

**AMENDMENT TO REQUEST TO LIMIT DISCLOSURE OF
CONFIDENTIAL INFORMATION**

AND

MOTION FOR LEAVE TO SUBMIT ADDITIONAL DOCUMENTS

Introduction

On December 11, 2006, this Board issued an order accepting a joint (if possible) or separate reports recommending procedures on remand of this matter from the U.S. District Court for the Central District of California, to address whether additional briefing should be conducted on the issue of Appellants' standing to challenge the Pacific Regional Director's decision to acquire 6.9 acres in trust for the Santa Ynez Band of Chumash Mission Indians ("Tribe"), in light of documents that were inadvertently omitted from the administrative record (the "supplemental record documents"). The Board also invited the Appellants and the Tribe to file responses to the Regional Director's request to limit disclosure of certain supplemental record documents that contain information protected from disclosure under Section 304 of the National Historic Preservation Act. On January 12, 2007, the Board granted an unopposed motion by the Regional Director for an extension, until February 2, 2007, for the parties to comply with the Board's December 11, 2006 order.

In the Regional Director's view, additional briefing is not necessary to the Board's reexamination, in light of the supplemental record documents, of its February 3, 2006 order (42 IBIA 189) dismissing this appeal for lack of standing. There are only a few supplemental record documents for the Board to consider on remand and the parties have already submitted approximately 92 pages of briefs (excluding declarations and exhibits) on the issue of standing, including 54 pages by the Appellants and other citizens groups originally parties to this appeal.

33 pages by the Tribe, and 5 pages by the Regional Director. The Appellants believe that additional briefing is necessary, however, and therefore the Regional Director is submitting this separate report.

In addition, the Regional Director is hereby amending his request to limit disclosure of confidential information. Following the completion of consultation under Section 304 of the National Historic Preservation Act on January 25, 2007, the Regional Director has released two additional supplemental record documents, in redacted form, to the Appellants and the Tribe.

Finally, at the request of the Appellants, and over the objection of the Tribe, the Regional Director moves for leave to submit for the Board's consideration additional documents consisting of approximately 1,300 pages of public comment letters favoring or opposing the placement of land in trust status for the Tribe. The grounds for this motion are described below.

I. REGIONAL DIRECTOR'S PROPOSED PROCEDURES ON REMAND

The issue that the Board is being asked to address on remand is whether, in light of a small number of documents that were inadvertently omitted from the administrative record originally certified to the Board, the Board perceives any reason to disturb its order of February 3, 2006 dismissing this appeal for lack of standing. As described more fully in the Regional Director's filing to the Board on November 30, 2006 (at pages 4-6),¹ a large majority of the additional documents that the Regional Director submitted to the Board on remand were included in the BIA's original submission to the Board, and are not supplemental.

The comparatively few supplemental record documents consist of: (1) an architectural report and two archaeological reports and related correspondence; (2) notice letters pursuant to

¹ The filing was captioned "Response to Appellants' Report Re Procedures on Remand Pursuant to 43 C.F.R. 4.316 and Petition to File Supplemental Record Documents and Request to Limit Disclosure of Confidential Information."

25 C.F.R. § 151.10 requesting comments from state and local governments on the potential impacts of placing the subject 6.9 acres in trust; (3) general correspondence, including requests by the County of Santa Barbara for extensions of the comment period on the Tribe's application; (4) comment letters expressing support for or opposition to the Tribe's 6.9 acre land-into-trust application; and (5) two video recordings of local meetings.

As the Board may determine on its own without further briefing from the parties, these few supplemental record documents support the Board's decision to dismiss this appeal. The Regional Director understands that, having considered the supplemental record documents, the Tribe has arrived at the same conclusion. Moreover, issuance of the Board's next order regarding standing without additional briefing from the parties would be consistent with the district court's directive that the remand proceeding be completed "at the earliest feasible time." See Court's Order of October 6, 2006, in *Preservation of Los Olivos, et al. v. Department of the Interior, et al.*, No. CV-06-1502 AHM (CTx) (C.D. Cal.). If the Board nonetheless orders additional briefing, the Regional Director respectfully requests that the parties be ordered to confer and to jointly propose a briefing schedule.

II. AMENDMENT TO REGIONAL DIRECTOR'S REQUEST TO LIMIT DISCLOSURE OF CONFIDENTIAL INFORMATION

As an amendment to the Regional Director's request to limit disclosure of confidential information under 43 C.F.R. § 4.31(d), the Regional Director is hereby submitting redacted copies of two documents (Letter from the Acting Regional Director to the State Historic Preservation Officer (Sept. 23, 2002) and Gibson's Archaeological Consulting, "Inventory and Assessment of Historic Properties" (Aug. 10, 2000)) that were initially withheld from the Appellants and Tribe when the supplemented administrative record was submitted to the Board. Complete copies of these documents were provided under seal to the Board at that time. After

consultation under Section 304 of the National Historic Preservation Act with the Advisory Council on Historic Preservation, the Secretary determined that these documents could be redacted as indicated and disclosed. *See* E-mail from Tom McCulloch to Erika Martin Seibert (Jan. 25, 2007), **Exhibit A**, hereto. Redacted copies of these documents have already been produced to the Appellants and Tribe pursuant to 43 C.F.R. § 4.31(d)(2) and for their consideration in their respective responses to the Regional Director's request to limit disclosure of confidential information.

III. MOTION FOR LEAVE TO SUBMIT PUBLIC COMMENT LETTERS

The Regional Director now also moves for leave to submit approximately 1,300 pages of public comment letters regarding the Tribe's activities on its lands and/or efforts to place lands in trust. The Regional Director makes this motion at the request of the Appellants, over the objections of the Tribe, and in the interests of providing the Board with the complete record of comments predating the Regional Director's decision to acquire the subject 6.9 acres in trust and potentially related to the Tribe's 6.9 acre application underlying this appeal. Most importantly, regardless of whether the Board decides that the documents ought to be included in the record on appeal, *the documents on their face do not support Appellants' claims to have standing in this appeal and hence briefing regarding their effect on the Board's order of February 3, 2006 dismissing this appeal is not necessary.* Even if the public comment letters are to some degree relevant to the Tribe's 6.9 acre application underlying this appeal, the letters are both irrelevant and immaterial to the single legal issue that is currently before the Board -- Appellants' standing.

The public comment letters were not previously submitted to the Board because they were determined largely or entirely to relate to projects separate from the 6.9 acre application, including a 1.8 acre land-into-trust application and a casino expansion project on the Tribe's

current reservation. As reflected in correspondence attached hereto as **Exhibit B**,² the issue of whether to submit the public comment letters to the Board along with the supplemental record documents was carefully considered by the Bureau. The issue was also discussed among all of the parties and the parties agreed that, subject to the Appellants' and Tribe's independent review of the comment letters, the letters did not need to be included.

Having reviewed the comment letters, the Appellants now contend that they

bear directly on the standing issues before the IBIA in, at least two important respects: (1) they generally demonstrate that the Regional Office of the Pacific Region of the Bureau of Indian Affairs (BIA) is in the practice of soliciting comments directly from the community members and groups such as POSY and POLO as well as comments from applicants in connection with fee-to-trust applications and (2) the BIA substantively considers such comments from the community and community groups in deciding such fee-to-trust applications and collaborates with the applicant in connection with managing public comment.

Letter from John Rochefort to Thomas Blaser (Jan. 8, 2007), **Exhibit C**, hereto. In response to the Appellants and in opposition to inclusion of the public comment letters in the record on appeal, the Tribe argues that the Regional Director did not consider the comments when making his decision regarding the 6.9-acre parcel and that, while the Bureau does not turn away unsolicited comments from the public, neither does the Bureau solicit them. See Letter from Brenda Tomaras to Thomas Blaser (Jan. 10, 2007), **Exhibit C**, hereto.

² Letter from Daniel Shillito to Brenda Tomaras and Nancie Marzulla (Nov. 8, 2006); Letter from Lisa Gilford to Daniel Shillito and Judith Rabinowitz (Nov. 13, 2006); Memorandum from Clayton Gregory to Thomas Blaser (Nov. 17, 2006); Memorandum from Thomas Blaser to Clayton Gregory (Nov. 30, 2006); Letter from Amy Dutschke to John Rochefort and Roger Marzulla (Dec. 5, 2006). The two memoranda between Clayton Gregory and Thomas Blaser are being provided to give context to the parties' initial agreement not to include the public comment letters in the record on appeal and no broader waiver of any privilege is intended.

In order to assist the Board to determine whether and, if so, how these public comment letters ought to be considered in the context of this appeal, following is a brief explanation of the origin of these comment letters and their association with the Tribe's efforts to place lands in trust and other tribal activities. The above-referenced letters by the Appellants and Tribe at Exhibit C hereto, and the Regional Director's response to those letters that follows, should obviate any need for briefing on the issue of the impact of the public comment letters on the Board's February 3, 2006 order dismissing this appeal for lack of standing. If, after consideration of the parties' respective positions, the Board is nonetheless inclined to consider the public comment letters *in the context of Appellants' standing*, the Regional Director respectfully requests an opportunity to brief both the relevance and materiality of the documents to Appellants' standing.

The Tribe's 6.9-acre application that is being challenged in this appeal was submitted to the Bureau on November 8, 2000. Pursuant to 25 C.F.R. § 151.10, the Bureau solicited comments on the application from state and local governments (but not the general public) in April 2001. The Tribe updated its application on May 6, 2002 following the discovery of the remains of a historic, intact Chumash village site on the subject 6.9 acres. Later, on May 29, 2002, the Tribe separately applied to have an additional 1.8 acres placed in trust, which application was withdrawn. Also, during April and May 2002, the Tribe received comments on a casino expansion project that it was planning to conduct on its current reservation. Some of the persons who responded to the Tribe regarding the casino expansion project sent copies of their comments to the Bureau. However, that project was unrelated to the Tribe's applications to place lands in trust. *See* Letter from Brenda Tomaras to Jim Haynes (May 14, 2002), Exhibit D, hereto.

The public comment letters that the Regional Director is seeking leave to submit to the Board were generated between April and July 2002 and were not solicited by the Bureau. 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 newspapers by a citizens group, Santa Ynez Valley Concerned Citizens. An example of these letters is attached hereto as **Exhibit E**. These form letters state in pertinent part, "I am a citizen of the Santa Ynez Valley located in the County of Santa Barbara. I am writing to request that you decline the May 29, 2002 application by the [Tribe] to annex 1.8 acres of newly acquired land to the Reservation The recently announced casino expansion plans only serve to magnify the problem." Many other comment letters express support for the Tribe's 1.8-acre application, the Tribe's proposed casino expansion project, and/or the Tribe's efforts in general to place lands in trust. On their face, the public comment letters pertain largely or entirely to the separate 1.8 acre application, which the Tribe has withdrawn, and/or the unrelated casino expansion project on the Tribe's current reservation.

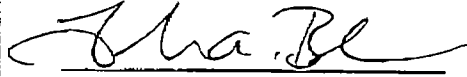
Notwithstanding that the public comment letters were not solicited by the Bureau and that they relate to other projects by the Tribe, the Bureau acknowledges that they may be relevant to the Tribe's then-pending 6.9 acre application to the extent they indicate opposition to or support for the Tribe's efforts in general to place land in trust. In addition, while the Bureau does not solicit public comments, the Bureau also generally does not turn comments away and simply considers them to the degree merited. The record reflects that the Bureau read and categorized the public comment letters, and that it found two of the letters to be noteworthy because they

were submitted by celebrities whose comments might attract media attention. See Enclosures to Letter from Daniel Shillito to Brenda Tomaras and Nancie Marzulla (Nov. 8, 2006) at Exhibit A. In the spirit of 25 C.F.R. § 151.10 (“If the state or local government responds within a 30-day period, a copy of the comments will be provided to the applicant, who will be given a reasonable time in which to reply . . .”), the Bureau also forwarded the public comment letters to the Tribe for its consideration. Unlike the comments that the Bureau solicited from the state and local governments, however, the Regional Director did not discuss the public comment letters in his letter of decision on the Tribe’s 6.9-acre application.

The consideration that the Bureau gave to the public comment letters is really beside the point at this time, however, because while the comment letters are potentially relevant to the Tribe’s 6.9-acre application to some degree, they are completely irrelevant to Appellants’ standing as a threshold jurisdictional matter. A plaintiff cannot manufacture standing for himself or herself simply by submitting comments (much less unsolicited comments) on an agency action. In this case, Appellants do not even allege that they or their members submitted the comment letters.

In sum, the public comment letters are at best marginally relevant to the Tribe’s 6.9 acre application underlying this appeal and they are totally irrelevant and immaterial to Appellants’ standing, which is the only issue now before the Board. It would therefore be reasonable for the Board to exclude the letters from the record on appeal. The Regional Director requests, however, that they be included in order to avoid a dispute over the completeness of the record.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Tha. Bl", written over a horizontal line.

Daniel G. Shillito
Thomas A. Blaser
Attorneys for Pacific Regional Director
Bureau of Indian Affairs

Dated: February 2, 2007

CERTIFICATE OF SERVICE

RE: Preservation of Los Olivos and Preservation of Santa Ynez v. Pacific Regional Director,
Bureau of Indian Affairs

I, the undersigned, declare that:

I am a citizen of the United States, over the age of eighteen, and am not a party to this litigation. On February 2, 2007, I served the

**“REGIONAL DIRECTOR’S REPORT RECOMMENDING
PROCEDURES ON REMAND
AND
AMENDMENT TO REQUEST TO LIMIT DISCLOSURE OF
CONFIDENTIAL INFORMATION
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MOTION FOR LEAVE TO SUBMIT ADDITIONAL DOCUMENTS”**

via FAX (excluding enclosures) and FEDERAL EXPRESS, addressed as follows:

U.S. Department of the Interior
Office of Hearings and Appeals
Interior Board of Indian Appeals
801 N. Quincy Street, MS-300-QC
Arlington, Virginia 22203
Telephone: 703-235-3816
Fax: 703-235-3199

and by placing a true copy enclosed in a sealed envelope via REGULAR MAIL (excluding enclosures), addressed as follows:

John M. Rochefort
Lisa Gilford
Weston, Benshoof, Rochefort,
Rubalcava & MacCuish, LLP
333 South Hope Street, 16th Floor
Los Angeles, CA 90071

Attorneys for Preservation of Los Olivos
and Preservation of Santa Ynez
Telephone: (213) 576-1000
Fax: (213) 576-1100

Brenda L. Tomaras
Tomaras & Ogas
10755-F Scripps Poway Parkway
Suite 281
San Diego, CA 92131

Attorneys for Santa Ynez Band of Chumash,
Mission Indians
Telephone: (858) 554-0550
Fax: (858) 777-5765

Roger J. Marzulla
Nancie G. Marzulla
Marzulla & Marzulla
1350 Connecticut Avenue, N.W.
Suite 410
Washington, DC 20036


Seth P. Waxman
Jonathan E. Nuechterlein
Wilmer, Cutler, Pickering, Hale &
Dorr, LLP
2445 M Street, NW
Washington, DC 20337

Attorneys for Santa Ynez Band of Chumash
Mission Indians
Telephone: (202) 822-6760
Fax: (202) 822-6774

Attorneys for Santa Ynez Band of Chumash
Mission Indians
Telephone: (202) 663-6000
Fax: (202) 663-6363

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

Executed this 2nd day of February, 2007.



Thomas A. Blaser

EXHIBIT A



"Tom McCulloch"
<tmcculloch@achp.gov
>

01/25/2007 02:00 PM
EST

To: <erika_seibert@nps.gov>
cc: "Javier Marques" <jmarques@achp.gov>
Subject: Section 304 withholding request

Ms. Erika Martin Seibert
National Register Archaeologist
National Park Service
Washington DC

Erika, pursuant to Section 304 of the National Historic Preservation Act (NHPA) the National Park Service has consulted with the Advisory Council on Historic Preservation (ACHP) about the Bureau of Indian Affairs' (BIA) intention to withhold select information about a significant archaeological site because release could cause significant invasion of privacy or harm the historic property, or impede its use as a traditional religious site by practitioners.

Since the information was developed as part of the BIA's compliance with Section 106 of the NHPA, the ACHP's regulations (36 CFR Part 800.11(c)) require the Secretary of the Interior to consult with the ACHP in making decisions to withhold or release this information. Based on the material we have reviewed, and discussions with you, we do not object to this information being withheld from public disclosure.

If you have any questions, do not hesitate to call me at 202-606-8554.

Sincerely, Tom McCulloch

Tom McCulloch, Ph.D., R.P.A.
Archaeologist
Advisory Council on Historic Preservation
Washington DC 20004
202.606.8554

EXHIBIT B

