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15 UNITED STATES DEPARTMENT OF THE INTERIOR
16 OFFICE OF HEARINGS AND APPEALS
17 INTERIOR BOARD OF INDIAN APPEALS

18 SANTA YNEZ CONCERNED
19 CITIZENS, PRESERVATION OF LOS
20 OLIVOS, PRESERVATION OF
21 SANTA YNEZ, and WOMEN'S
22 ENVIRONMENTAL WATCH OF
23 THE SANTA YNEZ VALLEY

Appellants,

vs.

24 PACIFIC REGIONAL DIRECTOR,
25 BUREAU OF INDIAN AFFAIRS

Appellee,

**REAL PARTY IN INTEREST SANTA
YNEZ BAND OF CHUMASH
MISSION INDIANS' REPLY TO
APPELLANTS', POLO/POSY,
RESPONSE TO MOTION TO
DISMISS AND ORDER OF JULY 11,
2005**

Docket No. IBIA 05-50-A

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1 **I. INTRODUCTION**

2 Real Party in Interest, the Santa Ynez Band of Chumash Mission Indians (“Tribe”),
3 hereby files this Reply to Appellants’, Preservation of Los Olivos (POLO) and Preservation of
4 Santa Ynez (POSY), Response to Motion to Dismiss and Order of July 11, 2005 (“Response”).

5 Appellants are two community associations who are appealing the Regional Director’s
6 January 14, 2005 decision to take 6.9 acres of land into trust for the benefit of the Santa Ynez
7 Band of Chumash Indians (“Tribe”) in Santa Barbara County, California.

8 Given what appears to be extensive discussion of substantive issues in Appellants’
9 Response, it is unclear whether Appellants intended this brief to also address issues on the merits
10 as well (note several references to the arbitrary and capricious standard of review). Nevertheless,
11 given the Board’s order of July 11, 2005, in this Brief the Tribe addresses the standing issue only,
12 and reserves its rights to address any substantive issues raised by Appellants at a later date should
13 the Board determine that Appellants do have standing.

14 **II. OBJECTIONS TO APPELLANTS’ SUBMITTED DECLARATIONS AND**
15 **EXHIBIT**

16 Appellants filed ten declarations in support of their brief. Only one of those declarants
17 has alleged that he is a member of one of the Appellant associations – Doug Herthel. Mr. Herthel
18 testifies that he is President of POLO, however none of the other declarants purport to be
19 members of either POLO or POSY. Appellants seem to concede this point as well as they note
20 that the declarations are from “members of POLO/POSY and neighboring residents and business
21 owners.” (Response, 3). Moreover, like the inadmissible declarations of the others submitted, the
22 majority of Mr. Herthel’s testimony is filled with untrue allegations concerning the Tribe, its
23 members and its gaming operations which have no bearing on the appeal at hand¹.

24 Appellants seem to fail to understand that they bear the burden of proof to establish that

25
26 ¹ The Tribe believes that the Board understands that the Tribe would like to respond to each and every inaccurate allegation, however, it will not
27 waste the Board’s time doing so since only one of the declarations is admissible and the majority of the statements in that declaration are irrelevant
28 to the instant question of standing. However, for evidence refuting these allegations, the Tribe would refer the Board to the administrative record
in the State administrative appeal proceedings concerning the Tribe’s liquor license for its fine dining restaurant. Most of the rhetoric contained in
these declarations is identical to that submitted in the State appeal and has been adequately refuted by the Tribe. (See *Clinton Alexander v. Santa
Ynez Band of Mission Indians and Department of Alcoholic Beverage Control*, AB-8258 (Before the Alcoholic Beverage Control Appeals Board))

1 the Appellant associations – POLO and POSY have standing to pursue the instant appeal. Such
2 standing cannot be established based upon the evidence of members of the general public who are
3 not associated with either organization. (See Hunt v. Washington State Apple Advertising
4 Commission 432 U.S. 333, 343 (1977) – the first prong of the association standing test is that the
5 association’s “members would otherwise have standing to sue in their own right.”). The Tribe
6 therefore objects to consideration of any testimony by non-association members in determining
7 whether the Appellants have standing to pursue the instant appeal.

8 In addition, while the Tribe is unsure how Appellants’ Exhibit C relates to its argument
9 concerning a gas spill since there is nothing in Exhibit C which addresses either that spill in
10 particular or hazardous waste in general, the Tribe is nonetheless compelled to object to its
11 admission as evidence since such a letter was never sent by the County, as evidenced by the lack
12 of any signature. Further, the alleged letter is irrelevant to this appeal and the issue of Appellants’
13 standing as the letter purports to relate to a different fee-to-trust application of the Tribe.

14 **III. CITY OF SHERRILL IS NOT RELEVANT TO APPELLANTS’ STANDING**

15 Appellants seem to believe that the recently decided Supreme Court case of the City of
16 Sherrill v. Oneida Indian Nation somehow has relevance to and bearing on their ability to
17 establish standing in this appeal. (City of Sherrill v. Oneida Indian Nation, 125 S.Ct 1478
18 (2005)). The Tribe is not sure of the exact intent of Appellants’ argument with regard to this
19 case, however, it appears that Appellants are arguing that the case has somehow abrogated or
20 altered the standing requirements under Lujan. As the Board is aware, the City of Sherrill case
21 addressed whether the Oneida Nation was able to claim tax immunity on lands within its
22 reservation boundaries which it was able to repurchase, but were not held in trust. It had been the
23 argument of the Nation that because the lands had been sold in violation of the Nonintercourse
24 Act, once it regained title to the lands that title merged with its aboriginal title to the lands. The
25 Nation argued that the property should therefore be considered Indian lands and consequently not
26 subject to state or local jurisdiction. While the Supreme Court held that the title had not merged
27 and therefore the Oneida Nation was not immune from the local taxes, it did point out that the
28 tribe had a method available to attain that tax exempt status for the land – via placing the land into

1 trust through the fee-to-trust acquisition process under 25 U.S.C. §465. In fact, contrary to what
2 Appellants brief seems to imply, the Supreme Court appeared to reaffirm the validity of the
3 statute and the fee-to-trust process.

4 Other than the validation of the process, the Tribe is unable to find any discussion which
5 would help Appellants with their standing argument in this matter. Unlike the Oneida Nation, the
6 Tribe has submitted an application to the federal government to take the land into trust pursuant
7 to 25 U.S.C. §465. Further, the party to the matter in the City of Sherrill was the City itself, and
8 not individual citizens or community organizations as we are dealing with in this matter. While
9 this Board has generally held that local governments whose jurisdictions border an Indian tribe's
10 reservation generally have standing to maintain challenges to fee-to-trust acquisitions, the same is
11 not true for non-governmental entities such as individuals and community associations. (See e.g.,
12 Oklahoma Petroleum Marketers Association v. Acting Muskogee Area Director, 35 IBIA 285,
13 287 (2000); Evitt v. Acting Pacific Regional Director, 38 IBIA 77 (2002); Friends of East Willits
14 Valley v. Acting Pacific Regional Direct, Bureau of Indian Affairs, 37 IBIA 213, 214 (2002)).

15 It is therefore the Tribe's contention that the case of City of Sherrill cited by the
16 Appellants is inapplicable to the issue of whether the associations have standing to challenge the
17 Regional Director's decision to take the subject property into trust.

18 **IV. APPELLANTS HAVE FAILED TO DEMONSTRATE STANDING TO**
19 **CHALLENGE THE REGIONAL DIRECTOR'S DECISION**

20 The Tribe again notes that the crux of Appellants' complaints seems to be that they do not
21 like the fee-to trust process in and of itself. (See e.g., Response, 10 – "The threat that this fee to
22 trust process can be treated as an 'annexation' is an injury n fact"). Appellants again complain
23 that they object to the trust acquisition because it will take the land out of state and local
24 jurisdiction and control. (See e.g., Response, 2,3,4). The Tribe refers the Board to its Response to
25 the Opposition of the Concerned Citizens for its more detailed argument regarding the inability of
26 appellants to establish injury based upon a generalized objection of the fee-to-trust process.

27 ///

28 ///

1 **A. The three-part test of Lujan is the applicable standard for standing**

2 An appeal of the decision of the BIA can only be brought by individuals who possess
3 legal standing. To have standing, Appellants must meet certain legal requirements established by
4 both this Board and the Supreme Court. Appellants seem to grudgingly concede that Lujan is the
5 applicable standard. (Lujan v. Defenders of Wildlife 504 U.S. 555 (1992)).

6 Under Lujan, Appellants bear the burden of establishing that they are entitled to standing.
7 (Lujan, 504 U.S. at 555-556). Further, the Board is not expected to imagine injury sufficient to
8 meet the standing requirements, rather Appellants bear the burden of ‘clearly and specifically
9 set[ting] forth facts sufficient to satisfy [] standing requirements.’ (Miccosukee Tribe of Indians
10 of Florida v. Florida State Athletic Commission, 226 F.3d 1226, 1229-1230 (11th Cir. 2000)).

11 **B. Appellants do not Satisfy any of the Three Requirements for Standing**

12 **1. Injury in Fact**

13 Appellants are unable to demonstrate a legally protected interest that is particularized and
14 concrete. The Supreme Court has held that to be “particularized,” the injury must affect the
15 appellant “in a *personal* and *individual way*.” (Lujan, 504 U.S. at 560). Thus, Appellants must
16 be able to show that its members “would thereby be directly affected apart from the members’
17 special interest in the subject.” (Id. at 556). Further, Appellants cannot raise only a “generally
18 available grievance” about a government action where the grievance claims only harm to every
19 citizen’s interest in the proper application of the law, because any relief available for such
20 grievance does not benefit them any more directly than the public at large. (Id. at 574).

21 In their Response, Appellants allege that the Regional Director’s decision will cause them
22 “injury in fact” because the placement of the Tribe’s land into trust will (i) impact their private
23 property values and use and quiet enjoyment of their properties; (ii) create a checkerboard or
24 piecemeal jurisdiction of alternating state and tribal jurisdiction; (iii) result in loss in property tax
25 revenue and sales tax revenue which will affect their taxes; (iv) give the Tribe an unfair
26 competitive advantage; (v) allow the Tribe to alter the character of the area; (vi) impact the local
27 drinking water supply if the Tribe pumps groundwater from the local aquifer; and (vii) permit the
28 Tribe to develop on allegedly gasoline and MTBE contaminated lands. While Appellants’

1 arguments often go into great detail on some of the substantive issues, they fail to make any
2 specific allegations regarding the alleged injuries. (Response, 3 – “if the 6.9 acres of land are
3 placed into trust the impact to their private property values and use and enjoyment of their
4 properties will cause injury in fact.”) The one and only declaration submitted by a
5 POLO/POSY² member merely reiterates the statements made in Appellants’ Response and fails
6 to state any facts to demonstrate how the Regional Director’s decision effects him or his
7 organization in a concrete and particularized way.

8 The Tribe has already addressed many of these alleged injuries in its Response to the
9 Concerned Citizens Opposition. (See discussion regarding aesthetic/health issues and economic
10 injury). These Appellants have provided no new assertions or allegations which are concrete and
11 particularized with respect to the alleged loss of use and enjoyment of their property or with
12 respect to unfair competitive business advantage by the Tribe. Mr. Herthel does not make any
13 specific allegations regarding aesthetics, public services or economic injury which are personal
14 or individualized. (See Herthel ¶6,8,13) For instance, while Mr. Herthel notes that the Tribe is
15 entitled to use local public services despite the fact that tribal property is exempt from local
16 taxes, he fails to assert any personal injury arising from that fact, much less tie this assertion to
17 the challenged action of the Regional Director approving the Tribe’s application to bring
18 property into trust.

19 With respect to the generally alleged injuries of loss of taxes and loss of local
20 jurisdiction, the Tribe questions whether Appellants are the proper parties to bring such claims.
21 The Code of Federal Regulations, 25 C.F.R. §151.10 requires notice to state and local
22 governments having regulatory jurisdiction over the land to be acquired. The state or local
23 government may comment as to the acquisition’s potential impacts on regulatory jurisdiction,
24 real property taxes and special assessments. (25 C.F.R. §151.10(e) and (f))³. Such comments are
25 sought from the state and local governments because those are the bodies that have the power

26
27 ² As with the Women’s Environmental Watch, specific allegations from POSY or its members are conspicuously lacking.

28 ³ While the BIA must consider the loss of taxes actually assessed, it need not consider speculative loss. (*Avoyelles Parish, Louisiana v. Eastern Area Director*, 34 IBIA 149, 154-155 (1999)). Further, while the BIA must consider jurisdictional issues and potential conflicts of land use, it need not resolve them. *Id.* at 156.

1 and right to regulate and tax properties within their jurisdictions. If there is “harm” from loss of
2 tax revenues or jurisdiction, it is a harm to the local governments, not its citizens. “That a party
3 may indirectly benefit from asserting the rights of a third party will not suffice to confer
4 standing.” (City of Roseville v. Norton, 219 F.Supp.2d 130 (D.D.C. 2002)). Appellants thus
5 cannot attempt to obtain standing through alleging the purported injuries of local governments.

6 Appellants dispute whether the Tribe has sufficient water rights if it chooses the
7 alternative to provide water through on-site wells. Once again, Appellants fail to set forth any
8 specific allegations which would show a concrete and particularized injury. Moreover, such
9 assertions are purely speculative since the Tribe has stated that the preferred alternative is to
10 receive water services from the local water district. (EA, 4-2). Appellants have thus failed to
11 state an injury in fact which would be either actual or imminent or personal and individual to
12 Appellants’ members as opposed to the general public at large.

13 Finally,⁴ Appellants spend a great deal of time discussing a gas spill on property not
14 even owned by the Tribe, and there appears to be no allegations that the spill was somehow
15 caused by the Tribe.⁵ Further, Appellants appear to concede that the Tribe’s property is not
16 currently affected by the spill. (Response, 11- the gas spill is “heading straight for the Chumash
17 reservation.”) The Tribe therefore fails to see how the speculation that the gas spill might affect
18 the Tribe’s property somehow produces an injury to Appellants. It is in neither the Tribe’s nor
19 the federal governments’ interest to hold title to contaminated property.⁶ In any event,
20 Appellants have failed to establish any injury in fact which is concrete and particularized, and
21 does not apply to the population as a whole, deriving from their allegations regarding the gas
22 spill.

23 While Appellants’ Response discusses various substantive allegations at length,

24 ⁴ The Tribe does not believe it is necessary to address the argument made at page 9 of Appellants’ Response as it does not appear to have any
25 relevance to the standing issue.

26 ⁵ The Tribe notes that Appellants make reference to 25 C.F.R. §151.11 in its argument, but assumes that this is either mere oversight or a simple
27 misunderstanding of the Regulations as 25 C.F.R. §151.11 pertains only to off-reservation acquisitions and the Tribe’s application in the instant
28 matter is considered on-reservation.

⁶ The Tribe was aware of the contamination of the gas station property and had both a Phase I Site Assessment performed at its property, as well
as a subsequent follow-up site assessment. (EA, Appendix D) Further, the Bureau is required to conduct site assessments to determine the
potential for a parcel of land to be contaminated by hazardous substances. (25 C.F.R. §151.10(h)). The BIA has complied with this requirement.
(See Notice of Decision, 10).

1 Appellants discussion of these alleged injuries, as well as the brief mentions of the other alleged
2 injuries, fails to show how any of the claimed injuries will affect the Appellant associations or
3 their members in anyway different than that of any other resident in the community. Thus,
4 Appellants have failed to demonstrate any particularized and concrete injury that would affect
5 the Appellant associations or their members in a personal and individual way and which would
6 not be considered a generally available grievance. (Lujan, 504 U.S. at 574).

7 **2. Causal Connection**

8 In addition to being able to allege a particularized injury, an appellant is also required to
9 show a causal connection between the injury alleged and the action complained of. (Lujan, 504
10 U.S. at 560; Friends of East Willits Valley, 37 IBIA at 215; See also, Evitt, 38 IBIA at 80).

11 Appellants must show that the trust acquisition decision itself, “rather than the independent
12 action of a third party not before the [Board], will cause the injuries they allege.” (Evitt, 38 IBIA
13 at 80).

14 Appellants fail to make any argument showing that there is a causal connection between
15 their alleged injuries and the decision of the Regional Director to approve the Tribe’s application
16 other than the claim that “but for the approval of the application to place the lands into trust, the
17 members of POLO/POSY would not be injured.”

18 The environmental and economic impacts which Appellants allege, for example, while
19 not particularized to Appellants themselves, could not be said to arise from the trust acquisition
20 itself, but rather from the intended use of the property after the trust acquisition. The intended
21 use could still be implemented by the Tribe regardless of the status of the property⁷. (Citizen’s
22 for Safety and Environment v. Acting Northwest Regional Director, 40 IBIA 87, 93-94 (2004))
23 (where the intended use of the property is not dependent upon the land’s trust status, there is no
24 causal connection between the alleged injury and the conduct complained of).

25 In the matter of Evitt, the Board found that the individual appellants’ alleged injuries of
26 property devaluation, traffic congestion, and water pipeline impacts, among others failed to

27 ⁷ See also the Tribe’s discussion regarding the lack of causal link between Concerned Citizens’ allegations of aesthetic, health and economic
28 injuries in its Response to the Opposition of the Concerned Citizens. Nothing Appellants have cited in their brief show that they have any alleged
injuries which differ in kind or magnitude from those alleged by the Concerned Citizens.

1 establish a causal connection between the Regional Director's action and the alleged injuries
2 because the Tribe was able to proceed with its development plans under State and County law,
3 even if the land were not taken into trust. (Evitt, 38 IBIA at 81). Further, the Board found that
4 under the principals of Lujan, the tribe itself was a third party with authority to take action
5 independent of the BIA and thus the development could proceed with or without BIA approval
6 and without being subject to review by the Board itself.

7 That Appellants' alleged injuries do not arise as a result of the Regional Director's
8 decision to take the land into trust, rather than a third party's actions, is highlighted by their
9 argument concerning the gas contaminated property which is near the Tribe's property. Neither
10 the BIA nor the Tribe have any ability or responsibility to address off-site contamination. (See
11 Response, 9 -Appellants note that the State has taken jurisdiction over the gas spill). Therefore
12 any complained of injuries due to the contamination are not a result of either the Regional
13 Director's decision to accept the property in trust or placing the property into trust. Likewise, the
14 fact that the Tribe has sufficient Winters' rights to utilize groundwater for its project if it so
15 chooses is in no way dependent upon the property being held in trust.

16 The Tribe has stated that it wants the property under its own jurisdiction because it
17 intends to preserve a Chumash village site as well as build a cultural museum/commercial
18 facility on the portions of the property which do not contain the cultural site. However, neither
19 preservation of its cultural resources nor the planned museum and retail center require the land to
20 be held in trust.⁸ Thus, even if Appellants had not failed to meet the first elemental standing
21 requirement, they would fail to meet the second elemental requirement because they are unable
22 to show any actual causation link between the Regional Director's decision to take the land into
23 trust and the alleged injuries.

24 3. Redressability

25 The final element in the test for standing requires an appellant to show that the injury
26 would be redressed by a favorable decision. (Lujan, 504 U.S. at 561). As with causation,
27 Appellants fail to allege any injuries which would be redressable by a favorable decision (i.e.,

28 ⁸ As the application notes, the current zoning of the property is commercial-highway.

1 one in which the Regional Director decides not to take the property into trust) or to even attempt
2 to argue that such alleged injuries are redressable by a favorable decision other than to make a
3 blanket statement. (Response, 11- "A reversal of the decision of the Area Director would be a
4 favorable decision removing the injuries.")

5 Appellants alleged injuries do not arise out of the decision itself to take the property into
6 trust, but rather arise either out of the proposed use of the property, which is not dependent on
7 trust status, or upon an alleged failure of the process for making the determination. Thus,
8 Appellants' allegations are not redressable because they arise out of either a generalized
9 objection to the fee-to-trust process as a whole or the planned development on the property
10 which the Tribe would be able to proceed with whether or not the property was in trust.

11 Where the Tribe, rather than the BIA, makes decisions regarding the use of a property,
12 and where such decisions are not controlled by the trust status of the land, a determination not to
13 take the land into trust would not redress the appellant's alleged injuries. (See Evitt, 38 IBIA at
14 83; Citizens for Safety and Environment, 40 IBIA at 94). As stated above, the Tribe's ability to
15 address off-site contamination is not controlled by whether its property is in trust. Further, the
16 Tribe's intended use of the property is not controlled by the trust status, nor are its Winters'
17 rights. Thus, a decision to not take the land into trust would not redress Appellants' alleged
18 injuries.

19 As with the previous elements, even if Appellants had not failed to meet the first two
20 elemental standing requirements, they would fail to meet the final elemental requirement because
21 they are unable to show that the injuries are redressable by a favorable opinion.

22 For all of the foregoing reasons, it is clear that Appellants fail to meet any of the elements
23 required to establish standing and the Board is respectfully requested to therefore dismiss their
24 appeal.

25 **C. Appellants do not claim to be within the zone of interests of the applicable**
26 **statute**

27 In addition to the three-part test established by the Board and the Supreme Court, the
28 Board may look to whether an appellant has established prudential standing by showing that it

1 falls within the zone of interests that the statutory provision at issue was intended to protect.
2 (See, e.g. State of Utah v. Acting Phoenix Area Director, 32 IBIA 169, 176 (1998)). Where an
3 appellant has failed to establish constitutional standing, however, it cannot thereby establish
4 standing through the prudential requirements. (Crow Tribe of Indians v. Campbell Farming
5 Corporation 828 F. Supp. 1468, 1477 (D. Mont. 1992)).

6 Like the Concerned Citizens, Appellants simply allege violations of both NEPA and 25
7 U.S.C. §465. Such allegations of violations of the procedures under those statutes, without more
8 specific reference to particular provisions of those laws upon which Appellants rely, are
9 insufficient to confer prudential standing on an appellant. (Central South Dakota Co-op. Grazing
10 Dist. v. Secretary of Agriculture, 266 F.3d 889, 896 (8th Cir. 2001)). While Appellants herein do
11 manage to throw in a citation to 42 U.S.C. §4332(c),⁹ that section requires that, in an
12 Environmental Impact Statement (EIS), the responsible office provide a statement regarding
13 potential impacts to the environment of the agency action, and evaluate potential alternatives. (42
14 U.S.C. §4332(2)(c)). Citation to that specific provision was considered by the Court in Central
15 South Dakota Co-op., which noted that the provision requires that an EIS should include a
16 “detailed statement on ‘alternatives to the proposed action’ on ‘major Federal actions
17 significantly affecting the quality of the human environment.’” (Central South Dakota Co-op.,
18 266 F.3d at 896). In that matter, as in the matter herein, a FONSI was issued and therefore no
19 EIS was prepared, making the provision inapplicable. Id.

20 Similarly, like Concerned Citizens, Appellants complaints and allegations focus on a
21 hostility to the fee-to-trust process itself. The Tribe has discussed the intent of Section 465 at
22 great length in its joinder. As the Tribe discusses more thoroughly in its Reponse to the
23 Opposition of the Concerned Citizens, Appellants interests are contrary to those intended to be
24 protected by the statute. As such, the Tribe does not believe that jurisprudence dictates that an
25 appellant should be considered to fall within the zone of interests intended to be protected by a
26 particular statute where the appellants interests are contrary to those protected by the statute.

27 Therefore, Appellants have failed to establish they are entitled to any prudential standing.

28 ⁹ While §4332(c) of 42 U.S.C. does not exist per se, the Tribe assumes that the intent was to cite to 42 U.S.C. §4332(2)(c).

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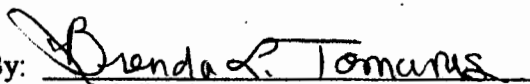
V. CONCLUSION

For all of the reasons stated herein, the Tribe respectfully requests that the Board grant the Bureau of Indian Affairs' Motion to Dismiss for Lack of Standing: Appellants neither satisfy the three-part standing test in order to establish standing, nor do they fall within the zone of interests anticipated to be protected by either NEPA or Section 465.

Dated: August 18, 2005

RESPECTFULLY SUBMITTED,

MIRANDA, TOMARAS & OGAS, LLP

By: 
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