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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

**MOTION OF THE SANTA YNEZ BAND OF CHUMASH MISSION INDIANS
 TO STRIKE PORTIONS OF APPELLANTS' OPENING BRIEF ON REMAND**

The Real Party in Interest, the Santa Ynez Band of Chumash Mission Indians (the Tribe), moves to strike two arguments in Appellants' brief that are flagrantly irrelevant not only to the single topic this Board authorized the parties to brief on remand—whether the supplemental record draws the Board's prior standing decision into question¹—but to this appeal as a whole. Specifically, the Tribe moves to strike:

- Appellants' inflammatory attack on the Tribe's status as a federally recognized Indian tribe (*see* Appellants' Opening Brief re Supplemental Proceedings on Remand ("Appellants' Br.") at 25-26 and attachment), which defies the Board's warning that "this is neither the proper proceeding nor the proper forum" for airing Appellants' "agenda to terminate the Tribe," Feb. 21 Order at 6; and
- Appellants' waived, irrelevant, and substantively frivolous "equal protection" claim (*see* Appellants' Br. at 23-26).

Indeed, as the Tribe discusses in its separate brief on the merits, Appellants' brief has little to say about the supplemental record at all. It seeks instead to relitigate the underlying merits of the Board's original standing decision *de novo*, even though the Board has already rejected Appellants' proposal to "reopen and reconsider the issue of Appellants' standing, without limitation." Feb. 21 Order at 4. The Board would thus be well within its rights to strike the majority of Appellants' brief as non-responsive to the Board's briefing order. We have moved to strike the two specific issues identified above, however, because they not only reach

¹ *See* Order on Procedures on Remand at 5 (Feb. 21, 2007) ("Feb. 21 Order") ("allow[ing] 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"). "Appellants" refers to the two associations that still challenge BIA's fee-to-trust decision: Preservation of Los Olivos ("POLO") and Preservation of Santa Ynez ("POSY").

beyond the scope of the Board's supplemental briefing order, but also raise issues outside the scope of this appeal.

BACKGROUND

On February 3, 2006, this Board dismissed, for lack of standing, the appeal of a fee-to-trust determination brought by various citizens groups, including these Appellants. *Santa Ynez Valley Concerned Citizens, et al. v. Pacific Regional Director*, 42 IBIA 189 (2006). On March 10, 2006, Appellants 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.). On September 25, 2006, the Department of Interior asked the District Court to remand this case to the IBIA so that the IBIA could evaluate its decision in light of newly discovered documents that the BIA had inadvertently omitted from the original administrative record transmitted to the IBIA. 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.). In its motion, the Interior Department explained that, on remand, 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.* Appellants opposed this remand and urged the District Court instead to engage in a cumbersome and time-consuming review of the omitted documents before remanding the matter for reconsideration by this Board.

On October 6, the district court rejected Appellants' suggestion and remanded the case to the IBIA for the "limited" purpose of "allow[ing] the IBIA to reconsider its determination . . . in light of the documents that were inadvertently omitted." 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.). The court instructed the IBIA to issue its order “at the earliest feasible time” and retained jurisdiction over Appellants’ lawsuit. *Id.* It indicated that Appellants would have an opportunity to challenge the IBIA’s new order in the District Court should they so choose. *Id.*

On February 21, 2007, the Board directed the parties to brief “the limited 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. The Board specifically prohibited Appellants from briefing the issue of the Tribe’s federal recognition, given that “recognition of the Tribe is wholly outside the scope of the Regional Director’s decision (or his authority) and outside the scope of these proceedings.” *Id.*

ARGUMENT

Both courts and administrative review boards may 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 [hearing],’” *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)), or, more generally, if that matter is “redundant, immaterial, impertinent, or scandalous.” Fed. R. Civ. P. 12(f); *see, e.g., Olson v. BIA*, 31 IBIA 44 (1997) (granting motion to strike two documents submitted in support of appellants’ opening brief); *Crow Tribe v. BLM*, 31 IBIA 16 (1997) (granting motion to strike new arguments raised for the first time on appeal); *Estate of Wellknown*, 1 IBIA 84 (1971) (granting motion to strike memorandum of law). Here, the Board should strike those portions of Appellants’ brief that address (1) the validity of the Tribe’s federal recognition and (2) Appellants’ novel equal protection and “reverse discrimination” theories. Appellants’ arguments on these points are spurious, inflammatory, and blatantly irrelevant to the limited issues the Board directed the parties to brief on remand.

Appellants' Attack on the Tribe's Federal Recognition.

In its February 21 Order, the Board rejected Appellants' bid to brief the issue of the Tribe's federal recognition, admonishing the parties that this issue "is wholly outside the scope of the Regional Director's decision (or his authority) and outside the scope of these proceedings, and therefore Appellants' alleged standing to challenge federal recognition of the Tribe is irrelevant to these proceedings." Feb. 21 Order at 5. Appellants themselves concede that they have flouted that clear directive by "rais[ing] the issue again," even though they were warned not to do so. *See* Appellants' Br. at 26 ("We are mindful of the IBIA's February 21, 2007 order directing procedures on remand which rejects appellants' request to brief standing in light of new evidence from the BIA and BLM files that the Santa Ynez Band are not ancestrally tied either to the Chumash or the subject land. We nonetheless respectfully raise the issue again[.]").

The Tribe thus requests that the Board strike the final four paragraphs of Section II.D of Appellants' brief (on pp. 25-26), which contain this attack on the Tribe's federal recognition, as well as the letter Appellants attach to their brief in support of that attack. First, these passages are plainly "impertinent" subject matter. Fed. R. Civ. P. 12(f). "[I]mpertinent' matter consists of statements that do not pertain and are unnecessary to the issues in question." *Wilkerson*, 229 F.R.D. at 170 (citing *Fantasy, Inc. v. Fogerty*, 984 F.2d 1524, 1527 (9th Cir. 1993)). As the Board has explained (Feb. 21 Order at 5-6), where a tribe is already recognized as a matter of law,² as is the case here, that status is not a factor in the Regional Director's fee-to-trust determinations and, therefore, is not a proper subject to raise in any proceeding challenging those determinations.

² The definition of "Tribe" under 25 C.F.R §151.2(b) states a tribe is "any Indian tribe, band, nation . . . which is recognized by the Secretary as eligible for the special programs and services from the Bureau of Indian Affairs"—i.e., those listed in 70 Fed. Reg. 71 (Nov. 25, 2005).

Moreover, these passages in Appellants' brief are "scandalous" as well because they "improperly cast[] a derogatory light" on the Tribe. *Wilkerson*, 229 F.R.D. at 170 (citing *Skadegaard v. Farrell*, 578 F. Supp. 1209, 1221 (D.N.J. 1984)). Indeed, attacking a tribe's status as a legitimate tribe is one of the most inflammatory accusations one can make about a tribe. "The term 'federally recognized tribe' has become synonymous with 'true' Indian heritage. As a result, 'nonrecognized tribe' has become associated with the '[s]tigma of second class Indian.'" 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). Here, because this attack has no relevance to the matter under consideration, the only conclusion that can be drawn is that Appellants are attempting to impugn the character of the Tribe. As the Board noted, if the intent of Appellants is to attempt to challenge federal recognition of the Tribe, then "this is neither the proper proceeding nor the proper forum." Feb. 21 Order at 6.

Appellants' Equal Protection and Non-Discrimination Claims.

In their brief, Appellants argue for the first time that they have standing pursuant to the equal protection component of the Due Process Clause of the Fifth Amendment and federal anti-discrimination statutes, including Title VI of the Civil Rights Act of 1964. This argument, which Appellants raise for the first time in their brief, is waived, irrelevant, and frivolous. The Board should thus strike Section II.D of Appellants' brief in its entirety, starting at page 23.

In their Statement of Reasons filed with their Notice of Appeal, Appellants set forth four reasons for appealing the Regional Director's decision to take this land into trust. Appellants argued that the Bureau (1) failed to comply with NEPA; (2) failed to properly consider the factors under Section 151.10; (3) failed to address the potential gaming use of the property; and

(4) lacked any rational basis for approving the Tribe's application. Statement of Reasons (February 22, 2005). Appellants never alleged any equal protection or anti-discrimination concerns in this Statement. Further, neither Appellants nor the other appellant group in the underlying appeal ("Concerned Citizens") claimed violations of the Equal Protection Clause or anti-discrimination statutes in their various pleadings before this Board. Appellants had ample opportunity to raise this claim, but they did not do so, and they cannot now on this limited remand insert new arguments into the proceedings. *See, e.g., United States v. Lucas*, 963 F.2d 243, 246 (9th Cir. 1992) ("We have consistently held that a party cannot raise new factual issues on appeal after failing to raise those issues or present that evidence in a timely fashion . . ."); *Estate of Waits*, 36 IBIA 46, 47 (2001) ("The Board has consistently held that it is not required to consider arguments on appeal that were not raised to the decisionmaker below.").

Moreover, this new claim has nothing to do with the one topic the Board authorized the parties to brief on remand: the relevance, if any, of the supplemental record to the Board's original standing decision. Appellants could have made precisely the same argument on the basis of the materials in the original record. Finally, the argument is frivolous in any event. *See Morton v. Mancari*, 417 U.S. 535, 551-55 (1974) (Indian preferences are political, not racial, in nature, and are subject only to rational basis review). For all of these reasons, the Board should strike Section II.D of Appellants' brief.

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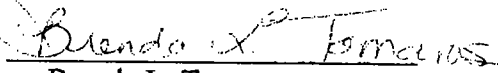
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CONCLUSION

The Board should strike those portions of Appellants' brief that address the Tribe's federal recognition and Appellants' new equal protection and anti-discrimination arguments.

Respectfully submitted,

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April 2, 2007

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CERTIFICATE OF SERVICE


The undersigned certifies that on this 2nd day of April 2007, a true and correct copy of the Motion of the Santa Ynez Band of Chumash Mission Indians to Strike Portions of Appellants' Opening Brief on Remand was placed in first-class mail, postage prepaid, to:

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