

**Response of the Santa Ynez Band of Chumash Mission Indians,
to Order Allowing Submission of Proposed Procedures for Remand
and Appellants' Report Re Procedures on Remand**

The Real Party in Interest, the Santa Ynez Band of Chumash Mission Indians (the Tribe), submits this response to the request of Appellants (Preservation of Los Olivos and Preservation of Santa Ynez) to “allow the parties to brief the issue of Appellants’ standing to challenge the Regional Director’s decision to approve the [Tribe’s] fee-to-trust application.” Appellants’ Report Re Procedures on Remand Pursuant to 43 C.F.R. §4.316, at 2 (Nov. 27, 2006) (“Appellants’ Report”). Nothing in the Supplemental Record, however, has any bearing on the Board’s rationale for dismissing Appellants’ challenge for lack of standing, and briefing on that point would be superfluous. Moreover, “to the extent that Appellants are requesting the IBIA to allow for a complete re-opening and complete re-litigation of their standing to sue,” the BIA is correct in observing that this request is “clearly beyond the scope of”—and is indeed flatly at odds with—“the district court’s remand [order].” BIA’s Response to Appellants’ Report 3 (Nov. 30, 2006); *see* 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.) (“Remand Order”). Whether narrow or broad in scope, further “briefing” in this already exhaustively briefed matter would accomplish nothing beyond delay—to the benefit of Appellants but the detriment of the Tribe.

Procedural 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 Preservation of Los Olivos and Preservation of Santa Ynez (Appellants). 42 IBIA 189. On March 10, Appellants filed a challenge to this 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, the Department of Interior asked the District Court to remand this case to the IBIA to 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.* The Interior Department made clear that its intent in requesting a remand was for very limited purposes, thereby dispelling any notion that the remand proceeding would become a second opportunity for the Appellants to relitigate the standing issue at the cost of further delay. *Id.*

Appellants opposed this remand, urging instead that the District Court 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, without argument, rejected Appellants’ suggestion, and remanded the case back to the IBIA for the limited purpose of reconsidering its decision in light of the supplemental documents. 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 District Court instructed the IBIA to issue its order “at the earliest feasible time” and retained jurisdiction over Appellants’ lawsuit. *Id.* The District Court indicated that Appellants would have an opportunity to challenge the IBIA’s new order in the District Court should they so desire. *Id.*

On November 30, 2006, the BIA provided the IBIA with the supplemental documents, noting that “[t]he IBIA may well determine, after reviewing the relatively few Supplemental

Record documents, that no briefing is warranted.” Pet. To File Supplemental R. Docs. at 3. On November 27, however, Appellants filed a report on remand asking “that a briefing schedule be established to allow the parties to brief the issue of Appellants’ standing to challenge the Regional Director’s decision to approve the Santa Ynez Band of Mission Indians’ fee-to-trust application.” Appellants’ Report re Procedures on Remand Pursuant to 43 C.F.R. § 4.316.

Proposed Remand Procedures

It is unclear precisely what the Appellants hope to accomplish by asking the Board to “allow the parties to brief the issue of Appellants’ standing to challenge” the fee-to-trust decision. Appellants’ Report 2. On the one hand, Appellants might theoretically be seeking a narrow opportunity to address whether anything *in the Supplemental Record* draws the Board’s previous standing decision into question. That seems most unlikely, however, because nothing in the Supplemental Record has any relevance to that issue. Instead, Appellants appear to seek an opportunity for full-blown relitigation of the standing issue. But the Remand Order forecloses that request, which in any event would be superfluous, given the abundant briefing opportunities Appellants enjoyed the first time around.

The Tribe thus submits that the Board should promptly review the Supplemental Record and issue its decision pursuant to the District Court’s remand order. 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.). Naturally, should the Board conclude that additional briefs narrowly limited to the Supplemental Record would benefit its decision making, the Tribe would be happy to file such a brief.

I. The Materials in the Supplemental Record Are Irrelevant to the Standing Issue.

The Supplemental Record consists mainly of two categories of documents: form comment letters on the fee-to-trust application and confidential architectural and archaeological reports¹ prepared as part of the environmental review. *See* BIA's Response to Appellants' Report at 5. None of the materials have any relevance to the standing question. First, the form letters—most of which were already before the Board on the CD it received with the original record—generally consist of a single conclusory paragraph stating that the commenter opposes taking the land into trust. None of these form letters present any new evidence that could bear on the issue of Appellants' standing.

Second, as the Board is aware, none of the Tribe's opponents, including these Appellants, objected to the fee-to-trust application on archeological grounds. Indeed, no objection would have made sense unless Appellants had some perverse reason to oppose the preservation of the site's archeological features (as opposed to the decision to take the site into trust). Appellants likewise did not raise any objections relating to the architectural report, which merely assessed the historic status of a residence that was on the property when the Tribe purchased it.² In all events, these documents could have no conceivable bearing on the Board's rationale for denying Appellants' standing.

In short, none of the supplemental documents draws the Board's standing decision into question, and additional briefing would be wasteful and dilatory.

¹ Pursuant to procedures under Section 304 of the NHPA, the ACHP determined that some of these documents could be released in redacted form and the Department served these on the parties. Nothing within those redacted documents, however, affects any of the Tribe's arguments.

² A historic property assessment under Section 106 was conducted and the building was considered not to be a historic property.

II. There Is No Basis for Reopening the Standing Question for Reasons Unrelated to the Supplemental Record.

To the extent that Appellants are asking the Board to reopen the fee-to-trust decision in its entirety and relitigate the standing issue, that request is unworkable. The District Court unequivocally ordered this remand for the “limited” purpose of “allow[ing] the IBIA to reconsider its determination . . . in light of the documents that were inadvertently omitted from the Administrative Record that was certified to the IBIA,” and the Court directed the Board to complete that inquiry “at the earliest feasible time.” Remand Order 1.³ As the BIA explains, therefore, Appellants’ apparent request “for a complete re-opening and complete re-litigation of their standing to sue . . . is clearly beyond the scope of the district court’s remand.” BIA Response to Appellants’ Report at 3.

In order to have standing to appeal the Regional Director’s decision, Appellants had to show that they were interested parties “whose interests could be adversely affected by a decision on appeal.” (43 C.F.R. §4.331). In reaching the standing determination in the instant matter, and in other appeals of fee-to-trust applications, the Board has held that an “interest” is not equivalent to a “concern.” (*State of Utah*, 32 IBIA at 176 (citing *Moffat Tunnel League* 289 U.S. 113, 119 (1933))) and has followed the test set forth by the Supreme Court in *Lujan* for determining whether a party has standing to appeal. ((*Lujan v. Defenders of Wildlife* 504 U.S. 555, 562 (1992)). Here, the Board properly concluded that the Appellants failed to meet these standing requirements. As noted previously, nothing contained within the Supplemental Record supports a different ruling, and the Appellants should not now be allowed to relitigate this standing issue merely because it is before the Board again for limited purposes.

³ Although Appellants cite 43 C.F.R. § 4.316, that provision merely states that the Board may consider recommendations for remand procedures “to the extent the court’s directive and time limitations will permit.” It does not remotely entitle a party in Appellants’ position to demand an unnecessary round of briefing when the court’s directive and time limitations do *not* permit.

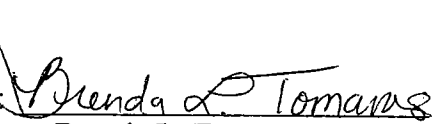
Indeed, it would be particularly inappropriate to permit further delay pending relitigation of the standing issue given that Appellants had abundant opportunities to brief the standing issue the first time around. In fact, the Board received nearly 250 pages of briefing and exhibits submitted by both appellant groups on the issue of standing. Not only were the appellant groups granted several extensions in which to prepare the briefings, but they also submitted supplemental declarations and documents that were not even a part of the administrative record. Again, further briefing on the same issues would serve no purpose beyond delay.

Conclusion

The Board should reject Appellants' recommendation to establish a briefing schedule on the standing issue.

Respectfully submitted,

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