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11 IN THE UNITED STATES DISTRICT COURT
 12 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 13 WESTERN DIVISION

14 PRESERVATION OF LOS OLIVOS and
 15 PRESERVATION OF SANTA YNEZ,

16 Plaintiffs,

17 vs.

18 UNITED STATES DEPARTMENT OF
 19 THE INTERIOR, DIRK KEMPTHORNE,
 20 in his official capacity as Secretary,
 21 BUREAU OF INDIAN AFFAIRS, by and
 through Pacific Regional Director,
 22 CLAYTON GREGORY, in his official
 23 capacity, and the INTERIOR BOARD OF
 24 INDIAN APPEALS

25 Defendants

26 THE SANTA YNEZ BAND OF MISSION
 27 INDIANS

28 Defendants – Intervenor

Case No.: CV-06-1502 AHM (CTx)

**FEDERAL DEFENDANTS'
 REPLY TO PLAINTIFF'S
 RESPONSE TO MOTION FOR
 REMAND TO DEPARTMENT
 OF THE INTERIOR**

**Date: September 25, 2006
 Time: 10:00 am**

Hon. A. Howard Matz

1
2 Federal Defendants hereby reply in support of their motion for a voluntary
3 remand of this matter back to the Interior Department. As explained in
4 Defendants' memorandum in support of remand, in the process of compiling the
5 Administrative Record of the challenged agency decision for certification and
6 lodging with this Court, Defendants discovered that the record before the Interior
7 Board of Indian Appeals (IBIA or Board) did not include all documents that were
8 before the decision maker, the Pacific Regional Director of the Bureau of Indian
9 Affairs (BIA).

10 Contrary to Plaintiffs' assertions in their Response, Defendants' confession
11 of error and request for a remand to remedy the mistake in the administrative
12 appeal process, are well within the scope of the Administrative Procedure Act
13 (APA), 5 U.S.C. §§ 701 *et seq.*, and case law interpreting and applying that Act.
14 Plaintiffs' proposal should be rejected because it would protract the process for
15 administrative correction and unnecessarily burden this Court. As explained
16 below, there is no reason for the Court to condition the requested remand or to
17 retain jurisdiction as suggested by Plaintiffs. There also is no basis for awarding
18 attorneys fees or costs at this juncture.

19 ARGUMENT

20 A. A Voluntary Remand Fully Comports With The APA

21 The starting point for consideration of Defendants' motion is the
22 presumption of regularity that attaches to the actions of government agencies. *See*
23 *U.S. Postal Service v. Gregory*, 534 U.S. 1, 10 (2001) (*citing United States v.*
24 *Chemical Foundation, Inc.*, 272 U.S. 1, 14-15 (1926)). Here, the agency has acted
25 in good faith by identifying, and then promptly informing the parties and the Court
26 of its error. *See SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed.Cir.
27 2001) (discussing circumstances warranting remands to agencies and noting that
28 "if the agency's concern is substantial and legitimate, a remand is usually

1 appropriate"); *Corus Staal BV v. U.S. Dept. of Commerce*, 259 F.Supp.2d 1253,
2 1257 (US CIT 2003) (noting appropriateness of a voluntary remand request where
3 an agency has identified error as opposed to a mere change of policy).

4 The discovery of error was openly discussed with counsel for Plaintiffs and
5 the Intervenor Tribe with the goal of achieving the most expeditious correction in
6 conformance with the APA. Defendants' remand motion not only allows for a
7 proper administrative appeal process, it ensures that any district court review will
8 conform to the scope of review provided by the APA.¹

9 The task of a court reviewing agency action under the APA's arbitrary and
10 capricious standard is to determine whether the decision was based on a
11 consideration of the relevant factors and whether the agency made a clear error of
12 judgment. "In making the foregoing determinations, the court shall review the
13 whole record or those parts cited by a party ..." 5 U.S.C. § 706. When
14 administrative record errors are identified, the normal course is for the court to
15 remand the matter back to the agency for correction. Where, as here, the appeal
16 within the agency took place upon an incomplete record, remand will allow for a
17 proper exhaustion of administrative remedies before district court review,
18 assuming it is still sought, takes place. Any other course would put the Court in
19 the untenable position of substituting its judgment for that of the Board respecting
20 the significance, if any, of those documents missing from the record before the
21 Board. *See, e.g., Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980) ("When
22

23 ¹ Plaintiffs' assertion that Interior must first provide more detail regarding the
24 documents that were not before the Board confuses the matter as this is precisely
25 what needs to occur within the agency in the first instance. It is premature to
26 provide documents to Plaintiffs until after certification of the full record by the
27 BIA, which will be done after the IBIA reopens the proceeding in accordance with
28 the agency's procedures. Plaintiffs' further suggestion that Interior provide
explication of how the error occurred would unnecessarily involve this Court in
matters of internal agency process which, in any event, are irrelevant to the need
for remand to rectify inadvertent error.

1 a reviewing court considers evidence that was not before the agency, it inevitably
2 leads the reviewing court to substitute its own judgment for that of the agency.”);
3 *Camp v. Pitts*, 411 U.S. 138, 142 (1973) (under the APA, “the focal point for
4 judicial review should be the administrative record already in existence, not some
5 new record made initially in the reviewing court”). If an agency fails to file the
6 entire record (which would be the case if Defendants simply filed the record before
7 the Board), the court should remand the matter to the administrative agency for
8 correction and further consideration. *Florida Power & Light Co. v. Lorion*, 470
9 U.S. 729, 743-44 (1985) (where the administrative record is discovered to be
10 inadequate for judicial review “the proper course, except in rare circumstances is to
11 remand to the agency for additional explanation or investigation”); *Camp* 411 U.S.
12 at 143. Thus, Plaintiffs’ contention that Defendants’ motion is “remarkable” and
13 “perhaps unprecedented,” ignores core principles of record review under the APA.

14 **B. There Is No Basis For Retention of Jurisdiction**

15 Plaintiffs’ suggestion that the Court retain jurisdiction over this matter
16 during the course of the remand is similarly ill-conceived. Judicial oversight of an
17 agency’s administrative process is not necessary where, as here, the agency has
18 confessed inadvertent error and proposed corrective steps that will save, rather than
19 waste judicial resources, and will adhere to the agency’s established policies and
20 regulations, the substance of which is well understood by the Plaintiffs.

21 Plaintiffs’ principal contention in support of retained jurisdiction is that
22 Interior’s motion for remand is “vague as to the nature of proposed proceedings
23 upon remand.” (Pls. Resp. at 8.) Plaintiffs’ Response, however, demonstrates
24 their fundamental understanding of the administrative proceedings upon remand.
25 In their own words, Plaintiffs explain that the BIA would ask the IBIA for a
26 “limited reopening [of the administrative appeal] to file the omitted documents
27 and request the IBIA to reconsider its earlier standing ruling.” (Pls. Resp. at 8;
28 see Defs. Mem. at 2.) Plaintiffs also acknowledge that, if the IBIA confirms its

1 original order of dismissal, "then the BIA will issue a new 30-day notice of
2 determination to acquire the land in trust, in turn allowing for another appeal to
3 federal court." (Pls. Resp. at 9.) Moreover, Plaintiffs recognize that the effect of a
4 remand would be to preclude Interior from acquiring the land in trust until after
5 issuance of the new 30-day notice. (Pls. Resp. at 7.)²

6 Plaintiffs do not challenge the appropriateness of the process proposed by
7 Interior to correct the underlying administrative error. Indeed, Plaintiffs concede
8 that this course of action is consistent with Interior's regulations governing tribal
9 applications to have land taken into trust by the United States. (Pls. Resp. at 9.)
10 Because they clearly understand Interior's administrative process following
11 remand and how that process relates to the land-into-trust program, Plaintiffs'
12 claim that the Department's motion for remand is vague is without merit. Indeed,
13 as demonstrated by Attachment A to this Reply, the corrective process already is
14 underway. (See attached Memorandum from BIA's Central Office to the Pacific
15 Regional Office outlining the administrative process following remand.)

16 Additionally, Plaintiffs argue that the Court should retain jurisdiction
17 following remand in order to "avoid duplicative federal actions and assure the
18 regularity and integrity of the proceedings on remand . . ." (Pls. Resp. at 9.)
19 Contrary to Plaintiffs' suggestion, remand would not lead to redundant federal
20 actions. Assuming, *arguendo*, that following remand proceedings the Plaintiffs
21 determined to pursue a second appeal to district court, they would need only to file
22 a new complaint. The administrative error was discovered before any substantive
23 consideration by this Court took place. Thus, Plaintiffs would not face the
24 prospect of re-litigation of any issue.

25
26
27 ² Assuming that another district court action ensues, Federal Defendants
28 would adhere to the usual practice of entering into an agreement to self-stay trust
acquisition of the land at issue.

1 Further, Plaintiffs have not demonstrated a need for this Court to referee the
2 agency to “assure regularity and integrity” in the administrative process upon
3 remand. Apart from Interior’s confession of inadvertent error, Plaintiffs point to
4 no irregularity in Interior’s administrative process. In addition, as previously
5 noted, Plaintiffs acknowledge that the post-remand process outlined by Interior
6 adheres to the agency’s established policies and regulations governing tribal fee-to-
7 trust applications. If, as Plaintiffs seem to imply, there is a risk of irregularity
8 following remand, any irregularity could be raised to a reviewing court. In sum,
9 Plaintiffs have not established any need for this Court to referee Interior’s
10 administrative process upon remand.

11 C. Plaintiffs Are Not Entitled To Fees And Costs

12 Plaintiffs’ Response asks this Court to condition the voluntary remand on
13 reimbursement under the Equal Access to Justice Act (“EAJA”), 28 U.S.C. §
14 2412(d), of fees and costs incurred to date. Plaintiffs’ request is unsupported and
15 premature. As a threshold matter, these plaintiffs have not established their
16 eligibility under EAJA, 28 U.S.C. § 2412(d)(2)(B)(i), (ii). *See, e.g., Love v. Reilly*,
17 924 F.2d 1492, 1494 (9th Cir. 1991) (“The party seeking fees has the burden of
18 establishing its eligibility”) (citation omitted). More fundamentally, however,
19 Plaintiffs cannot claim “prevailing parties” status because there has been no
20 judgment on their appeal from the Board’s decision. EAJA provides that, in a case
21 for judicial review of agency action (such as this), a “prevailing party” may be
22 awarded “fees and other expenses,” unless the position of the United States was
23 “substantially justified.” 28 U.S.C. § 2412(d)(1)(A) (2006). An application for
24 such fees and expenses must be submitted within 30 days of “final judgment.” *Id.*
25 § 2812(d)(1)(B). Under EAJA, a “final judgment” means a judgment that is final
26 and not appealable.” *Id.* § 2412(d)(2)(G). *See Auke Bay Concerned Citizen’s*
27 *Advisory Council v. Marsh*, 779 F.2d 1391, 1393 (9th Cir. 1986) (a pre-final
28

1 judgment award of fees is appropriate only where the plaintiff can show that it has
2 "prevailed" by obtaining relief that is final).

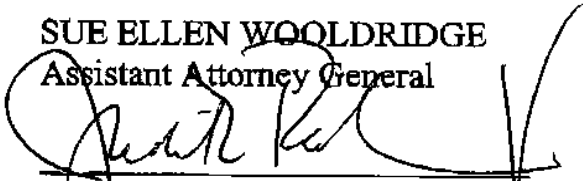
3 Even assuming that the Court could find adequate finality such that Plaintiffs
4 could qualify as "prevailing parties," a fees award still would be unwarranted.
5 "EAJA is not an automatic fee-shifting statute in favor of litigants who prevail
6 against the government." *Zapon v. United States Dep't of Justice*, 53 F.3d 283,
7 284 (9th Cir. 1995); Fees will not be awarded if the government's position was
8 "substantially justified," which means "'justified in substance or in the main'—that
9 is, justified to a degree that could satisfy a reasonable person." *Pierce v.*
10 *Underwood*, 487 U.S. 552, 565 (1988). Plainly, Defendants' position that they
11 need to correct their error in the administrative appeal process is substantially
12 justified.

14 CONCLUSION

15 For the above-stated reasons, Defendants respectfully request that their
16 motion for an immediate voluntary remand be granted, and that Plaintiffs' contrary
17 proposal be rejected.

18 DATED: September 18, 2006

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United States Department of the Interior

BUREAU OF INDIAN AFFAIRS
Washington, D.C. 20240

SEP 18 2006

IN REPLY REFER TO:

To: Director, Pacific Region, Bureau of Indian Affairs

From: Director, Bureau of Indian Affairs

Re: Appeal of decision to acquire 6.9 acres in trust for Santa Ynez Band of Mission Indians, *Preservation of Los Olivos et al. v. Department of the Interior et al.*, No. CV-06-1502 AHM (CTx) (C.D. Cal.)

As you know, as a result of an error in the appeal proceeding before the Interior Board of Indian Appeals (IBIA) in the above-referenced matter, which caused the IBIA to render a decision based on an incomplete Administrative Record, the Department has moved the district court to remand the matter to the Department in order to correct the error. The Pacific Regional Office should work to compile the complete Administrative Record in an orderly and expeditious manner. The Solicitor's Office will advise the Pacific Regional Office in this regard.

Once the complete Administrative Record has been compiled and after the district court orders remand to the Department (assuming that the court grants the Department's motion), you shall request the IBIA to reopen the matter. The request shall be for a limited reopening to allow the IBIA to reconsider its determination that the plaintiffs lack standing to challenge the Bureau's decision to acquire the 6.9 acres in trust, in light of the documents that were inadvertently omitted from the Administrative Record that was certified to the IBIA. While the Administrative Record upon which you made your decision was complete, the record was forwarded inadvertently to the IBIA with some documents not attached. As such, you are not obligated to reconsider this matter. It is important, however, that the IBIA reviews the same evidence that was before you when you made your determination.

Compiling and certifying a complete Administrative Record is fundamental to an Agency's decision-making process. The legal standard for review of an Agency's decision is whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), and this determination is based upon the Administrative Record. An incomplete Administrative Record may impact a court's ability to review a challenged Agency decision and delay implementation of the decision, as this case exemplifies. As you know, pursuant to 25 C.F.R. § 151.12(b), if the court orders remand the earliest that the Department would be able to acquire the land in trust is after the close of the 30-day period for filing appeals of a notice of decision to acquire land in trust. Please review and amend your Office's process for compiling and certifying Administrative Records as necessary to avoid such mistakes and resulting delay in the future.

Please contact Daniel Shillito, Regional Solicitor, Pacific Southwest Regional Office, at 916-978-5671 or Thomas Blaser, Attorney-Advisor, Office of the Solicitor, Division of Indian Affairs, at 202-208-5811 if you have any questions.

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 28 Defendants – Intervenor

Case No.: CV-06-1502 AHM (CTx)
CERTIFICATE OF SERVICE

Date: September 25, 2006
Time: 10:00 am

Hon. A. Howard Matz

PROOF OF SERVICE BY MAILING

I, Kevin Mann, hereby certify and declare:

1. I am over the age of 18 years and am not a party to this case.

2. My business address is United States Department of Justice, 301 Howard Street, Suite 1050, San Francisco, CA 94105.

3. I am familiar with my employer's mail collection and processing practices; know that said mail is collected and deposited with the United States Postal Service on the same day it is deposited in interoffice mail; and know that postage thereon is fully prepaid.

4. Following said practice, on September 18, 2006, I served true copies of the attached documents entitled:

Federal Defendants' Reply to Plaintiff's Response to Motion for Remand to Department of the Interior;

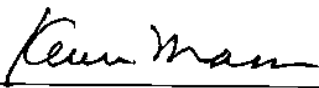
by placing them in addressed sealed envelopes with postage fully prepaid, and depositing them in regularly maintained interoffice mail to the following:

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I declare under the penalty of perjury that the foregoing is true and correct.

Executed on September 18, 2006, at San Francisco, California.



Kevin Mann