

1 LAW OFFICES OF DONALD B. MOONEY
2 DONALD B. MOONEY (SBN 153721)
3 129 C Street, Suite 2
4 Davis, California 95616
5 Telephone: (530) 758-2377
6 Facsimile: (530) 758-7169

7
8 Attorney for Appellant
9 Capay Valley Coalition

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11 **UNITED STATES DEPARTMENT OF INTERIOR**

12 **INTERIOR BOARD OF INDIAN APPEAL**

13 CAPAY VALLEY COALITION)

14 Appellant)

15 PACIFIC REGIONAL DIRECTOR, BUREAU)
16 OF INDIAN AFFAIRS)

17 Appellee)

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19 **APPELLANT'S OPENING BRIEF**
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I. INTRODUCTION

Appellant Capay Valley Coalition respectfully requests that the Assistant Secretary vacate the Pacific Regional Director's April 28, 2014 Notice of Decision ("NOD") to acquire the 853± acres of land into trust for the Yocha Dehe Wintun Nation ("Tribe") and remand it to the Regional Director for consideration of additional information and a reasonable determination based upon the administrative record. The Tribe's Application seeks far more land than is needed for the stated purpose in the Application. Neither the Tribe nor the Regional Director's NOD provide a demonstrated reason, purpose or need to transfer over 750 acres of agricultural land from fee to trust, especially when the Tribe claims that it intends to keep the land in agricultural production. As the land is located in a protected agricultural valley, there is no need to transfer the land to trust if the Tribe does in fact intend to maintain and protect the agricultural character of the land. The administrative record simply does not support the decision to convey over 750 acres of agricultural land to trust. As such, Appellant respectfully requests that the Assistant Secretary vacate the NOD and remand the matter to the Regional Director.

II. BACKGROUND INFORMATION

17 On June 20, 2011, the Tribe applied with the Bureau of Indian Affairs ("BIA") to have
18 transferred from fee simple into trust 15 parcels of land totaling 853± acres owned by the Tribe
19 in Yolo County. (Realty Administrative Record ("RAR"), Document ("Doc") 1.)

20 The property subject to the application is located in the Capay Valley and surrounded by
21 undeveloped, open space and agricultural lands. (RAR, Doc 47, at p. 7.) Cache Creek runs
22 along a portion of the eastern boundary of the property, State Route 16 traverses the property in
23 a north/south direction. (*Id.* at pp. 7-8.) Tribal member housing and the Tribe's community
24 center and recreation area are located adjacent to the property on the Tribe's trust lands. (*Id.* at
25 p. 8.) Most of the property is currently in agricultural production and 13 of the 15 parcels are
26 subject to the California Land Conservation Act of 1965 (Williamson Act), Pub. Resources
27 Code, section 51200 *et seq.* (*Id.*) Notices of non-renewal of the Williamson Act contract have
28 been filed for each of the 13 parcels. (*Id.*) The property contains 5 single family homes owned

1 by the Tribe. (*Id.*) Four of the homes are unoccupied and the fifth houses the Tribe's Cultural
2 Department. (*Id.*) The Tribe has stated its intention to develop portions of 6 parcels for
3 agricultural purposes, which would constitute 753.90 acres of the 852.9 acres (88 percent of the
4 property). (*Id.*, RAR, Doc. 1 at pp. 16-17.) The Tribe states that it has no current plans to
5 change the agricultural use of these 753.90 acres. (RAR, Doc. 1 at p. 17.) The Tribe, however,
6 conditions this plan by stating that:

7 The parcels will continue to be used consistent with the Williamson Act's
8 requirements, for at least as long as the remaining term of any Williamson Act
9 contract that presently exists with respect to any particular parcel, and such would
10 be consistent with permitted and conditionally permitted uses identified in Yolo
11 County's Agricultural Preserve zoning. (*Id.*)

12 The Tribe states that it intends to use the remaining 99 acres to develop 25 residential
13 housing units, a Tribal school, cultural and educational facilities, and a wastewater treatment
14 system. (RAR, Doc. 47, at p. 8; RAR, Doc 1 at pp. 16-17.)

15 After reviewing the Tribe's application and preparing an Environmental Assessment (EA),
16 required under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, the Pacific
17 Regional Director of the BIA issued a Finding of No Significant Impact (FONSI) in October of
18 2012. (Environmental Administrative Record ("EAR"), Document 35.) On April 28, 2014, the
19 Pacific Regional Director issued the NOD and approved the Tribe's application. (RAR, Doc.
20 47.)

21 Appellant Capay Valley Coalition, a non-profit organization located in Yolo County,
22 California, filed a timely Notice of Appeal of the decision, arguing that the Regional Director's
23 approval was in error, was arbitrary and capricious, represented an abuse of discretion, or was
24 otherwise rendered not in accordance with the law, as it: (1) failed to properly consider all of the
25 required elements under 25 CFR § 151.10; and (2) failed to comply with NEPA.

26 **III. ARGUMENT**

27 **A. THE REGIONAL DIRECTOR ABUSED HER DISCRETION IN GRANTING THE 28 APPLICATION TO TRANSFER 853 ACRES OF LANDS FROM FEE TO TRUST**

1. THE INDIAN REORGANIZATION ACT AND IMPLEMENTING REGULATIONS REGARDING FEE TO TRUST APPLICATIONS

1 The Indian Reorganization Act (“IRA”) authorizes the Secretary of the Interior, in her
2 discretion, to acquire land and hold it in trust “for the purpose of providing land for Indians.”
3 25 U.S.C. § 465. In approving the IRA, Congress sought “to conserve and develop Indian lands
4 and resources,” and “Congress believed that additional land was essential for the economic
5 advancement and self-support of the Indian communities.” *South Dakota v. U.S. Department of*
6 *Interior*, 487 F.3d 548, 552 (8th Cir.2007) (quoting *South Dakota v. U.S. Department of Interior*,
7 423 F.3d 798, 798 (8th Cir.2005) (internal quotation marks omitted).

8 The Secretary may acquire land already owned by a tribe. (See *Chase v. McCasters*, 573
9 F.2d 1011, 1016 (8th Cir.1978). “When the Secretary takes land into trust on behalf of a tribe
10 pursuant to the IRA, several important consequences follow.” *Conn. Ex rel. Blumenthal v. U.S.*
11 *Dep’t of Interior*, 228 F.3d 82, 85 (2d Cir.2000). “Land held in trust is generally not subject to
12 (1) state or local taxation; (2) local zoning and regulatory requirements; or, (3) state criminal
13 and civil jurisdiction, unless the tribe consents to such jurisdiction.” *Id.* at 85-86 (citing 25
14 U.S.C. § 465; 25 C.F.R. § 1.4(a); 25 U.S.C. §§ 1321(a), 1322(a) (citations omitted).

15 Title 25, Code Federal Regulations, section 151.10 sets forth the criteria the Secretary
16 shall consider in evaluating requests for the acquisition of land in trust status when the land is
17 located within or contiguous to an Indian reservation, and the acquisition is not mandated.

18 Those criteria that are applicable to the Tribe’s application consist of the following:

19 The tribe’s need for additional land;

20 The purposes for which the land will be used;

21 The impact on the State and its political subdivisions resulting from the
22 removal of the land from the tax rolls;

23 Jurisdictional problems and potential conflicts of land use which may
24 arise; and

25 If the land to be acquired is in fee status, whether the Bureau of Indian
26 Affairs is equipped to discharge the additional responsibilities resulting
from the acquisition of the land in trust status.

27 25 CFR § 151.10(b), (c), (e), and (f).
28

1 “Decisions of BIA officials whether to take land into trust are discretionary. The Board
2 does not substitute its judgment in place of BIA’s judgment in decisions which are based upon
3 the exercise of BIA’s discretion. Rather, the Board reviews such discretionary decisions to
4 determine whether BIA gave proper consideration to all legal prerequisites to the exercise of its
5 discretionary authority, including any limitations on its discretion established in regulations.”
6 *Cass County v. Midwest Regional Director*, 42 IBIA 243, 246 (2006). The decision must reflect
7 that the Regional Director considered the appropriate factors set forth in 25 C.F.R. Part 151, but
8 there is no requirement that BIA reach a particular conclusion with respect to each factor.
9 *Aitkin County v. Acting Midwest Regional Director*, 47 IBIA 99, 104 (2008); *Skagit County v.*
10 *Northwest Regional Director*, 43 IBIA 62, 63 (2006). The factors are not weighted or balanced
11 in any particular way, nor must each factor be exhaustively analyzed. *County of Sauk v.*
12 *Midwest Regional Director*, 45 IBIA 201, 206-07 (2007). Even with this deferential standard to
13 the Regional Director, Appellant meets its burden by demonstrating that the Regional Director
14 failed to properly exercise her discretion with respect to approval of the Tribe’s Application. As
15 demonstrated below, this is simply not a disagreement with the Regional Director’s decision. It
16 is based upon the lack of information in the Application and administrative record, the Regional
17 Director’s reliance upon the Tribe’s bare assertions, and the comments submitted by the County
18 of Yolo, Capay Valley Coalition and others.

19 When the administrative record in an appeal from a BIA decision is inadequate to support
20 the BIA’s decision, the decision should be vacated by the IBIA and the case remanded to the
21 BIA for development of an adequate record and issuance of a new decision. (*City of Eagle*
22 *Butte, South Dakota v. Great Plains Regional Director*, 38 IBIA 139 (2002); *Ziebach County,*
23 *South Dakota v. Great Plains Regional Director*, 36 IBIA 201 (2001); *Joseph Franklin Colby v.*
24 *Acting Eastern Oklahoma Regional Director*, 35 IBIA 139 (2000); *Cecelia Plain Feather v.*
25 *Acting Billings Area Director*, 18 IBIA 26 (1989); *Day County, South Dakota v. Aberdeen Area*
26 *Director*, 17 IBIA 204 (1989).) As discussed below, the administrative record is inadequate to
27 support the Regional Director’s decision granting the Tribe’s Application.
28

1 **2. THE BIA FAILED TO PROPERLY CONSIDER ALL CRITERIA REQUIRED UNDER**
2 **25 CFR § 151.10**

3 The Regional Director failed to properly consider the criteria required under section 151.10
4 Moreover, as discussed below, the administrative record does not support the Regional Director's
5 decision regarding the applicable criteria. The Regional Director failed to demonstrate the
6 existence of Tribal need for the land to be placed in trust. 25 C.F.R. § 151.10(b). The Regional
7 Director failed to sufficiently consider potential jurisdictional problems associated with the
8 transfer. *Id.*, § 151.10(f). The Regional Director failed to sufficiently consider potential land use
9 conflicts that may arise due to the transfer. *Id.*

10 **a. THE BIA FAILED TO DEMONSTRATE THE EXISTENCE OF TRIBAL**
11 **"NEED" FOR THE LAND TO BE PLACED IN TRUST**

12 The Regional Director failed to demonstrate the Tribe's need for 853± acres to be placed
13 in trust. One of the criteria to be considered by the Regional Director is the tribe's need for the
14 additional land. 25 C.F.R. § 151.10(c). Appellant acknowledges that the tribe need not be
15 landless to meet this criteria. (See *State of Kansas v. Acting Southern Plains Regional Director,*
16 *Bureau of Indian Affairs*, 26 IBIA 152, 155 (2001); *United States v. 29 Acres of Land*, 809 F.2d
17 544, 545 (8th Cir. 1987). The Tribe, however, must establish a need for the amount of land
18 sought to be transferred from fee to trust. 25 C.F.R. § 151.10(a)(3). Under 25 C.F.R. §
19 151.10(a)(3) the BIA must determine that the land to be acquired is "necessary" to facilitate
20 tribal self-determination, economic development, or Indian housing. See *City of Lincoln City v.*
21 *U.S. Department of Interior*, 229 F.Supp.2d 1109, 1124 (D.Or.2002).

22 The administrative record demonstrates that the project proposed by the Tribe for
23 development on the 853± acres approved for transfer into trust status only requires
24 approximately 99 acres. (RAR, Doc. 1 at p. 16.) Transferring 99 acres into trust would support
25 precisely the same goals as transferring 853± acres. The Tribe owns more than 11,000 acres in
26 fee simple, nearly all of which are used for agricultural operations under full Tribal governance.
27 Marshall McKay, Chairman, Yocha DeHe Wintun Nation, *Statement Before the U.S.*
28 *International Trade Commission Hearing, Washington, D.C., December 5, 2012*, available at

1 http://www.usitc.gov/press_room/documents/testimony/332_537_011.pdf (“McKay Statement”);
2 RAR Doc. 38 at p. 3.

3 With a transfer of 99 acres into trust, the Tribe would be able to achieve its development
4 goal on these acres of trust land and achieve its goal of maintaining agricultural operations
5 under full Tribal governance on its remaining more than 11,000 acres of agricultural land held
6 in fee simple.

7 There are options for the Tribe to meet its current and future expansion and development
8 needs on trust lands other than the 853± acres the BIA has approved for transfer. The Tribe
9 could pursue some additional development on trust lands under its control prior to the BIA’s
10 approval of the transfer to trust of these additional 853± acres, including the trust lands on
11 which sit the Tribal casino, resort and golf course. In the recent past, the Tribe considered
12 doing just that. (RAR, Doc 4.) The Tribe could pursue additional development on new trust
13 land acreage far less expansive than the 853± acres the Regional Director approved for transfer,
14 such as on parcels adding up to 99 acres transferred to trust which, according to the Tribe’s
15 Application, is the actual amount of land the Tribe needs to meet its development goals. (RAR,
16 Doc 1, at p. 16.)

17 The Regional Director based her decision on an incomplete assessment of the facts.
18 Nowhere in the record does the BIA establish clearly the existing trust acreage held for the
19 Tribe. Nowhere in the record does the BIA explore the recent Tribal plans, now deferred, for
20 extensive additional development on existing trust acres. The Regional Director should have
21 transparently evaluated the entirety of existing trust acreage and evaluated alternatives that
22 considered the transfer of 99 acres to trust or some other number less than 853 acres to meet the
23 Tribe’s proposed development. The failure to do so underlies the Regional Director’s failure to
24 adequately demonstrate the Tribe’s need for the transfer of 853± acres.

25 The Tribe asserts that its needs the additional acreage to grow and strengthen its
26 agricultural operation. RAR, Doc. 44 (December 13, 2013 Response to Comment of Yolo
27 County Concerning Notice of Land Acquisition Application of the Yocha Dehe Wintun Nation
28 at p. 3). Neither the Tribe nor the NOD state how the Tribe is hindered from expanding its

1 agricultural operations with the lands remaining in fee. Moreover, nothing in the administrative
2 record indicates how the Tribe is hindered by the property remaining in fee. The lands are
3 currently zoned for such activity and the most of the parcels were in contract under the
4 Williamson Act. The County, however, clearly articulated that the Tribe can achieve the
5 protection of the agricultural land while maintaining the fee status of the lands.

6 The land is currently zoned agricultural. The County has previously noted that
7 prior agreements have protected land owned by the Tribe. Indeed, the Tribe
8 currently operates over 10,000 acres of agricultural land in Yolo County and none
9 of it in trust. The Tribe has protected land in the past with a perpetual agricultural
10 conservation easement. The Tribe's stated desire to protect agricultural land
11 under its ownership is no way threatened by the County; the use of other available
12 mechanisms, for instance permanent agricultural easements, would ensure that
13 existing fee lands would stay in the Tribe's control in perpetuity. Tribal housing
14 likewise, is consistent with the County's clustered agricultural housing ordinance
15 which allows a density of housing on agriculturally zoned property.

16 RAR Doc 38 at p. 3. The zoning and other legal mechanisms provide the Tribe the authority and
17 ability to achieve its purported goal of protecting agricultural lands within the Capay Valley.

18 Thus, the Tribe cannot demonstrate the necessity for transferring the property from fee to trust.

19 The Tribe also asserts that it needs the additional acreage to exercise its sovereign
20 jurisdiction over the land. See RAR Doc. 1 at p. 14; RAR, Doc. 44 (December 13, 2013
21 Response to Comment of Yolo County Concerning Notice of Land Acquisition Application of
22 the Yocha Dehe Wintun Nation at p. 3). The Tribe argues that it needs the additional lands for
23 cultural traditions and values, and customs that that cannot be exercised on fee lands if they
24 happen to conflict with state regulations, such as hunting. (*Id.*) The lands being converted,
25 however, are agricultural lands and residential areas and the Tribe does not indicate how these
26 lands would be utilized for hunting.

27 Finally, the Regional Director's decision regarding the Tribe's need for the additional land
28 simply quotes directly from the Tribe's June 2011 Application to conclude there is a need for
additional land. RAR Doc. 47 at p. 18 ("This trust application is necessary in order for the
Tribe to exercise its sovereign jurisdiction over the land at its fullest."); compare with RAR
Doc. 1 at p. 14 ("This trust application is necessary in order for the Tribe to exercise its

1 sovereign jurisdiction over the land at its fullest.”) This amounts to a bare assertion without any
2 evidentiary support in the administrative record.

3 The Regional Director’s decision failed to demonstrate the necessity for 853± acres to be
4 transferred into trust to achieve the Tribe’s goals. As such the decision should be rescinded and
5 the matter remanded to the Regional Director.

6 **b. THE BIA FAILED TO SUFFICIENTLY CONSIDER POTENTIAL**
7 **JURISDICTIONAL PROBLEMS ASSOCIATED WITH THE TRANSFER OF**
8 **LAND INTO TRUST**

9 The Regional Director’s Notice of Decision simply restates that the Tribe’s assertions that
10 the Tribe does not anticipate any jurisdictional conflicts as a result of the transfer of property
11 into trust. (RAR, Doc 47 at pp. 21-22.) Simply because the Tribe does not anticipate
12 jurisdictional conflicts does not mean that there is no potential for jurisdictional conflicts.
13 Especially since the record indicates otherwise. The Regional Director, however, ignores the
14 County’s concerns regarding jurisdictional conflicts. See RAR, Doc 38 at p. 3. The County
15 raised concerns that if a deed restriction is not put into place, the County could be faced with an
16 intense commercial use of this property in an otherwise protected agricultural valley. *Id.* The
17 Regional Director ignored the County’s public interest concerns to limit or restrict intense
18 commercial development in otherwise protected agricultural valley.

19 The transfer of 853± acres into trust creates the possibility that the Tribe will extensively
20 develop what are currently undeveloped and almost entirely agricultural lands. Were the Tribe
21 to pursue such development, numerous problems would arise relating to land use and
22 transportation impacts within the Capay Valley and regionally along with environmental
23 impacts on water resources, habitat, and special status species. Local and state government
24 would face challenges dealing with the immediate and spillover effects of these impacts on non-
25 trust lands but would have no recourse to stop the Tribal development causing these impacts.

26 Intensive development of the 853± acres approved for transfer would lead to significant
27 impacts to land uses and transportation as well as to water and other environmental resources in
28 what is now an almost entirely agricultural valley and would run directly counter to the goals
and policies set forth in the relevant portions of Yolo County’s General Plan, Zoning Ordinance,

1 and the Capay Valley Area Plan. See Yolo County General Plan, October 2009, Goals LU 2, 3,
2 5 and 6; Yolo County Zoning Ordinance, 2009b; Agriculture Goals 1 – 3, Land Use Goal 1,
3 Capay Valley Area Plan, Yolo County, Oct. 2010. Yet Yolo County would have no
4 jurisdictional authority to do anything to address these impacts. *Conn. Ex rel. Blumenthal v.*
5 *U.S. Dep't of Interior*, 228 F.3d 82, 85 (2d Cir.2000); 25 U.S.C. § 465; 25 C.F.R. § 1.4(a); 25
6 U.S.C. §§ 1321(a), 1322(a).

7 Instead of addressing the jurisdictional conflicts raised by the County, the Notice of
8 Decision discusses the money the Tribe provides to the County and the services that the Tribe
9 provides within the Capay Valley. RAR, Doc 47 at pp. 21-22. These services and funds do not
10 and will not alleviate the jurisdictional conflicts when and if the Tribe develops these lands that
11 otherwise would have been protected by the County. The Regional Director's Notice of
12 Decision failed to sufficiently consider these potential serious jurisdictional problems associated
13 with the transfer of the land to trust status. As such, the Regional Director's NOD should be
14 vacated and the matter remanded to the Regional Director.

15 **c. THE REGIONAL DIRECTOR FAILED TO SUFFICIENTLY CONSIDER**
16 **POTENTIAL LAND USE CONFLICTS CREATED BY THE TRANSFER**

17 The Regional Director failed to sufficiently consider potential jurisdictional conflicts
18 relates directly to land use conflicts that would arise should the Tribe pursue more intensive
19 development on trust lands. The Regional Director's analysis fails to consider the potential for
20 the Tribe to pursue more intensive development on trust lands. See RAR, Doc 38 at p. 3. The
21 Tribe's recently considered development plans for existing trust lands should be viewed as
22 reasonably foreseeable projects, regardless of whether they were included by the Tribe in the
23 immediate fee-to-trust application. (RAR, Doc 4.) Were the Tribe to pursue developments
24 anything like their recently considered project for a greatly expanded casino and resort, there
25 would be significant land use conflicts between Tribal trust land development and the
26 surrounding agricultural and undeveloped land uses. The Regional Director's NOD failed to
27 consider these potential conflicts. (RAR, Doc 47 at pp. 21-22.) The County, through its
28 comment letter, articulated this concern.

1 Although the Tribe has stated in the Fee-to-Trust application there will be no
2 change in land use, there is enough information in the attached exhibits and prior
3 experience which indicate there is a strong possibility of a future change of use to
4 some degree of commercial activity. The rural western Yolo County portion of
State Highway 16 presents an ideal corridor of land worthy of permanent
protection from development.

5 The County is concerned that once the parcels are in trust pursuant to this
6 application, the Tribe may proceed with any development they desire, including
an intense commercial use.

7 RAR Doc 38 at p. 3.

8 Among the land use conflicts likely to arise are problems with cumulative impacts and
9 problems with growth-inducing impacts. Not only did the Notice of Decision failed to address
10 these land use conflicts, but such failure was carried over to the Environmental Assessment.
11 Section 4.4 of the EA, discusses and dismisses any significant problems related to cumulative
12 impacts. The EA states: "Since no planned projects and no reasonably foreseeable projects are
13 anticipated to occur in the vicinity of the project site on non-Tribal trust lands, implementation
14 of the Proposed Project ... would not lead to cumulatively considerable impacts to land use
15 management in the region." EAR Doc 3 - EA, Sec. 4.4.7, p. 4-42.

16 Section 4.5 of the EA, dismisses the potential for growth-inducing impacts: "Growth-
17 inducing impacts would be less than significant for all of the proposed alternatives." (EAR Doc
18 1 - EA, Sec. 4.5, p. 4-44.) Again, if the Tribe pursues more intensive development on its trust
19 lands than entertained in its Application, then the growth-inducing impacts would be significant.
20 An expanded casino or other intensive commercial operations would significantly increase
21 traffic on the two-lane State Route 16. The additional traffic could require road-widening on
22 State Route 16. Expanded roadway capacity could then facilitate even more growth-
23 inducement by allowing for more intensive development of trust lands. The Regional Director's
24 analysis and decision should have considered this cycle of growth-inducing impacts by looking
25 beyond the Tribe's proposed development project to reasonably foreseeable developments
26 based on a thorough evaluation of what the Tribe has considered for development in the recent
27 past. See RAR Doc 38 at p. 3.

1 The Regional Director's Notice of Decision failed to sufficiently consider these potential
2 land use conflicts associated with the transfer of the land to trust status. As such, the Notice of
3 Decision should be vacated and the matter remanded to the Regional Director.

4 **d. THE TRIBE FAILED TO PROVIDE THE BIA INFORMATION NEEDED TO**
5 **FULLY EVALUATE THE APPLICATION**

6 The Regional Director based her decision on information provided by the Tribe that was
7 insufficient for informed decisionmaking. When the administrative record in an appeal from a
8 BIA decision is inadequate to support the BIA's decision, the decision should be vacated by the
9 IBIA and the case remanded to the BIA for development of an adequate record and issuance of
10 a new decision. *City of Eagle Butte, South Dakota v. Great Plains Regional Director*, 38 IBIA
11 139 (2002); *Joseph Franklin Colby v. Acting Eastern Oklahoma Regional Director*, 35 IBIA
12 139 (2000); *Cecelia Plain Feather v. Acting Billings Area Director*, 18 IBIA 26 (1989); *Day*
13 *County, South Dakota v. Aberdeen Area Director*, 17 IBIA 204 (1989).

14 The Tribe failed to provide in its Application a full and complete accounting of total
15 existing Tribal trust acres. RAR Doc 1. The Tribe failed to provide detailed information
16 regarding existing land uses on existing trust acres and the percentage of existing trust acres that
17 have been developed compared to existing trust acreage still available for development. The
18 Tribe also failed to provide any information regarding its recently considered development
19 expansion plans on existing trust lands.

20 Neither the Tribe's Application nor any other document in the administrative record
21 provides a full and complete accounting of total existing Tribal trust acres. Thus, it is unclear
22 precisely how many acres are held in trust for the Tribe prior to the BIA's approval of the
23 addition of 853± acres. The Tribe's failure to provide this information to the Regional
24 Director's makes it difficult to do a thorough analysis of the need for additional trust acres and
25 makes it appear that the only way for the Tribe to meet its stated goals is with the transfer to
26 trust of the full 853± acres. The Tribe's failure to provide detailed information regarding
27 existing land uses on existing trust acres and the percentage of existing trust acres that are
28

1 developed hinders the Regional Director's ability to thoroughly evaluate the need for additional
2 acres to be transferred to trust.

3 Finally, the Tribe failed to provide any information regarding its recently considered
4 development expansion plans on existing trust lands. The Tribe has had plans for extensive
5 expansion of its casino and resort operations, amounting to an approximate tripling of the
6 Tribe's development on its existing trust lands. (RAR, Doc 4; RAR Doc 38.) The only place in
7 the administrative record any detailed information about this appears is in a comment letter
8 submitted by Lisa Leonard on August 24, 2011 in response to the Draft EA. RAR Doc 4. The
9 Tribe's recent expansion plans included 467 hotel rooms representing an increase of 392,250
10 square feet, 27 new Casitas totaling 40,500 square feet, an event and conference center totaling
11 62,480 square feet, gaming, dining, retail, operational, and public space representing 308,017
12 square feet, and water development and wastewater treatment increases to support the expanded
13 development which in total would be nearly three times the current casino operations. RAR
14 Doc 4. The Tribe should have revealed and discussed its proposed expansion plans for the
15 existing trust land and Regional Director should have taken that into consideration in evaluating
16 the Tribe's Application.

17 The fact that the Tribe decided not to currently pursue these development expansion plans
18 on existing trust lands and has instead pursued the present fee-to-trust application raises the
19 issue of whether the Tribe is merely deferring its development plans until such time as it
20 controls more land in trust and can then pursue even more intensive development than was
21 considered for existing trust acres.

22 In the present appeal, the administrative record is inadequate to support the BIA's decision
23 to approve the fee-to-trust transfer because it lacks a complete accounting of total existing
24 Tribal trust acres, lacks detailed information regarding existing land uses on existing trust acres,
25 fails to provide information on the percentage of existing trust acres that have been developed
26 compared to existing trust acreage still available for development, and does not contain any
27 information regarding the Tribe's recently considered development expansion plans on existing
28

1 trust lands. *City of Eagle Butte, South Dakota v. Great Plains Regional Director*, 38 IBIA 139
2 (2002); *Ziebach County, South Dakota v. Great Plains Regional Director*, 36 IBIA 201 (2001)

3 The Regional Director must base her decision on information provided by the Tribe on its
4 proposed use of the land and also on any other information that the BIA may know or should
5 know about which could impact future land uses on the acres considered for transfer to trust.
6 *City of Lincoln City, Oregon v. Portland Area Director*, 33 IBIA 102, 107 (1999); *Village of*
7 *Ruidoso, New Mexico v. Albuquerque Area Director*, 32 IBIA 130 (1998). The fact that the
8 Tribe recently considered and then deferred extensive development expansion on its existing
9 trust acres is information that the BIA may have known or at least should have known that
10 could impact future land uses on the acres considered for transfer to trust status. As the
11 Regional Director failed to consider this information in the NOD, the NOD should be vacated
12 and the matter remanded to the Regional Director.

13 **B. THE DECISION FAILED TO COMPLY WITH NEPA**

14 In approving the Tribe's Application, the Regional Director relied upon an EA to adopt a
15 FONSI. The EA and FONSI, however, failed to acknowledge the potential for significant
16 development and conversion of agricultural lands acquired in trust and thus no longer subject to
17 State and Local land use regulations. The EA failed to address future potentially significant
18 changes to land use in the Capay Valley associated with placing so many acres in trust. The EA
19 also failed to indicate why the parcels must be placed in trust. Finally, the EA failed to address
20 environmental issues related to water and riparian ecosystem impacts as well as the potential for
21 loss of important habitat due to the removal of State and Local government oversight over
22 parcels placed in trust.

23 Congress enacted NEPA to "promote efforts which will prevent or eliminate damage to
24 the environment." 42 U.S.C. § 4321. NEPA requires federal agencies to analyze environmental
25 impacts of a particular action. *Id.* § 4332(2)(C). In addition, NEPA ensures the public is
26 notified of and allowed to comment on the environmental impacts of a proposed action before
27 the agency finalizes its decision to proceed with a project.

28 The cornerstone of NEPA is the environmental impact statement ("EIS") that federal

1 agencies must prepare and circulate for public review and comment for all "major Federal
2 actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C);
3 40 C.F.R. § 1501.4. An EIS must be prepared prior to initiating any major federal action so that
4 the environmental impacts can be considered and disclosed to the public during the decision-
5 making process. 40 C.F.R. §§ 1501.2, 1502.5. Federal agencies may prepare an environmental
6 assessment to determine whether a project's environmental impacts are significant and an EIS is
7 required. 40 C.F.R. § 1508.9. If the EA concludes that a project may have a significant impact
8 on the environment, then an EIS must be prepared. If not, the federal agency must provide a
9 detailed statement of reasons why the project's impacts are insignificant and issue a "finding of
10 no significant impacts" ("FONSI"). *Id.* § 1508.13.

11 In either an EIS or EA, federal agencies must broadly consider the environmental impacts
12 of their actions. Federal agencies must not only review the direct impacts of their actions, but
13 also analyze indirect and cumulative impacts. Indirect effects are those "caused by the action
14 and are later in time or farther removed in distance but are still reasonably foreseeable." 40
15 C.F.R. § 1508.8. Cumulative impacts include impacts of "other past, present, and reasonably
16 foreseeable future actions regardless of what agency (Federal or non-Federal) or person
17 undertakes such other actions." *Id.* § 1508.7.

18 **1. THE EA AND FONSI FAIL TO DISCUSS AND ANALYZE THE POTENTIAL FOR**
19 **SIGNIFICANT ENVIRONMENTAL IMPACTS CAUSED BY CONVERSION OF**
20 **AGRICULTURAL LANDS TRANSFERRED TO TRUST**

21 Once lands are transferred to trust status, state and local land use regulations no longer
22 apply. See *Conn. Ex rel. Blumenthal v. U.S. Dep't of Interior, supra*, 228 F.3d at 85, 25 U.S.C.
23 465. Thus, transferring land from fee to trust for the Tribe effectively pre-approves any future
24 development the Tribe may wish to pursue on trust land, including intensive residential or
25 commercial development. Transferring 853± acres into trust for the Tribe creates the potential
26 for significant environmental impacts caused by the conversion of currently agricultural land,
27 without any recourse for the Tribe's farming neighbors or Yolo County.

28 The land approved by the Regional Director for transfer to trust status is described in the
EA as Alternative A. EAR, Doc 3 - EA, Sec. 2-1, p. 2-1. Alternative A is the Tribe's Proposed

1 Project and includes 853± acres to be transferred into trust with approximately 99 acres to be
2 developed. RAR Doc 1 at p. 16. The Tribe maintains in its Application that the remaining
3 more than 750 acres are to be maintained in their present state of agricultural operation. *Id.*
4 Other than five dwelling units, nearly all of the land in the Proposed Project is currently
5 agricultural and is surrounded by mostly other agricultural and otherwise undeveloped land.
6 (*Id.*, at p. 13; EA, p. 1-2.)

7 The Tribe maintains that its development intentions for the 853± acres are to only develop
8 approximately 99 acres, leaving the remaining 750± acres in agricultural operation. (RAR, Doc
9 1, at p. 16.) The Tribe's currently proposed developments include 25 residential housing units
10 for Tribal members, a new Tribal school, cultural and educational facilities, and a wastewater
11 treatment system to accommodate the Tribe's current members and anticipated growth. *Id.*

12 The transfer to trust status of 853± acres, far beyond the acreage needed, by the Tribe's
13 own admission, for its proposed developments, permits the Tribe to develop any or all of its
14 new trust acres, which would significantly impact the environment. The EA does not address
15 the discrepancy between the Tribe's own stated need for additional trust land to develop (99
16 acres) and the total acreage requested and approved for transfer to trust (853± acres).

17 The only comment the EA makes regarding the fact that the vast majority of land being
18 transferred into trust is and will purportedly continue to be agricultural land comes in its
19 evaluation and support of the Proposed Project, or Alternative A: "The maintenance of some
20 agricultural operations on all parcels and exclusive maintenance of agriculture on the northern
21 parcels (not proposed for development) in Alternative A would foster direct Tribal control over
22 their ongoing agricultural enterprises." (EAR Doc 3 - EA, Sec. 2-4, p. 2-9.) Nowhere does the
23 EA address the fact that the Tribe owns more than 11,000 acres in fee simple, all of which are
24 dedicated to agricultural operations. See *McKay Statement*.

25 The maintenance of agriculture on approximately 750 additional acres to be taken into
26 trust does no more to "foster direct Tribal control over their ongoing agricultural enterprises"
27 (EAR Doc 3 - EA, Sec. 2-4, p. 2-9) than the Tribe's maintenance of agriculture on its other
28 more than 11,000 acres held in fee simple. The entire area is zoned agricultural. (*Id.* - EA, Sec.

1 1-2, p. 1-2; Sec. 3-8, p. 3-69, Fig. 3-11.) The entire Capay Valley is defined by agricultural
2 operations. There is nothing different or special agriculturally about these approximately 750
3 acres approved for transfer into Trust that the Tribe and the EA maintain will be maintained in
4 agricultural operations.

5 But there is something different and special in terms of the potential for intensive
6 development about the 853± acres approved for transfer: these 853± acres are less than 2 miles
7 north of the Tribe's existing casino and other Tribal operations, adjacent to other existing Tribal
8 buildings, and straddle State Route 16, the roadway that provides all access to the casino and
9 other Tribal operations. The location of these particular 853± acres, as contrasted with the
10 location of the Tribe's more than 11,000 other agricultural acres raises the concern that they will
11 be developed. The Tribe now has the authority to develop these acres in ways that are
12 inconsistent with Yolo County's agricultural zoning regulations currently in operation on the
13 land, a plan that would not be feasible to pursue on land held in fee simple and subject to local
14 land use regulations.

15 This concern was identified in a comment letter submitted on the Draft EA to the BIA by
16 the County of Yolo on July 12, 2011. EAR, Doc 11. Yolo County noted that "[f]uture land use
17 decisions [by the Tribe] could result in higher-density development that could be inconsistent
18 with surrounding land uses and the rural agricultural character of the Capay Valley. Of
19 particular concern to the County is the potential for highway commercial development on the
20 parcels adjacent to State Route 16." *Id.*; see also RAR Doc. 4.

21 Fitting all of the recently abandoned plans for development onto existing trust land might
22 have been a challenge and could have created dense land uses on already developed trust
23 parcels. See RAR Doc 4. Yet it was not so infeasible as to prevent the Tribe from developing
24 plans to pursue precisely this development expansion. There would, however, be ample space
25 for the Tribe's recently abandoned development expansion plans or even greater expansion on
26 the 853± acres spread along State Route 16 adjacent to existing Tribal buildings and less than 2
27 miles from the Tribe's casino that the BIA has approved for transfer into trust.
28

1 In *City of Lincoln City v. U.S. Dept. of Interior, supra*, 229 F.Supp.2d at 1127, the court
2 held that the EA need not consider all potential future uses of the land transferred to trust and
3 not required to consider uses of the property not identified by the Tribe. *City of Lincoln City v.*
4 *U.S. Dept. of Interior, supra*, 229 F.Supp.2d at 1127; citing *Trout Unlimited v. Morton*, 509
5 F.2d 1276, 1286. This matter differs from *City of Lincoln City* where there was already
6 approved development. Given the recent history of the Tribe's planning for extensive
7 development on existing trust lands, concerns in this case are based on far more than mere
8 speculation about possible future development plans; these concerns are based on actual plans
9 developed by the Tribe in the recent past that were deferred because they were deemed to be
10 infeasible on the Tribe's existing trust acres. As discussed by the County, the Tribe has a
11 history of intensive commercial development in the Capay Valley. (RAR Doc 38 at p. 3.)

12 The Yolo County Zoning Ordinance covering the project site identifies the entirety as
13 Agricultural Preserve (A-P) zoned land. (Yolo County, 2009b.) This ordinance states that the
14 purpose of the A-P Zone "shall be to preserve land best suited for agricultural use from
15 encroachment of non-agricultural uses." (Yolo County, 2009b, Art. 4, Sec. 8; EA, p. 3-68.) The
16 Capay Valley Area Plan similarly focuses on the importance of preserving the area's rural and
17 agricultural character and establishes the following agricultural and land use goals: "Viable
18 agriculture in the Capay Valley Plan planning area[;] Adequate soil and water resources to
19 support agricultural lands in the Capay Valley[;] Land uses compatible with agriculture[;] and
20 Preservation of the rural quality of life and community unique to the Capay Valley region."
21 (Capay Valley Area Plan, Yolo County, Oct. 2010; EAR Doc 3 - EA p. 3-70-71.) The potential
22 conversion and development of hundreds of acres of agricultural land represents a significant
23 impact that the EA fails to address. The FONSI and the failure of the EA to acknowledge these
24 potential impacts renders the BIA's approval in error.

25 **2. THE EA FAILS TO ADDRESS FUTURE POTENTIALLY SIGNIFICANT CHANGES TO**
26 **LAND USE IN THE CAPAY VALLEY ASSOCIATED WITH PLACING 853± ACRES IN**
27 **TRUST**

28 According to the EA, "The Tribe's purpose for taking the 853± acres of land into trust is
to provide housing and expanded governmental, educational, and cultural facilities/services

1 under the direct control of the Tribal government to accommodate the Tribe's current members
2 and anticipated growth." EAR Doc. 3 - EA, p. 1-5, Sec. 1.3. However, as stated in the Tribe's
3 Application and in the EA prepared by the BIA, total acreage needed to accommodate the
4 Tribe's development purposes is approximately 99 acres, leaving more than 750 acres of the
5 land to be transferred into trust in agricultural operation. RAR Doc 1 at p. 16; EAR Doc 3 - EA,
6 p. 2-11, Table 2-2.

7 The EA states that the transfer "would allow the Tribe to maintain its agricultural
8 operations under full Tribal governance for the majority of the land proposed to be taken into
9 trust" and that "this would thereby allow the Tribe to continue to build economic self
10 sufficiency and diversity." EAR Doc 3 - EA p. 1-5, Sec 1.3. This conclusion in search of
11 justification suggests that without the transfer the Tribe would somehow be prevented from
12 achieving these same goals, a suggestion that is erroneous and misleading.

13 The Tribe currently owns more than 11,000 acres in fee simple. (McKay, *Statement*, Dec.
14 5, 2012.) The vast majority of these acres is in agricultural operation. Nothing prevents the
15 Tribe from maintaining its agricultural operations under full Tribal governance or continuing to
16 build economic self sufficiency and diversity with agricultural land held in fee simple. There is
17 no threat that these lands will be rezoned by Yolo County to prohibit agricultural operations.
18 Land use across the entire Valley is defined by agriculture. The only threat to the maintenance
19 of agricultural operations in the Valley is posed by the potential for the development of trust
20 lands by the Tribe.

21 Given the Tribe's commercial development and plans for expansion in recent years, it is
22 not mere speculation that the Tribe will pursue far more intensive development than proposed in
23 its Application on new lands transferred into trust. (RAR Doc 38 at p. 3.) Transferring 853±
24 acres into trust significantly expands the potential for more intensive development by the Tribe
25 to significantly alter land uses in the Capay Valley, negatively impacting the rural and
26 agricultural nature of the Valley.

27 The EA fails to explain or even explore the glaring discrepancy between the acreage
28 needed for the development proposed in the Tribe's Application (99 acres) and the acreage

1 requested to be transferred into trust (853± acres). This discrepancy raises serious concerns
2 about the potential for future significant changes to land use in the Capay Valley by placing
3 approximately 750 acres into trust beyond what is needed by the Tribe to meet their professed
4 development needs.

5 The EA's failure to address future potentially significant changes to land use in the Capay
6 Valley due to the transfer into trust of far more acreage than is needed by the Tribe to pursue the
7 development it proposes in its Application. As such, the FONSI should be vacated and
8 remanded to the Regional Director.

9 **3. THE EA FAILS TO ADDRESS ENVIRONMENTAL ISSUES RELATED TO POTENTIAL**
10 **IMPACTS ON WATER RESOURCES AND POTENTIAL LOSS OF HABITAT FOR**
11 **SPECIAL STATUS SPECIES DUE TO REMOVAL OF STATE AND LOCAL**
12 **GOVERNMENT OVERSIGHT**

13 Acres approved for transfer to trust status may be developed without consideration of
14 otherwise applicable state and local laws. The 853± acres approved for transfer to trust are
15 dependent on limited existing water supplies and contain sensitive ecosystems capable of
16 providing habitat for special status species. The development of these acres could create
17 significant impacts on water resources in the Capay Valley and reduce incidence of special
18 status species within the Valley. The EA fails to sufficiently address these environmental issues
19 and thus the BIA's approval of the transfer is in error.

20 As noted repeatedly above with regard to the threat of conversion of agricultural lands and
21 changes to land use in the Capay Valley, the core threat to water resources and habitat comes
22 not from the project as proposed but from the significant potential for a much more intensive
23 project to be undertaken by the Tribe on lands placed in trust.

24 Agricultural operations in the Capay Valley rely on limited surface water derived from
25 Clear Lake, Indian Valley Reservoir, and Cache Creek (EAR, Doc 3 - EA, Sec. 3-2-1, p. 3-9)
26 and groundwater pumping from wells. Groundwater is particularly important through the dry
27 spring and summer months when surface water flows are more limited. Traditionally,
28 groundwater reserves in the Valley have been allowed to recharge every winter by precipitation
and by the fact that no pumping of groundwater is needed during the winter rainy season.

1 However, the Tribal casino, resort and golf course complex operate year-round and pump water
2 year-round. Year-round pumping of groundwater combined with the severe drought in
3 California, has limited the amount of groundwater recharge, has led to intensified pressures on
4 groundwater reserves in the Capay Valley. Should the Tribe pursue more intensive
5 development than outlined in its Application, the result could be intensive overdraft of
6 groundwater in the Valley, which could significantly impact neighboring farmers' water supply
7 through the dry summer months. The EA fails to address these impacts.

8 The EA similarly fails to sufficiently address the potential adverse impact of more
9 intensive development on habitat and special status species in the area. Although there is no
10 designated critical habitat on the site, there is designated sensitive habitat in the form of riparian
11 woodland. EAR Doc 3 - EA, p. 4-14. The potential exists for negative impacts to riparian
12 woodland and to the following other habitat types: grasslands, oak Savanna, waterways, and
13 wetlands. *Id.*

14 There are a number of state-listed and federally-listed special status species observed to be
15 occurring or listed as potentially occurring on the land approved for transfer to trust: Valley
16 Elderberry Longhorn Beetle, Western Yellow-Billed Cuckoo, Brewer's Western Flax, Green
17 Jewel-Flower, Foothill Yellow-Legged Frog, Western Spadefoot Toad, Western Pond Turtle,
18 Golden Eagle, Burrowing Owl, Swainson's Hawk, Mountain Plover, American Peregrine
19 Falcon, Bald Eagle, Bank Swallow, Pallid Bat, Townsend's Big-Eared Bat, and Western Red
20 Bat. Again, although the EA concluded that the project would not pose a significant impact, the
21 likelihood of far more intensive development on the 853± acres may have significant impacts.
22 More intensive development would likely impose a significant adverse impact on habitat and
23 sensitive species in the area.

24 IV. CONCLUSION

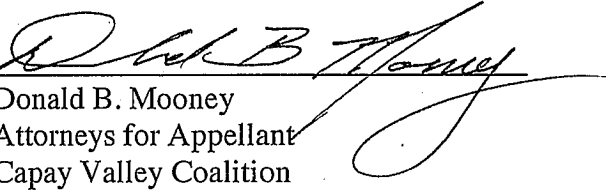
25 Based upon the foregoing, Appellant Capay Valley Coalition respectfully requests
26 that the Assistant Secretary vacate the NOD and FONSI and remand the matter to the
27 Regional Director.

28 //

1 Dated: January 9, 2015

2 Respectfully submitted,

3 LAW OFFICES OF DONALD B. MOONEY

4
5 By 
6 Donald B. Mooney
7 Attorneys for Appellant
8 Capay Valley Coalition

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1 **CERTIFICATE OF FILING AND SERVICE**

2 Pursuant to 43 CFR § 4.332(a) and § 4.333, I certify that a true and correct copy of this
3 Appellant's Opening Brief, was sent via electronic mail, on January 9, 2015, addressed to:

4 Kevin K. Washburn
5 Assistant Secretary – Indian Affairs
6 U.S. Department of the Interior
f2appeals@bia.gov

7 Yocha Dehe Wintun Nation
8 P.O. Box 18
9 Brooks, CA 95606
TribalCouncil@yochadehe-nsn.gov
sferguson@yochadehe-nsn.gov
djones@yochadehe-nsn.gov

10 Pursuant to 43 CFR § 4.332(a) and § 4.333, I certify that a true and correct copy of this
11 Appellant's Opening Brief, was mailed to the Regional Director of the Bureau of Indian Affairs
12 (BIA), by first class mail, postage prepaid, on January 9, 2015:

13 Amy Deutschke, Regional Director
14 Bureau of Indian Affairs
15 United States Department of Interior
16 Pacific Regional Office
2800 Cottage Way
Sacramento, CA 95825

17 Pursuant to 43 CFR § 4.332(a) and § 4.333, Capay Valley Coalition has identified the
18 following interested parties/party representatives in this action based upon the notice list of the
19 BIA decision and commenters to the Environmental Assessment, and has served upon them a
20 true and correct copy of this Appellant's Opening Brief, by first class mail, postage prepaid, on
21 January 9, 2105:

22 Marshall McKay, Chairman
23 Yocha DeHe Wintun Nation
24 P.O. Box 18
25 Brooks, CA 95606

26 California State Clearing House
27 Office of Planning & Research
28 P.O. Box 3044
Sacramento, 95814

Mr. Daniel Powell
Legal Affairs Secretary
Office of the Governor
State Capitol Building
Sacramento, CA 95814

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Sara Drake
Deputy Attorney General
State of California
Department of Justice
P.O. Box 944255
Sacramento, CA 94244-2550

U.S. Senator Diane Feinstein
331 Hart Senate Office Building
Washington DC 20510

Capay Valley Coalition
P.O. 894
Esparto, CA 95627

Yolo County Assessor
625 Court Street, Room 104
Woodland, CA 95695

Yolo County Treasure/Tax Collector
625 Court Street, Room 102
Woodland, CA 95695

Yolo County Board of Supervisors
Julie Dachter, Deputy Clerk of the Board
625 Court Street, Room 204
Woodland, CA 95695

Yolo County Sheriff's Department
140 Tony Diaz Drive
Woodland, CA 95776

Yolo County Department of Planning and Public Works
292 West Beamer Street
Woodland, CA 95695

Stand Up for California
Cheryl Schmit, Director
P.O. Box 355
Penryn, CA 95663

Superintendent
Central California Agency – BIA
650 Capitol Mal, Suite 8-500
Sacramento, CA 95814

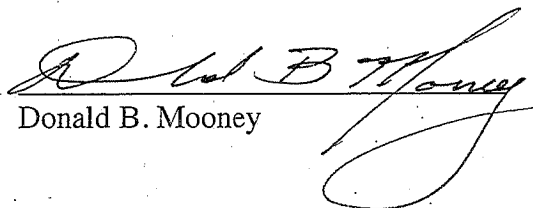
1 Capay Valley Coalition has identified the following interested parties/party representatives
2 that own property adjacent to the property acquired in trust, and has served upon them a true and
3 correct copy of this Appellant's Opening Brief, by first class mail, postage prepaid, on January 9,
4 2015:

5 Jim Eldon & Julie Rose
6 Tierra Rica
7 18265 County Road 70
8 Brooks, CA 95606

9 Joseph V. Costello, Jr
10 St Francis Land & Cattle LLC
11 1880 Lombard Street
12 San Francisco CA 94123

13 Donna & Larry Farnham
14 P.O. Box 141
15 Brooks, CA 95606

16 Charles M. Gordon, Jr.
17 Gordon Farms, Inc.
18 19341 County Road 76
19 Brooks, CA 95606

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Donald B. Mooney

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