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FEDERAL U.S. DISTRICT COURT  
CENTRAL DISTRICT OF CALIF.  
LOS ANGELES

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17 **PRESERVATION OF LOS OLIVOS and**  
18 **PRESERVATION OF SANTA YNEZ**

19  
20 **UNITED STATES DISTRICT COURT**  
21 **CENTRAL DISTRICT OF CALIFORNIA**  
22 **WESTERN DIVISION**

23 PRESERVATION OF LOS OLIVOS and  
24 PRESERVATION OF SANTA YNEZ,

25 Plaintiffs,

26 v.

27 UNITED STATES DEPARTMENT OF  
28 THE INTERIOR, DIRK KEMPTHORNE,  
in his official capacity as Secretary,  
BUREAU OF INDIAN AFFAIRS, by and  
through Pacific Regional Director,  
CLAYTON GREGORY, in his official  
capacity, and the INTERIOR BOARD OF  
INDIAN APPEALS,

Defendants,

THE SANTA YNEZ BAND OF MISSION  
INDIANS

Defendants – Intervenor.

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

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN OPPOSITION TO  
MOTION BY THE FEDERAL  
DEFENDANTS TO REMAND;  
DECLARATION OF JOHN M.  
ROCHEFORT**

Date: September 25, 2006  
Time: 10:00 a.m.  
Ctvm: 14

Hon. A. Howard Matz

Filing Date: March 10, 2006  
Trial Date: Not Set  
Discovery Cut-off: Not Set  
Motion Cut-off: Not Set

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 The federal defendants' motion presents a remarkable and unusual  
4 request, one that is perhaps unprecedented in the annals of review of administrative  
5 proceedings before the Bureau of Indian Affairs ("BIA") and the Interior Board of  
6 Indian Appeals ("IBIA" or "Board").

7 In lieu of serving and filing the administrative record so that this action  
8 may proceed on the briefing schedule set forth in the July 25, 2006 Joint Rule 26(f)  
9 Report, Stipulation and Order, the federal defendants instead moved to remand the  
10 case back to the IBIA in order to allow the Pacific Regional Director of the BIA to  
11 supplement the administrative record previously certified by the BIA to the IBIA. The  
12 BIA intends to augment the record with documents that allegedly had been omitted by  
13 inadvertence. The motion does not describe the missing documents, explain how they  
14 may be relevant to the IBIA's February 3, 2006 Order Dismissing Appeal (review of  
15 which is the subject of this action), or even suggest how the documents came to be  
16 excluded from the administrative record in the first instance. Further, when asked, the  
17 BIA attorney responsible for gathering and certifying the administrative record  
18 declined to identify any of the omitted materials or even to describe the nature of such  
19 materials. In short, the federal defendants request the Court to remand the case to the  
20 IBIA to supplement the record sight unseen by this Court or by the plaintiffs so that  
21 only the defendants will know what is at issue.

22 One thing is clear and on which the parties apparently are in agreement—  
23 the proceedings before the IBIA were flawed and the IBIA's February 3, 2006 Order  
24 Dismissing Action is invalid. Where the parties diverge is with regard to the course  
25 forward. The moving party defendants urge the Court to simply remand the matter,  
26 without identifying the omitted documents, explaining how they happened to be  
27 excluded or how the error was discovered several months after the administrative  
28 record was initially certified as complete. Plaintiffs strongly oppose such a secretive

1 process and, instead, respectfully request the Court undertake the following two step  
2 procedure:

3           Step 1:       Prior to considering whether to remand the case, the federal  
4 defendants should be directed to separately produce to plaintiffs: (1) the  
5 administrative record that the IBIA actually considered; (2) the record actually relied  
6 on by the BIA's Pacific Regional Director in approving the fee to trust application of  
7 the Santa Ynez Band of Chumash Mission Indians ("Band"); (3) all documents which  
8 said defendants contend were omitted from the administrative record; and, (4) a clear  
9 and cogent explanation of how the alleged omission occurred and how it was  
10 discovered so many months after the fact.

11           Step 2:       If, upon consideration of the documents and information  
12 produced pursuant to Step 1, the Court determines to remand the case to the IBIA then  
13 the order of remand should be conditioned as follows: (1) a status quo order  
14 restraining the federal defendants from acquiring the 6.9 acres in trust status pending a  
15 final decision on the merits; (2) an order directing the federal defendants to reimburse  
16 plaintiffs their reasonable attorneys' fees and costs which they unnecessarily incurred  
17 as a result of the BIA's failure to certify a complete administrative record; and, (3) the  
18 Court should retain jurisdiction of the action following remand.

19           The foregoing proposed two step process and conditions upon remand are  
20 appropriate to protect plaintiffs' rights in light of the irregularity of the proceedings  
21 that have apparently already taken place. Nor do such conditions prejudice the federal  
22 defendants: (1) upon full and fair disclosure, the federal defendants can petition the  
23 BIA and/or IBIA to augment the record which is the stated purpose of the pending  
24 motion, (2) the status quo to which the federal defendants have already agreed will be  
25 maintained thus allowing neither party to gain an unfair advantage, (3) plaintiffs will  
26 be compensated for the unnecessary fees and costs reasonably incurred as a result of  
27 the admitted error in proceedings caused by the BIA and IBIA; and, (4) the Court will  
28 retain jurisdiction in order to minimize additional expenses associated with being

1 required to file a new federal action and to assist, if necessary, during this unusual  
2 hiatus in this case.

3 **II. BACKGROUND**

4 This is an action brought by two non-profit organizations formed to  
5 protect the character and environment of their communities in the face of expansionist  
6 plans of the Band which operates a large Class III gaming casino in the midst of what  
7 was a relatively quiet and rural community in the Santa Ynez/Los Olivos region of  
8 Central California. Specifically, plaintiffs challenge a February 3, 2006 order of the  
9 IBIA which dismissed, for lack of standing, plaintiff's timely appeal of the decision of  
10 the Pacific Regional Director of the BIA who had approved the Band's application to  
11 take 6.9 acres into federal trust, thus extending the acreage held in trust for the Band.  
12 The Regional Director's decision, if permitted to stand, will place the acreage beyond  
13 state and local taxing and regulatory authority applicable to all non-Indian real  
14 property and business enterprises.

15 Within a few days before the August 28, 2006 date for certification of the  
16 administrative record set forth in the July 25, 2006 Joint Rule 26(f) Report, Stipulation  
17 and Order, the federal defendants disclosed that they would not, and allegedly could  
18 not, certify the administrative record because it was allegedly incomplete.<sup>1</sup> This  
19 motion for remand followed. The federal defendants contend:

20 A subset of documents that were part of the record of  
21 decision-making before the BIA and, which therefore should  
22 have been before the IBIA on appeal, were inadvertently  
23 omitted from the record certified to the Board. Federal  
24 Defendant's Memorandum in Support of Motion for  
25 Remand to the Department of Interior ("Supporting  
26 Memo."), p. 2:8-10.

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27 <sup>1</sup> The federal defendants agreed to file the certified administrative record with  
28 this Court no later than August 28, 2006. Joint Rule 26(f) Report, Stipulation and  
Order, 4:9-10. See 5 U.S.C. § 706 (requiring reviewing Court to review the whole  
administrative record).

1           Nowhere in the moving papers do the federal defendants advise the Court  
2 of the nature or identity of the omitted documents, nor their relevancy, nor why they  
3 were omitted from the administrative record certified by the BIA to the IBIA. Nor do  
4 the moving papers mention how -- or whether -- the omitted documents were even  
5 considered by the Pacific Regional Director of the BIA in the decision which plaintiffs  
6 appealed to IBIA.<sup>2</sup> Moreover, when counsel for plaintiffs inquired about the identity  
7 or nature of the documents and how this error arose, the BIA attorney responsible for  
8 preparing the record responded that he could not, at that time, tell what all had been  
9 omitted nor would he consent to advising plaintiffs of the identity or nature of the  
10 omitted documents prior to the formal re-certification of the administrative record  
11 following remand. (Declaration of John M. Rochefort, ¶¶ 3-4.)

12           The fair administration of justice and the transparency required of an  
13 open and democratic form of government such as ours demand that the Court order  
14 the federal defendants to answer the foregoing questions and produce the documents  
15 in an orderly fashion.

### 16 **III. ARGUMENT**

#### 17 **A. The Federal Defendants Must Explain the Nature and Scope of their** 18 **Error and Produce the Complete Record**

19           43 C.F.R. § 4.335 lays out the requirements for preparation and  
20 transmittal of the administrative record by the BIA official whose decision is  
21 challenged to the IBIA:

22           (a) Within 20 days after receipt of a notice of appeal, or  
23 upon notice from the Board, the official of the Bureau of  
24 Indian Affairs whose decision is appealed shall assemble  
25 and transmit the record to the Board. *The record on appeal*  
26 *shall include, without limitation, copies of transcripts of*

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27 <sup>2</sup> Not only do the moving papers filed by the federal defendants fail to provide any  
28 detail concerning the identity of the missing documents, why they were excluded or  
how the error was discovered, they also fail to submit a sworn declaration establishing  
the factual basis for their motion.

1           *testimony taken; all original documents, petitions, or*  
2           *applications by which the proceeding was initiated; all*  
3           *supplemental documents which set forth claims of interested*  
4           *parties; and all documents upon which all previous*  
5           *decisions were based.*

6           (b) The administrative record shall include a Table of  
7           Contents noting, at a minimum, inclusion of the following:

8                                   \* \* \*

9           (3) Certification that the record contains *all* information and  
10           documents utilized by the deciding official in rendering the  
11           decision appealed. 43 C.F.R. § 4.335 (Emphasis added.)

12           The application by the Band to have the United States to take the subject  
13           6.9 acres into trust was filed on November 8, 2000. The Pacific Regional Director of  
14           the BIA then took the application under consideration until January 14, 2005 when he  
15           issued his Notice of Decision to accept the parcel into trust. Plaintiffs timely served  
16           and filed their notice of administrative appeal to the IBIA on February 22, 2005. The  
17           Regional Director filed the administrative record but it was incomplete. Now, nearly  
18           six years after the application was filed, almost nineteen months after the IBIA appeal  
19           was commenced, and six months after the IBIA's order of dismissal, the BIA claims  
20           that the record was incomplete, the proceedings before the IBIA were flawed and the  
21           matter must go back to the IBIA to start over again.

22           The substantial lapse of time (nearly six years) between when the  
23           Regional Director took the Band's application under consideration and when the  
24           government discovered the alleged error in the record raises significant doubt that the  
25           administrative record (which the BIA now wishes to "augment") will be accurate and  
26           complete. Furthermore, plaintiffs' doubts are not assuaged by the government's  
27           reluctance to explain the error or the nature of the documents allegedly omitted.

28           Therefore, as a condition to considering the government's motion to  
remand, the Court must order production of: (1) the existing administrative record; (2)  
the record actually considered by the Pacific Regional Director; (3) all documents

1 which the defendants contend were omitted; and, (4) a clear and cogent explanation of  
2 how the alleged omission occurred and how it was discovered.

3 **B. The Court Should Enter An Order Maintaining the Status Quo**  
4 **Pending Final Decision On The Merits**

5 At the outset of this case and in order to avoid a time-consuming and  
6 costly application for a preliminary injunction, the plaintiffs and federal defendants  
7 reached agreement that the federal defendants would stay acquisition of the 6.9 acres  
8 in trust status until a final decision on the merits is issued. This agreement is  
9 memorialized in, at least, two filings with the Court. The first is the July 25, 2006  
10 Joint Rule 26(f) Report, Stipulation and Order at page 2, lines 2-3 and the second is  
11 the federal defendants' Supporting Memo at page 2, lines 23-26. However, the  
12 Supporting Memo goes on to state, "[t]he effect of a remand to the Interior  
13 Department would be to preclude acquisition of the land in trust *until after re-issuance*  
14 *of a 30-day notice of determination to acquire the land in trust.*" (Supporting Memo,  
15 2:26-3:2, emphasis added.)

16 Notwithstanding the defendants' previous assurances that acquisition of  
17 the 6.9 acres would be stayed until after a final decision on the merits (including  
18 review by the federal court), upon remand the government would be free to acquire  
19 the land following the re-issuance of a new 30-day notice of decision. See also,  
20 defendants' reliance on 25 C.F.R. § 151.12(b) which contemplates that a new 30-Day  
21 notice of decision will be published in the Federal Register followed by new  
22 administrative and judicial appeals. If the case is remanded, plaintiffs respectfully  
23 request that the assurances by the federal defendants to stay the acquisition of the 6.9  
24 acres until after a final decision on the merits be memorialized by a status quo order of  
25 this Honorable Court maintaining the status quo ante.

26 **C. The Federal Defendants Should Reimburse Plaintiffs' Reasonable**  
27 **Attorneys' Fees And Costs**

28 The federal defendants argue that remanding the matter to the IBIA will

1 not prejudice the plaintiffs. (Supporting Memo, 2:23.) At best, this proposition is a  
2 naïve view of the nature and extent of the proceedings below and the impact of the  
3 government's failure to certify an accurate and complete administrative record when it  
4 should have.

5 Plaintiffs timely filed their appeal of the Pacific Regional Director's  
6 Notice of Decision on February 22, 2005. Pursuant to 43 C.F.R. § 4.335, the Regional  
7 Director was obligated to certify the complete administrative record within twenty  
8 (20) days of the notice of appeal which he failed to do. Thereafter, the plaintiffs  
9 engaged in extensive briefing and other proceedings before the IBIA. Now, the  
10 federal defendants suggest that the entire matter be remanded to the IBIA, that the  
11 record be augmented and that the Board consider the matter *de novo*. At the very  
12 least, the government's error caused the plaintiffs to incur unnecessary attorneys' fees  
13 and costs in connection with the invalid initial proceedings of the IBIA. As a  
14 condition of remand, the federal defendants should reimburse plaintiffs' reasonable  
15 fees and costs incurred in the proceedings below. See 28 U.S.C. § 2412(d)(1)(A).

16 Moreover, if the Court decides to dismiss the action, plaintiffs will be  
17 required to file a new action challenging the decision of the IBIA following remand.  
18 Under these circumstances, the fees and costs incurred by the plaintiffs in this action  
19 will have been for naught and should be reimbursed by defendants.<sup>3</sup>

20 **D. The Court Should Retain Jurisdiction Following Remand**

21 The federal defendants' moving papers are vague as to the nature of  
22 proposed proceedings upon remand. They suggest that the BIA will seek some sort of  
23 "limited reopening" to file the omitted documents and request the IBIA to reconsider  
24 its earlier standing ruling. (Supporting Memo 17-19.) Thereafter and assuming that  
25

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26 <sup>3</sup> In the event the Court orders the federal defendants to reimburse fees and costs,  
27 plaintiffs will meet and confer with the federal defendants and, if the matter of the fees  
28 and costs cannot be resolved by negotiation and agreement, then plaintiffs will  
promptly serve and file a declaration itemizing such fees and costs and noticing the  
matter for hearing.

1 the IBIA confirms its earlier order of dismissal, then the BIA will issue a new 30-day  
2 notice of determination to acquire the land in trust, *in turn allowing for another*  
3 *appeal to federal court.*" (*Id.* Emphasis added.) Without conceding that the foregoing  
4 administrative course is appropriate, it appears that the federal defendants suggest that  
5 this action be dismissed and, if plaintiffs wish to appeal the reconsidered decision of  
6 the IBIA, then they must commence *another* federal action. As noted above, the  
7 foregoing course proposed by the federal defendants is consistent with their reliance  
8 on 25 C.F.R. § 151.12(b) and their intention to have the Regional Director issue a new  
9 30-Day Notice of Decision. (Supporting Memo, 2:19-22.)

10 In order to avoid duplicative federal actions and assure the regularity and  
11 integrity of the proceedings on remand, plaintiffs respectfully request that this Court  
12 retain jurisdiction of this action following remand.

#### 13 **IV. CONCLUSION**

14 For all the reasons set forth above, plaintiffs respectfully request that the  
15 Court deny the federal defendants' motion to remand pending their separate  
16 productions of the administrative record actually considered by the IBIA, the allegedly  
17 omitted documents, the record relied on by the Regional Director and an explanation  
18 of why and how this error occurred and was discovered. Furthermore, if the case is  
19 remanded to the IBIA, such order of remand should be conditioned on (1) an order  
20 maintaining the status quo until a final decision on the merits is issued; (2)  
21 reimbursement by the federal defendants of plaintiffs' reasonable attorneys' fees and  
22 costs unnecessarily incurred as a result of the Pacific Regional Director's failure to

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24 ///

25 ///

26 ///

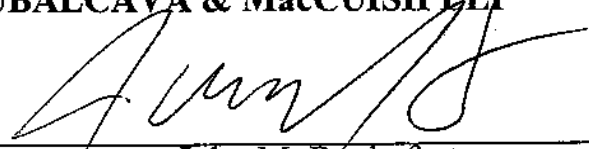
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28 ///

1 certify the full administrative record to the IBIA and (3) the Court retaining  
2 jurisdiction over this action following remand.

3  
4 DATED: September 11, 2006

JOHN M. ROCHEFORT  
MICHAEL D. BRADBURY  
LISA GILFORD  
PETER E. MASAITIS  
WESTON, BENSHOOF, ROCHEFORT,  
RUBALCAVA & MacCUISH LLP

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10 \_\_\_\_\_  
John M. Rochefort

11 Attorneys for Plaintiffs  
12 **PRESERVATION OF LOS OLIVOS and**  
13 **PRESERVATION OF SANTA YNEZ**  
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1 matter should proceed. During these conversations, I asked Mr. Blaser, who said that  
2 he was responsible for gathering and certifying the administrative record, to describe  
3 the nature of the omitted documents. He said that he could not describe the  
4 documents to me at that time. I then asked him when he would be able to provide us  
5 with copies of the omitted documents or, at least, describe them. He responded that he  
6 would not "preview" the documents for us but that we would be served with a copy of  
7 the full administrative record in the ordinary course after the matter had been  
8 remanded, the new documents inserted and the augmented record certified.

9           5. The substantial lapse of time since the application was filed and  
10 the IBIA appeal commenced and the reluctance of the federal defendants to openly  
11 produce the purportedly omitted documents or explain how or why they were omitted  
12 in the first place raises questions to the plaintiffs as to whether the omitted documents  
13 should really be part of the administrative record certified to the IBIA pursuant to 43  
14 C.F.R. § 4.335.

15           Executed this 11<sup>th</sup> day of September, 2006 in Los Angeles, California

16           I declare under penalty of perjury of the laws of California and the  
17 United States that the foregoing is true and correct.

18  
19   
20 \_\_\_\_\_  
21 John M. Rochefort  
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28

1 **PROOF OF SERVICE**

2 I, Marlene D. Yokley, declare:

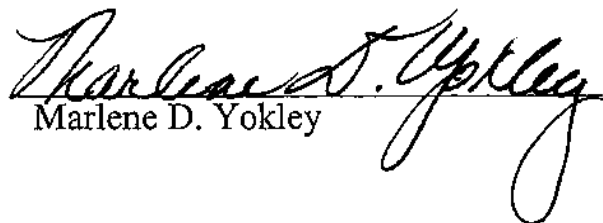
3 I am employed in the County of Los Angeles, State of California. I am  
4 over the age of 18 and not a party to the within action. My business address is  
5 Weston, Benshoof, Rochefort, Rubalcava & MacCuish LLP, 333 South Hope Street,  
Sixteenth Floor, Los Angeles, CA 90071. I am over the age of eighteen years and not  
a party to the action in which this service is made.

6 On September 11, 2006, I served the document(s) described as  
7 **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO**  
8 **MOTION BY THE FEDERAL DEFENDANTS TO REMAND;**  
**DECLARATION OF JOHN M. ROCHEFORT** on the interested parties in this  
action by enclosing the document(s) in a sealed envelope addressed as follows:

9 **SEE ATTACHED SERVICE LIST**

- 10  BY MAIL: I am "readily familiar" with this firm's practice for the collection  
11 and the processing of correspondence for mailing with the United States Postal  
12 Service. In the ordinary course of business, the correspondence would be  
13 deposited with the United States Postal Service at 333 South Hope Street, Los  
14 Angeles, California 90071 with postage thereon fully prepaid the same day on  
15 which the correspondence was placed for collection and mailing at the firm.  
16 Following ordinary business practices, I placed for collection and mailing with  
17 the United States Postal Service such envelope at Weston, Benshoof, Rochefort,  
18 Rubalcava & MacCuish LLP, 333 South Hope Street, Los Angeles, California  
90071.
- 15  BY FEDERAL EXPRESS  UPS NEXT DAY AIR  OVERNIGHT  
16 DELIVERY: I deposited such envelope in a facility regularly maintained by   
17 FEDERAL EXPRESS  UPS  Overnight Delivery [specify name of  
18 service: ] with delivery fees fully provided for or delivered the envelope to a  
19 courier or driver of  FEDERAL EXPRESS  UPS  OVERNIGHT  
20 DELIVERY [specify name of service:] authorized to receive documents at  
21 Weston, Benshoof, Rochefort, Rubalcava & MacCuish LLP, 333 South Hope  
22 Street, Los Angeles, California 90071 with delivery fees fully provided for.
- 19  BY FACSIMILE: I telecopied a copy of said document(s) to the following  
20 addressee(s) at the following number(s) in accordance with the written  
21 confirmation of counsel in this action.
- 21  [State] I declare under penalty of perjury under the laws of the State of  
California that the above is true and correct.
- 22  [Federal] I declare under penalty of perjury that the foregoing is true and  
correct.

23 Executed on September 11, 2006, at Los Angeles, California.

24  
25   
26 Marlene D. Yokley  
27  
28

