

1 Constitution adopted on May 9, 1981, pursuant to the Indian Reorganization Act of 1934, 25
2 U.S.C. 461 et seq., and located in Jamul, California.

3 2. Plaintiff, WALTER J. ROSALES, is also a lineal descendant and son of Native
4 American, Helen Cuero, the personal representative of his mother's estate, the Estate of Helen
5 Cuero, the personal representative of his son's estate, the Estate of Dean Rosales, the personal
6 representative of his un-named younger brother's estate, and a lineal descendant with ownership
7 and control of their human remains and Native American cultural items, as set forth in 25 U.S.C.
8 3001-2, 43 C.F.R. 10.1-17, and Cal. Pub. Res. Code 5097.9-5097.99.

9 3. Plaintiff, KAREN TOGGERY, is also a lineal descendant and daughter of Native
10 American, Marie Toggery, and the personal representative of her mother's estate, the Estate of
11 Marie Toggery, as well as the mother of her son Matthew Tinejero Toggery, and the personal
12 representative of the Estate of Matthew Tinejero Toggery, and a lineal descendant with
13 ownership and control of their human remains and Native American cultural items, as set forth in
14 25 U.S.C. 3001-2, 43 C.F.R. 10.1-17, and Cal. Pub. Res. Code 5097.9-5097.99.

15 4. The Defendants are the UNITED STATES OF AMERICA, and its divisions,
16 including, but not limited to, the DEPARTMENT OF THE INTERIOR, through its Secretary
17 DIRK KEMPTHORNE, the BUREAU OF INDIAN AFFAIRS, through its Assistant Secretary
18 for Indian Affairs, GEORGE SKIBINE.

19 5. The true names and capacities, whether individual, corporate, associate or
20 otherwise, of DOES 1-20, inclusive, are unknown to Plaintiffs at this time, who, therefore, sue
21 said Defendants by said fictitious names. Plaintiffs are informed and believe, and based thereon
22 allege, that each of the fictitiously named Defendants is responsible in some measure for the
23 actions, events and happenings herein alleged, and was the legal cause of injury and damages to
24 the Plaintiffs as herein alleged. When the true names and capacities of said Defendants are
25 ascertained by Plaintiffs, Plaintiffs will seek leave to amend this complaint to insert their true
26 names and capacities, or will serve said Doe Defendants when they become known.

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1 above granted and described premises unto the said Grantee, his successors and assigns **forever**
2 for the purpose above specified,” as set forth in Exhibits A and B hereto, and now known as
3 parcels 597-080-05 and 597-080-06. In 1912, Father LaPointe and the Roman Catholic church
4 erected a chapel at the cemetery, and since 1956 the diocese of St. Pius Xavier has maintained
5 the chapel, on the parcel now known as 597-080-05, for the purpose of ministering at the Indian
6 cemetery.

7 10. From their birth, the Plaintiffs were the lineal descendants of the Native American
8 families that have occupied and possessed that cemetery and the property contiguous to that
9 Indian graveyard in Jamul, California, since before 1852, which private property was owned at
10 various times since 1831 by Mexican Governor and Don, Pio Pico, U.S. General Henry S.
11 Burton and his widow Maria Amparo Ruiz de Burton, John D. Spreckel’s Coronado Beach
12 Company, and later by the Lawrence and Donald Daley families, and the Catholic Diocese, as
13 reflected in Exhibits A, B, C and D hereto.¹

14 11. On December 12, 1978, title to 4.66 acres of land then occupied by the Plaintiffs’
15 families, Parcel 597-080-01, now known as parcel 597-080-04, as depicted in Exhibit G, was
16 conveyed to the United States in trust for the explicit benefit of those half-blood Jamul Indians
17 then occupying the property. On December 27, 1978, Lawrence and Donald Daley, recorded the
18 grant deed of parcel 597-080-01 to “the United States of America in trust for such Jamul Indians
19 of one-half degree or more Indian blood as the Secretary of the Interior may designate,” as set
20 forth in Exhibit D hereto. This provided a place for those half-blood Jamul Indians then
21 occupying the property to live, and be inhumed, interred, deposited, dispersed, and placed in
22 perpetuity, and a place to be protected by the United States as a trustee for the living and the
23 dead of those half-blood Jamul Indians then occupying the property, against all forms of
24 alienation, trespass, desecration, mutilation, disinterment, and any other wrongful infringement.

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26 ¹ See also, United States v. Pio Pico (1870) 27 F.Cas. 537; Estate of Burton (1883) 63
27 Cal. 36; G.W.B.McDonald, Administrator v. Burton (1886) 68 Cal. 445; Henry H. Burton v.
28 Maria A. Burton (1889) 79 Cal. 490; In re Burton’s Estate (1892) 93 Cal. 459; and McDonald v.
McCoy (1898) 121 Cal. 55.

1 12. The Secretary of the Interior through his subordinates designated the individual
2 Plaintiffs and the Native American families then possessing and residing on parcel 597-080-04,
3 as the beneficial owners thereof, consistent with the federal regulations for unorganized groups
4 of individual Indians, by locating said individual Indians on the parcel, providing for their needs,
5 acquiescing in their continued presence on, and use of, the parcel for more than 28 years, in
6 building houses for them on the parcel, in providing them with services usually accorded to
7 Indians living on such property, allowing them to inhume, inter, deposit, disperse and place the
8 human remains and funerary objects of their dead, below, on, and above the property, and further
9 providing strong and uncontroverted evidence of their designation as the beneficial owners of
10 parcel 597-080-04, as a matter of law, within the meaning of the grant deed, and as set forth in
11 Coast Indian Community v. U.S. (“Coast”) (Fed. Cl. 1977) 550 F.2d 639, United States v.
12 Assiniboine Tribe (“Assiniboine Tribe”) (Fed. Cl. 1970) 428 F.2d 1324, 1329-30, and 1
13 Opinions of the Solicitor of the Department of Interior Relating to Indian Affairs 1917-1974
14 (“Mem. Sol. Int.”) at 668, 724, 747, and 1479, attached hereto as Exhibit J.

15 13. Similar forms of grant deeds have long been accepted by the BIA and similar
16 designations of individual Indians’ beneficial ownership have long been made by the BIA, and
17 enforced by the courts. See, Coast, 550 F.2d 639, 651, n32; State Tax Comm., 535 F.2d 300,
18 304; Assiniboine Tribe 428 F.2d 1324, 1329; and the Memoranda of the Solicitor of the Interior,
19 reprinted in Mem. Sol. Int. at 668, 724, 747, and 1479, involving for e.g., the Mississippi
20 Choctaws, the St. Croix Chippewas, the Nahma and Beaver Indians, and the Nooksack Indians,
21 attached as Exhibit J hereto.

22 14. The December 27, 1978 grant deed was recorded nearly three years before the
23 Constitution of the Jamul Indian Village was adopted, and three years before the Congress of the
24 United States recognized the creation of the Jamul Indian Village, as an Indian tribe under the
25 Indian Reorganization Act of 1934. When the Village was created, under the terms of the Indian
26 Reorganization Act of 1934, it was a landless governmental entity. To date, the United States
27 has not set aside or created an Indian reservation for the VILLAGE. This deed was accepted by
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1 the United States on December 21, 1978, pursuant to 25 U.S.C. 81 and Section 5 of the Indian
2 Reorganization Act of 1934, 25 U.S.C. 465. Parcel 597-080-01, now known as parcel 597-080-
3 04, was not acquired for an Indian tribe, and has never been recognized by the federal
4 government as being a parcel over which the subsequently federally recognized entity, known as
5 the Jamul Indian Village, exercises governmental power. Nor has it ever been lawfully subject to
6 the exercise of any tribal governmental power. The United States Department of Interior, Bureau
7 of Indian Affairs, August 3, 2000 response to the Plaintiffs' Freedom of Information Act (FOIA)
8 request, confirms that the "current trust parcel was accepted into trust in 1978 for Jamul Indians
9 of ½ degree (4.66 acres)," and that there is "no record of the 1978 trust parcel being known as
10 the Jamul Village," as reflected in Exhibit E hereto. This is consistent with the tribe's
11 constitution, Article II, Territory, which fails to identify the 4.66 acres, parcel 597-080-04, as
12 within the territory of the Jamul Indian Village, as reflected in Exhibit I hereto.

13 15. Parcel 597-080-01, now known as parcel 597-080-04, was not acquired for a
14 tribe, nor could it have been acquired for a tribe that did not then exist, leaving only the
15 possibility under 25 U.S.C. 465 that it was purchased and taken in trust for the individual Native
16 American families then possessing and residing on the parcel, including the Plaintiffs and their
17 families, as set forth in Coast, Assiniboine Tribe, and Mem. Sol. Int., supra.

18 16. Therefore, Walter Rosales and Karen Toggery are the beneficial owners of parcel
19 597-080-04, designated by the Secretary of Interior, since they are Jamul Indians of one-half
20 degree or more Indian blood, and were located on the parcel by the federal government, that
21 provided for their needs, acquiesced in their continued presence on, and use of, the parcel for
22 more than 28 years, and which government built houses for them on the parcel, provided them
23 with services usually accorded to Indians living on such property, allowed them to inhume, inter,
24 deposit, disperse and place the human remains and funerary objects of their dead, below, on, and
25 above the property, and further provided strong and uncontroverted evidence that they were
26 designated as the beneficial owners of parcel 597-080-04, which land was acquired and held in
27 trust for individual Indians pursuant to 25 U.S.C. 465. As the beneficial owners of this parcel
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1 and the homes thereon, in addition to their rights under the federal and California NAGPRA
2 statutes, Walter and Karen were entitled to be secure in their homes, and to exclude all others,
3 save the United States, from their property.

4 17. Congress specifically enacted 25 U.S.C. 465, to ensure that land acquired in trust
5 for individual Indians would not be alienated by anyone without the government's express
6 approval. In fact, the Indian Reorganization Act (IRA) continues to specifically provide for the
7 acquisition of land by the United States for the benefit of individual Indians "through purchase,
8 relinquishment, gift, exchange, or assignment...for the purpose of providing land for Indians." 25
9 U.S.C. 465.

10 Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464, 465,
11 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be taken in
12 the name of the United States in trust for the Indian tribe **or individual Indian** for
which the land is acquired, and such lands or rights shall be exempt from State
and local taxation. 25 U.S.C. 465. (emphasis added).

13 18. The 1934 House Report on the IRA clearly evidences a policy that includes
14 acquiring land in trust for individual Indians, and not just for recognized tribes: "Section 5 [25
15 U.S.C. 465] authorizes the Secretary of the Interior to purchase or otherwise acquire land for
16 landless Indians." H.R. Rep. No. 1804, 73d Cong., 2d Sess. 6-7 (1934).

17 19. The Federal government's own Handbook of Federal Indian Law,² authorized and
18 funded by Congress in the Indian Civil Rights Act of 1968, 25 U.S.C. 1341(a)(2), provides that
19 "...[A] number of statutes have allowed individual Indians to obtain trust or restricted parcels out
20 of the public domain and not within any reservation. ... The government has at times...purchased
21 trust lands for individuals. Fn. 118. Since 1934 this has been done pursuant to provisions of the
22 Indian Reorganization Act. 25 U.S.C. 465." Felix S. Cohen's Handbook of Federal Indian Law
23 ("Handbook of Federal Indian Law") (DOI 1982) Ch. 1, Sec. D3c, p. 40-41, citing City of
24 Tacoma v. Andrus, 457 F. Supp. 342 (D.D.C. 1978), and Chase v. McMasters, 573 F.2d 1011,

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26 ² Congress directed the Secretary of Interior to revise and republish Cohen's Handbook
27 of Federal Indian Law in the Indian Civil Rights Act of 1968. 25 U.S.C. 1341(a)(2). Hence, the
28 United States is estopped to deny its admissions with regard to the lands held in trust for
individual Indians.

1 1016 (8th Cir. 1978), cert. denied, 439 U.S. 965 (1978), wherein the court enforced an individual
2 Indian's beneficial ownership of trust land acquired for her benefit under the IRA, stating: "The
3 Secretary may purchase land for an individual Indian and hold title to it in trust for him...Section
4 465 lists gifts among the means by which the Secretary may acquire land, and it was amended to
5 authorize acquisition of land in trust for individual Indians... See 78 Cong. Rec. 11126 (1934)...
6 The land acquired may be located... without a reservation." Id., at 1016. "The Act not only
7 authorized the Secretary to acquire land for Indians, 25 U.S.C. 465, but continued the trust status
8 of restricted lands indefinitely, 25 U.S.C. 462..." Id., at 1016.

9 20. On May 9, 1981, Plaintiff WALTER J. ROSALES, Chairperson of those Indians
10 seeking to adopt a constitution, certified on behalf of the election board, that sixteen of twenty
11 three registered voters adopted the VILLAGE constitution. The United States approved the
12 adoption of the constitution on July 7, 1981, but did not recognize the existence of the tribe.

13 21. Subsequently, the Catholic Diocese agreed to deed another portion of the Indian
14 Cemetery to the United States in trust for the Jamul Indian Village for the purpose of
15 maintaining the Indian graveyard and approach thereto, as required by, and provided in, the
16 original Coronado Beach Company deed to the Catholic Diocese. On July 27, 1982, the Roman
17 Catholic Bishop of San Diego, successor to the Roman Catholic Bishop of Monterey and Los
18 Angeles, a corporation sole, recorded a grant deed of a portion of parcel 597-080-02, now known
19 as 597-080-05 and 597-080-06, consisting of approximately 1.372 acres, to "the United States of
20 America in trust for the Jamul Indian Village," as set forth in Exhibit F hereto.

21 22. Excepted from the July 27, 1982 deed for parcel 597-080-02 was that portion of
22 the Coronado Beach Company land grant, now known as parcel 597-080-06, consisting of
23 approximately .838 acres, where some of the Native American human remains were inhumed,
24 interred, deposited, dispersed and placed, below, on, and above the property, to which the
25 Catholic Diocese retains title. The Catholic Diocese also explicitly reserved "to [itself and its]
26 successors or assigns an easement [over, on, and in, parcel 597-080-05] for (1) utility service
27 lines and (2) ingress and egress over the existing well-traveled road," which extends the entire
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1 length of the north edge of the 1.372 acres, and which the San Diego County tax assessor's maps
2 continue to describe as "the Indian cemetery," as set forth in Exhibits F and G hereto.

3 23. However, on July 27, 1982, the Jamul Indian Village had not yet been recognized
4 by the United States. The Congress of the United States first recognized the VILLAGE, as an
5 Indian tribe, by publication in the Federal Register on November 24, 1982. 47 Fed. Reg. 53130,
6 53132 (Nov. 24, 1982).

7 24. By virtue of these afore-described acts, a Native American sanctified cemetery,
8 place of worship, religious and ceremonial site, and sacred shrine, as defined by 25 U.S.C.
9 3009(4) and Cal. Pub. Res. Code 5097.9, and Cal. Health & Safety Code sections 8551-53, have
10 been dedicated on the parcels now known as 597-080-04, 597-080-05, and 597-080-06. The
11 recorded declaration by the Coronado Beach Company and the Catholic Diocese provided
12 constructive notice to all persons and the United States of the dedication of said property to
13 cemetery purposes, pursuant to 25 U.S.C. 3009(4) and Cal. Health & Safety Code sections 8551-
14 8558.

15 25. During 1996 a faction of individuals, who were not all Jamul Indians of one-half
16 degree of Indian blood, illegally staged a Secretarial election, along with the illegal assistance of
17 the Bureau of Indian Affairs, which is the subject of Rosales v. U.S., U.S. Court of Federal
18 Claims, Case No. 98-860. This faction claims to have elected to amend the tribal constitution to
19 admit, and claims to have admitted, a majority of Jamul Indians, who were only one-quarter
20 Indian blood, as members of the tribe. Walter Rosales and Karen Toggery have sued the
21 government for damages, resulting from the government having illegally staged the Secretarial
22 election at which that amendment was purportedly adopted, in their original Court of Federal
23 Claims action. However, in the meantime, the Jamul Indian Village, is legally precluded, as a
24 matter of law, from making any legally protectable claim to parcel 597-080-04, since the deed
25 granted the property to the United States in trust for only "such Jamul Indians of one-half degree
26 or more Indian blood," and did not create any trust over the property for any Jamul Indians of
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1 less than one-half degree Indian blood, and the tribe contends that its majority is no longer Jamul
2 Indians of one-half degree or more Indian blood.

3 26. As concluded by the BIA Director of the Office of Tribal Services on July 1,
4 1993:

5 The Jamul Indians lived on one acre of private land and on land deeded to the
6 Diocese of San Diego as an Indian cemetery. On June 28, 1979, the United States
7 acquired from Bertha A. and Maria A. Daley a portion of the land known as
8 "Rancho Jamul" which it took "in trust for such Jamul Indians of one-half degree
9 or more Indian blood as the Secretary of the Interior may designate."...The United
10 States accepted these conveyances of land in accordance with the authority
11 contained in Sections 5 and 19 of the Indian Reorganization Act of 1934 [25
12 U.S.C. 465, and 479 respectively]..

13 The Constitution of the Jamul Indian Village was approved by the Deputy
14 Assistant Secretary-Indian Affairs on July 7, 1981. In approving the IRA
15 Constitution, the Village was authorized to exercise those self-governing powers
16 that have been delegated by Congress or that the Secretary permits it to exercise.
17 A number of "tribes" have been created, from communities of adult Indians, or
18 expressly authorized by Congress under provisions of the IRA and other Federal
19 statutes. For example, some IRA entities availed themselves of the opportunity to
20 adopt an IRA constitution and are considered to be IRA "tribes." However, they
21 are composed of remnants of tribes who were gathered onto trust land. Those
22 persons had no historical existence as self-governing units. They now possess
23 only those powers set forth in their IRA constitution. They are not an inherent
24 sovereign. Rather, that entity is a created tribe exercising delegated powers of
25 self-government. Such is the case with Jamul Indian Village. Ex. K, page 2-3.

26 27. The Jamul Indian Village therefore has never had jurisdiction over, nor lawfully
27 exercised governmental power over, parcel 597-080-04, and there has never been a transfer of
28 the parcel to the subsequently recognized tribe, nor has the Secretary of the Interior ever
designated the subsequently recognized tribe to be a beneficiary of any grant deed. The
government has long conceded that it has "no record of the 1978 trust parcel [04] being known
as the Jamul Indian Village." Ex. E. The Jamul Indian Village is only a tribal governmental
entity, landless at its creation, and did not exist until its constitution was adopted in 1981.

29 28. Since "[a]n Indian tribe's jurisdiction derives from the will of Congress," Kansas
30 v. Norton, 249 F.3d 1213, 1229-31 (10th Cir. 2001), and Congress never granted the subsequently
31 recognized tribe "jurisdiction" over parcel 04, the express beneficiaries of the deed to the United
32 States for parcel 597-080-04 were, and still are, the individual half-blood Jamul Indians residing
33 on the property in 1978, and not the tribal governmental entity that was subsequently recognized

1 in 1981. Thus, the government is estopped to deny, that the “only possible” designation that
2 exists in the 1978 grant deed, as a matter of law, is that parcel 04 was taken in trust for the
3 “individual” “Jamul Indians of one-half degree or more Indian blood,” including the individual
4 Plaintiffs and their families, as was held in Coast, 550 F.2d at 651, n32, and State Tax Comm.,
5 535 F2d. at 304.

6 29. Coast, 550 F.2d 639, held on nearly identical facts, that the parcel in question,
7 “was not acquired for a tribe, leaving only the possibility under the [Indian Reorganization] Act
8 that it was purchased for individual Indians.” 550 F.2d 639, 651, n. 32. The Coast deed “was
9 conveyed to the United States: ...’in Trust for such Indians of Del Norte and Humboldt Counties,
10 in California, eligible to participate in the benefits of the [Indian Reorganization] Act of June 18,
11 1934, as shall be designated by the Secretary of the Interior...” 550 F.2d 641-41. The Jamul
12 deed was conveyed to the United States “in trust for such Jamul Indians of one-half degree or
13 more Indian blood as the Secretary of the Interior may designate.” See, Ex. D. There, as here,
14 “the United States acquired the [land]...pursuant to ... 25 U.S.C. 465. Section 465 provided that
15 the title to land acquired under it ‘shall be taken in the name of the United States in trust for the
16 Indian tribe or individual Indian for which the land is acquired...” Coast, 651, n32.

17 Section 479... defined “tribe” for the purposes of the Act as ‘...any Indian tribe,
18 organized band, pueblo, or the Indians residing on one reservation.’ The Coast
19 Indian Community [and the Jamul Indian Village] does not come within this
20 definition, for it is not a tribe in the anthropological sense of the term, nor is it
21 organized or a pueblo, nor were its members residing together on one reservation
22 before or at the time of the Rancheria acquisition. The Rancheria, then, was not
23 acquired for a tribe, leaving only the possibility under the Act that it was
24 purchased for individual Indians. The deed and proclamation say nothing to
25 contradict this. Thus, the land was taken in trust for the individual Coast Indian
26 Community members.” Coast, at 651, n32.

27 30. Here, Walter Rosales and Karen Toggery are among the individual “Jamul
28 Indians of one-half degree or more Indian blood” that were designated in the 1978 grant deed,
Ex. D, as the beneficiaries of the trust acquisition of parcel 597-080-04, under 25 U.S.C. 465.
Since the Government has conceded that there was no recognized tribe of Jamul Indians in 1978,
this is the only possible designation of beneficiaries permitted as a matter of law, as held in
Coast, 550 F.2d 639, 651, n32; U.S. v. State Tax Comm. (5th Cir.1976) 535 F.2d 300, 304.

1 31. The U.S. has no evidence that the subsequently created “tribe,” known as the
2 “Jamul Indian Village,” was ever designated as the beneficiary of the parcel, nor that a grant
3 deed ever transferred the parcel to the tribe. In fact, the only evidence is that the Secretary of the
4 Interior designated the individual “Jamul Indians of one-half or more Indian blood” to be the
5 beneficiaries of the Parcel, by allowing them to reside upon the trust land for 28 years, just as
6 occurred in Coast, 550 F.2d at 651, n32; see also Ex. D.

7 32. It is undisputed that the Tribe did not exist, had not been created under the I.R.A.,
8 and was not recognized, in 1978, when the Government accepted the grant deed for the parcel in
9 trust for the individual Indians described therein. There is no authority in real property law that
10 allows a grant deed to convey an interest in real property (in trust or otherwise) to a beneficial
11 owner that does not exist, or is merely an “anticipatory expectancy.” Either a beneficial owner
12 exists at the time of a conveyance, or it does not. A non-existent person or entity simply cannot
13 be “designated” a beneficial owner of trust property. Real property law only recognizes
14 ownership by an existing person. Cal. Civil Code 679 and 680; Greenwald & Asimow,
15 Cal.Practice Guide: Real Property Transactions (Rutter 2002) 4:133, p. 475.

16 33. It also cannot be disputed that the Government failed to follow its own guidelines
17 for recording a grant deed to a subsequently recognized tribe, and therefore the existing grant
18 deed for 597-080-04, as a matter of law, only created a beneficial interest in the individual Jamul
19 Indians of one-half degree or more Indian blood. Mem. Sol. Int. at 668, 724, 747, and 1479;
20 Exhibit J. There, the Solicitor of the Interior specifically advised the field personnel of the BIA
21 that any transfer of the individual Indians’ designated beneficial interest to any subsequently
22 recognized tribe, must still be accomplished the old-fashioned way by recording a grant deed.
23 Here, no grant deed ever transferred Walter Rosales and Karen Toggery’s individual designated
24 beneficial interest in the parcel to any tribe. Following the recording of the original 1978 grant
25 deed for parcel 597-080-01, now known as 597-080-04, there is no subsequent record of any
26 transfer of the parcel from the United States’ trust on behalf of the individual half-blood Jamul
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1 Indians designated by the Secretary, to any tribe, including the federally recognized Jamul Indian
2 Village.

3 34. The Government cannot deny that its own Handbook of Federal Indian Law, Ch.
4 11, B3, pp. 615-16 (DOI 1982), concedes that all individual designated beneficiaries are
5 cotenants in the trust land held by the U.S. Cotenants have equal rights to possession of the
6 property, and no single cotenant has the right to exclude any other cotenant from the property.
7 Cal. Civil Code 685-86; Zaslow v. Kroenert, 29 Cal.2d 541, 548 (1946). Therefore, all of the
8 individual cotenants, including Walter Rosales and Karen Toggery, must consent to any transfer
9 of their individual beneficiaries' designation to a subsequently recognized "tribe," before the
10 subsequently recognized "tribe" may lawfully be designated as the beneficiary and acquire
11 "jurisdiction" over the parcel. Id.

12 35. Here, there is no evidence of any such consent by the individual Indian co-
13 tenants, including the individual Plaintiffs, to transfer their beneficial interest in the parcel, and
14 the government never recorded a subsequent grant deed, transferring the individual Indian
15 beneficiaries' interest in the parcel to any subsequently recognized tribe, including the Jamul
16 Indian Village.

17 36. Here, it is no wonder that the "Jamul Indians of one-half degree or more Indian
18 blood" have never consented to transfer their individual designation as beneficial owners to any
19 subsequently created "tribe," since the IBIA found non-members participating in the tribal
20 government, perhaps from the time the entity was first recognized, at 32 IBIA 166. Where, as
21 here, no subsequent grant deed was recorded, the individual Plaintiffs' beneficial ownership of
22 the trust property cannot, as a matter of law, have been transferred to any subsequently
23 recognized tribe.

24 37. The government's own Handbook of Federal Indian Law explains the significant
25 distinction between (1) taking land into trust for "individual" Indians, before they are allowed to
26 become a recognized tribe under the IRA, as here, and (2) recognizing a landless "tribe" under
27 the IRA, and then requiring the Secretary to transfer the land in trust from the individual Indians,
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1 with their consent, to the “tribe,” after it was recognized. Here, after the tribe was finally
2 recognized in 1982, the government never obtained the consent of the individual Indians,
3 including the Plaintiffs to transfer the parcel 597-080-04 into trust for the tribe. Nor did the
4 government ever convey title to parcel 597-080-04 in trust for the tribe.

5 38. The government’s own Handbook of Federal Indian Law, Ch.1, Sec. B2e, at 15-
6 16 (1982 Ed.), also admits that: “One provision of the IRA gives the Secretary discretionary
7 authority to accept or purchase land in trust for Indians included within its provisions. 25 U.S.C.
8 465. The Solicitor has held that the Secretary may exercise this authority for all individuals of
9 one-half or more Indian blood.... This approach has also been used for the Quartz Valley Indians,
10 Duckwater Shoshone Indians, Yomba Shoshone Indians, Port Gamble Band of Clallam Indians,
11 and Sokaogan Chippewa Indians (Mole Lake Band)... This procedure has been suggested for
12 other Indian groups as well. *E.g.*, Memo. Sol. Int. May 1, 1937, *reprinted in* 1 Interior Opinions,
13 *supra* not 76, at 1479 (status of Nahma and Beaver Island Indians). Handbook. Ch.1, Sec. B2e,
14 pp.15-16 fn. 86. In other cases non-reservation tribes have become eligible for organization
15 under the IRA by first being recognized as a tribe under the Act and then having the Secretary
16 take land in trust for the tribe.”

17 39. In fact, the government Handbook’s citation of the DOI Solicitor’s Memorandum
18 Opinion concerning the St. Croix Chippewas, Mem. Sol. Int., at 724, Ex. K, confirms that where
19 the grant deed, Ex. D, fails to contain the final phrase, “until such time as they organize under
20 section 16 of the [IRA] and then for the benefit of such organization,” the property remains in
21 trust for the individual Indians, who may, or may not have ever decided to transfer their
22 beneficial interest to any subsequently recognized tribe.

23 40. This is exactly what happened here. The original grant deed, Ex. D, failed to
24 contain the final phrase transferring the beneficial interest in the property to the subsequently
25 recognized Jamul Indian Village. It is still undisputed that the Tribe did not exist, had not been
26 created under the I.R.A., and was not recognized, in 1978, when the Government accepted the
27 grant deed for the parcel in trust for the individual Indians described therein. There is also no
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1 dispute that the Government failed to follow its own guidelines in recording the grant deed.
2 Mem. Sol. Int. at 668, 724, 747, and 1479, attached in Exhibit J. Hence, for there to be any
3 subsequent transfer of the individual Jamul Indians' designated beneficial interest in parcel 597-
4 080-04 to any subsequently recognized tribe, such a transfer must still be accomplished the old
5 fashioned way by recording a grant deed. Here, no grant deed ever transferred the individual
6 Indians' designated beneficial interest in the parcel to any tribe.

7 41. These Solicitors' memoranda further admit that the 1978 trust acquisition cannot
8 be made for a "tribe" that did not then exist. With regard to the Mississippi Choctaw, the
9 Solicitor found that a grant deed simply cannot "designate" a "tribe" that doesn't exist as a
10 beneficiary, since "there is in fact no existing tribe of Indians in Mississippi known as the
11 Choctaw Tribe." Mem. Sol. Int., at 668, Ex. J. There, Solicitor Margold describes how the grant
12 deed should have been prepared to put the property in trust for the Mississippi Choctaws: "The
13 United States in trust for such Choctaw Indians of one-half or more Indian blood, resident in
14 Mississippi, as shall be designated by the Secretary of the Interior, **until such time as the**
15 **Choctaw Indians of Mississippi shall be organized as an Indian tribe** pursuant to the act of
16 June 18, 1934 (48 Stat. 984), and **then in trust for such organized tribe.**" Mem. Sol. Int., at
17 668 (emphasis added), Ex. J. Similarly, no such language appears in the 1978 Jamul grant deed.
18 Ex. D.

19 42. There, the Choctaw deed had to be amended and re-recorded to designate any
20 subsequently recognized tribe a beneficiary. Since the deed did not contain the words: "**until**
21 **such time as the Choctaw Indians of Mississippi shall be organized as an Indian tribe**" or
22 "**then in trust for such organized tribe,**" the property remained in trust for the individual
23 Indians, and not a tribe, as in Coast, 550 F.2d at 651, and State Tax Comm., 535 F.2d 300, 304,
24 where the court held that the absence of the words "then in trust for such organized tribe" in a
25 relief act designating individual Choctaw beneficiaries meant that "only those individuals
26 designated by the Interior Secretary were to have the benefit of this" designation, since "[n]either
27 a tribe nor a reservation is mentioned."
28

1 43. The government’s own Solicitor’s written instructions to its BIA field
2 superintendents states: “[i]n all of those cases where the title papers have already been returned
3 to the field, instructions should be given to the field agents to have the deeds corrected before
4 they are recorded. In that case where the deed has already been recorded and accepted, it will be
5 necessary to secure a new deed. The necessary corrections will be made in the other cases which
6 are now pending in this office. The error...arises perhaps out of unusual circumstances, but its
7 one that might have been avoided.” Mem. Sol. Int., at 668, Ex. J.

8 44. Here, the deed was never corrected. The 1978 grant deed does not contain the
9 words, “until such time as they organize,” proscribed by the Defendants’ Solicitor to put the
10 property into trust for the tribe, after the tribe was recognized. Ex. D. Nor does it state: “and
11 then in trust for such organized tribe.” Moreover, it is conceded that there was no transfer of the
12 designation of the individual Indian beneficiaries, including the individual Plaintiffs, to any
13 subsequently recognized tribe, since no subsequent grant deed has ever been recorded.

14 45. Therefore, as a matter of law, the government is estopped by its own Solicitor’s
15 memoranda to deny that the parcel 597-080-04 is held in trust for the designated individual
16 Jamul Indian beneficiaries, who are of one-half degree Indian blood, including the individual
17 Plaintiffs, since the government concedes that the “Jamul Indians of one-half degree or more
18 Indian blood,” were not recognized as a tribe in 1978. Memos. Sol. Int. at 668, 724, 747, 1479,
19 Ex. J, and Ex. K.

20 46. Hence, since there was never a subsequent transfer of the individual Indians’
21 beneficial interest in the trust land of parcel 597-080-04 to the subsequently recognized tribe, the
22 individual Plaintiffs’ beneficial ownership of trust parcel 597-080-04 has never been under the
23 governmental power of the Jamul Indian Village, and as such, remains subject to the protections
24 of the U.S., its Constitution, the Indian Reorganization Act, both the federal and California
25 NAGPRA statutes, and held in trust for the Plaintiffs’ possession, use and quiet enjoyment.

1 **Unlawful Eviction and Violation of federal and California NAGPRA**

2 47. For more than 100 years, the Native American families of which the Plaintiffs are
3 the lineal descendants have inhumed, interred, deposited, dispersed and placed hundreds of their
4 deceased family members' human remains, and items associated with their human remains,
5 including, but not limited to grave goods, cultural items, associated funerary objects, sacred
6 objects, and objects of cultural patrimony, as defined in 25 U.S.C. 3001, 43 C.F.R. 10.2, and Cal.
7 Pub. Res. Code 5097.9-5097.99, below, on, and above, three parcels of land, originally known as
8 597-080-01 and 597-080-02, and now known as 597-080-04, 597-080-05, and 597-080-06.

9 48. Plaintiff Walter J. Rosales was personally present when his younger brother's
10 human remains, his mother, Helen Cuero's human remains, and his son, Dean Rosales' human
11 remains, were inhumed, interred, deposited, dispersed, and placed, along with the items
12 associated with their human remains, including, but not limited to grave goods, cultural items,
13 associated funerary objects, sacred objects, and objects of cultural patrimony, as defined in Cal.
14 Pub. Res. Code 5097.9-5097.99, and 25 U.S.C. 3001, below, on, and above, what are now
15 known as Parcels 597-080-04 and 597-080-06.

16 49. Plaintiff Karen Toggery was personally present when her mother, Marie
17 Toggery's human remains and her son, Matthew Tinejero Toggery's human remains, were
18 inhumed, interred, deposited, dispersed, and placed, along with the items associated with their
19 human remains, including, but not limited to grave goods, cultural items, associated funerary
20 objects, sacred objects, and objects of cultural patrimony, as defined in Cal. Pub. Res. Code
21 5097.9-5097.99, and 25 U.S.C. 3001, above, on, and below, what are now known as Parcels 597-
22 080-04 and 597-080-06.

23 50. Recently, the San Diego Museum of Man repatriated a significant collection of
24 Native American human remains and funerary objects, which have also been inhumed, interred,
25 deposited, dispersed, and placed, below, on, and above, Parcels 597-080-04, 597-080-05, and
26 597-080-06.

1 51. The Plaintiffs have personal knowledge of at least 20 Native Americans whose
2 human remains, and items associated with their human remains, including, but not limited to
3 grave goods, cultural items, associated funerary objects, sacred objects, and objects of cultural
4 patrimony, as defined in Cal. Pub. Res. Code 5097.9-5097.99, and 25 U.S.C. 3001, have been
5 inhumed, interred, deposited, dispersed, and placed below, on, and above, the three parcels of
6 land, originally known as 597-080-01 and 597-080-02, and now known as 597-080-04, 597-080-
7 05, and 597-080-06.

8 52. On or about December 10, 2005, all residents of Parcels 597-080-04 and 597-080-
9 05, and 597-080-06, except Walter Rosales, Karen Toggery and Vivian Flores, abandoned their
10 residences on the Parcels, and have been living continuously in other locations in San Diego
11 County.

12 53. On March 10, 2007, Walter Rosales, Karen Toggery and her son, Ayhule Louis
13 Gomez, were forcibly removed from their residences at gunpoint by armed thugs, against their
14 will, after they were beaten and pepper sprayed. The armed thugs that forcibly removed Walter
15 Rosales and Karen Toggery from their homes against their will and their rights under the First
16 and Fourth Amendments to the U.S. Constitution, had no color of authority, nor authority of law
17 to remove them from their property, nor any right under the law to deprive them of their
18 religious freedom to protect the sepulcher of their dead.

19 54. After the armed thugs agreed in writing that Plaintiffs' homes would not be
20 destroyed for seven days to allow them to obtain injunctive relief from the courts to prevent their
21 removal from the property, which agreement was witnessed by San Diego Sheriffs, the armed
22 thugs breached their agreement not 48 hours later, when Plaintiffs were further prevented from
23 returning to their homes, and their homes were bulldozed on March 12, 2007.

24 55. This grading, excavation, demolition, operation of heavy equipment, moving dirt
25 and/or gravel, and other construction activities, which continue today, on the parcels now known
26 as 597-080-04, 597-080-05, and 597-080-06, have knowingly and/or willfully mutilated,
27 disinterred, wantonly disturbed, and willfully removed, and caused irreparable damage to, the
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1 Plaintiffs' Native American human remains, associated funerary objects, sacred objects, and
2 objects of cultural patrimony, as defined in 25 U.S.C. 3001, 43 C.F.R. 10.2, and Cal. Pub. Res.
3 Code 5097.9-5097.99, that have been inhumed, interred, deposited, dispersed, and placed below,
4 on, and above, these three parcels of land, in violation of 25 U.S.C. 3002(c), 43 C.F.R. 10.3,
5 10.4, 10.5, 10.6, and 10.10, 16 U.S.C. 470aa et seq., 25 U.S.C. 262 et seq., 43 C.F.R. 7.5 and
6 10.3(b)(1), 25 U.S.C. 3009(4), Cal. Health & Safety Code 7050.5 and 7052, and Cal. Pub. Res.
7 Code 5097.98 and 5097.99.

8 56. Knowingly mutilating, disinterring, wantonly disturbing, and willfully removing
9 such human remains without authority of law is a crime, under 25 U.S.C. 3009(4) and Cal.
10 Health & Safety Code 7050.5, and any person willfully mutilating or disinterring any remains
11 known to be human without authority of law is guilty of a felony, under 25 U.S.C. 3009(4) and
12 Cal. Health & Safety Code 7052, as is anyone obtaining or possessing, or who removes with
13 malice or wantonness, and without authority of law, any Native American artifacts or human
14 remains from a Native American grave or cairn, pursuant to 25 U.S.C. 3009(4) and Cal. Pub.
15 Res. Code 5097.99.

16 57. 25 U.S.C. 3009(4) and Cal. Health & Safety Code 7050.5 provide that: "In the
17 event of discovery or recognition of any human remains in any location other than a dedicated
18 cemetery, there shall be no further excavation or disturbance of the site or any nearby area
19 reasonably suspected to overlie adjacent remains until...the recommendations concerning the
20 treatment and disposition of the human remains have been made to the person responsible for the
21 excavation, or to his or her authorized representative, in the manner provided in Section 5097.98
22 of the Public Resources Code," which includes the lineal descendants' preference for
23 "preservation of the Native American human remains and associated items in place."

24 58. 25 U.S.C. 3009(4) and Cal. Pub. Res. Code 5097.98, as amended September 30,
25 2006, provide that upon the discovery of Native American human remains, which may be an
26 inhumation or cremation, and in any state of decomposition or skeletal completeness, the
27 landowner is obligated to ensure that the immediate vicinity, according to generally accepted
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1 cultural or archaeological standards or practices where the Native American human remains are
2 located, is not damaged or disturbed by further development activity, so long as the lineal
3 descendants' preferences are to preserve the Native American human remains and associated
4 items in place, and that any items associated with the human remains that are placed or buried
5 with the Native American human remains are to be treated in the same manner as the remains.

6 59. Plaintiffs have repeatedly put the world, including the Defendants, on written
7 notice of:

8 (1) Plaintiffs' beneficial ownership of parcel 597-080-04;

9 (2) Plaintiffs' ownership and control, as lineal descendants, of their deceased Native
10 American family members' human remains, and the items associated with their human remains,
11 including, but not limited to grave goods, cultural items, associated funerary objects, sacred
12 objects, and objects of cultural patrimony, as defined in Cal. Pub. Res. Code 5097.9-5097.99,
13 and 25 U.S.C. 3001, that for more than 100 years have been inhumed, interred deposited,
14 dispersed, and placed, below, on and above these three parcels of land known as 597-080-04,
15 597-080-05, and 597-080-06; and

16 (3) Plaintiffs' preference, as lineal descendants, to leave their families' human remains
17 and funerary objects in place, as required by 25 U.S.C. 3009(4) and Cal. Pub. Res. Code
18 5097.98, the CEQA Guidelines 14 Cal. Code Regs. 15126.4 (b)(3), and 25 U.S.C. 3001 et seq.,
19 43 C.F.R. 10.1-10.17, and the directives of the National Center for Cultural Resources and the
20 National NAGPRA Program, as published on its website. Exhibit H hereto.

21 60. Such notice has been published in the records of the Catholic Diocese,
22 newspapers of general circulation, letters to the U.S. Department of Interior and the Bureau of
23 Indian Affairs, the records and files in the San Diego Superior Court and the U.S. District Court
24 for the So. Dist. of California, and in the Public Access to Court Electronic Records. In addition,
25 the recorded declaration by the Coronado Beach Company and the Catholic Diocese provided
26 constructive notice to all persons of the dedication of said property to cemetery purposes,
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1 pursuant to 25 U.S.C. 3009(4) and Cal. Health & Safety Code sections 8551-8558.

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3 61. No permit required by 25 U.S.C. 3002(c), 43 C.F.R. 7.5 and 10.3(b)(1), 16 U.S.C.
4 470aa et seq., 25 U.S.C. 262 et seq., and Cal. Health & Safety Code 7500 et seq., has been
5 posted by any federal land manager on parcels 597-080-04 and 597-080-05 for anyone to grade,
6 excavate, damage, disinter, remove or otherwise alter or deface, or attempt to grade, excavate,
7 damage, disinter, remove or otherwise alter or deface, human remains or funerary objects from
8 the parcels now known as 597-080-04, 597-080-05 and 597-080-06. Nor can any such permit be
9 granted by any federal land manager, without the consent of the Indian owning the land and
10 owning and controlling the human remains and funerary objects, which consent the Plaintiffs,
11 who are the beneficial owners of the land with ownership and control of their families' human
12 remains and funerary objects, have not granted. 25 U.S.C. 3002(c), 43 C.F.R. 10.3, 16 U.S.C.
13 470cc(g)(2) and 470ee, and 25 C.F.R. 262 et seq.

14 62. Based upon the foregoing, Plaintiffs are the beneficial landowners of parcel 597-
15 080-04, and the lineal descendants' with ownership and control of their predecessors' human
16 remains and Native American and associated cultural items, as set forth in 25 U.S.C. 3001-2, 43
17 C.F.R. 10.6, and Cal. Pub. Res. Code 5097.9-5097.99, including, but not limited to grave goods,
18 cultural items, associated funerary objects, sacred objects, and objects of cultural patrimony,
19 which have been inhumed, interred, deposited, dispersed, and placed, below, on and above the
20 parcels now known as 597-080-04, 597-080-05 and 597-080-06 over the last 100 years. The
21 United States is the titled landowner of Parcel 597-080-04.

22 63. The United States has breached its fiduciary duty and general trust responsibility
23 to the Plaintiffs by failing to:

24 (1) enforce the grant deed of San Diego Co. parcel 597-080-04 and Walter Rosales and
25 Karen Toggery's beneficial ownership of that parcel;

26 (2) block Walter Rosales and Karen Toggery's eviction from, and prevent any further
27 alienation of Walter Rosales and Karen Toggery's beneficial interests in, parcel 597-080-04;

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1 (3) seek the return of parcel 597-080-04 to Walter Rosales and Karen Toggery for their
2 possession, use and quiet enjoyment;

3 (4) prevent any further knowing and/or willful mutilation, disinterment, wanton
4 disturbance, and willful removal of Plaintiffs' Native American human remains, along with the
5 items associated with their human remains, including, but not limited to grave goods, cultural
6 items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined
7 in 25 U.S.C. 3001, 43 C.F.R. 10.2, and Cal. Pub. Res. Code 5097.9-5097.99, without authority of
8 law, caused by further grading, excavation, demolition, operation of heavy equipment, moving
9 dirt and/or gravel, and other construction activities, which have begun and continue on the
10 parcels now known as 597-080-04, 597-080-05, and 597-080-06, without a permit issued
11 pursuant to 25 U.S.C. 3002(c), 43 C.F.R. 7.5 and 10.3(b)(1), 16 U.S.C. 470aa et seq., 25 C.F.R.
12 262 et seq., and Cal. Health & Safety Code 7500, and which have caused, and will continue to
13 cause, irreparable damage to the Plaintiffs' Native American human remains, along with the
14 items associated with their human remains, including, but not limited to grave goods, cultural
15 items, associated funerary objects, sacred objects, and objects of cultural patrimony, as defined
16 in 25 U.S.C. 3001, 43 C.F.R. 10.2, and Cal. Pub. Res. Code 5097.9-5097.99;

17 (5) complete, execute, and provide a copy of, a written plan of action to Walter Rosales
18 and Karen Toggery, specifically including Walter Rosales and Karen Toggery's ownership,
19 custody and control of, and the kind of traditional and planned treatment, care and handling of,
20 and the disposition and repatriation of, any of their human remains, funerary objects sacred
21 objects, or objects of cultural patrimony which have been, or may be, discovered and/or
22 excavated, below, on, or above, the surface of parcels 597-080-04, 597-080-05, and 597-080-06,
23 in violation of 25 U.S.C. 3002(c), 43 C.F.R. 10.3, 10.5(a), (b), and (e), 10.6, and 10.10(a) and
24 (b)(1), and 25 U.S.C. 3009(4) and Cal. Pub. Res. Code 5097.98;

25 (6) transfer custody to Walter Rosales and Karen Toggery any of their Native American
26 human remains and funerary objects that are excavated or otherwise removed from parcels 597-
27 080-04 and 597-080-05, in violation of 25 U.S.C. 3002, and 43 C.F.R. 10.6,
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1 (7) repatriate to Walter Rosales and Karen Toggery any of their Native American human
2 remains and funerary objects that are excavated or otherwise removed from parcels 597-080-04
3 and 597-080-05, in violation of 25 U.S.C. 3002, and 43 C.F.R. 10.10;

4 (8) prevent further excavation or disturbance of parcels 597-080-04 and 597-080-05,
5 where human remains and funerary objects are located or any nearby area reasonably suspected
6 to overlie adjacent remains until the recommendations concerning the treatment and disposition
7 of the human remains have been made to the person responsible for the excavation, or to his or
8 her authorized representative, which includes Walter Rosales and Karen Toggery's preference
9 for the preservation of their Native American human remains and associated items in place, in
10 violation of 25 U.S.C. 3009(4), Cal. Health and Safety Code 7050.5 and Cal. Pub. Res. Code
11 5097.98;

12 (9) ensure as the titled landowner of parcels 597-080-04 and 597-080-05, that the
13 immediate vicinity, according to generally accepted cultural or archaeological standards or
14 practices where the Native American human remains are located, is not damaged or disturbed by
15 further development activity, so long as Walter Rosales and Karen Toggery's preferences are to
16 preserve their Native American human remains and associated items in place, and that any items
17 associated with the human remains that are placed or buried with the Native American human
18 remains are to be treated in the same manner as the remains, in violation of 25 U.S.C. 3009(4)
19 and Cal. Pub. Res. Code 5097.98;

20 (10) discuss and confer with Walter Rosales and Karen Toggery concerning their
21 preference for the preservation of their Native American human remains and associated funerary
22 objects, sacred objects and cultural patrimony, in place, and that if, the U.S. rejects the
23 recommendation of Walter Rosales and Karen Toggery to preserve their Native American human
24 remains and associated funerary objects, sacred objects and cultural patrimony, in place, failing
25 to apply to, and mediate before, the California Native American Heritage Commission, Walter
26 Rosales and Karen Toggery's preference for the preservation of their Native American human
27 remains and associated funerary objects, sacred objects and cultural patrimony, in place, and that
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1 if, such mediation fails to provide measures acceptable to both the U.S., as titled landowner, and
2 Walter Rosales and Karen Toggery, as beneficial landowners, failing to reinter the human
3 remains and items associated with their Native American human remains and associated funerary
4 objects, sacred objects and cultural patrimony, with appropriate dignity on the parcel from which
5 they were located in a location not subject to further and future subsurface disturbance, in
6 violation of 25 U.S.C. 3009(4) and Cal. Pub. Res. Code 5097.94 and 5097.98.

7 64. These breaches of fiduciary duty and the general trust responsibility to the
8 Plaintiffs by the Defendants have caused, and will further cause, Plaintiffs' substantial damages,
9 in an amount in excess of \$1 million dollars, subject to further proof at trial, due to the loss of the
10 quiet enjoyment of their beneficial ownership of said parcels and the damage to the Plaintiffs'
11 Native American human remains, along with the items associated with their human remains,
12 including, but not limited to grave goods, cultural items, associated funerary objects, sacred
13 objects, and objects of cultural patrimony, as defined in Cal. Pub. Res. Code 5097.9-5097.99,
14 and 25 U.S.C. 3001, by the above described eviction, taking, knowing and/or willful mutilation,
15 disinterment, wanton disturbance, and willful removal of them without authority of law.

16 65. These breaches of fiduciary duty and the general trust responsibility to the
17 Plaintiffs by the Defendants have also caused substantial irreparable damage to, and interfered
18 with, the Plaintiffs' free expression and exercise of Native American religion as provided in the
19 United States Constitution and the California Constitution, and has caused and shall further
20 cause severe and irreparable damage to the Plaintiffs' Native American sanctified cemetery,
21 place of worship, religious or ceremonial site, and sacred shrines located on said parcels, in an
22 amount in excess of \$1 million dollars, subject to further proof at trial.

23 **FIRST CLAIM FOR RELIEF**

24 (Breach of Fiduciary Duty and General Trust Responsibility)

25 66. Plaintiffs incorporate by reference paragraphs 1 through 67 of this petition and
26 complaint as though fully set forth herein.
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1 67. Defendants owe plaintiffs a fiduciary duty, a common law trust duty, and a general
2 trust responsibility, for the management of Indian affairs, as described by the United States
3 Supreme Court in Mitchell v. United States (Mitchell II) (1983) 463 U.S. 206, based upon the
4 comprehensive nature of the federal statutes and regulations adopted pursuant to Titles 25 and 16
5 of the United States Code, and the fact that the Federal government has taken on, controlled, and
6 supervised the Plaintiffs' Indian trust properties, human remains, and funerary objects, as
7 defined in the Indian Reorganization Act, 25 U.S.C. 465 et seq., and the Native American Graves
8 Protection Act, 25 U.S.C. 3001 et seq., and the Archaeological Resources Protection Act, 16
9 U.S.C. 470aa et seq.

10 68. By virtue of the Plaintiffs having placed confidence in the fidelity and integrity of
11 the Federal defendants, a confidential relationship existed at all times herein mentioned between
12 Plaintiffs and said defendants. Because defendants had superior knowledge and access to
13 information not available to Plaintiffs, and knew that Plaintiffs were acting in reliance upon their
14 skill and expertise, and because defendants represented to Plaintiffs that they were acting in the
15 best interests of Plaintiffs, defendants had a fiduciary duty to deal honestly, fairly and in good
16 faith with the Plaintiffs and to provide Plaintiff with full, complete and accurate information at
17 all times.

18 69. By virtue of the acts alleged herein, defendants breached their fiduciary duty,
19 common law trust duty, and their general trust responsibility to Plaintiffs by doing the acts
20 alleged more particularly above, including, but not limited to, failing to enforce the deed to, and
21 Plaintiffs' beneficial ownership of, parcels 597-080-04 and 597-080-05, failing to block the
22 Plaintiffs' eviction from these parcels, failing to block the grading of these parcels, failing to
23 prevent the desecration of the Plaintiffs' human remains and funerary objects, and failing to seek
24 return of the Plaintiffs' possession, use and quite enjoyment of these parcels and their human
25 remains and funerary objects, as described more fully above.

26 70. As a result of the Defendants breach of fiduciary duty, common law trust duty, and
27 general trust responsibility, as more fully described above, Plaintiffs have suffered general
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1 damages and diminution of value of their trust property, rights and benefits in an amount in
2 excess of \$1 million dollars, subject to proof at trial, including, but not limited to the loss of
3 possession, use, and quiet enjoyment of their trust property, human remains and funerary objects,
4 with interest thereon, and any and all attorneys' fees, costs and expenses incurred in prosecuting
5 this action.

6 71. Plaintiffs have been greatly and irreparably damaged by reason of Defendants'
7 conduct, and unless Defendants are incidentally enjoined by this court, they will continue their
8 violation of plaintiffs' rights further irreparably harming the plaintiffs.

9 72. As a result of the wrongful conduct of the defendants as herein alleged, plaintiffs are
10 incidentally entitled to a temporary, preliminary and permanent injunction to prevent great and
11 irreparable injury resulting from the infringement and violation of their rights, from the
12 likelihood that Defendants will be unable to respond in damages, and from the difficulty or
13 impossibility to ascertain the exact amount of personal bodily injury and property damage
14 plaintiffs have, and will in the future, sustain. These ongoing and continuing injuries sustained
15 by plaintiffs cannot be fully compensated in damages and plaintiffs are without an adequate
16 remedy at law without the imposition of the requested incidental equitable injunctive relief.

17 **SECOND CLAIM FOR RELIEF**

18 (Taking)

19 73. Plaintiffs incorporate by reference paragraphs 1 through 74 of this complaint as
20 though fully set forth herein.

21 74. Defendants have unlawfully failed to enforce the deed to, and Plaintiffs' beneficial
22 ownership of, parcels 597-080-04 and 597-080-05, failed to block the Plaintiffs' eviction from,
23 and failed to block the grading of, and the failed to seek return of the Plaintiffs' possession, use
24 and quiet enjoyment of, these parcels and their human remains and funerary objects, as described
25 above.

26 75. Plaintiffs have demanded that Defendants return said property to Plaintiffs, but
27 Defendants and each of them, have refused and continue to refuse to return said property.
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1 76. As a result of the Defendants' taking of Plaintiffs' trust property without just
2 compensation, as more fully described above, Plaintiffs have suffered general damages and
3 diminution of value of their trust property, rights and benefits in an amount in excess of \$1
4 million dollars, subject to proof at trial, including, but not limited to the loss of possession, use,
5 and quiet enjoyment of their trust property, human remains and funerary objects, with interest
6 thereon, and any and all attorneys' fees, costs and expenses incurred in prosecuting this action.

7 77. Plaintiffs have been greatly and irreparably damaged by reason of Defendants'
8 conduct, and unless Defendants are incidentally enjoined by this court, they will continue their
9 violation of plaintiffs' rights further irreparably harming the plaintiffs.

10 78. As a result of the wrongful conduct of the defendants as herein alleged, plaintiffs are
11 incidentally entitled to a temporary, preliminary and permanent injunction to prevent great and
12 irreparable injury resulting from the infringement and violation of their rights, from the
13 likelihood that Defendants will be unable to respond in damages, and from the difficulty or
14 impossibility to ascertain the exact amount of personal bodily injury and property damage
15 plaintiffs have, and will in the future, sustain. These ongoing and continuing injuries sustained
16 by plaintiffs cannot be fully compensated in damages and plaintiffs are without an adequate
17 remedy at law without the imposition of the requested incidental equitable injunctive relief.

18 **WHEREFORE** plaintiffs petition for judgment as follows:

19 1. That plaintiffs be awarded general damages subject to proof at trial, in an amount
20 in excess of \$1,000,000;

21 2. That plaintiffs be awarded their reasonable attorneys' fees, costs, and expenses in
22 this action;

23 3. That plaintiffs be awarded interest and costs; and

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4. That plaintiffs be awarded such other and further relief, including, but not limited to, incidental temporary, preliminary, and permanent injunctive relief, as this court may deem just and proper.

Dated: July 10, 2008

WEBB & CAREY

Patrick D. Webb, Attorneys for
Plaintiffs