KENNETH R. WILLIAMS, State Bar No. 73170
Attorney at Law
980 9th Street, 16th Floor
Sacramento, CA 95814
Telephone: (916) 543-2918
Fax: (916) 446-7104

Attorney for Appellants
Preservation of Los Olivos and
Preservation of Santa Ynez

UNITED STATES DEPARTMENT OF INTERIOR

INTERIOR BOARD OF INDIAN APPEALS

PRESERVATION OF LOS OLIVOS and PRESERVATION OF SANTA YNEZ, Appellants, **v.** PACIFIC REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	Case No. IBIA 05-050-A and 12-148 **APPELLANTS' REPLY TO SANTA YNEZ BAND OF CHUMASH MISSION INDIANS' ANSWER TO RESPONSE TO ORDER TO SHOW CAUSE**

This reply is submitted by Appellants, Preservation of Los Olivos (P.O.L.O.) and Preservation of Santa Ynez (P.O.S.Y.) in response to the answer of the Santa Ynez Band of Chumash Mission Indians (SYBand) to the Appellants' Response to the Pre-Docketing Notice and Order to Show Cause (OSC) dated August 21, 2012. The SYBand's answer lacks merit for several reasons.

1. **The SYBand failed to file a timely answer to Appellants' Notice of Appeal (NOA) and, therefore, the SYBand is precluded from participating in this appeal.**

As summarized in the Appellants' Response, the NOA was timely filed with the BIA ("the office of the official whose decision is being appealed") within the required 30 days. 25 C.F.R. § 2.9. The NOA was also sent to the Assistant Secretary for Indian Affairs ("the official who will

decide the appeal"). And the NOA was served on all known interested parties – including the SYBand. (*Id.*)

The SYBand does not deny that the NOA was timely filed with the BIA pursuant to 25 C.F.R. § 2.9. Nor do they deny that this appeal is currently pending before the Assistant Secretary for Indian Affairs. Nor do they deny that they were properly served with a copy of the NOA, as an interested party, on July 12, 2012. Despite these facts, the SYBand inexplicably failed to file a timely answer to the NOA – which is required before they can participate in this appeal. 25 C.F.R. § 2.11 (a)-(c) requires that:

> **(a) Any interested party wishing to participate in an appeal proceeding should file a written answer responding to the appellant's notice of appeal and statement of reasons.** An answer should describe the party's interest.
> **(b) An answer shall state the party's position or response to the appeal** in any manner the party deems appropriate and may be accompanied by or otherwise incorporate supporting documents.
> **(c) An answer must be filed within 30 days after receipt of the statement of reasons by the person filing an answer.** (Emphasis added.)

Furthermore, an answer and any supporting documents shall be filed in with the BIA and shall be clearly titled with the words "ANSWER OF INTERESTED PARTY." 25 C.F.R. § 2.11(d)&(e).

The SYBand was served with the NOA on July12, 2012. Allowing five days for mailing and receipt, the SYBand's answer was due on or about August 16, 2012. The SYBand did not file an answer to the NOA within 30 days and, therefore they are precluded from participating in this appeal. And their unauthorized answer to Appellants' Response should be disregarded.

The SYBand's unwarranted participation in this appeal has already been prejudicial to Appellants. (*See* Assignment of Docket Number and Order Granting Extension for the Tribe to File Answer dated October 5, 2012.) The SYBand filed an ex parte motion for a 20-day of time to file an answer to Appellants' Response to the OSC. Unbeknownst to the Appellants, the motion was submitted to the IBIA on October 4, 2012, one day before any answer was due. Although the SYBand consulted ex parte with the BIA several days before submitting that

motion, the SYBand did not contact the Appellants beforehand. Furthermore, if contacted, the Appellants would have objected because the SYBand had not answered the NOA and is precluded from participating in this appeal. But, the Appellants were not given an opportunity to make this objection and the motion for extension of time was granted without input from the Appellants. As a result, Appellants are now required to spend time and incur expense responding to a document filed by a party who has no right to participate in this appeal.

2. The SYBand's contention that this appeal should have been submitted to the Interior Board of Indian Appeals (IBIA) pursuant to 43 C.F.R. § 4.332(a) is without merit.

The SYBand contends that, instead of filing this appeal with the BIA, and serving the Assistant Secretary for Indian Affairs, as required by 25 CFR §§ 2.9 and by the IBIA May 17, 2010 Order Vacating Decision in Part and Remanding in Part (2010 Remand Order), this appeal should have been filed directly with IBIA pursuant to 43 C.F.R. § 4.332(a). The SYBand's contention is wrong for several reasons.

First, the SYBand ignores the 2010 Remand Order which required that this appeal be handled by the BIA pursuant to 25 C.F.R. Part 2. The 2010 Remand Order does not even mention 43 C.F.R. § 4.332(a). And the SYBand does not discuss 25 C.F.R. Part 2, much less explain why it could be ignored by the BIA in favor of 43 C.F.R. Part 4.

Second, the SYBand does not dispute that the NOA had to be filed with the agency making the decision within 30 days. 25 C.F.R. § 2.9. In this case that agency is the BIA, not the IBIA. And there is no dispute that the NOA was filed by Appellants with the BIA within 30 days. Furthermore, it is important to note that the BIA has not objected to the filing of the NOA or indicated that it was misdirected. See 25 C.F.R. § 2.13. The SYBand does not address this point or explain why the NOA should have been filed with the IBIA instead of the BIA.

Third, and perhaps most importantly, 43 C.F.R. § 4.331 required this matter to be decided by the Assistant Secretary for Indian Affairs before any party could file an appeal with the IBIA

pursuant to 43 C.F.R. § 4332. Specifically, Section 4.331(a) provides that any interested party affected by a decision of an official of the BIA may appeal to the IBIA, "**except -- (a) To the extent that decisions which are subject to appeal to a higher official within the Bureau of Indian Affairs must first be appealed to that official.**" (Emphasis added.)

In this case, the BIA's decision on remand regarding the legal impact of the *Carcieri* and *Hawaii*, is subject to review by, and appeal to, the Assistant Secretary for Indian Affairs. As summarized in the Appellants' Response to the OSC, the remand request was made by the BIA at the direction of the Assistant Secretary pursuant to a memorandum dated February 24, 2012. (*See* BIA Motion for Remand dated 3/19/10.) In fact, the motion for remand was brought at the request of "Counsel for the Department of Interior, Office of the Regional Solicitor and Office of the Solicitor, Division of Indian Affairs." (*Id.*) After this matter was remanded, the BIA deferred the decision to an Associate Solicitor with the Department of Interior, Division of Indian Affairs who issued a memorandum legal opinion to the BIA. The Associate Solicitor's legal opinion, without modification, is the BIA's 2012 decision on remand. As such, it should be reviewed by the Assistant Secretary. (*County of Amador v. Associate Deputy Director* (2006) 44 IBIA 6.)

The SYBand does not address the fact that the remand was requested by the Assistant Secretary and the Solicitor's office. Nor does the SYBand mention Section 4.331 or the fact that it requires that the Assistant Secretary to review the BIA/Assistant Solicitor decision and decide the matter first and before it can be appealed to the IBIA pursuant to Section 4.332.

Furthermore, given recent events, it is probable that the Assistant Secretary for Indian Affairs will want to reevaluate the decision of the Associate Solicitor regarding the impact of the *Carcierri* decision. The Assistant Solicitor applied the test developed by the Department of Interior in the December 17, 2010 record of decision (ROD) with respect to the Cowlitz Tribe of Indian fee to trust transfer in Clark County, Washington. (*See* Associate Solicitor's Memo to BIA

dated May 23, 2012 at 2.) But the Cowlitz ROD is subject to pending litigation in the United State District Court for the District of Columbia. (*Clark County, Washington et.al v. United States Department of Interior* USDC, DC Cir No. 1:11-cv-0027.) And, as a part of that litigation, the 2010 Cowlitz ROD was recently rescinded. Thus, it is no longer a valid basis for the BIA/Associate Solicitor's legal opinion in this case. At least the Assistant Secretary should have the first opportunity to review the impact of the Cowlitz ROD recession on that legal opinion.

3. The SYBand's reliance on the BIA's June 13, 2012 letter is misplaced. The BIA's authority on remand is limited by the IBIA's May 17, 2010 Partial Remand Order.

As outlined in Appellants' Response to the OSC, the procedural confusion in this case is directly related to the procedural missteps of the BIA while this matter has been on remand. The 2010 Remand Order limited and gave the BIA the authority to do two things:

First, the BIA was directed to determine the legal impact of the *Carcieri* and *Hawaii* decisions, if any, on its 2005 decision to take 6.9 acres into trust for the SYBand. Thereafter, the BIA was required to return jurisdiction over this matter to the IBIA. The IBIA did not give the BIA authority to keep jurisdiction or reopen the entire 2005 decision which is already subject to the pending appeal of P.O.L.O. and P.O.S.Y.

Second, the BIA was also directed to comply with the requirement of 25 CFR Part 2 and to give all interested parties an opportunity to appeal this focused legal determination regarding the impact of the *Carcieri* and *Hawaii* decisions regardless of whether they are parties to the pending 2005 appeal. In fact, although P.O.L.O. and P.O.S.Y. remain the only Appellants in the 2005 appeal, the BIA was specifically directed to serve P.O.L.O. and P.OS.Y. as interested parties and potential appellants, pursuant to 25 CFR § 2.9. (*See* 2010 Remand Order at 2, fn.1.)

On June 13, 2012, the BIA finally issued its Notice of Decision regarding the legal impact of the *Carcieri* and *Hawaii* Supreme Court cases on the pending fee-to-trust application of the SYBand. But, instead of returning that decision to the IBIA, as required by the 2010 Remand

Order, the BIA sent it to SYBand Chairperson Armenta. The two page transmittal letter to Chairperson Armenta enclosed and adopted the Associate Solicitor's legal opinion dated May 23, 2012. In addition, based on that legal opinion, the BIA affirmed its decision of January 14, 2005, which was is the subject of the pending appeal by P.O.L.O. and P.O.S.Y. The BIA's June 13, 2012 decision is confusing and contrary to the 2010 Remand Order for at least three reasons:

a. The BIA attempted to reopen the 2005 appeal in excess of its remand authority.

Instead of limiting any new appeal to the 2012 legal opinion of the BIA/Associate Solicitor, the BIA's 2012 letter decision gives the impression that the appeal of the 2005 decision is reopened for all purposes. Although it is not clear whether this was intentional or inadvertent, it is clear that the BIA did not have the authority or jurisdiction to reopen the entire 2005 appeal or to deviate from the directives of the IBIA in the 2010 Remand Order. (*See United States v. Bingham* 41 F.3d 1514 (CA 9th 1994).) And, to the extent that the BIA's June 13, 2012 letter decision exceeds its jurisdiction and authority under the 2010 Remand Order, it is void. (*See Hall v. City of Los Angeles,* WL4335936 (CA 9th Cir. 2012).)

b. **The BIA still has not returned the June 13, 2012 decision to the IBIA.**

Also contrary to the 2010 Remand Order, the BIA still has not returned jurisdiction or the administrative record to the IBIA for review and consideration as part of the pending 2005 appeal. Regardless of any *ultra vires* statement in the BIA's June 13, 2012 letter, the 2012 decision is not reviewable by the IBIA, or subject to appeal to the IBIA, until the remand is returned to the IBIA. (*See Southern Utah Wilderness Alliance v. Kempthorne,* 525 F.3d 966 (CA 10th Cir. 2008). Thus, any obligation to appeal the 2012 BIA decision is essentially tolled until the BIA returns the remand and jurisdiction to the IBIA.

///

///

c. The BIA's notice to interested parties was incomplete and misleading.

In the 2010 Remand Order, the IBIA also concluded that, because new issues will be addressed by the BIA on remand, all "interested parties are entitled to a right of appeal from that decision, without regard to whether they are parties to this [2005] appeal." The IBIA directed the BIA to "comply with the requirements of 25 C.F.R. 2.7" and to serve the Appellants as "interested parties" with a separate right to appeal. Although the June 13, 2012 letter was misleading because it did not reference or attach a copy of 25 C.F.R § 2.7 and related regulations as required by the 2010 Remand Order, the BIA did at least serve all known interested parties with the Associate Solicitor' legal opinion. Consequently, after P.O.L.O. and P.O.S.Y. were served as interested parties, they timely filed the NOA with the BIA, and sent a copy to the Assistant Secretary for Indian Affairs pursuant to 25 C.F.R. § 2.9 and the 2010 Remand Order.

In summary, the BIA's actions while this matter is on remand have created a great deal of confusion and ambiguity regarding the appeal of the June 13, 2012 decision of the BIA/Associate Solicitor regarding the legal impact of the *Carcieri* and *Hawaii* Supreme Court decisions. The BIA's attempt to reopen the 2005 appeal was in excess of its limited authority on remand. The BIA's failure to return the 2012 decision, and the related administrative record, to the IBIA is in violation of the 2010 Remand Order and has precluded the IBIA from lifting the stay and deciding these issues. And the BIA's failure to reference the appellate procedures in 25 CFR Part 2 when it notified interested parties of their right to appeal the 2012 legal opinion of the BIA/Associate Solicitor is misleading and contrary to the 2010 Remand Order.

Any mistake in the appellate process followed in this case is a direct consequence of the BIA's inconsistent and confusing actions while this matter is on remand. (25 C.F.R. § 2.13.) This problem continues and is compounded by the fact that the BIA has not returned the remand to the IBIA and has not affirmatively addressed the issues in the OSC.

Regardless of the BIA's actions, it is undisputed that the NOA was properly filed with the BIA within 30 days as required by 25 CFR § 2.9. If the BIA felt that the NOA was misdirected, and should have been filed elsewhere, it had an affirmative obligation to notify the Appellants and promptly forward the NOA to the appropriate official. (25 C.F.R. § 2.13.) P.O.L.O and P.O.S.Y. have not received any notification from the BIA that their NOA was misfiled, misdirected or rerouted to the IBIA or any other agency or official. Consequently, the BIA has implicitly confirmed that NOA was appropriately filed with the BIA and sent to the Assistant Secretary for Indian Affairs.

CONCLUSION

For the forgoing reasons, and those reasons included in their response to the OSC, Appellants P.O.L.O. and P.O.S.Y. respectfully request that the OSC be withdrawn and discharged. Also because the SYBand failed to file a timely answer to the NOA, Appellants request that the SYBand be precluded from participating in this appeal and that their answer to Appellants' Response to the OSC be disregarded.

Date: October 30, 2012

Respectfully submitted,

Kenneth R. Williams
Attorney for Appellants
Preservation of Los Olivos and
Preservation of Santa Ynez

PROOF OF SERVICE

On October 30, 2012, I served the attached APPELLANTS' REPLY TO SANTA YNEZ BAND OF CHUMASH MISSION INDIANS' ANSWER TO RESPONSE TO ORDER TO SHOW CAUSE on the following individuals and entities by mail and by placing a true copy in the United States Mail, postage prepaid, addressed as follows:

Asst. Secretary of Indian Affairs
U.S. Department of Interior
1849 C Street, N.W.
MS-4140-MIB
Washington, DC 20240

Amy Dutschke - Regional Director
Bureau of Indian Affairs
U.S. Department of Interior
2800 Cottage Way
Sacramento, CA 95825

Mr. Vincent Armenta, Chairperson
Santa Ynez Band
P.O. Box 517
Santa Ynez, CA 93460

Mr. Jacob Appelsmith
Senior Legal Advisor
Office of the Governor
State Capitol Building
Sacramento, CA 95814

Ms. Joni Gray – Chairperson
County Board of Supervisors
Santa Barbara County
401 E. Cypress Avenue
Lompoc, CA 93465

Lieutenant
Sheriff's Department
140 W. Highway 246
Buelton, CA 93427

Chief Executive Officer
County of Santa Barbara
105 E. Anapamu Street
Santa Barbara, CA 93101

Cathie McHenry, President
Women's Environmental Watch
P.O. Box 830
Solvang, CA 93464

Marzulla Law, LLC
1150 Connecticut Ave. NW # 1050
Washington, D.C. 20036

City Hall, Planning Department
630 Garden Street
Santa Barbara, CA 93101

Chief of the Fire Department
City of Santa Barbara
121 East Carrillo Street, Suite A
Santa Barbara, CA 93101

Jena A. MacLean
Perkins Coie LLP
700 Thirteenth Street N.W.
Washington D.C. 20005-3960

Sara J. Drake – Senior Asst. A.G.
California Department of Justice
Indian & Gaming Law Section
P.O. Box 944255
Sacramento, CA 94244-2550

Chief of Police
Lompoc Police Department
107 Civic Center Plaza
Lompoc, CA 93436

Honorable Holly Sierra
City of Buelton
107 W. Highway 246
Buelton, CA 93427

Board of Supervisors
County of Santa Barbara
105 E. Anapamu Street
Santa Barbara, CA 93101

Mr. Gregory M. Simmons
Vice President
Santa Ynez Concerned Citizens
P.O. Box 244
Santa Ynez, CA 93460

Superintendent,
Southern California Agency
Dept. of Int. – Indian Affairs
1451 Research Park Drive, # 100
Riverside, CA 92507

Mr. Kenneth Pettit
S.B. County Assessor's Office
105 E. Anapamu Street
Santa Barbara, CA 93101

Chief of Police
Santa Barbara Police Department
215 E. Figueroa Street
Santa Barbara, CA 93101

Brenda L. Tomaras, Esq.
Tomaras & Ogas, LLP
10755-F Scripps Poway Pkwy, 281
San Diego, CA 92131

California State Clearing House
Office of Planning and Research
P.O. Box 3044
Sacramento, CA 95812-3044

District Director
Office of the Hon. Diane Feinstein
750 B Street, Suite 1030
San Diego, CA 92101

City Manager
City of Solvang
1644 Oak Street
Solvang, CA 93463

Santa Barbara City Hall
735 Anacapa Street
Santa Barbara, CA 93101

Bobbie Martin
General Manager
Santa Ynez Community Serv. Dist.
P.O. Box 667
Santa Ynez, CA 93460

Honorable Lois Capps
U.S. House of Representatives
301 East Carrillo Street, Suite A
Santa Barbara, CA 93101

Office of County Counsel
County of Santa Barbara
105 E. Anapamu Street
Santa Barbara, CA 93101

Public Works Department
County of Santa Barbara
123 E. Anapamu Street
Santa Barbara, CA 93101

James E. Marino
Attorney at Law
1026 Camino Del Rio
Santa Barbara, CA 93110
Attorney for "No More Slots"

Office of Hearing and Appeals
Interior Board of Indian Appeals
801 North Quincy Street, Suite 300
Arlington, VA 22203

Rebecca M. Ross, Attorney-Advisor
Office of the Solicitor
Division of Indian Affairs
US Department of Interior1849 C Street,
NW, MS-6513-MIB
Washington, DC 20240

I declare under the penalty of perjury that the forgoing is true and correct.

Dated: October 30, 2012