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**UNITED STATES DEPARTMENT OF THE INTERIOR
 OFFICE OF HEARINGS AND APPEALS
 INTERIOR BOARD OF INDIAN APPEALS**

SANTA YNEZ CONCERNED CITIZENS,)
 PRESERVATION OF LOS OLIVOS,)
 PRESERVATION OF SANTA YNEZ, and)
 WOMENS'S ENVIRONMENTAL WATCH)
 OF THE SANTA YNEZ VALLEY,)
)
 Appellants,)
 v.)
)
 PACIFIC REGIONAL DIRECTOR,)
 BUREAU OF INDIAN AFFAIRS,)
)
 Appellee.)
 _____)

Docket No. IBIA 05-50-A

**BRIEF FOR THE SANTA YNEZ BAND OF CHUMASH MISSION INDIANS
 CONCERNING THE SUPPLEMENTAL RECORD**

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25 C.F.R. § 151.103

INTRODUCTION AND SUMMARY

The real party in interest, the Santa Ynez Band of Mission Indians (Tribe), respectfully submits this response to Appellants' supplemental brief on standing issues. This matter arises from a January 2005 decision of the Pacific Regional Director of the Bureau of Indian Affairs (BIA) to convert a 6.9-acre parcel adjacent to the Tribe's current reservation—a parcel the Tribe currently owns in fee simple—into federal trust status. This Board dismissed Appellants' challenge to this fee-to-trust decision for lack of standing, and Appellants sought judicial review in district court. Shortly thereafter, government counsel notified the district court that BIA had mistakenly omitted some materials from the administrative record it had certified to the Board. The district court thereafter remanded for the "limited" purpose of "allow[ing] the IBIA to reconsider its determination . . . in light of the documents that were inadvertently omitted," and it directed the Board to complete that inquiry "at the earliest feasible time." Order Granting Fed. Defs.' Mot. to Remand at 1, *Pres. Of Los Olivos v. Dep't of the Interior*, No. CV-06-1502 AHM (CTx) (C.D. Cal.) ("Remand Order"). On remand, the Board likewise "allow[ed] briefing on the *limited* issue of whether, and if so how, the *supplemental record* warrants reversal of the Board's decision that Appellants lack standing," and it pointedly rejected Appellants' proposal to rebrief the entire standing question de novo. Order on Procedures on Remand at 4, 5, 6 (Feb. 21, 2007) ("Feb. 21 Order").

Appellants ignore that instruction. Appellants mention the supplemental record only in passing, and in the process make it abundantly clear that they, like BIA and the Tribe, have identified nothing in the supplemental materials that could draw into question the Board's rationale for dismissing Appellants' challenge for lack of standing. Appellants instead spend most of their brief rearguing whether, on the basis of the materials included in the *original*

administrative record, the Board was right the first time around when it dismissed their challenge on standing grounds. And, for good measure, Appellants throw in a gratuitous attack on the Tribe's status as a federally recognized Indian tribe: a topic that this Board specifically instructed Appellants not to brief, given that "this is neither the proper proceeding nor the proper forum" for airing Appellants' "agenda to terminate the Tribe." Feb. 21 Order at 6.

In a separate motion, the Tribe has asked the Board to strike the portions of Appellants' brief that fall most egregiously outside the scope of this limited remand. As discussed in Section I of the Argument below, the Board should further reject, on procedural grounds, any arguments raised by Appellants that do not relate specifically to the supplemental record and that Appellants therefore could have raised (and in many cases did raise) in the original round of briefing. Finally, as discussed in Section II of the Argument, the Board should reject Appellants' suggestion that the letter-writing campaign orchestrated by the Tribe's opponents somehow casts doubt on the zone-of-interests analysis in the Board's original decision.

BACKGROUND

The 6.9-acre parcel at issue here borders on the Town of Santa Ynez, is currently zoned "highway commercial," and is located immediately across Highway 246 from the Tribe's current 138.95-acre reservation. Because flooding and geographic irregularities preclude significant further development of the existing reservation, the Tribe originally designated this 6.9-acre parcel for additional tribal administrative buildings and sought a fee-to-trust determination on that basis. After the Tribe submitted its original fee-to-trust application, however, it discovered that the parcel encompasses an ancient Chumash burial site and an intact Chumash village site.¹

¹ The Santa Ynez Band of Mission Indians, recognized in 1901, is the only federally recognized Chumash tribe in the nation. The Chumash Indians once numbered in the tens of thousands and lived along the coast of California. Their territory encompassed 7,000 square

This discovery prompted the Tribe to revise its plans for the property, and it filed an amended application on May 6, 2002. The revised application explained that placing the parcel into trust will enable the Tribe to preserve this sacred land, including its historical and cultural artifacts, and will promote tribal self-determination.

To that end, the application proposes three main uses of the parcel. First, the Tribe will cap the site and construct a 3.5-acre public commemorative park over the ancient burial and village sites in order to prevent any further disturbance to those sites. This area will also contain interpretive exhibits focusing on the history of the Chumash people. Second, the Tribe plans to construct an approximately 14,350 square-foot museum and cultural center to celebrate the traditions of the Chumash people. Third, to generate revenue to pay for the maintenance of the cultural center, museum, and park, the Tribe plans to build a modest two-story commercial facility to house professional offices and small retail shops.

These development plans will have minimal impact on the surrounding environment. In April 2004, following the completion of a Phase I Contaminant Survey, the Tribe prepared an Environmental Assessment ("EA") that the BIA subsequently adopted. *See* 25 C.F.R. § 151.10(h). The BIA found, on the basis of this EA, that the Tribe's plans will not significantly affect the quality of the human environment within the meaning of NEPA and that the preparation of an environmental impact statement is therefore unnecessary. *See* Notice of Finding of No Significant Impact (FONSI) for the Proposed Santa Ynez Band of Chumash Indians 6.9-Acre Fee-to-Trust Acquisition (Sept. 22, 2004). With respect to the specific issues now raised by Appellants, the EA concluded, for example, that:

miles that spanned from the beaches of Malibu to Paso Robles (including the four Northern Channel Islands). The Chumash also lived inland to the western edge of the San Joaquin Valley. *Santa Ynez Valley Concerned Citizens, et al. v. Pacific Regional Director*, 42 IBIA 189, 190 (2006).

- “There will be no impacts on water quality related to wastewater since all flows will be discharged to the City of Solvang WWTP.” EA at 4-4.
- “No significant local CO [emissions] impacts would occur.” EA at 4-5.
- “Therefore, the proposed action will have no significant impact on traffic and circulation.” EA 4-10.
- “Due to the remote location of the proposed action and agricultural lands that surround the project area, views of the proposed facilities would be limited to travelers on SR-246 and surrounding surface streets[.]” EA at 4-18.²

In any event, as the Board has explained, the fee-to-trust decision has little logical bearing on any possible environmental concerns in the first place, because the Tribe’s proposed development “could almost certainly proceed *whether or not* the Property is taken into trust.” *Santa Ynez Valley Concerned Citizens, et al. v. Pacific Regional Director*, 42 IBIA 189, 199 (2006) (emphasis added).

On January 14, 2005, the BIA’s Pacific Regional Director (Regional Director) approved the Tribe’s fee-to-trust application pursuant to 25 C.F.R. §151.10, concluding that “taking the land into trust would allow the Tribe to be the ultimate authority on the treatment and disposition of the archeological resources on the Property and to execute its own use and development goals.” 42 IBIA at 191. The Regional Director further determined that removal of the property from the Santa Barbara County tax rolls would not harm the County and that the Tribe’s development plan comports with the land’s zoning status (commercial highway) and existing traffic patterns. *Id.*

² Further, with respect to the claimed economic injuries, the Response to Comments in the Final EA concluded, and the FONSI concurred, that California law requires the collection of sales or use taxes at shops and stores on a Reservation where the sale is to a non-Indian or an Indian who does not reside on the Reservation. EA Response Letter at 9; FONSI at 8. Therefore, there would be little chance for the Tribe to create a “tax-free enclave” that could unfairly compete with local businesses. *Id.*

On February 22, 2005, these Appellants—Preservation of Los Olivos (POLO) and Preservation of Santa Ynez (POSY), along with several other parties who have since dropped out of the case—appealed the Regional Director’s decision to this Board. On February 3, 2006, the Board dismissed that appeal for lack of standing. 42 IBIA 189 (“IBIA Original Decision”). On March 10, 2006, POLO and POSY challenged that decision in the U.S. District Court for the Central District of California. *See Compl., Pres. of Los Olivos v. Dep’t of the Interior*, No. CV-06-1502 AHM (CTx) (C.D. Cal.). The respondent, the Regional Director, agreed to stay the effect of his fee-to-trust decision pending the disposition of that lawsuit.

On September 25, 2006, the Department of the Interior asked the district court to remand this case to the Board in light of newly discovered documents that the BIA had inadvertently omitted from the administrative record transmitted to the Board. Fed. Defs.’ Notice and Mot. For Remand to Dept. of the Interior at 2, *Pres. of Los Olivos v. Dep’t of the Interior*, No. CV-06-1502 AHM (CTx) (C.D. Cal.). The Interior Department informed the district court that the BIA would ask the Board to engage in a “limited reopening of the Plaintiffs’ IBIA appeal in order for the Board to determine whether the excluded documents affect its determination that the Plaintiffs lacked standing to appeal.” *Id.* On October 6, 2006, the court remanded this matter to the Board for the “limited” purpose of “allow[ing] the IBIA to reconsider its determination . . . in light of the documents that were inadvertently omitted.” Remand Order at 1. To underscore the limited nature of the remand, the court directed the Board to complete its review of the supplemental record “at the earliest feasible time.” *Id.*

On November 30, 2006, the BIA forwarded the supplemental record materials to the Board. These materials consist primarily of (i) a wide assortment of comment letters (many of them form letters) concerning the fee-to-trust decision and (ii) architectural and archaeological

reports about the proposed development site. As the BIA observed, “[m]ost of the documents that are now being provided were included in the BIA’s original submission to the IBIA, and are not supplemental,” because “[t]hey were contained in a compact disk” submitted with the original record. Regional Director’s Report Re Procedures on Remand at 4-5 (Nov. 30, 2006). Moreover, because these documents bear little or no relationship to the issue of Appellants’ standing, the BIA noted, upon transmitting them, that “[t]he IBIA may well determine, after reviewing the relatively few supplemental record documents, that no briefing is warranted.” *Id.* at 3.

On February 21, 2007, the Board “allow[ed] briefing on the limited issue of whether, and if so how, the supplemental record warrants reversal of the Board’s decision that Appellants lack standing,” but rejected Appellants’ request to “reopen . . . the issue of Appellants’ standing, without limitation[.]” Feb. 21 Order at 4-5.

ARGUMENT

I. The Board Should Reject, as Procedurally Barred, Any Argument Raised by Appellants That Does Not Relate Specifically to the Supplemental Record.

The district court and this Board have both stressed that this administrative remand is exceedingly narrow: it is “limited” to the “issue of whether, and if so how, the *supplemental record* warrants reversal of the Board’s decision that Appellants lack standing.” Feb. 21 Order at 5 (emphasis added); *accord* Remand Order at 1. Both the district court and the Board have also stressed the importance of resolving this remand as quickly as possible. *See* Remand Order at 1 (directing Board to “attach priority to the matter and . . . issue another order . . . *at the earliest feasible time*”); Feb. 21 Order at 6 (issuing expedited briefing schedule, given that briefing will be “limited to the effect of the supplemental record”). Time is, indeed, of the essence. Given the Regional Director’s consent to a stay while this litigation is pending, every day that passes

during this lengthy review process is a day that the Tribe cannot exercise the sovereign rights authorized by the BIA's fee-to-trust decision, which is now more than two years old.

That delay benefits Appellants, who wish only to maintain the status quo. And they have left no stone unturned in their effort to defer the date on which the fee-to-trust decision takes effect. Appellants' latest gambit is to argue for reopening the entire standing question from scratch. But the Board already rejected that gambit when it denied Appellants' proposal to "reopen and reconsider the issue of [their] standing, without limitation." Feb. 21 Order at 4. Undeterred, Appellants now devote the great majority of their brief to legal arguments that have nothing in particular to do with any supplemental evidence. By and large, these are arguments that Appellants tried and failed to persuade the Board to adopt in 2005. These rehashed arguments are flatly at odds with the limited scope of this remand and should be rejected as such.³

Appellants also hope to exploit this limited remand as an opportunity to introduce a few new standing arguments that likewise have nothing specifically to do with the supplemental

³ The Board found that only two declarants (Jon Bowen and Michele Hinrichs) had constitutional standing (even though it found that they lacked prudential standing), and the association representing Hinrichs (Concerned Citizens) has dropped its appeal. Appellants chide the Board for "ignor[ing] Declarant Ed Hamer," who, they say, claimed that he "will also not be able to compete fairly with the Tribe" because of the Tribe's exemption from certain taxes. Appellants' Br. at 12. This is nonsense: Hamer's declaration claimed no such thing, and it cannot begin to support either standing for Hamer himself or for Appellants. (An association, of course, has standing to bring suit on behalf of its members only if "its members would otherwise have standing to sue in their own right." *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). Occupying just half a page, the declaration contained several conclusory sentences objecting generally to the Tribe's influence on the community. The closest it came to alleging individualized competitive harm was this: "Santa Barbara County would loose [sic] the revenue from these parcels but MOST of all jeopardize loosing [sic] revenue from already established businesses unable to compete with newly established businesses in a tax free zone." Hamer Decl., ¶ 3 (attached to POLO's Response to Mot. to Dismiss (Aug 10, 2005)). But Hamer did not even identify his "business," much less explain why it would be "unable to compete" with businesses on the parcel in question.

record and that they could have made before, on the original record, but did not. The Tribe has identified the most egregious examples in its motion to strike: (i) Appellants' attack on the Tribe's legitimacy, which they have pursued in the teeth of the Board's admonition that "this is neither the proper proceeding nor the proper forum" in which "to pursue an agenda to terminate the Tribe" (Feb. 21 Order at 6), and (ii) Appellants' equal protection challenge to longstanding U.S. policies governing relations with Indian tribes, a challenge that is as spurious on the merits as it is detached from any issue relating to the supplemental record.⁴ The Board should strike these flagrantly improper arguments from Appellants' brief and, in all events, it should dismiss them as procedurally improper.

Another new argument that Appellants improperly seek to introduce on remand is the claim that the Indian Reorganization Act (IRA), 25 U.S.C. §§ 461–479, in its entirety,⁵ rather than just Section 5 of that statute (25 U.S.C. § 465), defines the "zone of interests" for prudential standing purposes.⁶ See Appellants' Br. at 16-22. They have waived this argument, too, because it bears no relation to the supplemental record and because Appellants could have raised it in the

⁴ It is well settled that statutes and regulations which pertain to, and confer benefits solely on, tribes are not unconstitutional. See, e.g., *Washington v. Washington State Commercial Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979) (upholding distinction between tribal and non-tribal applicants for fishing permits). Further, "federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications." *United States v. Antelope*, 430 U.S. 641, 645–46 (1977). Thus, Appellants' claims of violation of any anti-discrimination statutes are also spurious.

⁵ The purpose of the Indian Reorganization Act, 25 U.S.C. §§ 461–479, is "to rehabilitate the Indian's economic life and to give him a chance to develop the initiative destroyed by a century of oppression and paternalism." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 152 (1973).

⁶ "Whether a plaintiff's interest is arguably protected by a statute under the zone-of-interests test for prudential standing is determined by reference to the particular provision of law upon which the plaintiff relies, and not by reference to the overall purpose of the act in question." *Central South Dakota Co-op. Grazing Dist. v. Secretary of Agriculture*, 266 F.3d 889, 896 (8th Cir. 2001).

original round of briefing but did not.⁷ In any event, this new argument is insubstantial on the merits, because Appellants identify no provision that requires the government to account for private non-Indian interests, as opposed to the interests of state and local governments, when deciding whether to confer trust status on fee lands that, like this parcel, are owned entirely by Indians. *Cf.* Appellants' Br. at 18-19 (citing 25 U.S.C. §§ 463 and 463e, which prohibit federal government from nullifying non-Indian ownership interests in land converted into trust for Indians). Here, of course, only the interests of private non-Indians are at issue, given the failure of Santa Barbara County to file a timely appeal. *See* 42 IBIA at 189 n.1.

II. The Supplemental Record Casts No Doubt on the Board's Original Basis for Dismissing This Appeal for Lack of Standing.

Appellants' overwhelming emphasis on issues unrelated to the supplemental record suggests what a review of that record confirms: the supplemental materials have no relevance to the Board's grounds for concluding that Appellants lack appellate standing.

The only items in the supplemental record that Appellants even mention are unsworn and often formulaic "comment letters" relating to the parcel at issue.⁸ Although many of these letters

⁷ *See generally* *Crow Tribe of Montana v. Montana State Director, Bureau of Land Management*, 31 IBIA 16, 27 (1997) (applying waiver bar to arguments not previously raised). In the prior IBIA proceedings, Appellants did not specifically address prudential standing at all. Concerned Citizens—which is no longer an appellant—did address that issue, but confined its prudential standing arguments to NEPA and 25 C.F.R. § 151.

⁸ Many of these comment letters concerning the parcel at issue are not in fact "new," because they were already contained in a compact disk included in the Regional Director's original transmission to the Board. *See* Regional Director's Rep. Re Procedures on Remand 4-5 (Nov. 30, 2006). The BIA also recently transmitted to the Board, along with the supplemental record, additional comment letters concerning unrelated tribal development projects. Those comment letters are not properly part of the record of this proceeding and would be irrelevant even if they were. Moreover, as the BIA explains, "Appellants are simply wrong that the letters demonstrate that the Bureau is in the practice of soliciting comments from community members and groups such as Appellants, or that the Bureau did so in this case. Indeed, a large proportion of the comments are form letters that were copied from newspaper advertisements posted in local

support the Tribe's plans for developing the parcel, Appellants predictably focus on the letters that oppose those plans. Significantly, however, Appellants do *not* claim that any signatory of any letter has suffered individualized injury-in-fact within the zone of interests of a relevant statutory scheme.⁹ Indeed, Appellants identify neither (i) any letter that even claims such an individualized injury nor (ii) any signatory who is a member of either POLO or POSY. Thus, rather than cite these letters for constitutional standing purposes, Appellants cite them only for an abstract legal point about the zone-of-interest test.¹⁰ "The BIA," they argue, "clearly solicited and considered public comment and input from the local community during the application process," and "[i]t is incongruous . . . to find that community group and local citizens' interests are not within the zone contemplated by the statutory scheme when the public was called upon, and did, actively participate in the agency process." Appellants' Br. at 22-23. This "incongruity" argument is untenable for multiple reasons.

As an initial matter, Appellants have waived this argument because they could have made it—like all of their other arguments—during the prior round of briefing before the Board. Specifically, even if the argument had merit, they did not need to see the actual comment letters that were submitted (in some cases, by their own members) in order to contend that "[t]he BIA

newspapers by a citizens group[.]” Regional Director’s Rep. Recommending Procedures on Remand at 8 (Feb. 2, 2007).

⁹ Nor do Appellants attempt to show how any of the individual comment writers have any constitutional standing.

¹⁰ “Although the Board is not bound by the case or controversy requirement of Article III of the U.S. Constitution, as a matter of prudence, the Board generally limits its jurisdiction to cases in which the Appellant can show [constitutional] standing.” 42 IBIA at 192. Appellants suggest in a footnote that “[t]o the extent that the Order Dismissing Appeal appears to require a more demanding evidentiary showing [for standing] than would be required by the district court, the IBIA would be creating impermissible barriers to POLO/POSY’s right to seek review of agency action.” Appellants’ Br. at 3 n.2 (citation omitted). But Appellants do not actually allege that, much less explain how, the Board in fact requires “a more demanding evidentiary showing.” They have thus waived any such argument.

... solicited and considered public comment and input from the local community.” *Id.* Moreover, as the BIA observes, “[m]ost of the documents [in the supplemental record] were included in the BIA’s original submission to the IBIA, and are not supplemental,” because “[t]hey were contained in a compact disk (at Tab 8 of the original record)[.]” Regional Director’s Report Re Procedures on Remand at 4-5 (Nov. 30, 2006). Presumably for these reasons, Appellants do not contend that any omission of materials from the original record somehow prejudiced their ability to make their zone-of-interest argument.

Second, the premise of Appellants’ “incongruity” argument—that the BIA sought and considered public comment on issues the Board deemed outside the zone of interests—is false in any event. As Appellants acknowledge, the BIA solicited comment from the general public only as to the *Environmental Assessment*, not as to the economic effects of the fee-to-trust decision under the IRA.¹¹ This Board addressed the zone-of-interest test only in connection with two declarants claiming *economic* injuries. The Board relied entirely on constitutional standing principles, not zone-of-interest principles, in rejecting the standing of the declarants who claimed environmental injury. These comment letters could not begin to cure that constitutional standing problem unless (among other things) the individual signatories claiming environmental injury satisfied constitutional standing requirements, and, as noted, Appellants do not claim that they do.

¹¹ See Appellants’ Br. at 23. Appellants further note that the BIA distributed the fee-to-trust application to state and local governments and all Southern California tribes. *Id.* It is difficult to discern what Appellants hope to gain from that observation, since BIA did *not* distribute the fee-to-trust application for comment by the private non-Indians who constitute Appellants’ membership. Instead, BIA narrowly circulated the application to state, local, and tribal governments to promote intergovernmental comity and to discharge the federal government’s fiduciary obligation to neighboring Indian tribes.

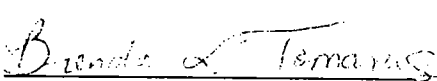
satisfied constitutional standing requirements, and, as noted, Appellants do not claim that they do.

CONCLUSION

The Board should reaffirm its earlier decision rejecting this appeal on standing grounds, and it should find that Appellants have waived any legal arguments that they could have raised, but did not raise, in the earlier round of briefing.

Respectfully submitted,

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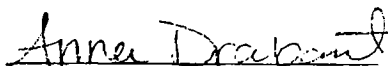
The undersigned certifies that on this 2nd day of April 2007, a true and correct copy of the Brief for the Santa Ynez Band of Chumash Mission Indians Concerning the Supplemental Record was placed in first-class mail, postage prepaid, to:

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