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22 IN THE UNITED STATES DISTRICT COURT  
 23 FOR THE CENTRAL DISTRICT OF CALIFORNIA

22 PRESERVATION OF LOS OLIVOS  
 23 and PRESERVATION OF SANTA  
 24 YNEZ,

24 Plaintiffs,

25 vs.

26 THE UNITED STATES DEPT. OF  
 27 THE INTERIOR, et al.,

28 Defendants.

Case No.: CV-06-1502

**DEFENDANT-INTERVENOR'S  
 RESPONSE TO PLAINTIFFS'  
 OPPOSITION TO REMAND**

Date: September 25, 2006

Time: 10:00 am

Hon. A. Howard Matz

1 **REPLY OF DEFENDANT-INTERVENOR TO PLAINTIFFS' OPPOSITION**  
2 **TO THE FEDERAL DEFENDANT'S MOTION TO REMAND**

3 Defendant-Intervenor, the Santa Ynez Band of Mission Indians (Chumash or  
4 Tribe), supports the government's motion for a prompt remand to the Interior  
5 Board of Indian Appeals (IBIA) to determine in the first instance whether certain  
6 mistakenly withheld documents in the administrative record were material to the  
7 IBIA's standing decision (and there is no indication that they were). For the  
8 reasons discussed below, the Tribe urges the Court to remand the matter promptly  
9 to the IBIA and to reject Plaintiffs' apparent request that the Court conduct its own  
10 time-wasting review of these documents in the first instance before any remand.

11 **1. The Appropriate Remedy For an Incomplete Administrative Record**  
12 **Is for the District Court to Remand the Case Back to the Agency for a**  
13 **Decision.**

14 As part of their proposed "two-step procedure," Plaintiffs ask the Court first  
15 to order the Department of Interior to produce to Plaintiffs all documents that  
16 comprised the administrative record that the IBIA relied upon in making in  
17 February 8, 2006 decision, and all documents that were erroneously excluded from  
18 the record.<sup>1</sup> They further ask the Court, before issuing any remand order, to  
19 "consider[] . . . the documents and information" inadvertently withheld from the  
20 IBIA and "determin[e]" whether "to remand the case to the IBIA." Pl. Opp. 3.  
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24 It is unclear why Plaintiffs ask the Court to undertake that burdensome task,  
25 given that the government has acknowledged that a prompt remand is appropriate  
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<sup>1</sup> Plaintiffs notably do not request that these same documents be produced to  
28 the Tribe. Of course, if those documents are produced to Plaintiffs, they should be  
produced to the Tribe as well.

1 to enable the IBIA to determine in the first instance whether the documents at issue  
2 were at all material to its decision. *See Asarco v. EPA*, 616 F.2d 1153, 1160 (9th  
3 Cir. 1980) (“When a reviewing court considers evidence that was not before the  
4 agency, it inevitably leads the reviewing court to substitute its own judgment for  
5 that of the agency.”)  
6  
7

8 To the extent that Plaintiffs ask this Court to resolve that materiality issue in  
9 the first instance, they run headlong into basic principles of administrative law.  
10 “[I]f the record before the agency does not support the agency action, if the agency  
11 has not considered all relevant factors, or if the reviewing court simply cannot  
12 evaluate the challenged agency action on the basis of the record before it, the  
13 proper course, except in rare circumstances, is to remand to the agency for  
14 additional investigation or explanation.” *Florida Power & Light Co. v. Lorion*,  
15 470 U.S. 729, 744 (1985); *see also The Lands Council v. Powell*, 395 F.3d 1019,  
16 1030 n.10 (9th Cir. 2005) (“Normally, if an Agency’s administrative record is  
17 incomplete, we would expect litigants to seek to supplement the record in the  
18 agency before seeking to expand the record before the district court.”); *Public*  
19 *Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982) (“When there is a  
20 need to supplement the record to explain agency action, the preferred procedure is  
21 to remand to the agency for its amplification.”) No such “rare circumstances” are  
22 presented here, and Plaintiffs do not contend otherwise.  
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1           **2. Further Delay in the Resolution of This Case Will Exacerbate the**  
2           **Already Lengthy Delay That Defendant-Intervenor Has Experienced in**  
3           **Finalizing This Fee-to-Trust Petition.**

4           Although Plaintiffs inexplicably suggest that they are somehow victimized  
5 by the government's discovery of the withheld record documents, in fact the  
6 opposite is true: the Tribe is the only party aggrieved by the further delay of a final  
7 resolution of this dispute. That is why the Tribe seeks a prompt remand to the  
8 IBIA and opposes Plaintiffs' request for a time-wasting "two-step process."

9           The fee-to-trust petition at issue in this case for 6.9 acres of land has been  
10 pending for nearly six years. The original petition was filed with the Bureau of  
11 Indian Affairs (BIA) on November 8, 2000, and was granted by the BIA's Pacific  
12 Regional Director on January 14, 2005. On February 22, 2005, Plaintiffs filed an  
13 administrative appeal of the BIA's decision, which culminated in a decision by the  
14 Interior Board of Indian Appeals' dismissing Plaintiffs' appeal for lack of standing  
15 on February 8, 2006. This lawsuit has been pending in this Court since March 10,  
16 2006.

17           Further and unnecessary delay will cause the Tribe to suffer additional  
18 postponement of its ability to promote its substantial interest in exercising  
19 sovereign authority over the 6.9-acre parcel at issue. The Tribe's plans for this  
20 property are of significant importance for the Tribe; it intends to permanently  
21 preserve an ancient Chumash burial site and remains of an intact Chumash village  
22 site; develop an educational museum and cultural facility dedicated to telling the  
23 story of the Chumash people; create an open community commemorative park; and  
24 build a small professional office and retail facility to provide funding to maintain  
25 and operate the museum and cultural facilities.

26           As the Tribe has previously explained, placing the parcel into trust is  
27 necessary to allow the Tribe to consolidate its land holdings for the purpose of self-  
28 determination and to protect irreplaceable historical and cultural artifacts, and the

1 Tribe's strong commitment to promoting self-reliance and pride in Native  
 2 Americans by honoring Chumash traditions and culture. Whereas Plaintiffs suffer  
 3 no prejudice by virtue of a remand to the agency, the Tribe will suffer further,  
 4 unnecessary delay in an already nearly six-year long process under Plaintiffs'  
 5 proposed two-step document review process.

6 Given that remand of this case and review of the excluded documents by all  
 7 the parties will occur in due course in the proceeding before the IBIA, and  
 8 Plaintiffs will have ample opportunity to argue to the IBIA whether the exclusion  
 9 of the documents from the record was prejudicial, the Tribe is the only party that  
 10 will suffer if this case is not immediately remanded to the agency. Indeed, most of  
 11 the delay that has already occurred throughout the pendency of the Tribe's fee-to-  
 12 trust petition has been the result of Plaintiffs' fighting every step of the way  
 13 throughout the process.

14 Accordingly, this Court should grant the Federal Defendant's motion to  
 15 remand this case to the Department of the Interior.

16  
 17 Respectfully submitted,

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Dated September 18, 2006

By: Nancie Marzulla  
Nancie G. Marzulla

Counsel for Defendant-Intervenor

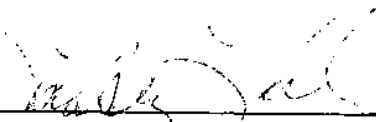
**CERTIFICATE OF SERVICE**

The undersigned certifies that on this 18th day of September, 2006, a true and correct copy of the Defendant-Intervenor's Response to Plaintiffs' Opposition to Remand was sent by placing the same in the United States mail, postage prepaid, and properly addressed to:

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