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VIA FACSIMILE

Ms. Amy Dutschke
Acting Regional Director
Bureau of Indian Affairs
Pacific Regional Office
2800 Cottage Way
Sacramento, California 95825

Re: *Preservation of Los Olivos, et al., v. Pacific Regional Director, Bureau of Indian Affairs, Docket No. IBIA 05-050-1*

Dear Acting Regional Director:

We are in receipt of the Santa Ynez Band's August 20, 2010 letter brief and exhibits and the Band's September 23, 2010 reply letter with additional exhibits. This letter and the accompanying Supplemental Appendix are submitted on behalf of Preservation of Los Olivos and Preservation of Santa Ynez (collectively, "POLO") in response to the foregoing submissions and briefs by the Santa Ynez Band.

I. Santa Ynez Band's Reliance on the Alleged Establishment of a Federal Reservation for the Band Prior to June 1934 is Misplaced.

To establish that it was a "tribe under federal jurisdiction" in June of 1934, the Santa Ynez Band's Opening Brief places substantial reliance on the assertion that since at least the early 1900's the federal government acquired title to land and held it in trust for the Band:

For example, it is axiomatic that if the United States holds title to lands for the benefit of a tribe, those lands and the tribe residing on those lands are under the government's control and jurisdiction as of the date the United States acquired such title. Santa Ynez Band's Opening Brief, page 3, para. 1.

The Band's reliance on its assertion that the federal government acquired land and held it in trust for the Band prior to June 1934 is fundamentally flawed for several reasons.¹

First, the record is absolutely clear that the federal government did not acquire title to the subject land to be held in trust for the Band until several years *after* June 1934, the effective date of the Indian Reorganization Act. Indeed, the federal government continued to solicit quit claim deeds to the property in the late 1930's and early 1940's and did not obtain title until 1941. Moreover, the federal government's applicable Title Statement expressly states that the reservation was not formed until 1941. (POLO Appendix Tabs 17, 21).

Faced with the foregoing inescapable evidence, the Band shifts direction in its Reply Brief, and argues that the fact the government did not establish the federal reservation until 1941 is a "hyper-technical" point which is irrelevant to determination of tribal status under federal jurisdiction as required by *Carciari*. (Santa Ynez Band Reply Brief, page 2, para. 1.) The Band's effort now to trivialize the foregoing issue of *when* the federal government took title to the land and placed it under trust for the Band is disingenuous and should be rejected. One need research no further than the 1940 Solicitor's Opinion to determine that the issue is not trivial and the federal government did not assume jurisdiction of the land, and thus the Santa Ynez Band that lived on the land, until after 1940. (POLO Appendix Tab 9.)

On page 2, the Solicitor's Opinion states under the heading "Held" as follows:

Held: That *before title may be accepted*, the following requirements must be met: (Appendix Tab 9, Emphasis added.)

Clearly, as of October 1940 the federal government had specifically and intentionally refused to accept title to the subject land and therefore did not hold title to such lands in trust for the Band. This fact is further confirmed by a May 11, 1940 letter from Superintendent Dady to the Commissioner in which he outlines the efforts to secure title to the property and then makes the following recommendation:

¹ The paramount importance that the Band places on the alleged pre-June 1934 transfer of land to the federal government as validation for the Band being "under federal jurisdiction" runs throughout the Band's Opening Brief. "In addition, the federal government has held land in trust for the Tribe since 1903." Opening Brief at 3. "After the conclusion of the quite (*sic*) title action in 1906, the Catholic Church transferred land to the United States to be held in trust for the Tribe." *Id.* at 5. As we discuss in the body of this Responsive Letter Brief, the federal government specifically declined to accept title to the land until 1941, when title was conveyed to the federal government by quit claim deeds.

We are extremely anxious to obtain the approval of the Department for the acquisition of this land as promptly as possible, which is urgently needed by the eighty-five Indians who appear on the Santa Ynez census rolls. Many of these people are entirely without homes at this time. As soon as title to the land is accepted by the Government, we hope to be able to obtain funds for building Indian homes, extending irrigation system and make other improvements on the reservation that are badly needed. (POLO Supplemental Appendix, Tab 28, emphasis added.)

The urgency Superintendent Dady's letter above belies the notion that the land was already owned by the federal government and that securing title was just a hyper-technical inconvenience. Moreover, the letter also refutes the Band's argument that the BIA had been consistently providing the necessities of life to the Band as early as the turn of the Twentieth Century. Dady acknowledges that much is to be done to assist the Band *once title to the land has been secured*.

Compare the foregoing evidence of *when the United States took title to the land* to the importance which the Band placed on such acceptance of title in its Opening Brief. The Band's admission is of such significance that it bears repeating, with emphasis, here:

For example, it is axiomatic that if the United States holds title to lands for the benefit of a tribe, those lands and the tribe residing on those lands are under the government's control and jurisdiction *as of the date the United States acquired such title*. Santa Ynez Band's Opening Brief, page 3, para. 1, emphasis added.

The United States declined to accept title to the subject land until sometime in 1941 and pursuant to the foregoing axiom, until such event occurred neither the land nor the tribe residing on those lands were under the government's control and jurisdiction. This is not a trivial matter or word gaming on POLO's part because prior to the federal government accepting title, the land fell under the jurisdiction and control of the State of California, a fact that the Band does not contest, or at least, on which the Band presents no countervailing evidence.

In an effort to deflect this issue, the Band argues that even though title to the land was not perfected in the federal government until 1941, the federal government nonetheless "established" a federal reservation on the land many years before. As support, the Band recites Webster's dictionary definition of the word "establish" (to make secure or firm; to found). Exercises in lexicography aside, the question whether the federal government believed it had established a federal reservation prior to accepting

title to the land in 1941 is answered by the clear language of the United States Solicitor's Opinion of October 1940:

The Office of Indian Affairs has presented for approval (certain quitclaim deeds and agreements) conveying as a donation their respective interests in certain lands . . . and water rights . . . within the *proposed* Santa Inez Indian Reservation in Santa Barbara County, California. The lands and water rights which are more particularly described in the deeds *are being conveyed for the establishment of a permanent Indian reservation* for the perpetual use and occupancy of the Santa Ynez Band . . . (POLO Appendix, Tab 9, page 1.)

Certainly, the Solicitor would not have identified the land as a proposed reservation if the federal government believed that a reservation already existed. Nor would the Solicitor have observed that the land was *for the establishment* of a federal reservation if such a reservation had already been established. (POLO Appendix Tab 9, page 3 (first page of text), para. 1) Webster's New College Dictionary does not control this issue—the Solicitor's October 14, 1940 Opinion does.

The second flaw in The Band's argument that it was under federal jurisdiction because the government held land in trust for the Band's use is that the argument ignores completely the purpose for which the government had entertained the transfer. As we discuss in POLO's Opening Brief, the Smiley Commission Report, on which the Band places substantial reliance, arose out of the Mission Indian Relief Act of 1891. That Act, as we pointed out in our Opening Brief, was part of the allotment process by which the federal government acquired land—not to promote existing tribes or recognize new ones—but to eventually break up reservations and distribute the land to individual Indians.

Moreover, the allotment system remained a central part of federal Indian policy right up to the enactment of the IRA. Submitted as Tab 29 in POLO's Supplemental Appendix is a letter from the Special Allotting Agent to the Commissioner of Indian Affairs dated July 12, 1922. The Special Agent describes the purpose for his task of enrolling Indians residing in Santa Ynez as follows:

I am just finishing the roll here at Santa Ynez. The plan, as I understood it, was to submit these tentative rolls to be used as a basis for action by the Office in making arrangements for the actual work of allotment, later.

In short, the Mission Indian Relief Act, like the Dawes Act, was intended by Congress to allot land to individual Indians and assimilate those Indians into the general population. As demonstrated above, the allotment process permeated the

relationship between the federal government and the Santa Ynez Band right up to June 1934 when the IRA was enacted. By its terms, the Mission Indian Relief Act was antithetical to Tribe building, or even tribal recognition, but rather was intended to dissolve tribes. The Band fails to discuss this important historical and legislative fact.

The third flaw in the Band's argument arises from the fact when the federal government finally did recognize the Santa Ynez Band by placing it under federal jurisdiction in 1960 the Bureau of Indian Affairs was not comfortable in acknowledging that the Band's membership could be accurately traced back to before 1940. The Band's original 1960 Constitution states that its membership shall consist of "those living persons whose names appear on the January 1, 1940 Census Roll of the Santa Ynez Band of Mission Indians." (POLO Appendix, Tab 6, Article III, Section 1.A.) As it now appears, the foregoing membership criteria was established by the Riverside Area Field Office of the BIA because the federal government did not feel comfortable tracing the Band's membership prior to 1940. The following appears in a May 10, 1960 cover letter from the BIA Area Field Office to the Spokesman for the Band enclosing a first draft of the Band's Articles of Associations:

You will note that the membership section is based on the 1940 Census Roll rather than the law suit of 1906. This change was necessary for identification purposes. (POLO Supplemental Appendix, Tab 30.)

Contrary to the Band's assertion, federal jurisdiction over the Band cannot be traced to the 1906 lawsuit or to any other time prior to June 1934. If it could, then Field Agent Pappan would not have found it necessary to base the Band's membership on a 1940 Census—which, of course, came well after the important June 1934 enactment of the IRA.

II. The Band Incorrectly Applies *Sandoval*

The Band relies primarily on *United States v. Sandoval* as the legal precedent that the Band was under federal jurisdiction prior to 1934. *United States v. Sandoval* (1913) 231 U.S. 28. Specifically, the Band argues that *Sandoval* requires only that Congress (or the executive branch) view the Band as "a distinctly Indian community" for it to be considered a tribe under federal jurisdiction. Band's Opening Brief, at page 3. The Band misinterprets and misapplies *Sandoval*.

Sandoval involved the Pueblo Indians of New Mexico, a historical tribe that had enjoyed a well developed and independent society with tribal self governance for centuries, dating back to first contact. The fact that the Pueblos constituted a self-governing historical tribe is made abundantly clear by the 1925 Supreme Court decision in *United States v. Candelaria*, (1925) 271 U.S. 432. In *Candelaria*, the Supreme Court once again had the occasion to consider whether the Pueblo Indians were a tribe under federal jurisdiction. After noting that the status of the Pueblos had been the subject of

Sandoval the Court explained the basis for the determination that the Pueblos were a tribe at all. The Court noted that the Pueblos fairly fall within the words of the statute, “any tribe of Indians” as follows:

Although sedentary, industrious and disposed to peace, they are Indians in race, *customs and domestic government*, always have lived in isolated communities . . . *Id.* at 441-42.

Significantly, the Court’s opinion goes on to adopt the definition of a tribe as the Court had defined that term in the earlier case of *Montoya v. United States*:

A more reasonable view is that the term “Indian Tribe” was used in the acts of 1834 and 1851 in the sense of ‘a body of Indians of the same or similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory. *Id.* at 442

The *Montoya* case pre-dates *Sandoval* and the *Sandoval* Court leaves unperturbed the definition of “tribe” as set forth in *Montoya*. As *Candelaria* makes clear, the Pueblo tribe satisfied the threshold definition of being a tribe which then presents the issue of whether it was a tribe under federal jurisdiction. By comparison, the Santa Ynez Band bears no resemblance to the Pueblos and the *Sandoval* case does not support the argument that the federal government recognized the Santa Ynez Band prior to 1934. The Band was not “united in a community,” and certainly was not organized politically under one leadership or government. Furthermore, the record places in question whether the group residing on the College grant was even comprised of the same or similar race.³

III. The Band’s Reliance on the Smiley Commission Report and Subsequent Annual Reports of the Commissioner Lacks Merit

POLO has fully briefed the significance of the Smiley Commission Report in its Opening Brief. Suffice it to say that the Report contains no evidence that the Santa Ynez Band had any attributes of a tribe, as that term is used for the purpose of federal recognition or to establish federal jurisdiction. What the Smiley Report observes and

² *Montoya v. United States*, (1901) 180 U.S. 261.

³ The Santa Ynez Band is wont to repeat that it traces its roots back to first contact yet it has never offered a scintilla of evidence to support its claim. In fact, as we point out in POLO’s Opening Brief, Agent Dady reported that the residents were actually Shoshone. The Band’s Reply Brief objects that it is POLO’s burden to prove Dady didn’t make a mistake. It is truly axiomatic that in administrative cases such as this the burdens of persuasion and proof fall on the applicant. Furthermore, POLO Supplemental Appendix Tab 31 is a March 14, 1925 letter from another federal agent that describes, as Dady had, the disorganized and disparate few families that lived on the Santa Ynez reservation.

what remained the case until the Band was organized *after* the IRA was enacted is a loose accumulation of residents living within the College grant, the ethnic origin of whom was unknown, and who had no sense of a distinct political society, no civic leadership and no self-governance at all. The scattered group of residents that the Smiley Commission observed were not a “tribe” at all, let alone one that the Report officially recognized as being under federal jurisdiction.

The Band’s reliance on the Annual Reports of the Commissioner similarly lacks merit, is overblown and mischaracterizes the reports. Most of the reports simply recite the unfulfilled hopes of some federal agents that some day the College grant would be placed under federal jurisdiction which, as we have seen, did not occur until 1941. See Band Exhibit 8: “steps have been taken by me to secure a permanent and fixed home.” See also Band Exhibit 9: “I have hopes of relocating the Indians.” Band Exhibit 10 speaks in terms of someday building a schoolhouse, but only after the “rights of the Indians and the Government can be adjusted.” Exhibit 10 also discusses the general need for teachers to educate the Indians but this reference reflects unspecified general ambitions, not specifically related to the Santa Ynez Band and no report discusses that any such teachers or schoolhouse was provided to the Band. The 1905 Report simply acknowledges again that title to the land has yet to have been secured by the federal government. It appears that these reports were generated with respect to the Santa Ynez Band based on, perhaps, a single annual visit—if that. Contrary to the representations set forth in the Band’s papers the reports do not discuss with respect to the Santa Ynez Band specifically “needs assessments, animal stock, educational needs, farming equipment, blankets, food and housing, as well as the Band’s relationships with settlers and church groups.” In short, the Commissioners reports reflect very casual contact with the residents of the College grant and certainly do not establish that the residents were a “tribe,” let alone one existing under federal jurisdiction.

IV. The Fact that the Band Voted to Organize Under IRA Does Not Establish that It was a Tribe Under Federal Jurisdiction Before IRA was Enacted.

The Band asserts that because it voted to organize under the IRA it was therefore a Tribe under federal jurisdiction before the passage of IRA. The argument is a *non sequitor*. First, the language of the IRA itself extended the right to organize to a variety of groups of Indians and not just those tribes that were under federal jurisdiction at the time of the Act. The Act defines Indian Tribe for the purposes of the Act as “any Indian tribe, organized band, pueblo, or *the Indians residing on one reservation.*” 25 U.S.C. § 479. Section 16 of the IRA enabled any Indian tribe, or tribes, residing on the same reservation,” to organize. 25 U.S.C. § 476. Neither the definition of a tribe nor the qualifications to organize under IRA are limited to those tribes that existed *and were under federal jurisdiction* in 1934.

Second, contemporaneous official documents from the Department of Interior, Commissioner of Indian Affairs demonstrate that the Commissioner's office liberally solicited a wide variety of disparate Indian groups to hold organizational elections under IRA. This was particularly true in California. For example, submitted hereto as POLO Supplemental Appendix Tab 32 is a September 19, 1935 letter from Roy Nash, Superintendent of Sacramento Indian Affairs Agency to the Commissioner. Nash's letter identifies by name a "number of various groups" of Indians in California for which no census had ever been prepared and whose identity and constituency were "changing practically constantly." Mr. Nash's letter hardly describes organized communities having a common culture that are politically organized under one leadership. Nonetheless, most of the "changing groups" of Indians identified in Mr. Nash's letter were encouraged to vote under the IRA and did so. POLO Supplemental Appendix, Tab 33. The fact that IRA permitted "groups" of Indians that had not previously been federally recognized as tribes is further confirmed by the Band's Exhibit 12, Haas, *Ten Years of Tribal Government under I.R.A.* (1947). Haas observes that at the present time (1947) there are "195 tribes, bands and *communities or groups* thereof," emphasis added.

Third, the Band fails to mention that notwithstanding that it was permitted to vote under IRA, the Commissioner refused to act on that vote for, at least, twenty-five years, and thus refused to accept the Band's charter or by-laws. Notwithstanding that the Santa Ynez Band had voted to organize under IRA, the Commissioner declined to permit such organization, "because of its smallness *and for other reasons*, Santa Ynez cannot now be considered for any kind of reorganization work." POLO Supplemental Appendix, Tab 34.⁴ Had the Band been a pre-existing tribe under federal jurisdiction at the time IRA was passed, then the Commissioner would have had no choice but to accept the Band's charter and by-laws in due course following the Band's favorable election. Obviously, the Commissioner did not believe at the time that the Band was already under federal jurisdiction.

⁴ The Band argues in its Reply Brief that POLO makes the novel assertion that in order to be under federal jurisdiction, the federal government must adopt the tribe's charter and by-laws. That is not what POLO asserts and the Band's argument is a red herring. POLO asserts that there is no credible evidence that the federal government recognized the Band or that it fell under federal jurisdiction prior to June 1934, and the first such evidence that the Band fell under federal jurisdiction was the adoption of the Band's Articles and by-laws in 1960.

V. Conclusion

POLO respectfully submits that its arguments under *Hawaii v. Office of Hawaiian Affairs* were fully and adequately briefed in its Opening Brief and will not prolong the record by reiterating those arguments here. For all of the reasons set forth above and in its Opening Brief, POLO respectfully submits that the Band does not qualify under *Carcieri* and the land in question may not be taken into trust under *Hawaii v. Office of Hawaiian Affairs*.

Very truly yours,

John M. Rochefort
Partner

JMR:jmr

cc: Nancie Marzulla, Esq. *Via Facsimile*
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