico to Francisco Solano in 1842. Mr. Francisco was an Indian and a Mexican citizen. He is described in the deeds as the "principal chief of the unconverted Indians" and as a "free man, owning a sufficient number of cattle and horses to establish a rancho." *Id.* In 1842 Mr. Francisco sold the land to Mr. Vallejo who in turn sold it in 1850 to Mr. Ritchie a resident and citizen of the State of California. Mr. Ritchie's title was challenged by the United States which wanted the land to be treated as public domain land available for sale. Consistent with its paternalistic attitude toward Indians, the United States argued that the initial deed was void because Mr. Solano was an Indian and, therefore, was not competent to own or sell real property. The Supreme Court reviewed the laws of Mexico and found just the opposite to be true:

> "Our conclusion is, (sic) that he [Mr. Solano] was one of the citizens of the Mexican government at the time of the grant to him, and that, as such, he was competent to take, hold and convey, real property, the same as any other citizen of the republic."
>
> *United States v. Ritchie,* 58 U.S. at 540.

Thus at the time California became a State, all Indians were individual citizens with the same rights "as any other citizen" of California and former citizens of the Mexican Republic.

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A legacy of the Plan of Iguala, and full Indian emancipation and citizenship in the Republic of Mexico is that, at the time of Statehood, there were very few tribes in California.[13] Instead there was a 30 year heritage of individual rights (including land ownership) and citizenship (including voting rights) that were previously conferred upon the California Indians by the Republic of Mexico in 1821. Although there were virtually no tribes in California in a governmental sense, there were some historic Indian neighborhoods where individual Indians continued to live. This included the Indians who continued to live around the Santa Ynez Mission. In 1891, instead of being described as a tribe, the Indians living near the Santa Ynez Mission were described as an: "Indian village composed of some fifteen families." (Smiley Commission Report and Executive Order of December 29, 1891.)

Although most of the California Indians remained wards of the United States, the State of California did its best to protect its citizens from the over paternalistic governance of the United States. California granted citizenship – including the right to vote and to be on a jury – to California Indians in 1871, over fifty years before they were given United States citizenship in 1924. Although the United States had extinguished all Indian aboriginal land title claims in California when it enacted and implemented the Act of 1851, California successfully sued the United States and obtained equitable relief and compensation for the "Indians of California." Similarly, although the United States failed to ratify 18 treaties with California Indians, California successfully prosecuted a lawsuit against the United States for equitable relief and compensation on behalf of the "Indians of California." California Indians, despite the ward-guardian relationship that they continue to have with the United States, have all the rights, privileges and duties of every other resident of California. See *Acosta v. San Diego* 126 Cal.App. 2d 455 (1954).

[13] The tribes that did exist were in the far north and far east areas of the State which were beyond the purview of the Mexican Republic.

As a result of this unique history, the Santa Ynez Indians, like most California Indians were not members of an organized tribe, much less a federally recognized tribe, in 1934 when the IRA was enacted.[14] They were individual citizens; tribes in the governmental sense were virtually non-existent. As was succinctly stated by Professor A.L. Kroeber in his 1925 book, "The California Indians" on page 27:

> "Tribes did not exist in California in the sense in which that word is properly applicable to the greater part of the North American continent. When the term is used [in relation to California Indians] it must therefore be understood as synonymous with 'ethnic group' rather than denoting a political entity." (Quoted in *Acosta* 126 Cal.App.2d at 465 (1954).)

Thus, instead of being a tribe or political entity, the Santa Ynez Indians may have been part of part of the Chumash ethnic group, or individuals from different ethnic groups, when California became a State and in 1934 when the IRA was enacted.[15]

This distinction between historic tribes and Indian communities, vis-à-vis the IRA, was outlined in a January 14, 1994 letter from Wyman D. Babby, Assistant Secretary of the Interior for Indian Affairs to Congressman George Miller, Chairman of the committee on Natural Resources. (A copy of that letter is attached as Exhibit E.) Assistant Secretary Babby states that:

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[14] In 1932 the Carnegie Institution of Washington published Charles O. Paulin's *Atlas of the Historical Geography of the United States* (Publication No. 401). Plates 35 and 36 depicting the Indian Reservations from 1840 through 1930 are attached as Exhibit D. In 1840, California was still part of the Mexican Republic and, as a consequence, there were no reservations in California. The Plates depict only four Reservations in California between 1875 and 1930. This is consistent with the fact that in 1864 Congress passed the Four Reservations Act which specifically stated that no more than four Indian reservations could be created in California. (13 Stat. 39.) The four reservations were Round Valley, Hoopa Valley, Tule River, and "Mission." *Matz v. Arnett* (1973) 412 U.S. 481, 489-491.) According to the Plates the reservation for the Mission Indians was created in 1875 in the San Diego area. There is no reservation in the Santa Ynez area. And the SYBand's claim that a "reservation" was created by the U.S. for their benefit in 1941 is not only incorrect; it would have been precluded by the Four Reservations Act.

[15] The Indians and others who lived near the Santa Ynez Mission over the years were not limited to those with Chumash ancestry. Nor was there a requirement that they any or all of the Indians at Santa Ynez be Chumash. According to Article III, Section 1, of the SYBand's 1964 Articles of Organization, membership individuals "whose names appear on the January 1, 1940 Census Roll of the Santa Ynez Band of Mission Indians" and their descendants who "have one fourth (1/4) or more degree of Indian blood of the Band."

> "Since the passage of the IRA the Department of the Interior (Department) has distinguished between the powers possessed by an historic tribe and those possessed by a community of adult Indians residing on a reservation, i.e. a non-historic tribe."

Assistant Secretary Babby also described a third category of landless Indians who, although living in a community, were not living on a reservation and were not an organized as tribe. "Once the land was acquired for these [landless] Indians, they then were entitled to organize under the provisions of Section 16 of the IRA and adopt a constitution and bylaws" and, thereafter, submit these documents and Articles of Organization to the Secretary of Interior for approval. This is the approach followed by the SYBand.

In 1934, although there were still a few Indians living near the Santa Ynez Mission, they did not own the land and were technically landless. Twenty of the 48 adult Indians living near the Santa Ynez Mission voted to accept the IRA in 1934. In 1941, the United States acquired land from the Catholic Church for the benefit of these landless Indians. And, thereafter the Santa Ynez Indians adopted a constitution, bylaws and article of organization which were approved by the Department of Interior in 1964. In the PREAMBLE and ARTICLE I - Name of their ARTICLES OF Incorporation the Santa Ynez Indians make it clear that they are creating a new tribe not confirming an historic tribe:

> "We, the members of the Santa Ynez Band of Mission Indians, in order to establish a formal organization and to promote our common welfare do hereby adopt the following Articles of Organization. . . . The name of this organiztion (sic) shall be the Santa Ynez Band of Mission Indian, hereinafter referred to as the Band."

At least as of 1964, the Santa Ynez Band did not claim to be Chumash or part of any historical group. And, although they claim to be a band of Mission Indians, they do not claim any interest in the Mission Reservation in San Diego. Thus, as summarized by Assistant Babby, the SYBand was as a group of landless Indians who, after receiving land from the United States, organized themselves into a new tribe in 1964. They were not a federally recognized tribe in 1934.

STANDARD AND SCOPE OF REVIEW

The IBIA's jurisdiction to review of BIA decisions is narrow and very limited. These limitations and the reasons behind them are outlined in detail at the Department of Interior website for the IBIA. (www.oha.doi.gov/IBIA). As is clarified there, the IBIA is part of the Executive Branch of Government and it has only that authority that has been delegated to it by the Secretary of Interior. The IBIA is not a court or part of the Judicial Branch of Government. And it lacks the authority to decide or adjudicate constitutional legal issues. The IBIA gives deference to tribal sovereignty and lacks the authority to grant equitable relief against a tribe. But, the IBIA does not have the authority to give racial preferences, or discriminate in favor of, individual Indians. (*See Adoptive Couple v. Baby Girl* U.S. (No. 12-399; decided June 25, 2013.) In addition to these general rules, there are some specific rules that pertain to this appeal which should be mentioned:

First the BIA's decision to take land into trust is a discretionary decision and the IBIA lacks the authority to reverse, or substitute its judgment for the BIA's judgment in such discretionary decisions. *Arizona State Land Department v. Western Regional Director,* 43 IBIA 158 (2006). Although the IBIA cannot reverse BIA's discretionary decisions, the IBIA must confirm and insure that the BIA's decision is supported by substantial evidence in the record. *Id.*

Second, the IBIA review of a discretionary decision is limited to determining whether BIA gave proper consideration to all legal prerequisites to the exercise of its discretionary authority, including any limit on the BIA's discretion established in the regulations. *Cass County v. Midwest Regional Director,* 42 IBIA 243, 246 (2006). The proof that the BIA considered all the factors set forth in the regulations must appear in the record, but there is no requirement that the BIA reach a particular conclusion with respect to each factor. *Eades v. Muskogee Area Director*, 17 IBIA 198, 202 (1989).

Third, although the IBIA has the authority to review some legal issues raised in a trust acquisition case, it lacks the authority to adjudicate legal challenges to the constitutionality of laws and regulations. *Arizona State Land Department,* 43 IBIA at 160. Furthermore, its legal conclusions regarding non-constitutional issues are not binding on the Courts.

Finally, although an appeal to the IBIA is a procedural prerequisite to initiating litigation with respect the BIA's decision to take land into trust, there is no requirement that the IBIA decide the merits of an appeal for it to be a final agency action. 43 CFR §4.314. This is because the IBIA is not able to reverse a BIA discretionary decision or grant the complete relief requested by the appellant. Consequently exhaustion of administrative remedies on the merits before the IBIA is not possible or necessary. If the IBIA declines to accept jurisdiction of the merits or dismisses the appeal for procedural reasons, then BIA decision on the merits becomes the final agency action for litigation purposes. *See Pine Bar Ranch v. IBIA*, 9th Cir. No. 11-35564 (2012).

ARGUMENT

A. POLO has Standing to Pursue this Appeal Before the IBIA.

As directed by Judge Matz of the United States District Court for the Central District of California in his 2008 remand order, the first order of business in this appeal is for the IBIA to reconsider its 2006 and 2007 Orders dismissing this appeal on the basis of standing. *Preservation of Los Olivos v. United States Department of Interior,* 635 F.Supp.2d 1076 (2008). Instead of following the "interested party" standing rules in its own regulations, the IBIA dismissed POLO's appeal by using the restrictive judicial standing principles. The IBIA intentionally used these rules "as a matter of prudence in the interest of administrative economy" to restrict appellate access. The Court held that IBIA's reliance on restrictive judicial standing principles was inappropriate and inconsistent with the broad standing principles outlined in the regulations. In fact the Court noted that the IBIA did not even cite, much less discuss, the regulations which

allow any "interested party" to appeal. 25 CFR §2.2 and 43 CFR §4.331. The Court provided guidance to the IBIA as it revaluates this issue and specifically directed the IBIA to conduct a functional analysis of administrative standing as detailed 35 years ago by Judge Bazelon in *Koniag, Inc. Village of Uyak v. Andrus*, 580 F.2d 601, 614-15 (D.C.Cir. 1978.) And although he gave the IBIA some latitude in this regard, Judge Matz cautioned that the regulations governing standing are not ambiguous and, therefore, the IBIA's interpretation of them is not entitled to deference. The Court's instructions to the IBIA were clear and direct:

> "Specifically, the IBIA must articulate its reasons (functional, statutory, or otherwise) for its determination of standing, taking into account the distinction between administrative and judicial standing and the regulations governing administrative appeals."
>
> *Preservation of Los Olivos,* 635 F.Supp.2d at 1080.

The functional analysis test for administrative standing directed and urged by Judge Matz is clearly the appropriate test. In its Appellants' Opening Brief (AOB), POLO applied the five factors of the functional analysis to the facts of this case. (AOB pp. 1-8) Based on that test POLO is an interested party which clearly has standing to pursue the appeal.

The SYBand in its Answer Brief argues that the IBIA, despite Judge Matz' Order and the broad regulatory standing standard, is free to adopt a stricter standard and can continue to use the restrictive concepts of judicial standing. These are basically the same arguments that were made by the SYBand and rejected by the District Court. They should be rejected here for the same reasons. The SYBand also claims that the IBIA was not required to apply the functional analysis of standing. But it is not possible to read Judge Matz directive – "the IBIA must articulate its reasons (functional, statutory or otherwise)" – as anything other than a mandate.

The SYBand also claimed that regardless of the test that was used, POLO failed to demonstrate sufficient "interest" to appeal the BIA's decision to take the 6.9 acres into trust under the IRA. The SYBand relied on the District of Columbia District Court case of *Patchak v.*

Salazar, 646 F.Supp. 2d 72 (2009). Mr. Patchak in that case, like POLO in this case, challenged a decision by the BIA to take land into trust for a tribe that was federally recognized in 1934 as required by *Carcieri*. Relying on the following quote from that case, SYBand claims POLO lacked standing because they are not Indians:

> "Plaintiff's alleged injuries could not be further divorced from these objectives [of the IRA]. Plaintiff is not an Indian, nor does he purport to seek to protect the interests of any Indians or Indian tribes."
>
> *Patchak,* 646 F.Supp. 2d at 77.

Fortunately, this race-based test for standing to challenge fee-to-trust transfers under the IRA, was ultimately rejected by the United States Supreme Court. (*Patchak v. Salazar,* 132 S.Ct. 2199 (2012); s*ee also Adoptive Couple v. Baby Girl supra.*) The Supreme Court in *Patchak* applied judicial standing principles and found that Mr. Patchak, a non-Indian, had standing to challenge the fee-to-trust transfer under the IRA. He met the Article III standing requirements and the interests he is asserting – economic, environmental and aesthetic - were "arguably within the zone of interests to be protected or regulated" by the IRA. Thus, even if the IBIA continues to apply the judicial standing requirement, the Supreme Court decision in *Patchak* confirms that POLO has standing under judicial standing principles, as well as regulatory standing.

The BIA, in its Answering Brief, also argues that it is permissible for the IBIA to use the judicial standing principles instead of the broader standing rules allowed by the regulations. The BIA claims that the stricter standing standard is appropriate because the regulations contemplate public participation during the BIA decision making stage and "very limited agency review" of BIA decisions by the IBIA. The BIA contends that the IBIA has no authority review the merits of the BIA decision and it is limited to insuring that the BIA complied with the procedural regulations. According to the BIA, the IBIA's limited scope of review of the merits of the BIA decision should mean that fewer interested parties should be allowed to appeal to the IBIA.

Although creative, this argument defies common sense.[16]

The IBIA has a different and broader role in the review process and its forum should be available to all interested parties. The IBIA has been delegated the responsibility by the Secretary of Interior to supervise the BIA and audit its actions to insure that the law and regulations were followed in the decision making process. This is especially important given the BIA's decision making is not an impartial process. The BIA's obligation and mission is to promote tribal interests. Thus it is usually an advocate for the SYBand's fee-to-trust request.[17]

POLO agrees that the IBIA's jurisdiction to conduct a *de novo* review of the merits of BIA's fee-to-trust decisions is limited . But the IBIA has broad authority to review the BIA's decision to insure that it complies with the law and all the applicable procedural rules and regulations. This is an extremely important appellate function. By insuring that the BIA fully complies with the procedures, the IBIA protects the due process rights of the public and the community. The IBIA is also required to insure that the decision is supported by sufficient evidence in the record. If the IBIA requires full procedural compliance with the regulations, then many of the concerns about BIA decision may be resolved without the need for litigation. All interested parties should be allowed to appeal to the IBIA and request a procedural review of the BIA's decision.[18]

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[16] It is also inconsistent with argument made by the BIA later in its answer that, although the IBIA's decision that POLO lacks standing was correct, the IBIA should still decide the merits.

[17] A primary purpose of the 1934 IRA was to restructure and recreate the BIA as a tribal controlled agency where the interests of the tribe is given the highest priority over all other factors when a fee to trust application is being considered. *See Morton v. Mancari* 417 U.S. 536 (1974). In the BIA Pacific Regional Office the bias is blatant. Specifically, The BIA has given a consortium of California tribes control over the fee-to-trust decision making process pursuant to an agreement known as the: MEMORANDUM OF UNDERSTANDING Between CALIFORNIA FEE TO TRUST CONSORTIUM TRIBES And BUREAU OF INDIAN AFFAIRS PACIFIC REGIONAL OFFICE. As a result of this built-in bias, the Pacific Region BIA approves 100% of the fee-to-trust applications. See Kelsey J. Waples, Extreme Rubber Stamping: the Fee-to-Trust Process of the Indian Reorganization Act of 1934 40 Pepperdine Law Review 251 (2013),

[18] This is not to say that the IBIA's procedural review of the BIA's decision is an impartial (Continued...)

As suggested by Judge Matz, and outlined in POLO's Opening Brief, the administrative standing test *Koniag* it the appropriate test to determine if an interested party has standing before the IBIA. The BIA, unlike the SYBand, acknowledges the IBIA is required by the remand order to "articulate" standing using the functional analysis in *Koniag.* But the BIA contends that the IBIA is not required to utilize the functional test. The BIA's attempt to parse to the obligation of the IBIA to comply with the Court's 2008 remand order, and resurrect the judicial standing standard, ignores the directive in the last sentence of that order which was made after a detailed discussion regarding the importance and applicability of the *Konaig* case:

> "For the forgoing reasons, the Court VACATES the IBIA Order [dismissing POLO's appeal based on judicial standing principles] and REMANDS the case to the IBIA for further consideration consistent with this ruling."
>
> *Preservation of Los Olivos,* 635 F.Supp.2d at 1096 (emphasis added).

Furthermore, the BIA also ignores the remand order in its discussion of the applicability of the judicial principles of standing. The BIA is trying to litigate issues that have already been conceded or decide against them. As stated by the Court in its decision:

> "Federal Defendants do not dispute that aesthetic, recreational and other quality of life values affected by the physical environment are cognizable injuries-in-fact under Article III or that the declarants who asserted such injuries have the required geographic nexus."
>
> *Preservation of Los Olivos,* 635 F.Supp.2d at 1086 (emphasis added).

Furthermore, the BIA's analysis and attempt to limit the prudential standing aspect of the judicial standing test is contrary the Supreme Court's discussion of this issue in *Patchak.* As stated and

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(...continued)
review. It is not. As summarized on its own website, the IBIA and the BIA are a part of the Department of the Executive Branch. And like the BIA, it is required to give deference to tribal interests and to uphold BIA decisions to take land into trust. As a result, the IBIA usually uses its procedural review to advance tribal interests and protect the BIA's decision from challenge. This history of the IBIA's review of this case over the last eight years is clear example of the IBIA's use of the procedural tools available to it to protect the merits of the BIA's 2005 decision from being challenged and reviewed in an impartial forum.

confirmed by the Supreme Court, the "prudential standing test . . . is not meant to be especially demanding." *Patchak* 132 S.Ct. at 2210. The BIA's attempt to limit the prudential standing test to economic interests, to the exclusion of aesthetic and environmental interests, should be rejected. As should the BIA's attempt to limit the application of the *Patchak* case to concerns over use of the land for gaming.[19] It is impossible to reconcile the BIA's proposed narrow reading of the prudential standing with the Supreme Court's decision in *Patchak.*[20] It should be rejected. It is clear that POLO has standing as an interested party to appeal the BIA decision to take the 6.9 acres into trust to the IBIA – whether under the *Konaig* functional analysis test or the *Patchak* prudential standard test.

B. The BIA Failed to Comply With the Applicable Regulations.

1. The BIA Failed to Comply with Section 151.11 of the Fee to Trust Regulations.

Both the BIA and the SYBand claim that the Regional Director's use of Section 151.10 to evaluate the fee to trust application was appropriate because the 6.9 acres is contiguous to the SYBand's reservation/casino property. Neither the BIA, nor the SYBand, presented evidence in the record to support their claim that the properties are contiguous.[21] In fact, as is outlined below,

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[19] Even if the *Patchak* prudential standing test was limited to trust acquisitions for gaming (and it is not) it would apply here. The SYBand's initial application explicitly stated that this trust acquisition is being pursued as a gaming application. And the current version is being pursued as an acquisition of a parcel that is contiguous to a parcel for gaming and therefore useable for casino and gaming or as potential first stepping stone to a contiguous, larger parcel that can be used for a new expanded casino.

[20] It is also inconsistent with recent changes to the fee-to-trust procedures and regulations proposed by Assistant Secretary of the Interior for Indian Affairs, Kevin K. Washburn, in response to the *Patchak* case. The proposed regulations, through several proactive notice provisions, are designed to increase the number of "interested parties" entitled to appeal to the IBIA. The proposed broadening of the regulations, nick-named the "Patchak Patch", is inconsistent with BIA's suggestion that the number of interested parties with IBIA standing should be reduced.

[21] The BIA also claims that this issue was already decided by the IBIA in its 2006 order dismissing POLO's appeal. But, even if that contention were true (and it is not), the 2006 IBIA Order predate the new regulations that specifically define "contiguous". 25 CFR § 292.2.

the evidence in the record reveals that the two parcels are not contiguous and therefore Section 151.11 should have been followed. Both the BIA and SYBand acknowledge that Section 151.11 applies to non-contiguous trust acquisitions and they admit that the Regional Director did not follow Section 151.11.

Instead the Regional Director followed Section 151.10 of the fee-to-trust regulations when it evaluated and decided the SYBand's application to take the 6.9 acre parcels into trust. That section pertains to "on-reservation" acquisitions and includes the acquisition of "land that is located within or contiguous to a reservation." (25 CFR §151.10.) The BIA and SYBand claim that the 6.9 acre parcel is contiguous to their "reservation" where their gaming casino is located.

"Off-reservation acquisitions" are governed by Section 151.11 which includes most of the requirements of Section 151.10 and adds several additional requirements to the fee-to-trust application. Such acquisitions include the acquisition of lands that are outside of and non-contiguous to the tribe's reservation." (25 CFR§ 151.11.)

Thus, the distinction between on-reservation and off-reservation acquisitions turns on the definition of the word "contiguous." "*Contiguous* means two parcels of land having a common boundary notwithstanding the existence of . . . a public road or right-of–way and includes parcels that touch at a point." (25 CFR §292.2.) [22]

A review of the assessor's parcel maps included in the record confirms that no part of the 6.9 acres is contiguous to the casino/reservation property. One small segment of one parcel in the 6.9 acres borders on State Highway 246 which is owned in fee by the public. (Calif. Sts. & Hwys Code §§ 233 and 546.) And, according to the assessor's parcel maps and their online

[22] POLO acknowledged and cited this rule in its Opening Brief. The SYBand in its Answering Brief, implies that this reference was an admission by POLO that the properties were contiguous. This is not correct. POLO did not admit that the properties were contiguous when it acknowledged the existence of this regulation.

information, on the other side of Highway 246 is a narrow 11 acre parcel apparently owned by the County of Santa Barbara for sewer lines and other right of ways. Consequently there are at least two parcels that separate the 6.9 acres and the casino/reservation property. They do not share a common boundary, they don't touch at any point and, therefore, they are not contiguous parcels. The BIA should have complied with Section 151.11 when evaluating this fee-to-trust application to acquire off-reservation property.

Furthermore, neither the BIA nor the SYBand offer or reference any contrary evidence in the record that demonstrates that the parcels are "contiguous" or that they "share a common boundary" or "touch at a point" as required by Section 292.2. Instead, there is evidence in the record that, in 2009, the BIA asked the Solicitor for an opinion as to whether the parcels were "contiguous." But, if there was a response from the Solicitor it is not in the record. And the 2012 Associate Solicitor's opinion offered by the BIA as part of its 2012 Notice of Decision did not address this issue. The record does not support the unsubstantiated statements by the BIA and the SYBand in their Answer Briefs that the 6.9 acres is contiguous to the casino/reservation property.

2. **The Regional Director's decision to take the 6.9 acres into trust is not supported by evidence in the record.**

POLO, in its 2010 Opening Brief, brought the *Carcieri* and *Hawaii* Supreme Court decisions to the IBIA's attention and, given the implications of these decisions, asked that the BIA 2005 decision be vacated. The BIA in response POLO's Opening Brief, and at the directive of the AS-IA, asked the IBIA to remand the matter to the BIA to be evaluated in light of these decisions. The IBIA granted POLO's request to vacate the 2005 decision and the BIA's request to remand. Thus, at this point, the 2005 BIA decision remains partially vacated.

This matter was on remand with the BIA for three years. The BIA finally filed an Answer Brief on May 31, 2013. But, contrary to the IBIA Order, the BIA did not discuss the *Carcieri* and

Hawaii cases. Nor did the BIA oppose POLO's contentions with respect to those cases. Nor did the BIA ask the IBIA to reverse or reconsider its decision to vacate part of the BIA's 2005 decision. Instead, the Regional Director of the BIA sent a letter to Vincent Armenta, Chairperson of the SYBand, reissuing and reaffirming the 2005 decision that was vacated by the IBIA in 2010. Although the top of the letter was labeled a "Notice of Decision," it was not published in the federal register and therefore was not a public notice to all interested parties. The Regional Director also informed Chairperson Armenta that the matter, including "supplemental evidence, briefs,[23] and other documentation," was referred to an Associate Solicitor for a legal opinion. The BIA attached a copy of this legal opinion without the supporting exhibits. It was in the form of an informal memorandum to the BIA Regional Director from an Associate Solicitor.

The Regional Director's 2012 "Notice of Decision" is defective and should be vacated for several reasons. First, although copies were sent to some interested parties, it was in the form of a letter to the SYBand Chairperson and not a public notice to all interested parties published in the federal register. Second it merely reasserted its 2005 decision (which was partially vacated by the IBIA in 2010) without modification or correction.

Third, although the Regional Director attached the legal memorandum from the Associate Solicitor, she did not attach the documents that she gave to the Associate Solicitor. Nor did she attach the 28 exhibits referenced by the Associate Solicitor. Thus there is no evidence in the record to support the unsubstantiated conclusions included in his memorandum to the Regional Director. And, consequently, there is no evidence in the administrative record to support Regional Director's 2012 decision. It should be vacated.

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[23] POLO submitted several letter briefs to the BIA while this matter was on remand. Those letters are referenced in the BIA's Answer Brief and are incorporated into this reply brief by this reference.

3. The BIA Failed to Consider Potential Gaming Uses for the Property or to Comply with the Regulations Governing Gaming Related Trust Acquisitions.

Both the BIA and SYBand argue that POLO's contention that the SYBand proposed trust acquisition is for gaming related purposes is mere speculation. But just the opposite is true. The parties need not speculate about the SYBand's intent to use the property for gaming related purposes. The SYBand, in its initial application, candidly concedes that it was requesting a gaming related acquisitions pursuant to 25 USC §2719. That section governs gaming on lands acquired after October 17, 1988. Although the SYBand amended its application to remove any reference to gaming or Section 2719, it could not erase the statements and admissions it made in its initial application. They remain in, and an important part of, the record.

Nor does the SYBand try to hide their intention to use the 6.9 acres for gaming related purposes in their amended application. In fact, as summarized above, the SYBand now claims that the 6.9 acres is "contiguous" to the casino and, even though it was acquired after 1988, it can be used for gaming related purposes pursuant to Section 2719.[24] Furthermore, the SYBand's 2005 application to have the 5.68 acres taken into trust expressly states that it is being made pursuant to Section 2719 and submits a map in support of its application that depicts both the 6.9 acres and the 5.68 acres. (Exhibit A.)

In summary, when considering the SYBand's application, the BIA was required to consider the impacts of the potential gaming related uses of the 6.9 acres and the 5.68 acres in connection with the existing casino. The BIA was also required to consider the applicability and

[24] The SYBand in footnote 124 of its Answer Brief states that POLO's argument that the SYBand intends to use the 6.9 acres for gaming related purposes is inconsistent with POLO's contention that the two parcels are not contiguous. This argument does not make sense; POLO's arguments regarding the properties and the SYBand's intended use of the properties are not inconsistent. But this comment does reveal that the SYBand understands the direct connection and importance of finding that the properties are contiguous if it is to be used for gaming or gaming related purposes.

SYBand's compliance with Section 2719. Furthermore, in addition to the fee-to trust regulations outlined in 25 CFR §§ 151.10 and 151.11, an applicant for a gaming or a gaming related acquisition must comply with additional guidelines, checklists, and guidance memoranda issued by the Assistant Secretary for Indian Affairs or the Office of Indian Gaming, Department of Interior, with respect to the proposed acquisition of trust land for gaming or gaming related uses. The BIA failed to mention the OIG regulations or to consider any of these factors in either its 2005 decision or its 2012 decision.

4. The Regional Director abused her discretion by concluding that the SYBand had a need for additional land.

As outlined in POLO's opening brief, there is no evidence that there is a need for the land to be taken into trust. The SYBand currently owns the land in fee and, assuming it complies with State and local law, it has not been precluded from developing the property as a museum and related facilities as planned. Both the BIA and SYBand acknowledge that land is not needed for the SYBand's governmental or sovereign functions.

The BIA and SYBand claims that the Regional Director need not consider a tribes need for additional *trust* lands, only whether it needs additional lands. That may be true, but it is not the issue here. The SYBand already owns the land in fee and the issue is not whether it needs additional lands. Instead, the issue is whether lands already owned by the SYBand need to be put in trust. For the reasons outlined in POLO's Opening Brief, the land that the SYBand already owns does not need to be in trust. The SYBand's contention in this regard is undermined by the fact that it owns several properties in fee in the area that are not, and apparently do not "need" to be, in trust.

The BIA and SYBand also agree with the Regional Director's claim that, regardless of its intended use, there is a need to put this land in trust to insure that the SYBand is able to exercise its own land use control and regulations over the property. As claimed by the Regional Director:

> "If the land were to remain in fee status, tribal decisions concerning the use of the land would be subject to the overriding authority of the State of California and the County of Santa Barbara, thus impairing the Tribe's ability to adopt and execute its own land use decision and development goals."

The Regional Director's assertion that the property will be exempt from State and local regulation is incorrect. The Regional Director cites no authority for the claim that lands taken into trust are exempt for state and local regulations. The IRA does not provide support for this claim. Although the IRA exempts trust land from state and local taxation, trust land was not exempted from State and local regulation.

POLO is aware that the Secretary of Interior claims that it has the authority to exempt Indian trust lands from State and local regulation pursuant to 25 CFR § 1.4. But there is no statutory authority for Section 1.4 and its constitutionality is suspect. Furthermore, even if Section 1.4 were constitutional, in 1965 the Secretary of Interior pursuant to his claimed authority under Section 1.4, adopted and made applicable to all trust lands in California:

> "all of the laws, ordinances, codes, resolutions, rules or other regulations of the State of California, now enacted or as they may be amended or enacted in the future, limiting zoning, or otherwise governing, regulating or controlling the use or development of any real or personal property, including water rights , , ,"
>
> 30 Fed. Reg. 8722 (1965).

Thus, regardless of whether the land is owned in fee by the SYBand, or owned by the United States in trust for the SYBand, it is subject to State laws and regulations. And, consequently, the Regional Director's claim that the SYBand needs to have the property placed in trust to escape State and local land use regulations is without merit. Instead, as required by the 1965 Secretarial Order, the SYBand should be required to demonstrate that it has complied with, and will continue to comply with, all State and local laws before this land is taken into trust – including the Santa Ynez Community Plan and the California Environment Quality Act and all other applicable California land use, water use, environmental and planning laws.

5. **The Regional Director abused her discretion by failing to consider Significant Jurisdictional Problems and Conflicts of Land Use.**

The Regional Director admits that the SYBand will attempt to assert its own civil regulatory jurisdiction over the 6.9 acres if the land is taken into trust. In fact, Regional Director claims that the primary reason or need to take the land into trust is to remove it from State and local control and regulation. This could cause major jurisdictional and land use conflicts.

But the Regional Director did not discuss the applicable State and local laws or the impact of removing their requirements and protections. Nor did the Regional Director compare the State and local laws to the proposed or applicable tribal laws to insure that the environment and public remain protected. Nor does the Regional Director discuss the 1965 order of the Secretary of Interior declaring that State laws and regulations, not tribal laws and regulations, apply to trust lands in California.

Furthermore the Regional Director implies that the SYBand will have exclusive, governmental control and authority over the land if it is taken into trust. This is simply not correct. The SYBand is not an independent government. It is, at most, a "dependent domestic sovereign" government subject to the guardianship and supervision of the United States. If the land conveyed into trust, it will be owned by the United States and held and managed by the United States for the benefit of the SYBand subject to federal land use and environmental laws. The potential application of these federal laws was not discussed by the BIA.

One extremely important federal land use law, which was not discussed by the Regional Director, is the potential impact of applying the federal reserved water rights doctrine to land acquired in trust and whether that doctrine should apply to Indian water claims to both ground water and surface water. Although the BIA and Regional Director ignored this issue in their 2005 and 2012 decisions, it has not been ignored SYBand. In a very recent law review article, which appears to been written on behalf or at the behest of the SYBand, a legal argument is made for the

notion that the SYBand has a reserved water right to the ground water and that it is entitled to take as much ground water that is needed for the casino and before the ground water "is depleted by non-Indian users." (Reservation and Quantification of Indian Groundwater Rights in California" Joanna (Joey) Meldrum, 19 Hastings West-Northwest Journal of Environmental Law & Policy 277 (Summer 2013).) The implication of SYBand's claim to federal priority reserved water rights, including ground and surface water to support their casino and other trust properties, should have been considered by the BIA before deciding whether to take these lands into trust.

C. The BIA failed to comply with NEPA.

The National Environmental Policy Act (NEPA) requires and Environmental Impact Statement (EIS) be prepared for all "major Federal actions significantly affecting the quality of the human environment." (42 U.S.C. § 4332(2)(c).) An agency may first prepare an Environmental Assessment (EA) to determine if a proposed federal action may have an environmental effect. (*National Parks & Conservation Assn. v. Babbit* (9th Cir. 2001) 241 F.#d 722,730. NEPA requires the agency to take "hard look" at the environmental consequences of its actions and provide a "convincing statement of reasons to explain why a project's impacts are insignificant." *(Id.)* In this context, NEPA requires the agency to take cumulative impacts and the interests of the community into account. (*Blue Mountain Biodiversity Project v. Blackwood as Supervisor, Umatilla National Forest* 161 F.3d 1208 (1998).) If there is a potential significant environmental effect, the agency must prepare an EIS (*Native Ecosystems Council v. U.S. Forest Services* (9th Cir. 2005) 428 F.3d 1233, 1239.)

In this case, as summarized in POLO's Opening Brief, it was arbitrary and capricious for the BIA in 2005 to prepare a Finding Of No Significant Impact (FONSI) instead of an EIS with respect to the trust acquisition and development of the 6.9 acres and reasonably foreseeable related projects. It was even more arbitrary and capricious for the BIA to rely on that same

FONSI and not update its environmental review and prepare and circulate an EIS before it approved the same project in 2012.

In its Opening Brief, POLO listed several serious impacts – including traffic, air quality and noise impacts - that warranted the preparation of an EIS. Those potential impacts are still there but were not even mentioned, much less addressed by the BIA in 2012. An EIS is still necessary to study these initially identified impacts.

Furthermore, the BIA should have also studied, at least in a new EA, the cumulative impacts of putting the 6.9 acres,5.68 acres and 1400 acres in trust. An agency is required to study the cumulative impacts of "past, present and reasonably foreseeable future actions." 40 CFR § 1508.7. Cumulative impacts may result from "individually minor but collectively significant actions taking place over time." *Id.* If several actions have a cumulative environmental effect, "this consequence must be considered in an EIS." *City of Tenakee Spring v. Clough,* 915 F.2d 1308, 1312 (9th Cir. 1990).) The 5.68 acre fee-to-trust application is still pending and the 1400 acre fee-to-trust application, according to the SYBand, is anticipated in the near future. The cumulative impacts of all three applications, and any other reasonably foreseeable trust applications, should be studied in an EIS now.

Despite the urging of POLO and others, and contrary to the mandates of NEPA outlined above, the BIA failed to study the cumulative impact of all three of these applications in either an EA or EIS. The BIA's decision to ignore NEPA or study these environmental issues prior to issuing its 2012 decision was arbitrary and capricious.

Any other federal agency taking a "hard look" at these potential impacts would mandate the preparation of an EIS. In this case the BIA completely ignored these impacts despite the fact that they were brought to their attention. The BIA does not even mention these impacts, much less supply a "convincing statement of reasons" to explain why, in their view, these impacts are

insignificant. *Save the Yaak Committee v. Block* 840 F.2d 714, 717 (9th Cir. 1997).

Furthermore, the problem here is potentially more serious than the fact that the BIA failed to take a "hard look" at the potential impacts or that the BIA failed to provide "convincing statement of reasons" why they think the impacts are insignificant. The problem is that it appears that the BIA is unwilling or unable to require full compliance with NEPA because to do so would be incompatible with its mission to protect and fully support tribal economic development. (See Footnote 17 above.) Obviously the BIA will not fully comply with NEPA and prepare an EIS, unless directed to do so by this Board or the Court.

D. The *Carcieri* Supreme Court Decision.

According to the application of the SY Band, its tribal charter was approved by, the Secretary of Interior in 1964. (See also Exh. A.)Thus, the SYBand was first recognized by the federal government in 1964 at the earliest. Before 1964, the SYBand did not exist as a tribal government. And it was not a federally recognized tribe in 1934 when the IRA was enacted and, per the Supreme Court's decision in *Carcieri*, it is not entitled to the benefits of a fee-to-trust transfer. The SYBand's application should be denied for this reason alone.

The *Carcieri* decision is not complicated. In *Carcieri v. Salazar* (2009) 555 U.S. 379, the Supreme Court held that the Supreme Court held that the Secretary of Interior's authority under the IRA to take lands into trust is limited to "recognized . . . under federal jurisdiction" in 1934. The Supreme Court also held that this statutory rule is clear and is not ambiguous and, therefore, the Secretary's and DOI's interpretation of this rule is not necessary or entitled to deference.[25]

A review of the facts of the *Carcieri* helps put the Supreme Court's decision in context – especially when comparing the tribal interests in that case with those of California Indians in

[25] The interpretation of the requirements of the IRA by the Supreme Court in *Carcieri*, is identical to the Assistant Secretary Babby's interpretation made 15 years earlier in his comprehensive letter to Congressman Miller. (Exh. E.)

general and the SYBand in particular. The tribe in *Carcieri* was the Nargansett tribe which is a State recognized tribe that had a long 200 year history of dealings with the Federal government. The Supreme Court held that although the Nargansett tribe was a federal recognized tribe with a 200 plus year relationship and interaction with the federal government, it was not a "federally recognized tribe" in 1934 when the IRA was enacted and therefore was not to the benefit of a fee to trust transfer.

In contrast the SYBand is not a State recognized tribe and had no government to government dealings with the federal government as a tribe (as opposed to individual Indians) in 1934. The SYBand did not even submit its tribal charter to the DOI for approval, or exist as a federally recognized tribal entity, until 1964. As stated in POLO's Opening Brief: "the evidence is overwhelming that the Santa Ynez Band lacked federal recognition at that critical date [1934]."

The SYBand and the BIA/Associate Solicitor ignored the clear legal test stated in majority opinion adopted, without qualification, by five Justices. In *Carcieri* the Supreme Court clearly stated that to benefit from the fee-to-trust provisions of the IRA, a tribe must have been a "recognized tribe now under federal jurisdiction" in 1934. The Supreme Court also said that this clear test did not require deference to the agency's interpretation. Either the tribe was a federally recognized tribe in 1934 or it was not. The SYBand was not.

Instead of acknowledging that the SYBand does not qualify under the *Carcieri* test, the BIA/Associate Solicitor and SYBand try to create a new test more to their liking. Specifically they cut the clear *Carcieri* test in half and then focus only on the "under federal jurisdiction" half of the test. And after severing it from the "recognized tribe" half of the test, they then claim that the phrase "under federal jurisdiction" is ambiguous and subject to interpretation by the federal entities – which they then claim should be entitled deference . This attempt to escape the clear legal test stated by Supreme Court should be rejected. It should also be considered as an

admission that SYBand could not meet the full *Carcieri* test because it was not a federally recognized tribe in 1934.

Furthermore, the facts that they offer do not support the claim that the SYBand was a tribal government under federal jurisdiction in 1934. The BIA/Associate Solicitor discuss a series of pre-1934 facts and events that they claim demonstrate that the SYBand was under federal jurisdiction in 1934. But these proposed facts do not support the claim that the SYBand was a tribal government in 1934 for several reasons.

First the BIA/Associate Solicitor failed to attach or provide copies of the exhibits which they contend support the Associate Solicitor's analysis. The Associate Solicitor's memorandum is unsubstantiated and should be stricken from the record to the extent it purports to provide factual support for his legal contentions. Second, none of the facts and correspondence involves evidence that the United States dealt with the SYBand as a governmental entity in 1934. Instead, all of the facts offered involve individual Santa Ynez Indians or the Catholic Church and not the SYBand as a tribe. Indeed, the SYBand did not even adopt its "new tribal name" until 1964. And, third, some of the so called supporting evidence was mischaracterized by the Associate Solicitor as involving tribal members and tribal lands and actions by the United States, when, in fact, the proffered evidence involved individual non-tribal citizens dealing with lands owned by the Catholic Church.[26]

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[26] In essence, BIA is trying to rewrite history to create, after the fact, a fictional Santa Ynez tribe in 1934. The purpose of this fictional tribe is to give the current SYBand preferences and entitlements under the IRA that, under *Carcieri* it is not entitled to have. The Associate Solicitor seems to claim that the United States has the "plenary authority" to create this fictional tribe and use it to take land into trust exempt from State and local regulation and with priority water rights to the detriment of other residents in the Santa Ynez Valley. But the United States' so called plenary power over Indians has constitutional limits and certainly does not include creating a tribe 80 years after the fact just to benefit the current Indians of the SYBand. To give IRA preferences to Indians who were not a recognized tribe in 1934 would violate the equal protection rights of other residents in Santa Barbara. (See *Adoptive Couple v. Baby Girl supra.*)

Both the SYBand and the Associate Solicitor claim that the 1947 Haas report, Ten Years of Tribal Government Under the I.R.A. supports the contention that the SYBand was a federally recognized tribe in 1934, because it lists 20 Santa Ynez Indians as voting to accept the IRA. However, as is outlined in POLO's opening brief, just the opposite is true. First Table A attached to the Haas Report is not just a list of tribes; it is a list "Indian Tribes, Bands and Communities." As outlined above the Santa Ynez Indians were, at most, an Indian community, not a tribe, in 1934. Second, a majority of the Santa Ynez Indians did not vote to accept the IRA. Instead, of the 48 eligible voters, only 20 Santa Ynez Indians voted to accept the IRA. Furthermore the list incorrectly indicates that there was a Santa Ynez reservation in 1934. Even the SYBand acknowledges that the land that they call their reservation was not acquired until 1941. (Exh. A.)

Finally the Haas Report confirms that voting to accept the IRA did not immediately make the Indian community a tribe. Instead, before they can emerge as a acknowledged as a newly organized tribe under the IRA, according to Haas, the Indian group needs to adopt by-laws and a constitution and complete several pre-requisites before submitting a tribal charter to the Secretary of Interior for approval. This is consistent with the description of the situation included in the 1994 letter by Assistant Secretary Babby. (Exh. E.) And even the SYBand concedes that its tribal charter was not approved until 1964 – 30 years after IRA was enacted.

It is true that 20 of the 48 Indians living at the Santa Ynez Mission in 1934 voted to accept and try organize themselves pursuant to the terms of under the IRA. But that is not evidence that they existed as a tribe before 1934. It is merely evidence that some (not the majority) of the Indians living near the Santa Ynez Mission would, in the future, try to organize themselves in accordance with the IRA. And, in fact, after the enactment of the IRA, at the urging of the federal government some of the Indians at the Santa Ynez Mission began to try to organize themselves in accordance with the IRA. But it would be 30 years before they were prepared to submit a tribal

charter to the Department of Interior for approval under the IRA in 1964. Regardless of these post 1934 activities, the SYBand clearly was not a "recognized tribe now under federal jurisdiction" in 1934 and is not entitled to benefit from the fee-to-trust transfer provisions of the IRA as defined by the Supreme Court in *Carcieri.*

This unique non-tribal status of the California Indians in 1934 when the IRA was enacted was discussed in 2009 by the Supreme Court when it heard *Carcieri.* It was noted by the Court that, during a 1934 hearing before the IRA was enacted, Senator Wheeler and Mr. Collier, Indian Commissioner and author of the IRA, had a discussion regarding its potential applicability to the California Indians. Apparently Senator Wheeler expressed concern that California Indians, who were not federally recognized or organized as tribes, would receive the fee-to-trust benefits of the IRA. Commissioner Collier's solution was to add the phrase "recognized tribe now under federal jurisdiction" and that would be sufficient to exclude most California Indians and other Indians who were not federally recognized as tribes before 1934. See *Carcieri* transcript at pp. 14-16 and 25-28. Thus, that same language inserted by Collier in the IRA, was intended to, and should, preclude the BIA and AS-IA from taking into trust for the benefit of the SYBand.

E. The *Hawaii* Supreme Court Decision

It is undisputed that the 6.9 acres is currently owned by the SYBand in fee. And it is equally beyond dispute that, prior the SYBand's acquisition of this property, it was privately held and not part of the public domain of the United States. Under these circumstances, under the principles of federalism and State sovereignty outlined by the Supreme Court in *Hawaii v. Office of Hawaiian Affairs* 129 S. Ct. 1436 (2009), the Secretary of Interior lacks the authority to remove the land from State and local regulation for the exclusive benefit of the SYBand.

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Both the SYBand and the BIA/Associate Solicitor address the *Hawaii* in terse fashion. They basically argue that it is irrelevant or not applicable to this appeal. The BIA and SYBand misunderstand the *Hawaii* decision and ignore its importance to this appeal.

The issue in *Hawaii* was whether the United States, after granting all public domain land to the State of Hawaii upon its admission in 1959, could strip Hawaii of its ownership and sovereignty over such land and return it to the Native Hawaiians. The lower court had held that the Native Hawaiians retained "unrelinquished claims" over the public domain lands previously transferred to the State. The Supreme Court disagreed and reversed that decision for several reasons. Most important for our purposes is the Court's conclusion that Congress cannot, after Statehood, retrieve public domain land or sovereign regulatory jurisdiction that has been previously transferred to the State. See also *Idaho v. United States,* 121 S. Ct. 2135 (2001). The Court concluded, based on the principles summarized in the *Idaho* case that "the consequences of admission are instantaneous, and it ignores the uniquely sovereign character of that event ... to suggest that subsequent events somehow diminish what has already been bestowed." Acts of Congress should not be read to create a "retroactive cloud" on the State's title or sovereignty. *Id.* The same principles of federalism apply to California lands and regulatory jurisdiction.

California received sovereign regulatory jurisdiction over all public and private lands and over all of it citizens "instantly" upon admission to the Union in 1850. (See also *Tarrant Regional Water District v. Herrmann* S.Ct. (No. 11-889; June 13, 2013.) Even public domain lands owned by the United States at the time of California's statehood are subject to State regulatory jurisdiction. The United States attempt to reassert exclusive regulatory jurisdiction over privately held lands to the benefit of SYBand – and to the exclusion of State and local laws and regulations - violates the principles of federalism and is precluded by the *Hawaii* case. And to the extent it gives rights and preference to Indians that are not enjoyed by the other citizens of California it

violates the Equal Protection clause of the constitution. Furthermore, any attempt by the Secretary of Interior, to exempt trust lands from State and local regulation, including 25 CFR Section 1.4, is unconstitutional and precluded for the same reasons. (See *Adoptive Couple v. Baby Girl supra.*)

CONCLUSION

For the forgoing reasons, POLO respectfully requests that the IBIA:

1. Find that POLO has standing to pursue this appeal;
2. Submit a response to the District Court as required by the 2008 remand order;
3. Find that the BIA failed to comply with the applicable regulations;
4. Find that the BIA failed to comply with NEPA;
5. Find that the SYBand was not a federally recognized tribe in 1934;
6. Find that the land is subject to State and local laws whether held in fee or in trust;
7. Find that the BIA's efforts to create preferences for Indians violates equal protection; and
8. For all the forgoing reasons, vacate the BIA's 2005 and 2012 Decisions.

Date: July 1, 2013

Respectfully submitted,

/s/
Kenneth R. Williams
Attorney for Appellants
Preservation of Los Olivos and
Preservation of Santa Ynez

Exhibit B

Santa Ynez Band of Chumash Indians
P.O. Box 517 • Santa Ynez, CA 93460
805-688-7997 • Fax 805-686-9578
www.santaynezchumash.org

February 14, 2005

Honorable Susan Rose, Chairperson
Santa Barbara County Board of Supervisors
105 East Anapamu, 4th Floor
Santa Barbara, CA 93101

Re: Annexation of 6.9 Acres

Dear Chairperson Rose:

Recognizing that the Tribal General Council must approve any agreement between the Tribe and the County, and recognizing that the Board of Supervisors similarly must approve any such agreement, the Tribal Business Council will recommend to the Tribal General Council the following:

The Tribe and the County will reach an agreement regarding the use of the 6.9- acre property that is the subject of the Tribe's fee-to-trust application.

The substance of this agreement will address the following matters:

- County will not appeal the Department of the Interior's decision to take the 6.9 acres into trust.
- Tribe will submit its proposed development plan to non-binding review by the County Board of Architectural Review or other mutually acceptable review body. The reviewer will consider the quality of the project architecture and whether the size, bulk, and scale of the project are appropriate for the site and harmonious with the community, and will make recommendations to the Tribe.
- The Tribe will not use the Property to directly or indirectly support gaming, including but not limited to use of the Property for Casino overflow parking or Casino employee parking.
- The Tribe will comply with departmental letters for compliance with infrastructure standards and California State Uniform Building Codes. These include: Road access and right of way requirements and standard building, fire and safety codes.

- The Tribe agrees not to unilaterally change the use of the property from the project as proposed to the Department of the Interior. The Tribe and the County will agree to a description of the uses and development of the property consistent with the proposed project, beyond which the Tribe and the County will meet and confer to negotiate terms and address issues related to any proposed changes. In the event that the parties are not able to reach agreement on such issues, then the parties agree to participate in a mutually agreeable dispute resolution process leading to agreed upon remedies.

Sincerely,

Vincent Armenta, Tribal Chairman

Exhibit C

Transcript of Testimony of Charles Jackson,
Executive Director, Santa Ynez Valley Concerned Citizens
Santa Barbara County Board of Supervisors
February 15, 2005

First of all, Madam Chair, Supervisors, thank you for this opportunity to speak. Last week you witnessed an extraordinary outpouring of concern, cogent, focused and issue-based, on issues concerning my community. It is representative of a fervent desire to protect the quality of life of the community. Today we see the opportunity perhaps, for a new day, a new relationship, and that is not the least bit lost upon the membership of the Santa Ynez Valley Concerned Citizens. Our mission statement has said for some time that we are about solutions and we do not wish to be an impediment to positive opportunity.

At the same time, we believe that we outlined a cogent process to examine the opportunity that you have before you with two objectives to deal with: one, a long-term agreement and the other to deal with the specific objectives of the 6.9. We are pleased to see that the specific objectives of the 6.9 have been addressed in this document. It is, however, a complex document and it still requires a great deal of attention to detail that I presume will take place over the course of the coming weeks. The citizens of the Santa Ynez Valley should be able to contribute to that dialogue and we wish to contribute to that dialogue and contribute the expertise on the basis of the issues that we have distilled down over the course of these past 4 years.

You have been induced to commit your trust, and it is an exciting though not a riskless proposition that you take into consideration. We thought about a protective appeal and we suggested that fairly strongly. While contrary to our suggestions, we are prepared to extend and entertain this agreement and perhaps to lend our support. I want you to understand that that is an objective of our organization.

The Tribe's proposal for this land has always been something that we have supported, a museum cultural center, some retail and adequate parking to support those. We are pleased that the Tribe has agreed to stick to its plans, no gaming, no overflow parking, etc. Moving forward whenever a developer proposes something within the existing land use and environmental parameters and promises to stick that plan, you'll see the Concerned Citizens there to support it.

This is not the end of the negotiations nor the conversation. This is the beginning of a much larger conversation on other parcels that the Tribe currently owns and anything that they would like to do including perhaps the suggested Parker project. We would like a commitment from the Tribe and the County to have that conversation We think we may have heard that today. There are many issues still to

talk about, many components of an agreement that we would like to see. We call on the federal government to help enforce this agreement. There is an opportunity for the BIA and the Dept. of Interior to participate here in a productive way and their participation I encourage you to solicit and include in this process. It is important. This agreement makes the Tribe's plans transparent. Next time we hope the Tribe will be committed to this transparency going forward so that not at the 11th hour when they are facing an appeal.

In closing, we would like to say to Mr. Firestone, your passionate and fervent desire to maintain the integrity of land use in the Santa Ynez Valley as it pertains not only to this issue but to others, was well-received, well-respected and greatly appreciated by those who attended that meeting and by our organization. We want that continuation of that fervent, passionate desire to protect the future as well as the present and we are still deeply concerned about precedent that will be established as it pertains to gaming and we feel that input needs to be provided to you on that issue of the non-gaming utilization and I want you to know that we will be there to assist.

I want to congratulate to Chairman Armenta. I feel the tone, I've been looking for it for some time and if it comes to fruition, I'm excited and its about time. I thank you and I look forward to providing you with additional information, I ask you to consider it. And I thank you for what you have done from this time forward.

Exhibit D

Solicitor's Endorsement/Comments

The policy of the First American Title Insurance Company, Order No. 1445909 (Amended), does not address (1) the Bureau's compliance with 25 CFR Part 151; (2) preparation of the required NEPA documents, if necessary, and (3) whether the land may be placed in trust. The above procedure for acquiring title to the subject properties from the Santa Ynez Band of Mission Indians to the United States of America, in trust for the Santa Ynez Band of Mission Indians, is acknowledged and in accordance with Departmental procedures.

The First American Title Insurance Company has presented only a Preliminary Report and not a Title Opinion. The Report, dated January 21, 2001, has only limited liability coverage and, as such, it is imperative that a title commitment or binder be obtained, by the Tribe, to cover the United States prior to accepting the 6.9 acres of property into trust.

Further, Exception 7 is unique, in that, the actual "northwesterly" boundary is unknown due to the movement in the Sanja Cota Creek. The Santa Ynez Tribe is clearly aware of this concern and, as required by the Attorney General Standards, they have agreed to accept this condition to title.

Finally, my review of the maps, which you enclosed, leads me to conclude that the parcel is "contiguous" with the reservation.

The documents submitted with your request are returned.

Daniel G. Shillito
Regional Solicitor
Sacramento, CA

Dated: January 29, 2003

RECEIVED
BY RFK DATE 1/27/03

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS

PRESERVATION OF LOS OLIVOS, and PRESERVATION OF SANTA YNEZ,	)	
Appellants,	)	
v.	)	Docket No. IBIA 12-148
PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS,	)	
Appellee.	)	

PROOF OF SERVICE

This certifies that on July 17, 2013, I filed the attached Joint Motion to Strike Portions of Appellants' Reply Brief, and served the individuals and entities listed below, by UPS, postage prepaid. The Joint Motion was served on:

Kenneth R. Williams, Esq.
980 9th Street, 16th Floor
Sacramento, CA 95814

Rebecca Ross, Esq.
U.S. Department of the Interior
Office of the Solicitor
Division of Indian Affairs
1849 C. Street NW, MS-6513-MIB
Washington, DC 20210

July 17, 2013

By: 
Ian F. Gaunt

DIANNE FEINSTEIN
CALIFORNIA

SELECT COMMITTEE ON INTELLIGENCE - CHAIRMAN
COMMITTEE ON APPROPRIATIONS
COMMITTEE ON THE JUDICIARY
COMMITTEE ON RULES AND ADMINISTRATION

United States Senate
WASHINGTON, DC 20510-0504
http://feinstein.senate.gov

August 9, 2012

The Honorable Jerry Brown
Governor
State Capitol
Sacramento, California

Dear Governor Brown:

I write to reiterate my strong opposition to the two off-reservation gaming proposals awaiting your approval. The residents of Yuba and Madera Counties oppose these projects:

- Yuba County voters rejected a casino at the proposed site by a 52-48 percent margin in 2005; and,

- A recent poll by J. Moore Methods found that 67% of Madera County voters oppose the North Fork Rancheria casino.

Based on this strong grassroots opposition, I urge you to reject these two part determinations and issue a clear policy that restricts the expansion of gaming to a tribe's modern and aboriginal lands.

The Department of the Interior's conclusion that the proposed casinos enjoy "strong community support" is simply false. In addition to the countywide vote, of the 21 local officials polled by the Department of the Interior on the Yuba Casino, only one (Yuba County) supported the project. However the Department bases its assertion on the County's 2002 Memorandum of Understanding with the tribe, a document that was executed nearly three years prior to the countywide vote. Furthermore, three of the 21 officials expressed outright opposition to the casino, while the remaining 16—including myself—did not respond. Unfortunately I never received this letter. If I had, four officials would be on record opposing this off-reservation gaming proposal.

CAPPELLO
& NOËL LLP
TRIAL LAWYERS

A. BARRY CAPPELLO

November 18, 2011

File No. 07005.001
194412.1

Via Overnight Delivery

The Honorable Lois Capps
United States House of Representatives
2231 Rayburn House Office Building
Washington, DC 20515-0523

Re: ***Proposed Chumash Fee-To-Trust Conveyance***

Dear Congresswoman Capps:

We represent Preservation of Los Olivos ("P.O.L.O."), a grass roots citizen group in the Santa Ynez Valley of Santa Barbara County.

We understand that the Santa Ynez Band of Mission Indians (the "Tribe") intends to seek your support to have the United States accept the conveyance of certain land located in the Valley in trust for the Tribe. P.O.L.O. does not support the Tribe's "fee-to-trust" proposal, and requests that you consider the enclosed letters that explain P.O.L.O.'s position before you form your own position.

The first letter is from our office to the Santa Barbara County Board of Supervisors. The second letter is from the Office of the Governor of the State of California, written by Peter Siggins, who at the time was Governor Schwarzenegger's Legal Affairs Secretary and is currently an Associate Justice on the State of California Court of Appeal.

Thank you for your time and consideration. If you have any questions or comments, feel free to contact us.

Very truly yours,

CAPPELLO & NOËL LLP

A. Barry Cappello

831 STATE STREET, SANTA BARBARA, CALIFORNIA 93101-3227 ABC@CAPPELLONOEL.COM
TEL (805) 564-2444 FAX (805) 965-5950 WWW.CAPPELLONOEL.COM

cc: Governor Jerry Brown
c/o State Capitol, Suite 1173
Sacramento, CA 95814

Santa Barbara County Board of Supervisors
105 East Anapamu Street
Santa Barbara, CA 93101

Enclosures

CAPPELLO
& NOËL LLP
TRIAL LAWYERS

A. BARRY CAPPELLO

September 6, 2011

File No. 09000.024
190132.1

Via Hand Delivery

Salud Carbajal, Supervisor
Janet Wolf, Supervisor
Doreen Farr, Supervisor
Joni Gray, Supervisor
Steve Lavagino, Supervisor
Santa Barbara County Board of Supervisors
105 East Anapamu Street
Santa Barbara, CA 93101

Re: ***Proposed Chumash Cooperative Agreement***

To the Honorable Members of the Santa Barbara County Board of Supervisors:

We represent Preservation of Los Olivos ("P.O.L.O."), a grass roots citizen group in the Santa Ynez Valley.

We understand that the Santa Barbara County CEO has received, and intends to submit to you for approval, a proposed Cooperative Agreement (the "Agreement") between Santa Barbara County and the Santa Ynez Band of Mission Indians (the "Tribe").[1] The Board of Supervisors ("Board") would be violating the law and corrupting the planning process if it signed the Agreement.

Here is why:

Background

The Santa Ynez Reservation (135 acres) disputably[2] held in trust by the United States for the Tribe is not subject to State or County laws or regulation.

[1] On Friday, August 12, 2011, our office called the office of the Santa Barbara County CEO to request confirmation that the CEO had received the proposed Agreement and intended to pass it to the Board. As of this date, the CEO's office has not provided an answer to our request.

[2] See, e.g., *Preservation of Los Olivos, et al. v. Pacific Regional Director, Bureau of Indian Affairs*, U.S. Dept. of the Interior, Office of Hearings and Appeals, Interior Board of Indian Appeals, Docket No. IBIA 05-050-1.

831 STATE STREET, SANTA BARBARA, CALIFORNIA 93101-3227 ABC@CAPPELLONOEL.COM

TEL (805) 564-2444 FAX (805) 965-5950 WWW.CAPPELLONOEL.COM

The Reservation includes the Chumash Casino complex on Highway 246, which is near both residential and school property. Because the Reservation is exempt from County planning, the casino complex, and the impacts it engendered, were and are outside of County planning jurisdiction or control. Yet the County is obligated to provide services, including but not limited to police, fire, water, medic and other services to this mega complex.

In or about April, 2010,[3] the Tribe acquired approximately 1400 acres of real property located along Highway 154 and Armor Ranch Road (the "Property"). This area is almost the size of the town of Solvang. The Property contains five parcels, all zoned agricultural. It is not contiguous to the existing Reservation property.

The Tribe contends that it may annex property via a "fee-to-trust" transfer in one of two ways: through the Bureau of Indian Affairs ("BIA") administrative process, or through federal legislation. The Tribe has encountered community resistance in its attempt to annex, through the BIA process, a separate property comprised of approximately 6.9 acres. Now the Tribe is seeking the Board's approval of this Agreement to avoid the BIA process. It intends to use the Board's approval for an alternative process such as (but not limited to) direct legislation to place the Property into trust, once approval of this proffered "Agreement" is received from the Board.

The Proposed Agreement

A copy of the proposed Agreement obtained by P.O.L.O. is attached hereto. In brief, it provides the Tribe will make Agreed Payments in an uncertain amount, and the County will support and assist the Tribe in its attempt to annex the Property by any possible method. In short, take money and ignore your sworn duty to uphold the law, specifically the Santa Ynez Valley Community Plan of this County.

The Agreement provides:

Recitals (page 1):

- the Tribe "desires to expand Tribal housing opportunities and operate Tribal economic development projects."
- "proposed and future Tribal development are not County projects and are not subject to the discretionary approval of the County . ."
- "given the scope of the proposed Tribal housing and economic development projects, specific impacts are not always subject to precise measurement . . "

¶ 3. "The County shall support the fee-to-trust annexation of the Property to the Reservation by federal legislation, the administrative process by federal agencies, or any other possible way in existence now or in the future. Upon request of the Tribe, the County shall confirm such support by letter or resolution." (Page 3.)

[3] The Agreement apparently incorrectly recites that the purchase date was April, 2011.

¶ 5: "The Santa Ynez Band and County acknowledge and agree that in consideration for Santa Ynez Band's Agreed Payments above, any additional impacts to the County, including, without limitation, law enforcement, fire, and traffic/roads, will be mitigated solely by the County at no additional cost to Santa Ynez Band." (Page 4.)

Apparently the Agreement contemplates Tribe development of the Property, unhindered by County review or requirements, prior to the date the Property is annexed (if ever).

The Agreement Surrenders County Jurisdiction Over a City-Sized Property Already Subject to Specific Community Plan When the Anticipated Development Is Unknown and Adverse Impacts Cannot Be Assessed

On October 6, 2009, this Board adopted the Santa Ynez Valley Community Plan ("SYV Plan"), as an update to the County's Comprehensive General Plan. Citizen involvement in the preparation of a community plan is required by State law, and is a cornerstone of the community plan process. The SYV Plan process took approximately nine years. It involved a concerted long-range effort by the community and the County which included targeted research; data collection and analysis; extensive public involvement; the drafting of goals, policies, and development standards; and numerous public hearings with the Planning Commission and the Board. (See, SYV Plan, pp. 5, 7.)

The SYV Plan augmented various elements of the County's General Plan, including but not limited to, the Land Use Element goals,[4] development policies,[5] and Visual Resources Policies.[6] The SYV Plan also augmented the Housing Element ("a comprehensive assessment of projected housing needs for all segments of the jurisdiction and all economic groups" [SYV Plan, p. 10]), as well as the Seismic Safety and Safety, Noise, Circulation, Conservation, Open Space, Agricultural, and Scenic Highways ("The Plan recognizes the suitability of design guidelines for protecting the scenic qualities of Highway 154 . ." [SYV Plan p. 12]), Environmental Resources Management Elements, and the Clean Air Plan. (See generally, SYV Plan pp. 10-13.)

The SYV Plan specifically provides, among other things:

"The County shall oppose the loss of jurisdictional authority over land within the Plan area where the intended use is inconsistent with the goals, policies and developmental standards

[4] One of the Land Use Element's fundamental goals is the following: "Environmental constraints on development shall be respected. Economic and population growth shall proceed at a rate that can be sustained by available resources." Another is that in "rural areas, cultivated agriculture shall be preserved . . " (SYV Plan, p. 8.)

[5] The Land Use Development Policies "establish guidelines for development in order to respect constraints posed by geology, biology, and other physical environmental characteristics. In addition, these policies require the availability of adequate services and resources to serve a project prior to development." (See, SYV Plan, p. 9.)

[6] The Visual Resources Policies "require structures to be compatible with the existing community and protect areas of high scenic value and scenic corridors." (See, SYV Plan, p. 9.)

of the Plan or in the absence of a satisfactory legally enforceable agreement." (Policy LUG-SYV-6, p. 22)

"The County shall pursue legally enforceable government-to-government agreements with entities seeking to obtain jurisdiction over land within the Plan Area to encourage compatibility with the surrounding area and mitigate environmental and financial impacts to the County." (Action LUG-SYV-6.1, pp. 22-23.[7])

The Agreement would surrender County control over an area the size of a small town, at a time when the adverse impacts on the community and the necessary mitigation needs for the development are completely unknown and cannot be assessed. This requested abdication of your duty to uphold the planning process and the law, in favor of money, is abhorrent.

The Property is comprised of five agricultural zoned parcels which are currently enrolled in the County's Agricultural Preserve Program under the Williamson Act, and also situated along a designated Scenic Highway. The Agreement apparently would enable those parcels to be developed in any residential/commercial manner, without compliance with SYV Plan requirements. It would remove from the County an unknown amount of tax revenue from the Property as ultimately improved and developed, while leaving the County with obligations to provide support services to the developed Property and to deal with unmitigated impacts at its own cost. As the Agreement has no provision for County discretionary control over development, it provides no legally enforceable means of ensuring consistent use, compatibility, or mitigation.

In short, the Agreement vitiates the SYV Plan, which this Board adopted after nine hard years of work. It does this with absolutely no knowledge of what the Tribe's development plans might be. The Agreement does not provide any legally enforceable avenue for the County to promote/encourage/ensure issues of compatibility or mitigation. To the contrary: it provides that the County has no control over development of the Property. Either the signing of this Agreement, and/or recommending its contents to another governmental authority, violates your specific mandate under the SYV Plan as set forth above.

This Board Cannot Approve the Agreement

There are several major reasons why the Board cannot legally approve the Agreement.

First, because the Agreement is on its face inconsistent with the SYV Plan, the Board cannot approve it without first amending the plan. This Board is comprised of elected officials whose duty is to protect the public need for a "healthy, safe, and prosperous environment." (See,

[7] It is uncertain whether this Agreement, or a different agreement containing the necessary planning and environmental provisions, would be legally enforceable under all relevant law. (See, e.g., 25 U.S.C. § 81.) It is incumbent upon the Board to ensure that any agreement with the Tribe would be legally enforceable under all relevant law. This letter addresses initial problems related to planning, only, without waiver of any additional arguments, including but not limited to those related to enforceability under federal law.

e.g., Board Mission Statement, posted at www.countyofsb.org/bos.) As part of its task, the Board was statutorily required to prepare and adopt the comprehensive general plan, including numerous mandatory elements. (Govt. Code § 65300.) Pursuant to statute, this Board authorized and undertook the nine-year long process of developing the SYV Plan, including providing opportunities for the involvement of citizens, agencies, utilities, etc., through public hearings and other means. (See, e.g., Govt. Code §§ 65351, 65352, 65919 et seq.) It then adopted the SYV Plan by resolution in October, 2009, along with related ordinances. The SYV Plan now constitutes the law of this County which this Board must uphold.

As set forth above, the Agreement is flatly inconsistent with the SYV Plan. It cedes County jurisdiction entirely, blindly authorizes unlimited development, and does not create any legally enforceable document under which the County could obtain compliance with any of the SYV Plan requirements.

Second, because the Agreement exempts the Property from any compliance with the SYV Plan, it would, at the very least, constitute a *de facto* amendment to the SYV Plan. However, the statutes governing preparation and adoption of the General Plan are also applicable to amendments. (Govt. Code § 65350 et seq.)

As applied here, the Board cannot "approve" the *de facto* amendment unless it first undertakes the statutory procedure to amend the SYV Plan, and complies with the requirements for limited amendments. Thus, the Board must ensure that the Agreement/amendment is consistent with the General Plan (See, e.g., Govt. Code § 65300.5; *Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1336 (consistent if furthers the objectives and policies of the general plan and does not obstruct them).) The Board must obtain appropriate planning department and public involvement and notice under the statutes cited above. Indeed, in order for the public to understand the potential impacts of this Agreement/amendment, the County would have to provide notice of the assessed impacts. The Board would have to give notice that the Agreement constituted an amendment to the Plan when placing it on the agenda and as otherwise appropriate, and the Board would ultimately have to make findings of consistency.

However, the amendment process has not been invoked, and the requisite information on consistency is unavailable. The Tribe has not proposed any specific projects, so no one may assess whether this Agreement is consistent with the Plan or what impacts will result which would require mitigation. This Board cannot amend the Plan by fiat, nor can it subvert the process by failing to provide notice to the public on the amendment or its anticipated effect. Yet approval of the Agreement would do just that.[8]

Third, approval of the Agreement would unlawfully surrender control of the County's ability to control lands within its jurisdiction. It is settled law that a county cannot

[8] Under an analogous theory, adopting the Agreement would constitute an impermissible ad hoc exemption from Planning and Zoning Law. See, e.g., *Neighbors in Support of Appropriate Land Use v. County of Tuolumne* (2007) 157 Cal.App.4th 997 (county cannot adopt ad hoc exemption without rezoning or other proper procedure).

constitutionally divest itself of, or impair, its delegated governmental power, or contract away its right to exercise its police power in the future. (See, e.g. *County Mobilehome Positive Action Com., Inc. v. County of San Diego* (1998) 62 Cal.App.4th 727 (lease with rent stabilization measures conditioned on county refraining from enacting rent control legislation was facially unconstitutional); *Alameda County Land Use Assn. v. City of Hayward* (1995) 38 Cal.App.4th 1716 (City could not adopt a Memorandum of Understanding ("MOU") with other cities and county where the MOU conditioned further amendments of a general plan on parallel amendments by other agencies); *Avco Community Developers, Inc. v. South Coast Regional Com.* (1976) 17 Cal.3d 785, 800 (government may not contract away its right to exercise the police power in the future).)

The Agreement would void the County's ability to control land use on the Property in perpetuity. The County would be without any authority to influence development along Highway 154, a designated Scenic Highway and critical gateway to the community. The County would have surrendered its ability to control all land use issues: design, circulation, noise, density, etc.

The approval of this Agreement will result in the loss of millions of dollars of land value, harm unknown thousands of Santa Ynez Valley residents who rely on the planning process, and make a mockery of your careful deliberative process which culminated in approving the SYV Plan.

Very truly yours,

CAPPELLO & NOËL LLP

A. Barry Cappello

cc: Dennis Marshall
County Counsel
Santa Barbara County

Chandra L. Wallar
Santa Barbara County CEO

Enclosure

COOPERATIVE AGREEMENT

This Cooperative Agreement ("Agreement") is effective as of _____, 2011 by and between the County of Santa Barbara (the "County") and the Santa Ynez Band of Chumash Indians (the "Tribe" or "Santa Ynez Band") (referred to herein as collectively as "the Parties" and as to each as a "Party"). The terms "County," "Tribe," and "Santa Ynez Band" as used herein shall include the Parties' governmental entities, departments and officials unless otherwise stated.

RECITALS

WHEREAS, the Tribe is a federally-recognized Indian Tribe and which is within the geographic boundaries of the County; and

WHEREAS, the Tribe desires to expand Tribal housing opportunities and operate Tribal economic development projects in a manner that benefits the Tribe, its members, and the community as a whole, and the County recognizes the mutual benefit that can be derived if those goals are achieved; and

WHEREAS, proposed and future Tribal development are not County projects and are not subject to the discretionary approval of the County and absent this Agreement the County has limited opportunity to influence mitigation measures or seek compensation for adverse environmental impacts; and

WHEREAS, the Parties acknowledge that given the scope of the proposed Tribal housing and economic development projects, specific impacts are not always subject to precise measurement and that the mitigation measures agreed upon below are intended as good faith approximate mitigation of identified impacts; and

WHEREAS, the Parties recognize that this Agreement is an important step in furthering a government-to-government relationship and building trust, and mutual respect

BACKGROUND

After Mexico took over California from the Spanish and the secularization of Mission Santa Ynez in 1834, the Santa Ynez Chumash neophytes at Mission Santa Ynez settled in the creek bed of the Zanja de Cota Creek;

The U.S. Congress adopted the Mission Indian Relief Act of 1891 which established the Smiley Commission to report on the status of the Mission Indians of California;

The 1891 Report of the Smiley Commission verified such occupation of the Zanja de Cota Creek by the Santa Ynez Chumash from before California Statehood in 1835 and verified the status of the Santa Ynez Chumash as a tribe of Mission Indians as of 1891;

Then President Benjamin Harrison by Executive Order adopted the conclusions of the 1891 Smiley Commission on December 29, 1891;

After such report, the Indian Agent from the Tule River Agency began negotiation with the Catholic Church, to establish a permanent reservation for the Santa Ynez Band of Chumash;

Such negotiations resulted in the 1901 settlement agreement between the Church and the federal government;

As part of such negotiation, the Indian Agent agreed on behalf of the Tribe to waive the rights of the neophytes to the entire 36,000 acre Canada de los Pinos Rancho (College Rancho) which the Church claimed to own in common with the neophytes in exchange for the conveyance by the Church of all of its right title and interest in Zanja de Cota Creek to the Tribe as the Santa Ynez Reservation;

To finalize the waiver of the claim by the Tribe to the College Rancho, the Church filed a quiet title action against the federal government, the then members of the Tribe and the entire world in The Roman Catholic Bishop of Monterey v. Salmon Cota, et al ., Case no. 3926 (1897);

Upon the conclusion of such litigation, the 99 acre Santa Ynez Reservation was conveyed to the United States in trust for the Tribe the size of which Reservation which was later increased by 26.89 acres in 1979 and 12.73 acres in 2004 (collectively the "Reservation");

The original 99 acre Reservation as extended consists of the Zanja de Cota creek and flood plain with the last third of the Reservation being covered in wetlands unable to adequately house the Members of the Tribe and their children, grandchildren and great grandchildren;

On or about April 1, 2011, the Tribe acquired approximately 1,400 acres of real property east of Highway 154 and north of Highway 246/Armour Ranch Road from Fess Parker Ranch, LLC (the "Property");

The "Property" is within the historic boundaries of the College Rancho and is specifically within the boundaries of the quiet title action filed against the Tribe by the Church;

The Tribe desires to annex the Property by fee-to-trust transfer by either federal legislation or through the administrative process, and this Agreement is intended by the Parties to resolve the inter-governmental jurisdictional and other issues between the Parties;

I. EFFECTIVE DATE AND CONDITIONS TO EFFECTIVENESS OF AGREEMENT

1. This Agreement shall become effective on the latest of the dates upon which each of the following conditions precedent shall be met:

a) approval of this Agreement by the County of Santa Barbara Board of Supervisors and the General Council of the Santa Ynez Band; and

b) conveyance of the Property to the United States of America to hold in trust for the Tribe; and

c) Any other conditions precedent mutually agreed by the Parties.

2. Upon the satisfaction of all of the conditions precedent to effectiveness set forth in subsection 1, above, the parties shall execute an addendum to this Agreement memorializing the effective date of this Agreement in the form attached hereto as Attachment A.

II. FEE-TO-TRUST ANNEXATION OF THE PROPERTY

3. The County shall support the fee-to-trust annexation of the Property to the Reservation by federal legislation, the administrative process by federal agencies or any other possible way in existence now or in the future. Upon request of the Tribe, the County shall confirm such support by letter or resolution.

III. PAYMENTS IN LIEU OF TAXES

4. Agreed Payments:

a) In addition to the promises and covenants otherwise contained in this Agreement, the Parties acknowledge that annexation of the Property may, in some cases, result in lost revenues and/or fees to the County.

b) The Parties agree that the County does not have permitting authority over development on Trust Lands and that the payments made under this agreement do not constitute taxes, exactions, or fees.

c) The payments agreed to below are approximate off-sets to the above-mentioned potential losses and impacts to the County and are intended to support an approximate level of County services to the Reservation, the Property, and affected communities.

d) The amount of such Payments by the Tribe shall be as follows: Tribe to pay County flat annual fee in lieu of property taxes in the amount of $_____ which amount shall be due in four (4) equal quarterly payments beginning on the first day of the Calendar quarter and

continuing each quarter thereafter. Such payments shall begin the first day of the next calendar quarter after the effective date of this Agreement and shall expire in full on December 31, 2020.

5. Acknowledgement of Additional Impacts.

The Santa Ynez Band and County acknowledge and agree that in consideration for Santa Ynez Band's Agreed Payments above, any additional impacts to the County, including, without limitation, law enforcement, fire, and traffic/roads, will be mitigated solely by the County at no additional cost to Santa Ynez Band.

6. Adjustment of Payments.

a) Santa Ynez Band shall not be responsible for any construction cost overruns or any cost increases from any source, including, without limitation, those caused by inflation, labor, or material cost increases.

b) In the event that the Santa Ynez Band does not successfully annex such Property to the Reservation by fee-to-trust transfer to the federal government within two (2) years after the effective date of this Agreement, the parties shall negotiate in good faith as to how much, if any, of the contribution made by Santa Ynez Band under this Agreement shall be returned to the Band. If the parties are unable to reach agreement on these issues, that dispute will be resolved under the dispute resolution procedures included in this Agreement.

7. Reimbursements/credits for contributions from third party sources.

County agrees to reimburse or credit Santa Ynez Band as follows:

a) In the event that Santa Ynez Band receives funding from state or federal sources, and directs those monies to be paid directly to County, County shall accept 100% of such payment as if it were a payment paid directly by Santa Ynez Band.

b) In the event County receives funding from the Special Distribution Fund or any other fund created under the current or any future Tribal-Compact, earmarked for mitigation of off-reservation impacts resulting from the Santa Ynez Casino, County shall accept 100% of such payment as if it were a payment paid directly by Santa Ynez Band.

c) Any credits towards Santa Ynez Band's payment obligations pursuant to this Agreement shall be treated as the next payments in time to be paid by Santa Ynez Band.

d) In the event funds identified in this section are received by the County after the payment from Santa Ynez Band has already been paid to the County, the

County shall reimburse Santa Ynez Band within 30 days from receipt of such funds.

IV. MISCELLANEOUS

8. Tribal-State Compact.

County and Santa Ynez Band agree that Santa Ynez Band's contributions to County pursuant to this Agreement are not exactions or fees imposed as a condition of development, and therefore are not subject to the Mitigation Fee Act (California Government Code Section 66000 and following). County and Santa Ynez Band agree that Class III gaming facilities on reservation land are regulated by the Compact and that the County has no permitting authority over the Chumash Casino.

9. Notices.

All notices required or provided for under this Agreement shall be in writing and delivered in person or sent by certified mail, postage prepaid, return receipt requested, to the principal offices of the County and Santa Ynez Band. Notice shall be effective on the date delivered in person, or on the date when the postal authorities indicated that the mailing was delivered to the address of the receiving party indicated below:

Notice to Santa Ynez Band:	Santa Ynez Band of Chumash Indians Attn: Tribal Chairman P.O. Box 517 Santa Ynez, CA 93460
Notice to County:	County of Santa Barbara 105 East Anapamu Street Santa Barbara, CA 93101 Attn: CEO

Such written notices, demands, correspondence and communications may be sent in the same manner to such other persons and addresses as either party may from time to time designate by mail as provided in this section. A party may change its address by giving notice in writing to other Party and thereafter notices shall be delivered or sent to such new address.

10. Applicable Laws.

This Agreement shall be construed and enforced in accordance with the laws of the United States and to the extent not inconsistent therewith, the laws of the State of California.

11. Consent To Jurisdiction: Limited Waiver of Sovereign Immunity and Exhaustion Of Tribal Remedies.

a) Santa Ynez Band grants a limited waiver of sovereign immunity from suit exclusively to County, and to no other entity or person, for the sole purpose of enforcing this Agreement. For this limited purpose, Santa Ynez Band (i) agrees that any suit, action or other legal proceeding arising out of or relating to this Agreement may be brought in the federal courts of the United States, or in the event the federal courts refuse to hear such case for lack of jurisdiction, the State courts of the State of California (including any courts to which appeals there from are available); and (ii) waives its sovereign immunity in any such suit, action or legal proceeding by County for money damages, specific performance, injunctive relief and/or declaratory relief for Santa Ynez Band's breach of this Agreement. Santa Ynez Band does hereby unconditionally waive any claim or defense of exhaustion of tribal administrative or judicial remedies. In no instance shall any enforcement or judgment of any kind whatsoever be allowed or levied against any assets of Santa Ynez Band other than the limited assets of the Santa Ynez Band's distributed share of the revenue stream of the Chumash Casino and physical assets of the Chumash Casino, subject however, to prior existing liens or encumbrances on such assets. Specifically, this waiver shall not extend to any other accounts of Santa Ynez Band, the source of which includes distributions from accounts directly related to the Chumash Casino, so long as such distributions are in the ordinary course of business when the Agreement is not in default and are not done for the purpose of frustrating the County's remedies hereunder. Santa Ynez Band does not waive the defense of sovereign immunity with respect to any action by third parties, or extend its waiver to reach any assets of Santa Ynez Band other than those specifically set forth herein.

b) County acknowledges and agrees that Santa Ynez Band may bring an action in the State Courts of California to enforce the terms of this Agreement as against Santa Barbara County for money damages, specific performance, injunctive relief and/or declaratory relief for County's breach of this Agreement. County acknowledges and agrees that State Courts with proper venue have jurisdiction to hear such disputes. For purposes of the Agreement, County hereby waives any immunity it may have from suit in order to permit Santa Ynez Band to enforce the provisions of the Agreement.

12. Entire Agreement, Waivers.

This Agreement constitutes the entire understanding and agreement of the Parties. This Agreement integrates all of the terms and conditions mentioned herein or incidental

hereto, and supersedes all negotiations or previous agreement between the Parties with respect to all or any part of the subject matter hereof. All waivers of the provisions of this Agreement must be in writing and signed by the appropriate authorities of the County or of the Santa Ynez Band.

13. Amendments.

This Agreement may be amended by mutual written agreement of the Parties duly executed by the lawfully authorized officers or officials of each party.

IN WITNESS WHEREOF, the Agreement has been executed by the Parties as of the day and year first set forth above,

TRIBE:

SANTA YNEZ BAND OF CHUMASH INDIANS, a federally recognized Indian tribe

By:

_____

Vincent P. Armenta
Tribal Chairman

COUNTY:

COUNTY OF SANTA BARBARA, a political subdivision of the State of California

By:

_____