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August 19, 2010

VIA OVERNIGHT MAIL

Dale Risling
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 submit this letter brief on behalf of the Preservation of Los Olivos and Preservation of Santa Ynez (collectively "POLO") in response to the July 23, 2010 letter from the Pacific Regional Office of the Bureau of Indian Affairs ("Regional Director" or "BIA") inviting submission of documentation, information and briefs regarding the issues on remand in the above-entitled case. Enclosed herewith please also find an Appendix of documents to which POLO refers in this letter and which it respectfully requests the Regional Director to include in the administrative record.

I. INTRODUCTION

In February 2009 the United States Supreme Court decided the landmark case of *Carcieri v. Salazar*, (2009) 129 S.Ct. 1058, which, in terms as clear and unambiguous as the underlying statute itself, holds that the BIA may take land into trust under the Indian Reorganization Act ("IRA") *only* for Indian Tribes that were recognized by the federal government and under federal jurisdiction in June 1934, the effective date of the IRA. *Carcieri* reversed decades of erroneous administrative practice in which the BIA had taken untold acreage into trust and placed it beyond state and local jurisdiction on behalf of groups of Indians that were neither federally recognized nor under federal jurisdiction at the time the IRA was enacted in 1934.

When *Carcieri* came down, the Regional Director's ruling in this case (which recommended that 6.9 acres of land in Santa Ynez, California be placed into trust for the Santa Ynez Band of Mission Indians ("Santa Ynez Band")) was on appeal. Now, the case is again before the Regional Director to consider and apply the principles of *Carcieri*. As demonstrated below and by the historical records contained in the

Appendix, the Santa Ynez Band does not remotely qualify as a Tribe that was federally recognized and under federal jurisdiction as required by the Supreme Court. At best, the Band constituted a small collection of individuals of mixed heritage who occupied their land as citizens of the State of California. In 1934 the Band was not an independent political unit. It had no government. Indeed, the Band did not organize into such a political entity until thirty years later, in 1964. Nor was the Band federally recognized as an Indian Tribe in June 1934 and the unambiguous historical record clearly demonstrates that for decades before and after the enactment of IRA, the Indians which now constitute the Santa Ynez Band were governed by state law, like all other private citizens. Accordingly, under the dispositive authority of *Carcieri* the Regional Director's ruling must be vacated and the Santa Ynez Band's application to place the subject 6.9 acres into federal trust denied.

2009 brought a second United States Supreme Court decision that weighs heavily against the fee-to-trust application in this case. *Hawaii v. Office of Hawaiian Affairs*, (2009) 129 S.Ct. 1436. In *Office of Hawaiian Affairs*, the Court reversed a decision of the Hawaii Supreme Court that had placed a cloud on title to land that had been ceded to the State of Hawaii by the federal government upon statehood. The cloud was predicated on the interpretation of a post-statehood Congressional resolution which purportedly granted Native Hawaiians claims to their aboriginal land. The U.S. Supreme Court first disposed of the arguments on behalf of the Native Hawaiians' claims on the basis of conventional principles of statutory construction.

The Supreme Court then took the extraordinary additional step to state that even if Congress had intended the resolution to impair the state's title by granting to Native Hawaiians additional claimed rights in land; such grant would raise serious constitutional concerns arising from altering the State of Hawaii's sovereign rights granted by Congress on the Hawaiian's admission into statehood. Thus, *Office of Hawaiian Affairs* forecasts the Court's concern that the BIA's fee-to-trust practices pose a serious threat to the structural form of dual government guaranteed by the United States Constitution. In short, the Constitution neither authorizes nor permits the BIA to place land beyond state and local regulation by taking it into federal trust.

II. ARGUMENT

A. The BIA's Assertion That the Federal Government Recognized the Band Since 1891 Is Legally and Factually Flawed.

In a letter dated March 28, 2007, Carl Artman, the Assistant Secretary of the Department of Interior, Indian Affairs stated the BIA's official position as to when and how the federal government recognized the Santa Ynez Band:

> The Santa Ynez Band of Chumash Indians was included on the first list of Indian Tribal Entities published in the Federal Register. See 44 Fed. Reg. 7,235-7,236 (February

> 6, 1979). The reservation for the Santa Ynez Band of Chumash Indians was established December 27, 1901 pursuant to the Act of 1891 (26 Stat. 71-714, c.65) and the Band has had a bilateral political relationship with the federal government since at least the Act of 1891. (Appendix ("App.") Tab 1.)

Assistant Secretary Artman is correct that the Santa Ynez Band was included in the first list of Indian Tribes published in the Federal Register but that occurred in 1979 and has no relevance to whether the Band was a federally recognized Indian Tribe or was under federal jurisdiction in June 1934 when the IRA was enacted. However, Mr. Artman is wrong when he states that a *federal* Indian reservation was established for the Band in 1901 or that the Band has had a *bilateral political relationship* with the federal government since at least the Act of 1891 (the Mission Indian Relief Act.)

Indeed, the federal commission charged with investigating and reporting pursuant to the Act specifically recommended that the land occupied by the few families in Santa Ynez *not* be established as a federal reservation. Furthermore, the official position of both the BIA and the Santa Ynez Band itself is that the federal Santa Ynez reservation was established no earlier than 1941, seven years after the IRA was enacted. Nor is there any evidence whatsoever that the Santa Ynez Band was a political body capable of engaging in a bilateral political relationship with the federal government until 1964 when the BIA accepted the Band's initial Articles of Organization.[1]

1. The Santa Ynez Reservation Was Not Established As A Federal Reservation Until At Least 1941—Not 1901.

Contrary to the Mr. Artman's letter, the Santa Ynez reservation was not established as a federal reservation in 1901 pursuant to the Mission Indian Relief Act of 1891. That event—the establishment of a federal Santa Ynez reservation—did not occur until seventy three years after the foregoing Act and thirty years after the operative Indian Reorganization Act of 1934.

The stated purpose of the Mission Indian Relief Act was to establish *temporary* reservations for certain Indians residing in California. 26 Stat. 71-714, c.65. (App. Tab 3.) The Act was never intended to establish permanent federal reservations for any Indian group or tribe. Indeed, the Mission Indian Relief Act was not a tribal building

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[1] Assistant Secretary Artman's characterization of the Band as the Santa Ynez Band of *Chumash* Indians is also suspect. As late as 1933, the Superintendent of the Mission Indian Agency, John Dady, characterized the few scattered residents of the Santa Ynez area as "all of Shosonean origin with an admixture of Spanish." (App. Tab 18.) Even the Band's own initial Articles of Organization refers to itself as the Santa Ynez Band of *Mission* Indians. (App., Tab. 6.) The Band did not change its name to *Chumash* until subsequent amendments of its Articles, all in an apparent attempt to draw its origins to the historical aboriginal Chumash linguistic group that inhabited the Santa Ynez Valley prior to first contact.

statute at all. Nor was the Act a statute intended to establish new federally recognized tribes.[2] Rather, the Mission Indian Relief Act was a statute designed to allot land to Indians as individual private citizens. Moreover, the legislative history of the Act enumerates the specific California Mission Indian reservations and villages that the Act was intended to benefit *and Santa Ynez Village is not listed. See*, Congressional Record, Proceedings and Debates, Fifty-first Congress, Second Session, at 306-307 (App. Tab 4.)

The Mission Indian Relief Act authorized the formation of a commission to investigate conditions of the Mission Indians and issue a report recommending the feasibility for establishing temporary federal reservations which eventually would be broken up and allotted to the individual Indian occupants. The Mission Indian, or Smiley, Commission was expeditiously formed and undertook its chartered tasks.

On December 29, 1891 the Commission issued its Smiley Commission Report and Executive Order. (App. Tab 5.) Notwithstanding that the Santa Ynez Village had not been one of the reservations or villages enumerated in the Senate Debate of the Act, the Commission nonetheless investigated and reported on the Santa Ynez Village. (*Id.* at pg. 26.) The Report, which, as required, was approved and adopted by the Interior Secretary and President, is telling with respect to Santa Ynez. The area, characterized as an Indian village, was composed of about fifteen families. The families lived on land that was owned by the Catholic Church and as demonstrated by other land records, the Santa Ynez Land and Improvement Company ("Santa Ynez Land"). The Report further states that any claim to title by the fifteen or so foregoing families was questionable. Nonetheless, according to the Smiley Commission Report, the title holders had no intention to remove the families and, indeed, wished to provide for their continued occupancy, through a variety of alternative means including transferring title to the federal government. In conclusion, the report states that the Commission *does not have power* to set aside any lands for these families but does suggest that the special attorney for the Mission Indians take steps to receive the land that the title holders offered. Significantly, the Smiley Commission did not recommend that any land be taken into a federal reservation for the Santa Ynez families. This is in stark comparison to several other Indian settlements in which the Smiley Commission Report firmly recommends that a federal reservation be set aside.

Thereafter, the Catholic Church commenced litigation in the Santa Barbara Superior Court and obtained a judgment to settle its title. (App. Tabs 10, 11 & 12.) Later, the Church and Santa Ynez Land, respectively, entered into agreements to transfer title to the United States for the benefit of the Santa Ynez Band. (App. Tabs 13

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[2] The Mission Indian Act was passed by Congress during the era of Indian allotments and assimilation. *See*, Dawes Act of 1887, 24 Stat. 388. c 119. The purpose of the Dawes Act, and other Acts passed during this era such as the Mission Indian Relief Act, was to dissolve Indian tribes while granting allotments of land to individual Indians and assimilating the Indians into mainstream America. Assistant Secretary Artman's reliance on the Mission Indian Relief Act as the basis for establishing a permanent federal reservation for, or a bilateral political relationship with, the Santa Ynez Band stands the Act on its head.

& 14.) The judgment and the indentures executed pursuant to the foregoing agreements reserved certain water and other rights in the grantors and provided that the land shall revert to the grantors once all the descendents of the Band died (Catholic Church Agreement) or the original five Santa Ynez families ceased occupying the premises (Santa Ynez Land Agreement). (App. Tabs 13, 14 & 15.) All of the above is clearly spelled out in a Solicitor's Opinion dated October 14, 1940. (App. Tab 9.)

The fact that the judgment, agreements and indentures contained restrictions (including reversionary interests in the Church and Santa Ynez Land) prevented the United States from accepting title to the land. *See*, Solicitor's Opinion. (App. Tab 9.) Furthermore, such restrictions were not eliminated until at least 1938 following the recordation of a final set of quitclaim deeds by the Church and successors of Santa Ynez Land. (App. Tabs 16 & 17.) All of this means that *the federal government did not own the land* and could not possibly have established a federal reservation for the Santa Ynez Band until title was cleared and the conveyances accepted by the federal government. Those events did not occur until sometime after 1940.

Among the parties in interest in this appeal, the foregoing summary of events is not particularly controversial. For example:

- The face page of the aforementioned Solicitor's Opinion states that the opinion relates to the "*proposed* Santa Ynez Indian Reservation." Of course, the Deputy Solicitor would not refer to a federal reservation as "proposed" if it already existed. The Solicitor's Opinion also undercuts Assistant Secretary Artman's representation as to the authority for creating the reservation. At page 1, the Opinion states that the land is being taken for the (proposed) establishment of a federal reservation under the Act of February 14, 1931, not the Mission Indian Relief Act of 1891, as Mr. Artman's 2007 letter states. *Cf.* App., Tab 9 at pg. 1 with Tab 1 at pg. 1.

- In a November 7, 1941 letter to the Commissioner of Indian Affairs in Washington D.C., Mission Indian Agency Superintendent John Dady urges the Commissioner to "expedite as rapidly as possible" approval of these conveyancing papers in order to establish the reservation. (App. Tab 21.)

- In a document entitled "Title Statement," the BIA states that the Santa Ynez reservation was established on December 18, 1941. (App. Tab 22, final page.)

- Similarly, in another 5.8 acre fee to trust application, the Santa Ynez Band itself freely acknowledges that its reservation was not established until late 1941:

> It was not until December 18, 1941 that the area, approximately 100 acres of land; was officially acquired by

> the U.S. Government to be held in trust for use as the Santa Ynez Reservation."[3] (App. Tab 8 at 7 of 19.)

Therefore, the current contention of the Department of Interior and specifically the BIA that a federal Indian reservation was established for the Santa Ynez Band in 1901 pursuant to the Mission Indian Relief Act is simply wrong. Even if the Act were intended as a statutory means to recognize new Indian tribes (which it was not) and even if the Act specifically covered the Santa Ynez Band (which is questionable in light of the legislative history that omits Santa Ynez as one of the targeted reservations or villages) the historical evidence is overwhelming that a federal reservation was not created for the Santa Ynez Band until at least December 1941, well after the June 1934 enactment of the Indian Reorganization Act.

The delayed creation of the federal reservation is important for several reasons including, without limitation, that the Band continued to occupy land owned by the Catholic Church and successions of Santa Ynez Land and remained under the jurisdiction of the State of California as California citizens until late 1941.

2. In 1934 the Santa Ynez Band Was Not a Federally Recognized Tribe And Did Not Become One Until Thirty Years Later.

Federal recognition of an Indian tribe is a formal act that requires the group seeking such recognition to be a distinct political entity and upon such recognition a government-to-government relationship between the United States of America and the tribe is created.

> Federal acknowledgment or recognition of an Indian group's legal status as a tribe is a formal political act confirming the tribe's existence as a distinct political society, and institutionalizing the government-to-government relationship between the tribe and the federal government. State authority over recognized tribes is concomitantly limited. Cohen's *Handbook of Federal Indian Law* (2005 Edition) § 3.02[3].

Therefore, at least three elements must be present in order for a group to become a federally recognized Indian Tribe. First, the group seeking such recognition must constitute a *distinct political society*. Second, the federal government must take such legal and political steps necessary to establish a *government-to-government*

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[3] The Santa Ynez Band withdrew its 5.8 acre application, but such withdrawal does not diminish the Band's admission that its federal reservation was not formed until late 1941 several years after the IRA had been enacted.

relationship with the group.[4] Third, upon such recognition federal jurisdiction primarily applies to the Tribe while state jurisdiction is accordingly limited. The overwhelming historical evidence in this case demonstrates that the Santa Ynez Band was not a federally recognized Indian Tribe until at least February 1964 when the Secretary of the Interior accepted the Santa Ynez Band of Mission Indians' initial Articles of Organization.

As early as December 1891, the Smiley Commission described the Santa Ynez Indians in the following terms:

> Within the limits of the College Grant, in Santa Barbara County, in the Canada de la Cota, is an Indian village composed of the some fifteen families. These date their possession of the lands they occupy from about 1935, they removed to this place immediately after the Secularization Act, which emancipated them from the control of the Padres. (App. Tab 5 at pg. 26.)

There is no discussion or reference in the Smiley Commission Report that the families occupying the Canada de Cota had developed any sense of a distinct political society. There was no discussion or reference to civic leadership or any sense of governance at all. The report simply describes the inhabitants as some fifteen families. Moreover, the Commission Report notes that the families were not even indigenous to the area, having "removed to this place" following the Secularization Act, which was legislation that liberated Indians from the Catholic Church during Mexican rule over California. Indeed, this report does not even mention that these families, which we know from the report came from somewhere else, had any common ancestry, custom, governance—any of the indicia of a distinct political society. They were, as the report notes, simply "some fifteen families."

The foregoing observations of the Smiley Commission Report are confirmed generally by experts from the California Governor's Office who acknowledge that to the extent there ever were distinct politically independent villages in the Santa Ynez Valley, they were wholly "subsumed within the Spanish political system" by the Missions. (App. Tab 23, at pg. 5.)

The next significant piece of historical evidence on the subject is the November 27, 1933 letter from Mission Indian Agency Superintendent John W. Dady to the Honorable Henry E. Stubbs, United States Congressman for California's 10th

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[4] Carl Artman's March 28, 2007 letter to Jim Marino implicitly acknowledges that in order to establish a federally recognized Indian tribe, the group seeking such recognition must be a distinct political society with which the United States creates a government-to-government relationship: "the Band has had a *bilateral political relationship with the federal government* since at least the Act of 1891." Mr. Artman was correct in stating two of the three the necessary criteria for federal recognition of a tribe; he was wrong, however, in stating that the Santa Ynez Band met those criteria in 1891.

Congressional District. (App. Tab 19.) Superintendent Dady's characterization of the Indian inhabitants of Santa Ynez, coming as it does less than six months before the enactment of the IRA, is particularly informative:

> These Indians (of Santa Ynez) are all of Shoshonean origin, with an admixture of Spanish. The truth of the matter is, they resent being classed as Indians. A former parish priest stated that there were but few of this tribe he called genuine Indians, the others being mixed bloods who do not call themselves Indians, nor do they desire to be so called. Many of them live away from the reservation, and in fact have lost their identity as Indians. Children of these Indians are entered in schools as "Spanish." (App. Tab 19.)

Suffice it to say that what Superintendent Dady describes above is not a distinct society of any nature, let alone such a distinct political entity as to which the United States of America would, or even in major part has lost its identity and could, create a government-to-government relationship. Dady describes a group that resists being classified as a distinct Indian society, let alone one that is politically organized and active.

The Santa Ynez Band itself does not even adopt Assistant Secretary Artman's assertion that the Band was a federally recognized Indian Tribe as early as 1891. In fact, the Santa Ynez Band readily concedes that it did not even begin to establish political identity until many years after (and as a result of) the IRA. Specifically, in its fee-to-trust application in the present case, the Band states as follows:

> The Santa Ynez Band of Mission Indians is recognized as an American Indian Tribe by the Secretary of the Interior. *The Tribe in (sic) organized under the Articles of Organization which were adopted by the membership on November 17, 1963. The Articles of Organization were approved by the Secretary of the Interior on August 23, 1963.*[5] (App. Tab 7, at pg 3, emphasis added.)

Further, the Band's 5.8 acre fee to trust application correctly pinpoints exactly when the band became a distinct political entity—which was *after* enactment of IRA in 1934:

> The Santa Ynez Band reorganized their government under the IRA and *began both developing its governmental*

[5] The date of federal approval of the Articles of Organization that POLO obtained by an FOIA request is February 7, 1964. (App. Tab 6.) The discrepancy between the date cited by the Santa Ynez Band and the date on the copy produced pursuant to the FOIA request is immaterial.

> *functions and structures* . . ." (App. Tab 8, at pg. 8 of 19, emphasis added.)

How could the Band have enjoyed a "bilateral political relationship with the federal government since at least the Act of 1891" when by the Band's own admission it did not organize its government or *begin* to develop its governmental functions or structures until after IRA had been enacted in 1934? The answer is self-evident: the Band correctly describes the Interior Secretary's approval of the Band's Articles of Organization as the seminal event before which the Band had not yet established a distinct political society and, thus, could not have not achieved federal recognition. Assertions to the contrary by Mr. Artman; that federal recognition dates back to 1891, are simply mistaken.

3. The Inhabitants of the Canada de Cota Were Under State—Not Federal—Jurisdiction at The Time The IRA Was Enacted.

The third and final element under *Carcieri* to establish the right ot place land in federal trust is that a federally recognized tribe must be "under federal jurisdiction" at the time IRA was enacted in June 1934. This element is consistent with Cohen's *Handbook of Indian Law* definition, *supra*, that upon federal recognition, the federal government assumes jurisdiction over the tribe on a government-to-government basis and "state authority over the tribe is concomitantly limited."

In the present case, the evidence is overwhelming that at the time the IRA was enacted, the Santa Ynez Indians were under state and local jurisdiction and not federal jurisdiction. As we have already seen, at all relevant times up to December 1941 the lands on which the Indians of the Santa Ynez Band resided were owned by the Catholic Church or successions of Santa Ynez land and subject to state and local jurisdiction. Superintendent Dady correctly observed in November 1933 that while the Santa Ynez Reservation is a reservation, "the land is not in the United States." Moreover, "[a]ll the (Santa Ynez) Indians are citizens of the United States, and the same laws govern them as any other citizen." (App. Tab 19.) Dady did not distinguish when he said "all laws;" he meant all *state, local* and federal laws that govern all other citizens. Of course, such an observation is wholly consistent with the fact that there is not a scintilla of evidence that the Indians who comprised the Santa Ynez Band fell outside the jurisdictions of the State of California or the County of Santa Barbara in June 1934.

Such status is also consistent with the Catholic Church suing to quiet title in the Santa Barbara Superior Court—not the federal district court. In short, not until 1964 did the Santa Ynez Band or the land it occupies fall under federal jurisdiction pursuant to federal tribal recognition.

4. Other Evidence That Undercuts the Santa Ynez Band of Mission Indian's Claim It Is A Federally Recognized Tribe of Chumash Indians

We wish to raise the following additional evidence with respect to the status and federal recognition of the Santa Ynez Band of Mission Indians as Chumash. As we noted earlier, Superintendent Dady's letter to Congressman Stubbs dispels any notion that the Indian occupants of Canada de Cota in 1934 were descendent of the original Chumash residents of the Santa Ynez Valley, a moniker that the Band adopted only recently by amending its Articles of Organization.[6] Dady refers to the inhabitants of Canada de Cota in 1933 as "Shosonean with an admixture of Spanish." Further, Dady's letter is consistent with the earlier Smiley Commission report which observes that the fifteen or so families that resided at Canada de Cota "removed to that area (from somewhere else) at the time of Secularization Act passed by the Mexican government in the mid-19th Century. (App. Tab 5.) While it is difficult and confusing to track descendancy disposition of the families that inhabited the area in the late 19th Century, Brenda Tomares, the Santa Ynez Band's lawyer speaking for the Band and the BIA, stated in a May 2002 letter to the federal Bureau of Land Management that there no longer existed any lineal descendents of the original five families of the land deeded by Santa Ynez Land to the federal government. (App. Tab 18, at pg 2.)

So, what we know for sure is that the administrative record in this case contains no evidence that the current occupants of the Santa Ynez reservation are direct descendents of the Chumash linguistic group that inhabited the Santa Ynez Valley before first contact. Indeed, since Assistant Secretary Artman asserts federal recognition as a result of the Mission Indian Relief Act and since the Smiley Commission, reporting pursuant to that Act, states that the residents of the Santa Ynez Village "removed" to the Canada de Cota from somewhere else, we may presume that they were immigrants from another region. Nor, according to Tomares, are the current inhabitants descendent of the original five families for whom Santa Ynez Land executed its deed of conveyance.

Furthermore, the records that we do have indicate that at the time the IRA was enacted in 1934 the Indian Census Rolls for Santa Ynez were manipulated in order to make it appear that the occupants of the land were "more Indian" than they had previously represented. Tabs 24 through 27 of the Appendix contain the Annual Indian Census Rolls for Santa Ynez from 1932 through 1934 and 1940. The 1932 Census Roll shows, for example Florencia Armenta as ¼ degree Indian blood. (App. Tab 24.) On the 1933 Roll, the same Florencia Armenta is listed as ½ degree Indian blood. (App. Tab 25.) By the 1934 Roll, someone has crossed out ½ for Florencia and insert a handwritten

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[6] This revisionist characterization of the Band as "Chumash" is important because one of the applicant's stated needs for fee-to-trust status is to preserve the ancient Chumash human remains and artifacts discovered on the 6.9 acre site. If the Santa Ynez Band are not descendent of the ancient Chumash, then they have to special interest or status as safe keepers of these antiquities beyond that held by other non-Chumash residents of the Santa Ynez Valley who are proud of the Valley's rich history.

"f" indicating full Indian. (App. Tab 26.) And, the full Indian designation continues for Florencia on each succeeding annual census roll thereafter. (e.g. App. Tab. 27.) The foregoing mysterious discrepancies appear during the same time-frame for several of the other individuals on the Santa Ynez census rolls.

B. Taking The Band's Land Into Federal Trust And Placing It Beyond State And Local Regulation Raises Serious Constitutional Concerns.

1. Constitutional Concerns in General.

Land taken into trust according to current regulation and case law becomes "Indian country" which is not subject to state and local taxation. Nevertheless, the local government is still required to provide services to the trust land as a result of activity on that land and as it affects the surrounding community. Additionally, federal regulations also attempt to exempt trust land from state and local land use regulation.[7] In addition to lost revenue and diminished control over land use, the state's civil and criminal jurisdiction may be significantly compromised where tribal land or members are involved.[8] Finally, the Santa Ynez Band and many other tribes conduct gaming on trust land under IGRA, an activity that creates several other significant local impacts.[9]

There are over 562 federally-recognized Indian tribes.[10] Several tribal acknowledgment petitions are pending at the BIA.[11] The number of tribes seeking to secure trust land, as here, for whatever purpose makes the issue of creating new Indian reservations and adding trust lands to existing reservations a growing and highly-controversial issue. In fact, as recently as March, 2009, the United States Supreme Court weighed in on this issue. In *Hawaii v. Office of Hawaiian Affairs*, 129 S.Ct. 1436 (2009), the Supreme Court reviewed a Congressional Act which purported to strip the State of Hawaii of its authority to alienate its sovereign territory by passing a joint resolution to apologize for the role the United States played in overthrowing the Hawaiian Monarchy in the late nineteenth century. Relying on the Congress' joint resolution, the Supreme Court of Hawaii permanently enjoined the State from alienating certain lands pending resolution of native Hawaiian land claims that the Hawaii court described as not relinquished. *Id.* The United States Supreme Court in reversing the State Supreme Court indicated this resolution would raise grave constitutional concerns if it purported to cloud Hawaii's title to its sovereign lands more than three decades after the State's admission to

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7 25 C.F.R. § 1.4 (2003).

8 *Compare U.S. v. Stands*, 105 F.3d. 1565 (8th Cir. 1997) *with U.S. v. Roberts*, 185 F.3d 1125, 1131-32 (10th Cir. 1999)

9 25 C.F.R. § 2703(4).

10 Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs; Notice, 73 F.R. 18,553 (2008).

11 Department of Interior, Bureau of Indian Affairs Report, *Status Summary of Acknowledgement Cases* (September 22, 2008), <www.doi.gov/bia/docs/ofa/admin_docs/Status_Summary_092208.pdf>.

the union. The Court went onto state that "we have emphasized that Congress cannot, after statehood, receive or convey submerged lands that have already been bestowed upon a state." *Id* The fact the Court invoked this fundamental interpretation of the structure of the Constitution indicates the seriousness of the constitutional question presented by the federal government asserting that land can be withdrawn from state jurisdiction and somehow converted back later into federal territorial land subject to the Property Clause, Art. IV, Sec. 3, Cl. 2. As the Supreme Court unanimously concluded in *office of Hawaii affairs*, once Congress has disposed of territorial land and created the new state, its exclusive power over that land ceases. To conclude otherwise would allow the Congress to potentially remove any land from state jurisdiction, effectively cancelling the creation of the state. This, of course, poses a direct threat to our federal form of government guaranteed under the United States Constitution.

It should also be noted that the title to the land currently occupied by the Santa Ynez Band was conveyed by patent of the United States government to the Catholic Church to be used as a religious seminary in 1861 and thereafter, in 1880 Congress passed an Act authorizing the Church to sell the land without regard to the religious purpose set forth in the initial patent. (App. Tab 2.) The land, thus, fell within the exclusive jurisdiction of the State of California and County of Santa Barbara, until the transfer of title by the Catholic Church and successors of Santa Ynez Land was eventually accepted by the federal government in or after 1941. The imminent loss of the State's and County's jurisdiction over the parcels which are the subject matter of the Band's fee-to-trust application raises grave constitutional concerns.

2. The 10th Amendment to the United States Constitution Prohibits the Placement of Land Into Trust at the Expense of State Jurisdiction.

The Constitution created a federal government with only specifically enumerated powers.[12] This constitutional structure was then further limited by the adoption of the Bill of Rights which includes the Tenth Amendment. Under the Tenth Amendment:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.[13]

The powers delegated to the federal government and those reserved to the states are mutually exclusive.[14] Therefore, all federal statutes must be grounded upon a

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12 U.S. Const., art. 1, § 8.

13 U.S. Cons., amend. X.

14 *See New York v. U.S.*, 505 U.S. 144 (1992)("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States....")

power enumerated in Article I of the Constitution.[15] If the Congressional act lacks Article I authority, then the federal government has invaded the province of the states' reserved powers.[16]

James Madison wrote during the process by which the various states ratified the Constitution, that "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the state governments are numerous and indefinite."[17] The United States Supreme Court has also stated:

> Just as the separation and independence of the coordinate branches of the federal Government serves to prevent the accumulation of excessive power in any one branch, *a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.*[18]

It is axiomatic that Congress cannot unilaterally expand its authority, or the authority of any other branch of the federal government, with respect to the states. As the Supreme Court noted, "[s]tates are not mere political subdivisions of the United States....The Constitution instead leaves to the several States a residuary and inviolable sovereignty, reserved explicitly to the States by the Tenth Amendment."[19] Congress cannot infringe upon the rights retained by the states under the Tenth Amendment.

With the exception of the Enclave Clause discussed below, the federal government lacks any Constitutional authority to impinge upon state sovereignty by removing land from a state's jurisdiction. The removal of state jurisdiction which would result from placement of these parcels into trust would therefore be a violation of the Tenth Amendment, which limits the powers of the federal government to those specifically enumerated in the Constitution. Consequently, 25 U.S.C. § 465, to the extent

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15 *Id.* at 155.

16 *Id.*

17 THE FEDERALIST NO. 45, pp. 292 - 293 (J. Madison)(C. Rossiter, ed. 1961).

18 *U.S. v. Lopez,* 514 U.S. 549, 552 (1995), *quoting Gregory v. Ashcroft,* 501 U.S. 452, 458 (1991)[emphasis added].

19 *New York,* 505 U.S. at 156-57 ("The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States. The Tenth Amendment thus directs us to determine, as in this case, whether an incident of state sovereignty is protected by a limitation on an Article I power. The benefits of this federal structure have been extensively cataloged elsewhere, but they need not concern us here. Our task would be the same even if one could prove that federalism secured no advantages to anyone. It consists not of devising our preferred system of government, but of understanding and applying the framework set forth in the Constitution. "The question is not what power the Federal Government ought to have but what powers in fact have been given by the people." [citations omitted.])

it results in a loss of state jurisdiction to tax and further results in a total loss of land use jurisdiction under 25 C.F.R. § 1.4, is unconstitutional.

3. Congressional Authority to Create a Federal Enclave is Limited and Does Not Allow for the Placement of Land Into Trust for the Benefit of a Tribe Under § 465 of the IRA.

The Constitution provides the federal government only limited ability to reduce the land under control of the states. Under the Enclave Clause[20], congressional power is limited to establishing a federal "enclave," land over which the federal government exercises "exclusive jurisdiction," to that needed for "the erection of forts, magazines, arsenals, dock-yards, and other needful buildings...."[21] Even then, the land cannot be taken into federal jurisdiction without first obtaining the affected State's consent.[22] No other provision of the Constitution provides the federal government the authority to take land from state jurisdiction.[23]

Various courts, including the Supreme Court, have described "Indian country" and Indian reservations as federal enclaves.[24] The creation of these enclaves requires the consent of the affected state. Our federal system was created upon the

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20 U.S. Const. art. I, § 8 ("To exercise exclusive legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular states, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the state in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings....)

21 *Id.*

22 *Id.*

23 *See also* U.S. Const. art. IV, § 3 (expressly prohibiting the "involuntary reduction" of the State's sovereign territory in the creation of the new state.)

24 *See U.S. v. Antelope,* 430 U.S. 641, 648 n.9 (1977); *U.S. v. Goodface,* 835 F.2d 1233, 1237, n. 5 (8th Cir. 1987)(stating that the phrase "'within the exclusive jurisdiction of the United States' in 18 U.S.C. 1153 refers to the law in force in federal enclaves, including Indian country."); *U.S. v. Marcyes,* 557 F.2d 1361, 1364 (9th Cir. 1997); *U.S. v. Sloan,* 939 F.2d 499, 501(7th Cir. 1991), *cert denied,* 502 U.S. 1060 (1992)(tax code imposes taxes upon U.S. citizens through the nation not just in federal enclaves "such as ... Indian reservations"). Notwithstanding this fact, the First Circuit rejected an argument that taking trust lands for Indian tribes violates the Enclave Clause. *Carcieri v. Kempthorne,* 497 F.3d 15, 40 (1st Cir. 2007), *rev. on other grounds, Carcieri v. Salazar,* 129 S.Ct. 1058 (2009). That Court found that the Enclave Clause is inapplicable because the taking of land into trust by the federal government for the benefit of an Indian tribe is not one of the Clauses's enumerated permissible actions. The court also dismissed the assertion that taking land into trust by the federal government is an Enclave Clause violation because there is some sharing of jurisdictional authority between state and federal governments. *Id.* citing *Surplus Trading Co. v. Cook,* 281 U.S. 647, 651 (1930)("[Th]e Supreme Court offered an Indian reservation as a "typical illustration" of federally owned land that is not a federal enclave because state civil and criminal laws may still have partial application thereon."). The First Circuit reliance on *Surplus Trading* is a gross error. That case was decided well before the Indian Reorganization Act of 1934, which created the notion of Indian trust lands, and presented other facts rendering the court's premises unsupportable. And, the fact that States retain some jurisdiction over some matters in "Indian country" does eliminate the protection that the Enclave Clause provides to the territorial integrity of the states.

premise of the dual state and federal sovereignty. The lack of Constitutional authority to reduce state jurisdiction reflects the founders' respect for the territorial jurisdiction and integrity of the states as a fundamental aspect of their sovereignty. As the annals of the Constitutional convention reflect, delegates proposed and eventually adopted the Enclave Clause in the interest of safeguarding our nation's then-unique system of federalism.[25] To this end, the Enclave Clause grants Congress the right of exclusive legislative power over federal enclaves as prophylactic against undue state interference with the affairs of the federal government.[26] Yet, ever sensitive to the risk of granting the federal government unchecked power, the founders limited and balanced this grant of power by requiring state consent to the federal acquisition of land for an enclave.[27] Yet, neither the IRA nor the BIA fee to trust regulations requires consent of the affected states as a condition of taking land into federal trust.

The federal government simply lacks Constitutional authority to take land from the states without the state's consent. Nor may the BIA use the Enclave Clause for a purpose beyond those purposes enumerated in the Clause itself where the land in question is placed beyond state and local jurisdiction.

4. The Indian Commerce Clause Does Not Allow for the Placement of this Land into Trust.

The Indian Commerce Clause[28] is often cited as the authority for Congressional actions with respect to Indian tribes.[29] Federal courts deciding Tenth Amendment challenges have often based their opinions on the false assumption that Article I provides Congress with plenary authority over all matters involving Indians, no matter how remote, indirect, or tenuous the facts of the case may be related to the notion of "commerce," which is the only Constitutional authority actually granted the federal government.[30] Although lower courts have interpreted the Indian Commerce Clause to

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25 *Commonwealth of Va. v. Reno*, 955 F.Supp. 571, 577 (E.D. Va. 1997) *vacated on other grounds*, *Commonwealth of Va. v. Reno*, 122 F.3d 1060 (4th Cir. 1997).

26 *Id.*

27 As James Madison noted, many delegates expressed concern that Congress' exclusive legislation over federal enclaves would provide it with the means to "enslave any particular state by buying up its territory, and that the strongholds proposed would be a means of awing the State into an undue obedience to the [national] government." James Madison, 2 Debates in the Federal Convention, 513 (quoting Elbridge Gerry of Massachusetts). Ultimately, the delegates' apprehension about excessive federal power was allayed by requiring the national government to obtain the states' express consent to acquire and employ state property for federal purposes. *Id.*

28 U.S. Const. art I, § 8, cl. 3. "The Congress shall have the power...to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

29 *See e.g. Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 191-92 (1989); *Morton v. Mancari,* 417 U.S. 535, 551-552 (1974).

30 *See e.g.*, Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 DENVER UNI. L. REV. 201, 217 (2007)("Natelson")("When eighteen-century English speakers wished to describe interaction with the Indians of all kinds, they referred not to Indian commerce but to Indian 'affairs.'").

give Congress "plenary power...to deal with the special problems of Indians," the Supreme Court has limited this assertion of plenary power.[31]

That limitation is appropriate. The language of the Constitution does not support the assertion of plenary authority under the Indian Commerce Clause. That clause grants the federal government authority "to regulate commerce with...the Indian tribes."[32] In the legal and constitutional context, however, "commerce" means only mercantile trade.[33] The phrase "to regulate commerce" has long meant to administer the *lex mercatoria* (law merchant) governing purchase and sale of goods, navigation, marine insurance, commercial paper, money, and banking.[34] The common use of the phrase "to regulate commerce," and similar phrases, at the time of the Constitutional Convention "almost invariably meant 'trade with the Indians' and nothing more....It was generally understood that such phrases referred to legal structures by which lawmakers governed the conduct of the merchants engaged in the Indian trade, the nature of the goods they sold, the prices charged, and similar matters."[35]

The ability to distinguish a reference to "commercial activities" and references to all other activities was common in the vernacular of the time.

> "When eighteenth-century English speakers wished to describe interaction with the Indians of all kinds, they referred not to Indian commerce but to Indian 'affairs.'"[36]

Federal documents treated "affairs" as a much broader term than "trade" or "commerce."[37] An academic article studying of the Indian Commerce Clause states:

> A 1786 congressional committee report proposed reorganization of the Department of Indian Affairs....Their report showed the department's responsibilities as including military measures,

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31 *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 45 (1996).

32 U.S. Const. art I, § 8, cl. 3.

33 Natelson, *supra* n. 189, at 214.

34 *Id.* ("Thus, 'commerce' did not include manufacturing, agriculture, hunting, fishing, other land use, property ownership, religion, education, or domestic family life. This conclusion can be a surprise to no one who has read the representations of the Constitution's advocates during the ratification debates. They explicitly maintained that all of the latter activities would be outside the sphere of federal control.")

35 *Id.* At 215-16.

36 *Id.* at 216-17 ("Contemporaneous dictionaries show how different were the meanings of 'commerce' and 'affairs.' The first definition of 'commerce' in Francis Allen's 1765 dictionary was 'the exchange of commodities.' The first definition of "affair" was "[s]omething done or to be done." Samuel Johnson's dictionary defined "commerce" merely as "[e]xchange of one thing for another; trade; traffick.' It described 'affair' as '[b]usiness; something to be managed or transacted." The 1783 edition of Nathan Bailey's dictionary defined "commerce" as "trade or traffic; also converse, correspondence, but it defined 'affair' as 'business, concern, matter, thing.'")[citations omitted.]

37 *Id.*

> diplomacy, and other aspects of foreign relations, as well as trade. The congressional instructions to Superintendents of Indian Affairs...clearly distinguished 'commerce with the Indians' from other, sometimes overlapping, responsibilities. Another 1787 congressional committee report listed within the category of Indian affairs: 'making war and peace, purchasing certain tracts of their lands, fixing the boundaries between them and our people, and preventing the latter settling on lands left in possession of the former.'[38]

There is, therefore, no basis to argue that the language of the Constitution grants plenary authority over any matter that concerns Indian affairs. The text of that Constitutional provision provides only authority over Indian commerce.

The fact Congress' lack of authority over any Indian matters beyond those related to commerce, coupled with the lack of any authority to remove land from a state without the consent of the state, leads to the conclusion that § 465 of the IRA, especially combined with 25 C.F.R. § 1.4, is unconstitutional.

5. The Regional Director's Attempt to Place the Land at Issue into Trust is Unconstitutional in that it Violates Article IV, Section 3 of the United States Constitution by depriving the State and its Subdivisions of a Republican form of Government.

The Congress does have authority under the Property Clause over lands ceded by treaty or through war to the United States. This power has been interpreted as remaining in Congress until the lands are disposed of and placed under the jurisdiction of a state.[39] This authority to reserve federal public lands from application of state law at statehood has been consistently upheld. Indeed, *Office of Hawaiian Affairs*, *supra*, implicitly recognizes this authority for all lands not ceded to state jurisdiction following statehood. The lands of College de los Pinos[40] were not reserved once Congress transferred them to the Catholic Church and subsequently removed all restrictions on alienation.[41] This leads to the conclusion that Sec. 465 of the IRA, when combined with 25 C.F.R. Sec. 1.4, is unconstitutional. Because the Regional Director's decision rests solely on the Regional Director's exercise of unconstitutional authority, the Secretary cannot take the land into trust as requested by the tribe.

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38 *Id.* at 217-18.

39 *Winters v. U.S.*, 207 U.S. 564 (1908)

40 For the purposes of this presentation, College de los Pinos and Canada de Cota may me used interchangeably.

41 Appendix, Tab. 2.

6. The Acceptance of these Parcels into Trust Violates the Fourteenth Amendment of the United States Constitution.

Section 1 of the Fourteenth Amendment reads as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction of the equal protection of the laws.[42]

In analyzing the Fourteenth Amendment, the United States Supreme Court discussed the issue of a Republican form of government.

> The equality of the rights of citizens is a principle of Republicanism. Every Republican government is in duty bound to protect all of its citizens in the enjoyment of this principle, if within its powers. That duty was originally assumed by the states; and it still remains there. The only obligation resting upon the United States is to see that the states do not deny the right. This the amendment guarantees, but no more. The power of the National Government is limited to the enforcement of this guarantee.[43]

By taking these parcels into trust under 25 U.S.C. § 465 and removing all state and local jurisdiction via 25 C.F.R. 1.4, the United States is abridging the privileges and immunities of the citizens of the State of California and County of Santa Barbara. The citizens of the surrounding Santa Ynez and County of Santa Barbara have no ability to participate in governments over the trust parcels and may be subject to tribal jurisdiction for activities occurring on these parcels. The Fourteenth Amendment does not allow for such a result. Consequently, 25 U.S.C. § 465, to the extent it results in trust parcels being removed from all state and local jurisdiction, pursuant to 25 C.F.R. § 1.4, is unconstitutional because it results in the state and local governments being forced into violating the Fourteenth Amendment.

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42 Fourteenth Amendment of the United States Constitution

43 *U.S. v. Cruikshank*, 92 U.S. 542, 555 (1875).

III. CONCLUSION

For the reasons set forth above, the Regional Director should deny the pending fee to trust application of the Santa Ynez Band of Mission Indians.

Very truly yours,

John M. Rochefort
Partner

JMR:jmr
Enclosure

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CERTIFICATE OF MAILING

I Cynthia Ambriz certify and declare that I am over the age of 18 years, employed in the County of Los Angeles, State of California, and not a party to the IBIA Appeal, Preservation of Los Olivos, *et al.* v. Pacific Regional Director, Bureau of Indian Affairs, Docket No. IBIA 05-050-1.

On August 19, 2010 I served a copy of the attached letter brief from John M. Rochefort to Acting Regional Director Dale Risling and the Appendix to said letter by depositing them in the United States Mail, in a sealed envelope with postage thereon fully prepaid to the persons and at the addresses on the attached list.

Place of Mailing: 333 S. Hope Street, 16th Floor, Los Angeles, CA 90071.

Executed on August 19, 2010 at Los Angeles California.

I hereby certify that I am employed in the office of a member of the Bar of California and the Bar of the United States District Court for the Central District of California.

Cynthia Ambriz

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